

IN THE SUPREME COURT OF MISSOURI

Supreme Court No.: SC 84933

LAURA LANDMAN
Employee/Respondent,

v.

ICE CREAM SPECIALTIES, INC.,
Employer/Appellant,
and
OLD REPUBLIC INSURANCE COMPANY,
Insurer/Appellant

SUBSTITUTE APPELLANTS' BRIEF OF
ICE CREAM SPECIALTIES, INC. AND
OLD REPUBLIC INSURANCE COMPANY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 2

JURISDICTIONAL STATEMENT 9

STATEMENT OF FACTS 12

STANDARD OF REVIEW 32

POINTS RELIED ON 34

ARGUMENT 44

CONCLUSION 94

TABLE OF AUTHORITIES

Akers v. Warson Gardens Apts., 961 S.W.2d 50 (Mo. banc 1998) 32, 33

Blades v. Commercial Transport, Inc., 30 S.W.3d 827 (Mo. banc 2000) 32

Boring v. Treas. of Mo., 947 S.W.2d 483 (Mo.App.E.D.1997) 74, 75

Boyles v. USA Rebar Placement, 26 S.W.3d 418 (Mo.App.W.D.2000) 88, 89

Budding v. SSM Health Care, 19 S.W.3d 678 (Mo. banc 2000) 68

Burick v. Wood, 959 S.W.2d 951 (Mo.App.S.D.1998) 66

Campbell v. Citicorp Mortgage, 1995 WL 707218 (Ind.Cmsn.1995) 52

Carlson v. Plant Farm, 952 S.W.2d 369 (Mo.App.W.D.1997) 72, 80, 81, 82

Chapman v. Dunnegan, 665 S.W.2d 643 (Mo.App.E.D.1984) 47

Chatmon v. St. Charles County Ambulance Dist., 55 S.W.3d 451
(Mo.App.E.D.2001) 70

City of St. Louis v. Meintz, 18 S.W. 30 (Mo. 1891) 61, 62, 64, 65

Coloney v. Accurate Superior Scale, 952 S.W.2d 755
(Mo.App.W.D.1997) 79, 80

Community Memorial Hospital v. City of Soberly, 422 S.W.2d 290
(Mo. 1968) 47

Conley v. Treasurer of Missouri, 999 S.W.2d 269
(Mo.App.E.D.1999) 71

<i>County Court of Washington County v. Murphy</i> , 658 S.W.2d 14	
(Mo. banc 1983)	64, 67
<i>Curry v. Dahlberg</i> , 110 S.W.2d 742 (Mo. banc 1937)	66
<i>Dean v. St. Luke’s Hospital</i> , 936 S.W.2d 601 (Mo.App.W.D.1997)	84
<i>Desselle v. Quadpac</i> , 1995 WL 765370 (Ind.Cmsn.1995)	50, 51, 52, 53
<i>Dorn Chrysler-Plymouth v. Roderique</i> , 4897 S.W.2d 48	
(Mo.App.E.D.1972)	61, 62, 63
<i>Forsthove v. Hardware Dealers Mut. Fire Ins. Co.</i> , 416 S.W.2d 208	
(Mo.App.E.D.1967)	67
<i>Garibay v. Treasurer of Missouri</i> , 930 S.W.2d 57	
(Mo.App.E.D.1996)	72, 80, 81, 82, 87
<i>Gennari v. Norwood Hills</i> , 322 S.W.2d 718 (Mo.1959)	78
<i>Gerard v. Bd. of Election Commissioners</i> , 913 S.W.2d 88	
(Mo.App.E.D.1995)	62
<i>Griffiths v. BSI Constructors</i> , 2001 WL 193846 (Ind.Cmsn.2001)	47, 53
<i>Hall v. Wagner Division - McGraw Edison</i> , 755 S.W.2d 594	
(Mo.App.E.D.1988)	74, 87
<i>Harp v. Ill. Central R.R.</i> , 370 S.W.2d 387 (Mo.1963)	92
<i>Harris v. Union Electric</i> , 766 S.W.2d 80 (Mo. banc 1989)	64, 65
<i>Heisler v. Jetco Service</i> , 849 S.W.2d 91 (Mo.App.E.D.1993)	91, 92

<i>Hunt v. Laclede Gas Co.</i> , 869 S.W.2d 503 (Mo.App.E.D.1993)	62
<i>Ikerman v. Koch</i> , 580 S.W.2d at 273 (Mo. banc 1979)	32
<i>In re Apex Oil v. Arctic Bank & Trust</i> , 265 B.R. 144 (8 th Cir. 2001)	66
<i>In re Estate of Dotage v. Dotage</i> , 727 S.W.2d 925 (Mo.App.W.D.1987)	62
<i>In re the Interest of J.P. v. Mo. Div. of Family Services</i> , 947 S.W.2d 442 (Mo.App.W.D.1997)	62, 63
<i>Johnson v. Denton Construction</i> , 911 S.W.2d 286 (Mo. banc 1995)	79, 80
<i>Johnson v. Terre Du Lac</i> , 788 S.W.2d 782 (Mo.App.E.D.1990)	69
<i>Jones v. Jefferson City School Dist.</i> , 801 S.W.2d 486 (Mo.App.W.D.1990)	86
<i>Kasl v. Bristol Care</i> , 984 S.W.2d 852 (Mo. banc 1999)	74
<i>Kizior v. TWA</i> , 5 S.W.3d 195 (Mo.App.W.D.1999)	71
<i>Kristanik v. Chevrolet Motors Corp.</i> , 41 S.W.2d 911 (Mo.App.E.D.1931)	67, 68
<i>Landers v. Chrysler</i> , 963 S.W.2d 275 (Mo.App.E.D.1998)	84, 86
<i>Lansing v. Lansing</i> , 736 S.W.2d 554 (Mo.App.E.D.1987)	47
<i>Lewis v. Kloster Co.</i> , 1998 WL 910242 (Ind.Cmsn.1998)	55
<i>Loven v. Greene County</i> , 63 S.W.3d 278 (Mo.App.S.D.2001)	78
<i>Manley v. Mulligan Construction</i> , 2002 WL 1824986 (Ind.Cmsn.2002)	55
<i>Marcus v. Steel Constructors</i> , 434 S.W.2d 475 (Mo.1968)	80, 92

<i>Mathia v. Contract Freighters</i> , 929 S.W.2d 271	
(Mo.App.S.D.1996)	83, 86
<i>Mayor, Councilmen and Citizens of the City of Liberty v. Beard</i> , 636 S.W.2d	
330 (Mo. banc 1982)	64, 65
<i>McCormack v. Carmen Schell Constr.</i> , 2001 WL 1347522	
(Ind.Cmsn.2001)	47, 53, 54
<i>McCormack v. Carmen Schell Constr.</i> , 2002 WL 1363006	
(Mo.App.W.D.2002)	46, 47, 54
<i>Mesker Brothers Industries v. Leach man</i> , 529 S.W.2d 153	
(Mo.1975)	47
<i>Messex v. Sachs Electric</i> , 989 S.W.2d 206 (Mo.App.E.D.1999)	70, 80, 81
<i>MG v. GMB</i> , 897 S.W.2d 218 (Mo.App.E.D.1995)	45, 46
<i>Missouri Pipeline Co. v. Wilmes</i> , 898 S.W.2d 682 (Mo.App.E.D.1995)	92
<i>Modlin v. Sunmark</i> , 699 S.W.2d 5 (Mo.App.E.D.1985)	84, 86
<i>Moorehead v. Bismark Distrib.</i> , 884 S.W.2d 416 (Mo.App.E.D.1994)	75
<i>O'Rourke v. Sandberg, Phoenix & Von Gontard</i> , 1998 WL 831865	
(Ind.Cmsn.1998)	46, 47, 52
<i>Page v. Green</i> , 686 S.W.2d 528 (Mo.App.S.D.1985)	74, 87
<i>Phelps v. Jeff Wolk Construction</i> , 803 S.W.2d 641	
(Mo.App.E.D.1991)	89, 91

Philpott v. City of Blue Springs, 2000 WL 222125 (Ind.Cmsn.2000) 46, 52, 53

PM v. Metromedia Steakhouses, 931 S.W.2d 846

(Mo.App.E.D.1996) 58, 59, 60, 62, 65

Pollard v. Bd. of Police Commissioners, 665 S.W.2d 333

(Mo. banc 1984) 63, 67

Reese v. Coleman, 990 S.W.2d 195

(Mo.App.S.D.1999) 33, 45, 46, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 94

Reese v. Gary and Roger Link, 5 S.W.3d 522 (Mo.App.E.D.1999) 71

Reeves v. Midwestern Mortgage, 929 S.W.2d 293 (Mo.App.E.D.1996) 69

Roller v. Treasurer of the State of Missouri, 935 S.W.2d 739

(Mo.App.S.D.1996) 70, 71

Schuster v. St. of Mo. Division of Employ. Sec.,

972 S.W.2d 377 (Mo.App.E.D.1998) 69

Sheets v. Hill Brothers Distributing, Inc., 379 S.W.2d 514

(Mo.1964) 67, 68

Sifferman v. Sears, Roebuck & Co., 906 S.W.2d 275

(Mo.App.S.D.1995) 84

Simpson v. Saunhegrow Construction, 965 S.W.2d 899 (Mo.App.S.D.1998) 63

Smith v. Mann, Poger & Wittier, P.C., 882 S.W.2d 164

(Mo.App.E.D.1994) 66

State v. Paul, 437 S.W.2d 98 (Mo.App.E.D.1969) 45

State ex rel Lakeman v. Siedelik, 872 S.W.2d 503 (Mo.App.W.D.1994) 62

State of Mo. on the Inf. of Dalton v. Miles Laboratories, Inc.,
282 S.W.2d 564 (Mo. banc 1995) 68

Stillwell v. Universal Construction, 922 S.W.2d 448
(Mo.App.W.D.1996) 45, 46, 57

Toole v. Bechtel, 291 S.W.2d 874 (Mo.1956) 87

Townsend v. Boatmen’s National Bank of St. Louis,
159 S.W.2d 626 (Mo. 1942) 61, 62, 67

Trammel v. S & K Indus., 784 S.W.2d 209 (Mo.App.W.D.1989) 90

Vaught v. Vaught’s/Southern Missouri Construction,
938 S.W.2d 931 (Mo.App.S.D.1931) 71, 75, 82

Vinson v. Curators of the University of Missouri, 822 S.W.2d 504
(Mo.App.E.D.1991) 88

Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458
(Mo.App.E.D.1991) 62, 64, 65

Weinbauer v. Grey Eagle Distrib., 661 S.W.2d 652 (Mo.App.E.D.1984) 78

West v. Posten Constr. Co., 804 S.W.2d 273 (Mo. banc 1979) 32

Williams v. Long Warehouse, 426 S.W.2d 725 (Mo.App.E.D.1968) 79

Wilson v. Goode, 749 S.W.2d 17 (Mo.App.W.D.1988) 62, 63

***Wuebbleing v. West County Drywall*, 989 S.W.2d 615**

(Mo.App.E.D.1995) 81

RSMO. §287.020 69, 74, 77, 88

RSMO. §287.140 84, 85, 86

RSMO. §287.170 88

RSMO. §287.220 70, 71, 72, 74, 76, 80, 81, 82

RSMO. §287.495 32, 90

RSMO. §287.560 9, 10, 13, 14, 15, 16, 17, 44, 45, 46, 47, 48, 49, 50, 51,
..... 52, 55, 56, 57, 58, 60, 61, 63, 65, 66, 67, 68, 94

RSMO. §514.060 57

JURISDICTIONAL STATEMENT

Laura Landman brought two workers' compensation Claims against Ice Cream Specialties, seeking benefits for injuries occurring as a result of work related accidents in 1997 and 1999, as well as an occupational disease. ALJ Newcomb held a hearing on the Claims on December 1, 2000. On February 28, 2001, ALJ Newcomb issued separate Awards on the Claims. In his Award on the 1997 Claim, the ALJ granted claimant temporary total disability, permanent partial disability, past medical expenses, future medical treatment, and costs under RSMo. §287.560. In his Award on the 1999 Claim, the ALJ awarded claimant temporary total disability, past medical expenses, future medical care, and permanent total disability.

Thereafter, on March 14, 2001, employee filed her Application for Review with the Industrial Commission. Employer filed its Application for Review on March 15, 2001. On October 24, 2001, the Industrial Commission issued its Awards on the 1997 and 1999 Claims. Therein, the Commission found that the Awards of the ALJ were supported by competent and substantial evidence and affirmed the ALJ's Award on each Claim. Subsequently, on November 5, 2001, employee filed her Notice of Appeal with the Commission, appealing from the Awards on the 1997 and 1999 Claims. Employer filed its Notice of Appeal on November 7, 2001, appealing from both Awards.

On September 17, 2002, the Court of Appeals issued its Opinion. As to the Award on the 1997 Claim, the Eastern District affirmed the Commission's findings on the issues of future medical treatment and temporary total disability. While the Opinion affirmed the Commission's finding that the employer defended the 1997 Claim without reasonable ground, it reversed that part of the Award refusing to grant claimant attorney's fees as part of "the whole cost of the proceedings" under RSMo. §287.560. The Eastern District remanded the 1997 Claim to the Commission for a determination of the amount of attorney's fees to be paid

to claimant.

In its Opinion, the Eastern District affirmed the Commission's Award on the 1999 Claim as it pertained to the issues of permanent total disability, liability of the Second Injury Fund, and medical causation. While the Eastern District affirmed that portion of the Award finding the employer's defense of the 1999 Claim to be unreasonable, it reversed that part of the Award holding that claimant was not entitled to recover attorney's fees as part of the "whole cost of the proceedings" under RSMo. §287.560. The Eastern District modified the Award on the 1999 Claim to include an additional \$8,795.87 in attorney's fees for claimant. On September 27, 2002, employer filed its Motion For Rehearing and Application For Transfer with the Court of Appeals. The Court of Appeals denied employer's Motion For Rehearing and Application For Transfer on November 14, 2002. Employer filed its Application For Transfer with the Supreme Court on November 27, 2002. Thereafter, on December 24, 2002, the Supreme Court sustained the employer's Application.

This Court has jurisdiction to entertain appeals on transfer from the Court of Appeals pursuant to Article V §§3 and 10 of the Missouri Constitution (1945) (as amended 1982). Therefore, jurisdiction of this Court over the instant appeal is invoked pursuant to Article V, §§ 3 and 10 of the Missouri Constitution (1945) (as amended 1982).

STATEMENT OF FACTS

Procedural History

The instant case involves two workers' compensation Claims, wherein the employee sought recovery for work related accidents occurring in 1997 and 1999, and an occupational disease.

1997 Claim

On September 14, 2000, employee filed a First Amended Claim for Compensation (hereinafter "1997 Claim") against Ice Cream Specialties (hereinafter "employer" or "ICS"). (L.F. 6-7).¹ Therein, claimant alleged that on July 26, 1997, she tripped over wires at the employer's plant and fell, sustaining a contusion and a sprain/strain of her left leg, left shoulder and right ankle. Claimant averred that due to prolonged standing and other activities at work, she had developed conditions in both legs. The employee also asserted a claim against the Second Injury Fund (hereinafter "Fund") for permanent total disability, alleging previous injury to her body from obesity and injury to both legs. (L.F. 6-7). In its Answer to the Amended Claim, employer admitted that claimant sustained an accidental injury on July 26, 1997, for which all necessary compensation benefits and medical aid had been provided. (L.F. 8).

1999 Claim

On July 26, 1999, the employee filed her Claim for Compensation (hereinafter "1999 Claim"). (L.F.

¹Matters referred to herein that are contained in the Legal File shall be designated as (L.F. ____). Matters referred to herein that are contained in the Transcript of Hearing shall be designated as (Tr. ____).

59-60). Therein, claimant alleged that on February 27, 1999, she slipped in oil at the employer's plant, hitting her left leg on a metal bar. Additionally, claimant averred that, due to prolonged standing and other activities at work over numerous years, she had developed conditions in both legs. The employee also asserted a claim against the Fund, alleging previous injuries occurring on July 26, 1997 and over a period of years, affecting "both legs, left shoulder, and right ankle and body as a whole (obesity)." (L.F. 59-60). In its Answer, employer, *inter alia*, denied that claimant sustained accidental injury arising out of and in the course of her employment on February 27, 1999. (L.F. 62).

Hearing

On December 1, 2000, ALJ Newcomb held a hearing on the Claims. (Tr. 1-742). Issues to be resolved regarding the 1997 Claim were: liability of ICS for temporary total disability, past and future medical treatment, permanent partial disability and costs under RSMo. §287.560, and liability of the Fund. (Tr. 2). As to the 1999 Claim, issues to be resolved were: whether claimant's leg condition constituted an occupational disease; liability of ICS for temporary total disability, past and future medical treatment, permanent disability and for costs under RSMo. §287.560; and liability of the Fund (Tr. 2-3).

Awards Of The ALJ

On February 28, 2001, ALJ Newcomb issued separate Awards on the 1997 and 1999 Claims. (L.F. 10-29, 63-89).

Award On The 1997 Claim

The ALJ found that ICS was liable for temporary total disability for the period from July 14, 1999

to August 10, 1999, resulting in an award of \$1,873.04 in temporary total disability benefits. (L.F. 10-29). He ruled that claimant sustained a 40% permanent partial disability of the left shoulder. (L.F. 10-29). Additionally, the ALJ held ICS liable for past medical expenses and future medical treatment. Finally, the ALJ awarded costs to claimant under RSMo. §287.560, finding that ICS refused to provide medical treatment without reasonable ground.

Award On The 1999 Claim

ALJ Newcomb found that claimant suffered a compensable accident on February 27, 1999. (L.F. 63-89). Additionally, the ALJ held that claimant's venous stasis condition was a work related condition which manifested different symptoms throughout claimant's employment beginning in 1995, but that it did not rise to the level of a known compensable condition until 1999. While claimant's work might not have been the sole cause of her venous stasis disease, the ALJ found that it was a substantial factor in causing the disease. (L.F. 63-89).

The ALJ held that claimant was temporarily and totally disabled from March 18, 1999 to September 25, 2000 as a result of her occupational disease and venous stasis condition. (L.F. 63-89). Excluding the periods of temporary total disability for claimant's 1997 shoulder injury, the ALJ awarded her temporary total disability for the periods of March 18, 1999 to July 13, 1999 and March 4, 2000 to September 25, 2000. Additionally, the ALJ awarded claimant past medical expenses incurred to treat her venous stasis condition, as well as future medical treatment for that condition. (L.F. 63-89).

The ALJ held that claimant was permanently and totally disabled. He placed liability for claimant's permanent total disability on ICS. (L.F. 63-89). While claimant's pre-existing conditions of the left shoulder and her obesity were hindrances or obstacles to employment or re-employment in the open labor market,

the ALJ found that the primary injury and occupational disease of venous stasis were so severe that claimant was unable to compete in the open labor market due to that condition alone. (L.F. 63-89).

While the ALJ found that ICS acted unreasonably in raising the issue of medical causation, he denied claimant's request for costs under RSMo. §287.560. Attorney's fees could not be awarded as the "costs of the proceedings" under RSMo. §287.560 and there was no specific proof as to claimant's costs for the 1999 Claim. (L.F. 63-89).

Subsequently, on March 14, 2001 and March 15, 2001, respectively, claimant and employer filed their Applications for Review with the Industrial Commission (hereinafter "Commission"). (L.F. 30-32, 33-35, 90-92, 93-95). On October 24, 2001, the Commission issued its Final Awards. Finding that the Awards of the ALJ were supported by competent and substantial evidence, the Commission affirmed the ALJ's Awards on the 1997 and 1999 Claims. (L.F. 37-57, 97-124).

Employee, on November 5, 2001, filed her Notice of Appeal with the Commission, appealing from the Awards on the 1997 and 1999 Claims. (L.F. 125-186). On November 7, 2001, employer filed its Notice of Appeal. (L.F. 187-235).

On September 17, 2002, the Missouri Court of Appeals, Eastern District, issued its Opinion.² It affirmed the Award of the 1997 Claim in part and reversed it in part. The Opinion held that the Commission did not err in finding that claimant was entitled to temporary total disability and future medical treatment for her shoulder injury. Additionally, the Eastern District affirmed the Commission's ruling that ICS defended the 1997 Claim without reasonable ground, within the meaning of Section 287.560, because it refused to

² A copy of the Opinion is set forth on pages A 52-A 78 of the Appendix, *infra*.

provide medical treatment for claimant's shoulder condition. The Eastern District reversed that portion of the Award on the 1997 Claim ruling that claimant could not recover attorney's fees as part of the "whole cost of the proceeding" under Section 287.560 and remanded the Claim to the Commission for a determination of the amount of attorney's fees relating to the hardship hearing that ICS was to pay claimant.

In that portion of the Opinion addressing the Award on the 1999 Claim, the Eastern District affirmed the Commission's findings that claimant was permanently and totally disabled due to her venous stasis condition alone, that her venous stasis condition did not become compensable until 1999, and that the Fund had no liability under Section 287.220. The Eastern District affirmed that part of the Award on the 1999 Claim finding that ICS' defense of the Claim was unreasonable, given its position on medical causation. It reversed that portion of the Award refusing to grant claimant attorney's fees as part of the "whole cost of the proceedings" under Section 287.560 and modified the Award to include an order directing ICS to pay claimant \$8,795.87 in attorney's fees.

In awarding attorney's fees as costs under Section 287.560, the Eastern District declined to follow *Reese v. Coleman*, 990 S.W.2d 195, 199-201 (Mo.App.S.D.1999). Therein, the Southern District ruled that Section 287.560 did not authorize the Commission to order payment of an opposing party's attorney's fees.

On September 27, 2002, ICS filed a Motion For Rehearing and an Application For Transfer with the Court of Appeals. The Court of Appeals denied the Motion For Rehearing and Application For Transfer on November 14, 2002. In an Order dated November 25, 2002, the Eastern District stated that the Court en banc had reviewed the Opinion in accordance with Eastern District Rule 403 and Supreme Court Operating Rule 22.01.

ICS filed its Application For Transfer with the Supreme Court on November 27, 2002. On December 24, 2002, the Supreme Court sustained ICS' Application.

Relevant Facts

Testimony of Laura Landman

Laura Landman graduated from high school in 1982. (Tr. 13-14). Following high school, claimant received no specialized or vocational training. (Tr. 13).

Prior to working for ICS, claimant worked part-time at K-Mart for six months to one year. (Tr. 14). Claimant initially worked in the cafeteria, operating the grill, waiting on customers, and cleaning her work area. Subsequently, claimant switched to a cashier job, which entailed lifting items out of the cart, checking them out, and bagging them. (Tr. 15).

From late 1982 until March 17, 1999, claimant worked full-time for ICS. (Tr. 16-17, 77). ICS makes ice cream bars and popsicles. (Tr. 17). After working as a packer for one year, claimant became a machine operator, a position she worked in continuously until 1999. Claimant worked eight and a quarter hours a day, five to six days a week. (Tr. 17-18). She worked over-time 80% of the time. (Tr. 18-19). After her injury in 1997, claimant's hours declined. (Tr. 88).

As a machine operator, claimant was responsible for keeping the ice cream bar machine running. This required claimant to stand continuously next to or on top of the machine. (Tr. 20-21). In the event of a jam, claimant climbed on top of the machine to clear the jam. (Tr. 21-22). Also, claimant had to fill the machine with paper. The paper came on large 50 pound rolls. Claimant had to crouch and stoop to put the paper into the machine. (Tr. 20).

In addition, claimant made popsicle mix. (Tr. 19). To do so, claimant had to climb up 20 steep

steel steps and lift ingredients that weighed up to 50 pounds. (Tr. 19, 69). Claimant also carried supplies to her work area from as far away as 30 feet from the machine she was assigned to run. (Tr. 20).

The employee was required to use a heavy duty hose to keep her machine and the area around it clean. (Tr. 19, 21). While at work, claimant was exposed to a damp, cold environment. Her clothing would become wet from water, mix, or ice cream. (Tr. 21, 22, 395).

With the exception of two ten minute breaks, and a 20 minute lunch break, claimant was on her feet for the rest of her shift. (Tr. 21). Approximately 80% of claimant's work day involved lifting. She lifted weights of over 50 pounds on a frequent basis. (Tr. 20, 22, 23, 395).

Claimant's Pre-existing Injuries And Conditions

Claimant has a long-standing problem with her weight. After the birth of her daughter in 1990, claimant began slowly gaining weight. (Tr. 43-44, 71).

In the period from 1990 to July, 1998, claimant weighed between 260 and 275 pounds. (Tr. 44, 71). Beginning in July of 1998, claimant began a Weight Watchers Program. (Tr. 44, 81-82). As of February 27, 1999, claimant weighed 225 pounds. (Tr. 44-45).

Following February of 1999, claimant gradually began gaining weight because she was unable to walk, due to her leg condition. (Tr. 45-46). As of the date of hearing, claimant weighed 309 pounds. Because claimant was completely inactive, she continued to gain weight. (Tr. 45-46).

Before the accident on July 26, 1997, claimant had problems climbing stairs, bending, crouching, and lifting. She would become short of breath due to her weight while engaging in these activities. (Tr. 47, 48, 71). These problems affected claimant's work. Besides getting short of breath, claimant's weight slowed her down on the job. (Tr. 48, 71, 88).

In 1993, claimant fell on both knees while at work. (Tr. 62-63). Since that time, claimant continued to have problems with her knees swelling, and swelling in her legs from her ankles to her knees. (Tr. 63). While claimant was not under any permanent work restrictions as regards her knees or legs prior to February of 1999, claimant worked slower than she otherwise would have, due to her leg swelling and lesions. (Tr. 64, 84).

Prior to the July 26, 1997 accident, claimant had experienced problems with her legs. In 1995, claimant developed an open sore on her left leg. Dr. Mammen, her family physician, treated the sore with ointment, and it went away in a month or two. (Tr. 28-29). When claimant developed another left leg sore, Dr. Mammen referred her to Dr. Lee, who prescribed ointments, water pills and soaks, which cured the sore. (Tr. 29).

July 26, 1997 Injury

On July 26, 1997, claimant's right foot got tangled in some wires and she fell on the concrete floor, landing on her left side and shoulder. (Tr. 24). Upon falling, claimant experienced pain in her left leg and shoulder and right ankle. (Tr. 24).

That evening, claimant went to Barnes Emergency Room, as instructed by the employer. (Tr. 25). Claimant followed up with BarnesCare, where she was given medications and told to stay off work. (Tr. 25).³ After the accident, claimant had severe bruises on her left shoulder and left leg. She also had swelling of her left leg and her right ankle was red and discolored. (Tr. 25-26). While claimant's right ankle

³While being treated at BarnesCare, claimant was diagnosed with bilateral non-pitting edema secondary to venous insufficiency and stasis, that pre-existed her work injury. (Tr. 441).

problems resolved, she continued to have problems with her left shoulder. (Tr. 26, 83).

After receiving treatment from BarnesCare, claimant was referred to Dr. Dusek, who took x-rays, an MRI, and performed an arthrogram. (Tr. 26-27). Dr. Dusek unsuccessfully attempted to do arthroscopic surgery on claimant's shoulder. (Tr. 27).

Following the 1997 accident, claimant continued to have problems with her left shoulder at work. Since claimant could not lift over her head, co-workers had to help her lift. Co-workers often carried boxes of supplies for claimant. (Tr. 31, 66-67).

Immediately following the July, 1997 shoulder injury, claimant was off work for two weeks and then returned to her regular duties. (Tr. 82). Claimant was unable to work because of her shoulder during the period from July 15, 1999 to March 3, 2000. (Tr. 27).

After the BarnesCare doctors released claimant for her 1997 injury, she continued to have swelling and a bruise on her left leg. (Tr. 30). In August of 1997, claimant developed an open sore on her left leg. This sore went away three to four months later, after claimant took antibiotics and water pills. (Tr. 30, 31-32).

While the lesions and swelling on claimant's legs did not cause her to miss any time from work prior to her 1999 injury, they slowed claimant down and made it more difficult for her to get around. (Tr. 65-66). Before February of 1999, claimant had difficulty climbing the steps to make popsicle mix because of her legs. Climbing the steps caused claimant pain and she climbed the steps more slowly due to her leg problems. (Tr. 70).

In May of 1998, claimant's left leg lesion reopened. (Tr. 32). She received treatment from Dr. Lee and Dr. Mammen. This was the first time claimant received a prescription to keep her leg elevated

whenever possible. (Tr. 32).

February 27, 1999 Accident

On February 27, 1999, claimant stepped over a metal bar while walking under a machine. (Tr. 33). Her right foot slipped in oil and her left leg hit the bar. Immediately, claimant developed a deep purple bruise and experienced pain in her lower left leg. (Tr. 33-34). While claimant did not have lesions on her left leg in the weeks before her accident, she developed a lesion in the area where she bruised her leg. This lesion was present, intermittently, from March of 1999 until December 1, 2000. (Tr. 34, 75).

When the lesion opened up and began leaking fluid, Dr. Mammen prescribed an antibiotic and took claimant off work. Employer sent claimant to BarnesCare. (Tr. 34-35). BarnesCare doctors told claimant to continue with her family physician. (Tr. 35-36). Subsequently, claimant saw Drs. Mammen, Beckman, Squitieri, and Altsheler to treat her leg lesion. (Tr. 36, 37).

Claimant has had problems with her left leg lesion since the February 27, 1999 injury. (Tr. 37). The lesion has never closed up completely and, if claimant stands on her leg too long, the swelling in her leg makes it reopen. (Tr. 37, 56). While claimant had painful lesions on her leg prior to the 1999 accident, they would close up on their own, even though claimant would be on her feet. (Tr. 37-38).

Current Complaints

At the time of hearing, claimant was not receiving any treatment for her left shoulder problems from the 1997 accident. As to her current shoulder complaints, claimant's range of motion is limited, and she has pain in her left shoulder. (Tr. 48, 49, 68). She cannot lift overhead or lift with her arm in front of her or to her side. The employee has problems dressing and grooming herself. (Tr. 49, 50, 68, 70). Claimant also has problems cleaning and cooking when she has to use both hands. (Tr. 50-51, 60). Dr. Dusek limited

claimant to lifting five pounds with her left arm and cautioned her not to engage in repetitive lifting. (Tr. 51).

Currently, claimant experiences constant, burning pain in her legs, especially around open lesions. (Tr. 52). This pain increases with walking. Claimant can only walk for about ten minutes before the pain becomes intense. (Tr. 53). Additionally, claimant cannot walk very far or stand for a long period of time without her legs swelling. She cannot walk or stand without having her legs wrapped or wearing an elastic stocking on her legs. Twice a day, claimant uses a compression pump. (Tr. 53-54).

The employee can only sit for five minutes if her feet are not elevated above her hips. This affects claimant's ability to sit or ride in a car. (Tr. 55, 79).

On a typical day, claimant gets up, uses her compression pump, and then sits on the couch with her feet elevated. (Tr. 61). She only gets up to go to the bathroom. Sometimes, she is required to stay in bed to keep the lesions closed. Claimant is still undergoing active treatment with Dr. Altsheler for her legs. (Tr. 61).

Claimant's last day of work for ICS was March 17, 1999. She stopped working because of an infection in an open wound that developed on her left leg after hitting it in the February accident. (Tr. 77). Since February of 1999, claimant has been unable to bend from the waist down, kneel, or stoop because of her legs. (Tr. 79).

Testimony of James England

James England, a licensed rehabilitation counselor, reviewed claimant's medical records and evaluated her. (Tr. 98-99).

Claimant provided Mr. England with a vocational history that she only had one job, that at ICS. (Tr. 100). This job involved lifting 50 pounds several times a day, and operating machinery. In Mr. England's

opinion, claimant did not possess any transferable skills that she could apply in less physically demanding work. (Tr. 100).

On testing, claimant scored at an eighth grade level for word recognition and a seventh grade level in math. (Tr. 101). With seventh grade math skills, claimant could perform basic math functions. Claimant also had good reading skills. From an academic standpoint, she could engage in basic clerical activities. (Tr. 101).

In Mr. England's opinion, claimant's weight condition would affect her ability to engage in certain activities or occupations. (Tr. 104). Since claimant's weight resulted in a lack of endurance and slowed her down at work, it was an impediment to her employment. (Tr. 104-105, 117, 127). As to re-employment, it was an even greater impediment. Because of her weight, a new employer who was not familiar with claimant's abilities might be reluctant to hire her. (Tr. 105).

Mr. England found that the limitations claimant had as a result of her left shoulder injury were hindrances or obstacles to claimant's employment or re-employment. (Tr. 107). These limitations negated claimant's ability to do her old job and precluded any kind of job involving normal bimanual dexterity. (Tr. 107).

It was Mr. England's opinion that claimant's leg limitations - increased pain if she walked more than 15 to 20 feet, with standing, with sitting for five minutes without her feet elevated and a 15 minute maximum tolerated sitting without her feet elevated; increased pain with lifting that caused straining; having to use a compression pump twice a day; and limited endurance - would constitute an obstacle or hindrance to employment or re-employment. Mr. England believed that claimant was functioning at less than a full range of sedentary activity. (Tr. 108).

In order to perform a full range of sedentary work, an individual had to be able to sit as much as six hours in an eight hour work day and use both hands and arms effectively on a repetitive basis. (Tr. 108-109). These requirements were negated in claimant's case. She did not have normal use of her left upper extremity and she could not sit in a chair with her legs down. (Tr. 109-110). It was Mr. England's opinion that claimant's need to constantly keep her legs elevated was not something that could be accommodated in the open labor market. (Tr. 109).

Mr. England opined that claimant could not return to her former job for ICS. (Tr. 110). Claimant was unable to be on her feet the majority of the work day or lift 50 pounds several times a day. Nor could claimant work as a cashier or cafeteria worker, since these jobs involved being on her feet. (Tr. 110-111, 137).

Vocational rehabilitation was not an option, since claimant was unable to sit with her legs down. Mr. England was unaware of any job on the open labor market where an employee could have their legs elevated throughout the work day. (Tr. 111, 112, 134). Claimant's need to use a compression pump and elevate her legs prevented her from doing sedentary work. (Tr. 134-135).

In Mr. England's opinion, claimant was permanently and totally disabled and unable to compete in the open labor market. It was a combination of claimant's leg problems, shoulder problems, and obesity that rendered her permanently and totally disabled. (Tr. 111-112).

Testimony of Dr. Robert Poetz

Dr. Robert Poetz examined claimant on July 29, 2000. (Tr. 172). He made several diagnoses. Claimant had an old trauma in the left rotator cuff area and adhesive capsulitis. (Tr. 174-176). In Dr. Poetz' opinion, these conditions were caused by claimant's July 26, 1997 injury. The conditions were

permanent and affected claimant's range of motion, strength, endurance and caused pain with use of her left arm. (Tr. 175, 176-177). Dr. Poetz opined that claimant sustained a 40% permanent partial disability to the left upper extremity at the level of the shoulder as a result of the July 26, 1997 accident. (Tr. 203). In Dr. Poetz' opinion, claimant's shoulder injury would be a hindrance or obstacle to employment or re-employment in the open labor market. (Tr. 196-197).

Additionally, it was Dr. Poetz' opinion that while physical therapy would not cure claimant's shoulder condition, it would improve her symptoms. (Tr. 189-190). Dr. Poetz recommended that claimant take anti-inflammatory medications and have physician visits for her shoulder injury. (Tr. 177, 190, 213).

It was Dr. Poetz' opinion that claimant was morbidly obese and that her obesity was a permanent condition. Dr. Poetz opined that claimant's obesity was a hindrance or obstacle to her employment or re-employment as of July 26, 1997 and February 27, 1999. (Tr. 179, 181-182, 183).

Further, Dr. Poetz found that claimant had a pre-existing condition of venous stasis in both legs at the time of the July, 1997 accident. (Tr. 198, 201, 203). This prior condition resulted in a pre-existing permanent partial disability of 20% of the right lower extremity and 20% of the left lower extremity. (Tr. 202, 203).

Dr. Poetz concluded that claimant's venous status condition was an occupational disease resulting from her work for ICS. (Tr. 188, 198). He opined that claimant's 17 years of work, which included repetitive standing, lifting, crouching, climbing and walking, was a substantial factor in the cause of her venous stasis condition. (Tr. 199-200). In his opinion, claimant's venous stasis followed as a natural incident of her work activities and she was at a heightened risk for contracting the disease due to her work. (Tr. 200). While claimant's obesity was a factor in her venous stasis condition, her standing at work for 17

years was a substantial factor in causing the condition. (Tr. 229).

In Dr. Poetz' opinion, the February 27, 1999 incident exacerbated claimant's venous stasis condition. (Tr. 211). It was after this incident that claimant began using a compression pump and needed to elevate her legs for a majority of the day. (Tr. 217, 218). As a result of the February 27, 1999 injury, claimant sustained an additional 10% permanent partial disability of the left lower extremity. (Tr. 202, 209). Dr. Poetz assigned this additional 10% disability because claimant's work injury aggravated her pre-existing venous stasis condition. (Tr. 203).

In Dr. Poetz' opinion, Jobst stockings and a compression pump would modify the swelling in claimant's legs and reduce her tendency towards ulceration. Physician visits would also be appropriate to monitor claimant's leg condition. (Tr. 191-193).

Prior to the February 1999 accident, claimant had a 40% permanent partial disability to the left upper extremity at the level of the shoulder and a 15% permanent partial disability to the body as a whole resulting from obesity. (Tr. 203-204). Dr. Poetz concluded that claimant was permanently and totally disabled and was unable to compete in the open labor market. In Dr. Poetz' opinion, claimant was permanently and totally disabled as a result of the combination of her left shoulder injury, her obesity, and her venous stasis condition. (Tr. 207-208).

Testimony of Dr. Altsheler

Dr. Altsheler is board certified in internal medicine. He practices as a nephrologist, dealing with disorders of fluid retention. (Tr. 262-263). As a part of his practice, Dr. Altsheler treats patients with venous stasis disorder. (Tr. 265).

Upon examining claimant, Dr. Altsheler concluded that she suffered from chronic venous stasis

disease, with secondary post-traumatic complicating recurrent ulcer formation with cellulitis. (Tr. 285, 288). In Dr. Altsheler's opinion, claimant's venous stasis condition was related to her work for ICS where she repeatedly stood, lifted, crouched, and walked. (Tr. 292). He believed that claimant's job contributed significantly to her current condition in that it required her to lift and strain against immovable objects, increasing the pressure in her chest and, in turn, transmitting pressure down to the veins and dilating them. (Tr. 292). Claimant was at a heightened risk for contracting the condition because of her 17 years of work for ICS, particularly since she worked in a cold environment. (Tr. 298, 324-325).

While morbid obesity could contribute to venous stasis disorder, Dr. Altsheler would rate venous stasis disease first and obesity second in the causation of claimant's condition. (Tr. 333-334). Claimant was predisposed to the condition and her work promoted the process. In Dr. Altsheler's opinion, claimant was prone to venous stasis disease as a product of the type of labor that she performed on a daily basis and the cold environment in which she performed that labor. (Tr. 334-335).

While Dr. Altsheler did not know the exact time when claimant's venous stasis process started, it was before claimant injured her leg at work on February 27, 1999. (Tr. 335). After that injury, claimant had swelling associated with her wound. In Dr. Altsheler's opinion, the 1999 work incident was the trigger that allowed claimant's whole system to fall apart since after that, she had inflammation and tissue reactivity. (Tr. 336).

Dr. Altsheler testified that the longer claimant worked for ICS, the more blown out her veins were and the less functional her valves became, putting her at greater exposure to the risk that created venous stasis. (Tr. 345-346). In Dr. Altsheler's opinion, the nature of claimant's work, in particular, her having to lift heavy sacks, contributed to the disease process. (Tr. 346-347). The venous stasis disease continued

to worsen during claimant's 17 years of work to the point where she could no longer work after March 18, 1999. (Tr. 347-348).

As a result of her venous stasis condition, claimant was unable to maintain an upright posture without increasing the edema in her lower extremities. (Tr. 293). Basic activities such as walking, standing, lifting, bending, stooping, and coughing, all increased the pressure inside claimant's chest, which transmitted down to her lower extremities. (Tr. 294).

In Dr. Altsheler's opinion, claimant was unable to work in any occupation after March 17, 1999 because of her venous stasis condition. Since claimant's condition had been resistant to treatment, it was Dr. Altsheler's opinion that she would be permanently disabled in the future. (Tr. 294-295).

Besides her venous stasis condition, claimant suffered from pre-existing obesity. (Tr. 265-266). Claimant's leg condition, which required her to be inactive and prohibited her from participating in any exercise program, made her more prone to gaining weight. (Tr. 269). Dr. Altsheler found that claimant was permanently and totally disabled due to her leg condition alone, without consideration of her shoulder injury or her obesity. (Tr. 314).

The doctor concluded that claimant was at maximum medical improvement for her leg condition. (Tr. 311). He recommended that claimant continue with diuretics, antibiotics, physician visits, Jobst stockings or wraps, and a compression pump to control her symptoms. (Tr. 312-313).

STANDARD OF REVIEW

In reviewing an award of the Industrial Commission in a workers' compensation proceeding⁴ the Court is limited to a determination of whether the findings are authorized by law and supported by competent and substantial evidence. RSMo. §287.495; *Akers v. Warson Gardens Apts.*, 961 S.W.2d 50, 53 (Mo.banc 1998). The Court may modify, reverse, remand for hearing, or set aside the Award only on the grounds specified by statute, namely: (1) that the Commission acted without or in excess of its powers; (2) that the Award was procured by fraud; (3) that the facts found by the Commission do not support the Award; or (4) that there was not sufficient competent evidence in the record to warrant the making of the Award. RSMo. §287.495.1; *Akers*, 961 S.W.2d at 52-53.

Questions of law are reviewed independently. *Blades v. Commercial Transport, Inc.*, 30 S.W.3d 827, 828-829 (Mo.banc 2000). Decisions of the Commission that are clearly an interpretation or application of the law are not binding upon the reviewing Court and fall within the Court's province of review and correction. *West v. Posten Constr. Co.*, 804 S.W.2d 273, 278 (Mo.banc 1979); *Ikerman v. Koch*, 580 S.W.2d at 273, 278 (Mo.banc 1979).

Where the Commission's decision is based upon a determination of facts, the Court reviews the whole record in a light most favorable to the decision. *Akers*, 961 S.W.2d at 53. The Court's review is limited to a determination of whether the findings of fact are supported by competent and substantial evidence on the whole record. *Id.* Facts found by the Commission may be set aside where those factual

⁴The Standard of Review set forth herein applies to the claims of error discussed in Points I through IV of the Employer's Substitute Appellants' Brief.

findings are not supported by substantial evidence or are contrary to the overwhelming weight of the evidence before the Commission. ***Reese v. Coleman***, 990 S.W.2d 195, 199 (Mo.App.S.D.1999).

POINTS RELIED ON

I

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING THAT SECTION 287.560, PERMITTING AN AWARD OF THE WHOLE COST OF THE PROCEEDINGS AGAINST A PARTY WHO BRINGS, PROSECUTES OR DEFENDS A COMPENSATION CLAIM WITHOUT REASONABLE GROUND, APPLIED TO ICS' DEFENSE OF THE 1997 AND 1999 CLAIMS.

A.

THE COMMISSION ERRED AS A MATTER OF LAW IN AWARDING CLAIMANT THE COSTS OF THE PROCEEDINGS ON THE 1997 CLAIM PURSUANT TO RSMo. § 287.560 AND IN RULING THAT ICS' DEFENSE ON THE 1999 CLAIM WAS TAKEN WITHOUT REASONABLE GROUND WITHIN THE MEANING OF SECTION 287.560 FOR THE REASON THAT THE COMMISSION FOCUSED SOLELY UPON ONE ASPECT OF ICS' DEFENSE TO THE CLAIMS, RATHER THAN THE EMPLOYER'S ENTIRE COURSE OF CONDUCT IN THE PROCEEDINGS ON THE CLAIMS.

B.

EVEN ASSUMING, *ARGUENDO*, THAT ICS DEFENDED THE 1997 AND 1999 CLAIMS WITHOUT REASONABLE GROUND WITHIN THE MEANING OF SECTION 287.560, CLAIMANT COULD NOT RECOVER AN AWARD OF ATTORNEYS' FEES UNDER THAT STATUTORY PROVISION FOR THE REASON THAT SECTION 287.560 DID NOT AUTHORIZE THE COMMISSION TO ORDER PAYMENT OF CLAIMANT'S

**ATTORNEYS' FEES AS PART OF THE "COST OF THE PROCEEDINGS" IN
PROSECUTING HER CLAIMS FOR COMPENSATION.**

Reese v. Coleman, 990 S.W.2d 195 (Mo.App.S.D.1999)

Desselle v. Quadpac, 1995 WL 765370 (Ind.Cmsn.1995)

Stillwell v. Universal Construction, 922 S.W.2d 448 (Mo.App.W.D.1996)

Mayor, Councilmen and Citizens of the City of Liberty v. Beard, 636 S.W.2d 330 (Mo. banc
1982)

Philpott v. City of Blue Springs, 2000 WL 222125 (Ind.Cmsn.2000)

State v. Paul, 437 S.W.2d 98 (Mo.App.E.D.1969)

MG v. GMB, 897 S.W.2d 218 (Mo.App.E.D.1995)

O'Rourke v. Sanberg, Phoenix & Von Gontard, 1998 WL 831865 (Ind.Cmsn.1998)

McCormack v. Carmen Schell Constr., 2001 WL 1347522 (Ind.Cmsn.2001)

McCormack v. Carmen Schell Constr., 2002 WL 1363006 (Mo.App.W.D.2002)

Griffiths v. BSI Constructors, 2001 WL 193846 (Ind.Cmsn.2001)

Community Memorial Hospital v. City of Moberly, 422 S.W.2d 290 (Mo.1968)

Mesker Brothers Industries. v. Leachman, 529 S.W.2d 153 (Mo.1975)

Chapman v. Dunnegan, 665 S.W.2d 643 (Mo.App.E.D.1984)

Lansing v. Lansing, 736 S.W.2d 554 (Mo.App.E.D.1987)

Campbell v. Citicorp Mortgage, 1995 WL 707218 (Ind.Cmsn.1995)

PM v. Metromedia Steakhouses, 931 S.W.2d 846 (Mo.App.E.D.1996)

City of St. Louis v. Meintz, 18 S.W. 30 (Mo.1891)

Lewis v. Kloster Co., 1998 WL 910242 (Ind.Cmsn.1998)

Manley v. Mulligan Construction, 2002 WL 1824986 (Ind.Cmsn.2002)

Townsend v. Boatmen's National Bank of St. Louis, 159 S.W.2d 626 (Mo.1942)

Dorn Chrysler-Plymouth v. Roderique, 487 S.W.2d 48 (Mo.App.E.D.1972)

In Re the Interest of J.P. v. Mo. Div. of Family Services, 947 S.W.2d 442 (Mo.App.W.D.1997)

Pollard v. Bd. of Police Commissioners, 665 S.W.2d 333 (Mo. banc 1984)

Simpson v. Saunchegrow Construction, 965 S.W.2d 899 (Mo.App.S.D.1998)

Gerrard v. Bd. of Election Commissioners, 913 S.W.2d 88 (Mo.App.E.D.1995)

Washington Univ. v. Royal Crown Bottling Co., 801 S.W.2d 458 (Mo.App.E.D.1991)

State ex rel Lakeman v. Siedelik, 872 S.W.2d 503 (Mo.App.W.D.1994)

Hunt v. Laclede Gas Co., 869 S.W.2d 503 (Mo.App.E.D.1993)

County Court of Washington County v. Murphy, 658 S.W.2d 14 (Mo. banc 1983)

Harris v. Union Electric, 766 S.W.2d 80, 89 (Mo. banc 1989)

Curry v. Dahlberg, 110 S.W.2d 742 (Mo. banc 1937)

In re Apex Oil v. Arctic Bank & Trust, 265 B.R. 144 (8th Cir. 2001)

Smith v. Mann, Poger & Wittier, P.C., 882 S.W.2d 164 (Mo.App.E.D.1994)

Burwick v. Wood, 959 S.W.2d 951 (Mo.App.S.D.1998)

Forsthove v. Hardware Dealers Mut. Fire Ins. Co., 416 S.W.2d 208 (Mo.App.E.D.1967)

Sheets v. Hill Brothers Distributing, Inc., 379 S.W.2d 514 (Mo. 1964)

Kristanik v. Chevrolet Motors Corp., 41 S.W.2d 911 (Mo.App.E.D.1931)

Budding v. SSM Health Care, 19 S.W.3d 678 (Mo. banc 2000)

State of Mo. on the Inf. of Dalton v. Miles Laboratories, Inc., 282 S.W.2d 564 (Mo. banc 1995)

In Re Estate of Dotage v. Dotage, 727 S.W.2d 925 (Mo.App.W.D.1987)

Wilson v. Goode, 749 S.W.2d 17 (Mo.App.W.D.1988)

RSMo. §287.560

RSMo. §287.203

Rule 84.19

II

THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING ICS LIABLE FOR PERMANENT TOTAL DISABILITY ON THE 1999 CLAIM AND IN REFUSING TO ASSESS LIABILITY AGAINST THE SECOND INJURY FUND FOR THE REASONS THAT THE 1999 ACCIDENT, ALONE, DID NOT CAUSE CLAIMANT TO BECOME PERMANENTLY AND TOTALLY DISABLED, CLAIMANT'S PERMANENT TOTAL DISABILITY AROSE FROM A COMBINATION OF ALL HER INJURIES AND RESULTANT DISABILITIES, AND CLAIMANT'S VENOUS STASIS CONDITION WAS A PERMANENT, COMPENSABLE DISABILITY PRIOR TO THE 1999 ACCIDENT AND THUS, IT DID NOT CONSTITUTE THE LAST INJURY FOR THE PURPOSE OF FUND LIABILITY.

Messex v. Sachs Electric, 989 S.W.2d 206 (Mo.App.E.D.1999)

Carlson v. Plant Farm, 952 S.W.2d 369 (Mo.App.W.D.1997)

Garibay v. Treas. of Missouri, 930 S.W.2d 57 (Mo.App.E.D.1996)

Conley v. Treasurer of Missouri, 999 S.W.2d 269 (Mo.App.E.D.1999)

Wuebbleing v. West County Drywall, 989 S.W.2d 615 (Mo.App.E.D.1995)

Schuster v. St. of Mo. Division. of Employ. Sec., 972 S.W.2d 377 (Mo.App.E.D.1998)

Reeves v. Midwestern Mortgage, 929 S.W.2d 293 (Mo.App.E.D.1996)

Johnson v. Terre Du Lac, 788 S.W.2d 782 (Mo.App.E.D.1990)

Chatmon v. St. Charles County Ambulance Dist., 55 S.W.3d 451 (Mo.App.E.D.2001)

Roller v. Treasurer of the State of Missouri, 935 S.W.2d 739 (Mo.App.S.D.1996).

Reese v. Gary and Roger Link, Inc., 5 S.W.3d 522 (Mo.App.E.D.1999)

Kizior v. TWA, 5 S.W.3d 195 (Mo.App.W.D.1999)

Page v. Green, 686 S.W.2d 528 (Mo.App.SD 1985)

Hall v. Wagner Division - McGraw Edison, 755 S.W.2d 594 (Mo.App.E.D.1988)

Boring v. Treas. of Mo., 947 S.W.2d 483 (Mo.App.E.D.1997)

Vaught v. Vaught's/Southern Missouri Construction, 938 S.W.2d 931 (Mo.App.S.D.1931)

Gennari v. Norwood Hills, 322 S.W.2d 718 (Mo.1959)

Moorehead v. Lismark Distrib., 884 S.W.2d 416 (Mo.App.ED 1994)

Weinbauer v. Grey Eagle Distrib., 661 S.W.2d 652 (Mo.App.E.D.1984)

Marcus v. Steel Constructors, 434 S.W.2d 475 (Mo.1968)

Kasl v. Bristol Care, 984 S.W.2d 852 (Mo.banc. 1999)

Loven v. Greene County, 63 S.W.3d 278 (Mo.App.S.D.2001)

Johnson v. Denton Construction, 911 S.W.2d 286 (Mo. banc 1995)

Coloney v. Accurate Superior Scale, 952 S.W.2d 755 (Mo.App.W.D.1997)

Williams v. Long Warehouse, 426 S.W.2d 725 (Mo.App.E.D.1968)

RSMo. § 287.020

RSMo. § 287.220

III

THE COMMISSION ERRED AS A MATTER OF LAW IN AWARDING CLAIMANT FUTURE MEDICAL TREATMENT FOR HER LEFT SHOULDER INJURY RESULTING FROM THE 1997 ACCIDENT FOR THE REASONS THAT THE COMMISSION ARBITRARILY IGNORED THE MEDICAL RECORDS OF CLAIMANT'S TREATING PHYSICIAN, WHO FOUND CLAIMANT TO BE AT MAXIMUM MEDICAL IMPROVEMENT REGARDING HER LEFT SHOULDER AND DID NOT RECOMMEND ANY ADDITIONAL MEDICAL TREATMENT TO CURE OR RELIEVE THAT CONDITION AND ERRED IN RELYING UPON THE OPINION OF DR. POETZ, WHOSE TESTIMONY FAILED TO SHOW HOW THE TREATMENT HE RECOMMENDED FOR CLAIMANT WOULD CURE OR RELIEVE HER SHOULDER INJURY, AS REQUIRED BY RSMo. §287.140.

Mathia v. Contract Freighters, 929 S.W.2d 271 (Mo.App.S.D.1996)

Dean v. St. Luke's Hospital, 936 S.W.2d 601 (Mo.App.W.D.1997)

Landers v. Chrysler, 963 S.W.2d 275 (Mo.App.E.D.1998)

Modlin v. Sunmark, 699 S.W.2d 5 (Mo.App.E.D.1985)

Garibay v. Treas. of Mo., 930 S.W.2d 57 (Mo.App.E.D.1996)

Sifferman v. Sears, Roebuck & Co., 906 S.W.2d 275 (Mo.App.S.D.1995)

Toole v. Bechtel, 291 S.W.2d 874 (Mo.1956)

Page v. Green, 686 S.W.2d 528 (Mo.App.S.D.1985)

Hall v. Wagner Division - McGraw Edison, 755 S.W.2d 594 (Mo.App.E.D.1988)

Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490-491 (Mo.App.W.D.1990)

RSMo. § 287.140

IV

THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING CLAIMANT TO BE TEMPORARILY AND TOTALLY DISABLED FROM JULY 14, 1999 TO AUGUST 10, 1999 BECAUSE OF HER LEFT SHOULDER INJURY RESULTING FROM THE 1997 ACCIDENT AND IN AWARDING CLAIMANT TEMPORARY TOTAL DISABILITY BENEFITS FOR THIS PERIOD FOR THE REASONS THAT CLAIMANT'S TREATING PHYSICIAN DID NOT FIND HER TO BE TEMPORARILY AND TOTALLY DISABLED DURING THIS INTERVAL DUE TO HER LEFT SHOULDER INJURY, DR. POETZ' OPINION ON TEMPORARY TOTAL DISABILITY WAS UNSUPPORTED BY THE MEDICAL RECORDS AND PREMISED UPON AN ASSUMPTION, AND THE COMMISSION'S FINDING WAS BASED UPON SPECULATION, CONJECTURE, AND SURMISE.

Phelps v. Jeff Wolk Construction, 803 S.W.2d 641 (Mo.App.E.D.1991)

Boyles v. USA Rebar Placement, 26 S.W.3d 418 (Mo.App.W.D.2000)

Heisler v. Jetco Service, 849 S.W.2d 91 (Mo.App.E.D.1993)

Marcus v. Steel Constructors, 434 S.W.2d 475 (Mo.1968)

Vinson v. Curators of the University of Missouri, 822 S.W.2d 504 (Mo.App.E.D.1991)

Missouri Pipeline Co. v. Wilmes, 898 S.W.2d 682 (Mo.App.E.D.1995)

Harp v. Ill. Central R.R., 370 S.W.2d 387 (Mo. 1963)

Trammell v. S & K Indus., 784 S.W.2d 209 (Mo.App.W.D.1989)

RSMo. §287.170

RSMo. §287.020

RSMo. §287.495

ARGUMENT

I

THE COMMISSION ERRED AS A MATTER OF LAW IN RULING THAT SECTION 287.560, PERMITTING AN AWARD OF THE WHOLE COST OF THE PROCEEDINGS AGAINST A PARTY WHO BRINGS, PROSECUTES OR DEFENDS A COMPENSATION CLAIM WITHOUT REASONABLE GROUND, APPLIED TO ICS' DEFENSE OF THE 1997 AND 1999 CLAIMS.

A.

THE COMMISSION ERRED AS A MATTER OF LAW IN AWARDING CLAIMANT THE COSTS OF THE PROCEEDINGS ON THE 1997 CLAIM PURSUANT TO RSMo. §287.560 AND IN RULING THAT ICS' DEFENSE ON THE 1999 CLAIM WAS TAKEN WITHOUT REASONABLE GROUND WITHIN THE MEANING OF SECTION 287.560 FOR THE REASON THAT THE COMMISSION FOCUSED SOLELY UPON ONE ASPECT OF ICS' DEFENSE TO THE CLAIMS, RATHER THAN THE EMPLOYER'S ENTIRE COURSE OF CONDUCT IN THE PROCEEDINGS ON THE CLAIMS.

The Commission erred as a matter of law in finding that ICS defended the 1997 and 1999 Claims without reasonable ground, within the meaning of RSMo. §287.560. Claimant failed to demonstrate that ICS' conduct in the workers' compensation proceedings on her Claims was of a nature to satisfy the standard for awarding costs under that statutory provision. In the absence of such a showing, claimant could not recover costs from the employer.

Costs Under Section 287.560

Section 287.560 permits the Commission to award the “whole cost of the proceedings” against a party where it determines that “proceedings have been brought, prosecuted or defended without reasonable ground.” RSMo. §287.560; *Stillwell v. Universal Construction Co.*, 922 S.W.2d 448, 456 (Mo.App.W.D.1996); *Reese v. Coleman*, 990 S.W.2d 195, 199 (Mo.App.S.D.1999). The Commission has discretion to assess the whole cost of the proceedings upon the party who brought, prosecuted, or defended them. *Id.*

Neither a finding that ICS defended the employee’s Claims without reasonable ground nor an award of costs follows simply because claimant prevailed on her Claims. The cost provision in Section 287.560 is not a penalty provision, mandating that costs automatically be assessed against any party who does not prevail in a workers’ compensation action. *Compare*, Section 287.203 of the Act, providing that “reasonable cost of recovery **shall** be awarded to the prevailing party” in an action adjudicating the termination of certain benefits. RSMo. §287.203 (*emphasis added*). Under Section 287.560, the Commission has discretion in determining whether an award of costs is appropriate: the Commission “**may** assess the whole cost of the proceedings.” RSMo. §287.560 (*emphasis added*). Use of the word “**shall**” in RSMo. §87.203 is mandatory, while use of the word “**may**” in Section 287.560 is discretionary. *See, e.g., State v. Paul*, 437 S.W.2d 98, 101 (Mo.App.E.D.1969); *MG v. GMB*, 897 S.W.2d 218, 220 (Mo.App.E.D.1995).

A finding that an employer has defended a claim without reasonable ground is not appropriate merely because the employer has failed in some aspect of its raised defense. *O’Rourke v. Sanberg, Phoenix & Von Gontard*, 1998 WL 831865 (Ind.Cmsn.1998); *Philpott v. City of Blue Springs*,

2000 WL 222125 (Ind.Cmsn.2000).⁵ Rather, Section 287.560 should

only be applied in circumstances where the offense is egregious. *McCormack v. Carmen Schell*

⁵ At the time this case was submitted to the Eastern District, *Reese*, 990 S.W.2d 195, and *Stillwell*, 922 S.W.2d 448, were the only published Court of Appeals' opinions regarding costs under Section 287.560. *Reese* and *Stillwell* do not discuss at length the nature of conduct to which Section 287.560 refers or address the type of evidence which suffices to show that the defense of a claim was taken without "reasonable ground."

On June 25, 2002, the Western District issued *McCormack v. Carmen Schell Corp.*, 2002 WL 1363006 (Mo.App.W.D.2002). The Western District issued its Mandate on July 17, 2002. *McCormack* affirmed a Commission finding that an employer acted unreasonably in terminating an employee's benefits where the employee refused treatment at Mayo Clinic, and upheld a partial award of costs under Section 287.560 for the deposition fees of medical experts.

Because of the lack of controlling precedent regarding Section 287.560 and what conduct constitutes unreasonable action within the meaning of that statutory provision, employer will discuss decisions of the Commission construing and applying the statute. Admittedly, Commission decisions do not constitute binding precedent. However, they are instructive in determining the propriety of ICS' defense in the 1997 and 1999 Claims for purposes of an award of costs under Section 287.560. Accordingly, these decisions are entitled to respectful consideration. *See, Community Memorial Hospital v. City of Moberly*, 422 S.W.2d 290, 297 (Mo. 1968); *Mesker Brothers Industries v. Leachman*, 529 S.W.2d 153, 158 (Mo.1975).

Constr., 2001 WL 1347522 (Ind.Cmsn.2001); affirmed, *McCormack*, 2002 WL 1363006. To apply it routinely could have a chilling effect on the parties' rights to bring or defend claims. *Id.*

An award of costs under RSMo. §287.560 is akin to an award of damages for a frivolous appeal under Rule 84.19. *O'Rourke*, 1998 WL 831865; *Griffiths v. BSI Constructors*, 2001 WL 193846 (Ind.Cmsn.2001). Under Rule 84.19, an appeal is frivolous only when it presents no justiciable question and is so devoid of merit on the face of the record that there is little, if any prospect, that the appeal can succeed. *Lansing v. Lansing*, 736 S.W.2d 554, 559 (Mo.App.E.D.1987). The test used to determine if an appeal is frivolous is whether the questions raised are at least fairly debatable. *Id.* Rule 84.19 is not a strict liability provision, to be automatically applied when an appellant does not prevail on appeal. *Chapman v. Dunnegan*, 665 S.W.2d 643, 650 (Mo.App.E.D.1984) Absent a finding that an appeal was taken in bad faith, damages are not to be awarded under Rule 84.19. *Lansing*, 736 S.W.2d at 559.

Commission's Findings Regarding ICS' Defense To The Claims

The 1997 Claim involved several issues: the employer's liability for additional temporary total disability, past medical expenses, future medical treatment, nature and extent of permanent partial disability and liability for costs under Section 287.560, as well as the liability of the Fund. (Tr. 2). In its Award, the Commission found that ICS refused to provide past medical treatment without reasonable ground. (L.F. 37-57). It made no finding that any other aspect of ICS' defense to the 1997 Claim was taken without reasonable ground. Despite this fact, the Commission held that claimant was entitled to her costs for preparation of the hardship hearing. It made no attempt to limit the costs awarded against ICS or to make

a partial award of costs. (L.F. 37-57).

Likewise, the 1999 Claim involved numerous issues - accident, occupational disease, ICS' liability for temporary total disability, past medical expenses, future medical treatment, nature and extent of permanent disability, ICS' liability for costs under Section 287.560, and liability of the Fund. (Tr. 2-3). In its Award, the Commission found that, in raising the issue of the medical causation of claimant's venous stasis condition, ICS was unreasonable within the meaning of Section 287.560. It found the only valid issues to be the degree of claimant's disability and which party was liable to claimant, ICS or the Fund. The Commission did not award costs to claimant, finding that there was no specific proof as to what her whole costs of the proceedings were. (L.F. 97-124).

As is evident from both the 1997 and 1999 Awards, the Commission found ICS' defense to the 1997 and 1999 Claims to be unreasonable only in a limited respect. Absent in either Award is a finding that ICS' entire defense to either Claim was unreasonable or taken without reasonable ground. (L.F. 37-57, 97-124). Employer asserts that, in the absence of such a finding, an award of costs may not be made under Section 287.560. Assuming, *arguendo*, that the Commission may award costs under Section 287.560 where it finds an employer's defense to be unreasonable only in certain isolated respects, claimant should be limited to recovering only a portion of her costs and precluded from recovering the entire cost she incurred in preparation of the hardship hearing or in the proceeding to obtain benefits for her venous stasis condition.⁶

⁶ In its Opinion, the Eastern District held that claimant was entitled to the entire 25% lien that her counsel sought, in the amount of \$8,795.87, as her cost of the proceedings for the 1999 Claim under Section 287.560. It reasoned that this was a reasonable amount, given that 25% is a standard

ICS' Defense To The Claims Was Not Unreasonable

In determining whether ICS' defense of the 1997 Claim was taken without reasonable ground, within the meaning of RSMo. §287.560, it was necessary that the Commission look at the conduct of ICS in the Claim *as a whole*. Consequently, in deciding whether to assess costs against ICS, the Commission was required to determine whether ICS' *entire defense* of the 1997 Claim was undertaken without reasonable ground. *See for example, Desselle v. Quadpac, Inc.*, 1995 WL 765370 (Ind.Cmsn.1995), refusing to award costs, even though an employer had unreasonably denied that it was subject to the Act, where the employer's entire defense of the claim was undertaken in a reasonable manner. Therein, the employer had retained counsel from the date the claim was filed, prepared an answer, filed a report of injury, deposed the claimant and witnesses, and presented arguments which, if believed, would have resulted in a denial of the claim. *Id.*

However, the Commission's Award of costs on the 1997 Claim was based solely on one aspect of the employer's defense - its purported failure to provide past medical treatment for claimant's shoulder. The

fee in workers' compensation cases. Like the Commission, the Opinion made no suggestion that only partial costs be awarded. (Opinion, 26). As to the 1997 Claim, while the Eastern District noted that the 25% lien sought by claimant's counsel represented the total amount of her attorney's fees pertaining to the 1997 Claim, it held that there was no evidence indicating what percentage of those fees related to preparation for the hardship hearing. (Opinion, 26). The reasonable inference to be drawn from the Opinion is that it would award claimant's entire attorney's fees relating to the hardship hearing, rather than making a partial award of costs.

Commission erred as a matter of law in that it focused *solely* upon one aspect of ICS' defense, as opposed to its entire course of conduct in the proceedings on the Claim. *Desselle*, 1995 WL 765370. Had the Commission engaged in the appropriate legal analysis, it would have found that ICS' conduct throughout the course of the proceedings on the 1997 Claim was undertaken in a reasonable manner. *Id.*

Employer vigorously defended the 1997 Claim, filed all necessary pleadings, appeared at all necessary settings, and presented arguments to the ALJ which, if believed, would have resulted in a reduced liability of ICS on the 1997 Claim. *Desselle*, 1995 WL 765370. ICS' defense on all issues was based upon the Workers' Compensation Act and the facts and medical evidence which, ICS believed in good faith, to support its position. It advanced legitimate legal arguments and offered competent medical evidence and expert testimony to support those arguments. Moreover, ICS paid substantial temporary total disability benefits to claimant for her 1997 injury and did provide medical treatment for claimant's shoulder condition. In light of these facts, the Commission erred in finding that ICS' defense was unreasonable and that claimant was entitled to an award of costs on the 1997 Claim. *Desselle*, 1995 WL 765370.

The Commission made a similar error in finding ICS' defense of the 1999 Claim to be unreasonable within the meaning of Section 287.560. In its Award on the 1999 Claim, the Commission found that the employer "was unreasonable" in "raising the issue as to [medical] causation." (L.F. 97-124). To the Commission, the only valid issues were the degree of disability and which party was liable to the claimant. (L.F. 97-124). Clearly, the Commission found the employer's defense on the 1999 Claim to be unreasonable based *solely* on the fact that its arguments regarding medical causation were unsuccessful. That the Commission did not accept ICS' arguments regarding the medical causation of claimant's venous

stasis condition, and ruled contrary to ICS on that issue does not suffice to render those arguments frivolous, or demonstrate that ICS' defense of the 1999 Claim was taken without reasonable ground within the contemplation of RSMo. §287.560. *O'Rourke*, 1998 WL 831865; *Philpott*, 2000 WL 222125. To meet this statutory standard, ICS' conduct had to be taken in bad faith or vexatiously. *Lansing*, 736 S.W.2d at 559; *O'Rourke*, 1998 WL 831865. Absent in the record is any evidence of bad faith on ICS' part.

When determining whether ICS defended the 1999 Claim without reasonable ground, the Commission was also required to take into account the complexity of the factual and medical questions involved. *See, Campbell v. Citicorp Mortgage*, 1995 WL 707218 (Ind.Cmsn.1995). Given the complexity of claimant's venous stasis condition, the uniqueness of the condition in the workers' compensation context, and the undisputed evidence showing that claimant's condition pre-existed both her 1997 and her 1999 work injuries and required medical treatment before those injuries occurred, ICS did not act in bad faith in asserting its causation defense in the proceedings on the 1999 Claim. *Campbell*, 1995 WL 707218; *O'Rourke*, 1998 WL 831865.

The Commission erred as a matter of law in that it focused solely upon one aspect of ICS' defense - medical causation - as opposed to its entire course of conduct in the proceedings on the 1999 Claim. *Desselle*, 1995 WL 765370. Had the Commission engaged in the appropriate legal analysis, it would have found that ICS' defense throughout the entire course of the proceedings on the 1999 Claim was undertaken in a reasonable manner. *Id.* ICS vigorously defended the 1999 Claim, filed all necessary pleadings, appeared at all necessary settings, and presented arguments to the Division which, if believed, would have

resulted in a reduced liability of ICS on the 1999 Claim, as well as liability for the Fund. *Id.* Employer's position on all issues in the 1999 Claim was based upon the Act, Missouri case law, and the evidence in the record, that ICS believed in good faith to support its position. ICS' defense included arguments regarding the degree of claimant's permanent disability and which party was liable to claimant for that disability, arguments that the Commission itself found to be appropriate. (L.F. 97-124). Consequently, the Commission erred as a matter of law in finding that ICS defended the 1999 Claim without reasonable ground merely because it asserted a reasonable, albeit unsuccessful, causation defense in the proceedings on the Claim. *Philpott*, 2000 WL 222125; *O'Rourke*, 1998 WL 831865; *Griffiths*, 2001 WL 193846.

Awards Of Partial Costs Under Section 287.560

While the Commission has assessed costs against an employer where it found that the employer acted unreasonably in only one aspect of its defense to a claim, in that instance, the Commission held the employer liable for only a portion of the employee's costs of the proceedings, instead of assessing the employee's entire costs against the employer. *See, McCormack v. Carmen Schell Construction Co.*, 2001 WL 1347522. Virgil McCormack was electrocuted while working for Schell. Schell paid extensive workers' compensation benefits to McCormack following the accident. It discontinued McCormack's temporary total disability benefits when he refused to submit to treatment at Mayo Clinic. After a final hearing, the ALJ awarded McCormack benefits for permanent total disability and found Schell's discontinuation of temporary total disability to be unreasonable and awarded "costs" to the employee pursuant to Section 287.560. *Id.* The ALJ, however, failed to specify the amount or nature of the costs awarded. *Id.*

Employer appealed to the Commission. *McCormack*, 2001 WL 1347522. In response to

correspondence from the Commission, the employee's attorney submitted a list of expenses. *Id.* Schell argued that it had not unreasonably defended McCormack's claim and questioned the reasonableness of particular listed expenses. *Id.*

The Commission affirmed the ALJ's award, except for that portion pertaining to costs. *Id.* It found that Schell was not unreasonable in all aspects of its defense; Schell had paid the employee large amounts of temporary total disability benefits and medical expenses. *Id.* While the Commission took into account the fact that Schell was not unreasonable in its defense on all issues, it held that Schell's discontinuation of temporary total disability for McCormack's refusal to treat at Mayo Clinic was clearly unreasonable. *Id.* Weighing the nature of Schell's offensive behavior and the expenses incurred, the Commission ruled that the appropriate costs to be assessed against Schell under Section 287.560 were to be limited to the costs of deposition fees of medical experts. *Id.*

Schell appealed the Commission's award to the Court of Appeals. *See, McCormack*, 2002 WL 13630006 (Mo.App.W.D.2002). The Western District affirmed the cost award, finding that it was supported by competent and substantial evidence. *Id.*

For a similar Commission decision awarding only a portion of the costs of the proceedings under Section 287.560, *see Lewis v. Kloster Co.*, 1998 WL 910242 (Ind.Cmsn.1998), relied upon by the Commission in *McCormack*. Therein, the Commission awarded a portion of the cost of a workers' compensation proceeding against the Fund, reasoning that if an ALJ had discretion in assessing costs under Section 287.560, an ALJ also possessed the discretion to determine the amount of the sanction and may limit an award of costs made under that statutory provision. *Id.* *And see, Manley v. Mulligan*

Construction, 2002 WL 1824986 (Ind.Cmsn.2002), wherein the Commission made an award of partial costs for expenses incurred for the unreasonable cross-examination of expert witnesses.

ICS submits that the Commission erred as a matter of law in assessing costs against it on the 1997 Claim and in finding its defense on both Claims to be taken without reasonable ground, in that its entire defense on both Claims was reasonable and supported by the law and the evidence. Assuming, *arguendo*, that costs may be awarded under 287.560 where, as here, the Commission found the employer's defense to be unreasonable only in certain isolated respects, only a partial award of the costs of the proceedings is appropriate.

B.

EVEN ASSUMING, ARGUENDO, THAT ICS DEFENDED THE 1997 AND 1999 CLAIMS WITHOUT REASONABLE GROUND WITHIN THE MEANING OF SECTION 287.560, CLAIMANT COULD NOT RECOVER AN AWARD OF ATTORNEYS' FEES UNDER THAT STATUTORY PROVISION FOR THE REASON THAT SECTION 287.560 DID NOT AUTHORIZE THE COMMISSION TO ORDER PAYMENT OF CLAIMANT'S ATTORNEYS' FEES AS PART OF THE "COST OF THE PROCEEDINGS" IN PROSECUTING HER CLAIMS FOR COMPENSATION.

Reese v. Coleman

In *Reese v. Coleman*, 990 S.W.2d 195, 200-201 (Mo.App.S.D.1999), the Southern District ruled that attorney's fees did not constitute a "cost of the proceedings" within the meaning of Section 287.560 and, consequently, they could not be recovered under that statutory provision. *Reese*, 990 S.W.2d at 201. *Reese* was correctly decided. In ruling that attorney's fees were not recoverable as a part of the "whole cost of the proceedings" under Section 287.560, the Southern District adhered to long-standing Missouri precedent regarding the recovery of costs and attorney's fees by parties in civil litigation.

Reese, 990 S.W.2d at 201, ruled that Section 287.560 did not permit the Commission to order payment of an opposing party's attorney's fees as a "cost of the proceedings". Therein, an employer challenged an award to an employee for payment of attorney's fees in addition to an award of disability benefits. It contended that Section 287.560 did not permit or allow such an award. *Reese*, 990 S.W.2d

at 199. At issue was whether the term “costs of the proceedings,” as used in Section 287.560, included a party’s attorney’s fees. *Reese*, 990 S.W.2d at 200.

While the Southern District observed that no case had directly addressed this question, it noted that the issue of items recoverable as costs under Section 287.560 had been discussed in *Stillwell v. Univ. Constr. Co.*, 922 S.W.2d 448, 457 (Mo.App.W.D.1996). *Reese*, 990 S.W.2d at 200. In remanding a workers’ compensation case to the Commission for a determination of costs, *Stillwell* stated that, while there were no reported cases under Section 287.560 directing the Commission how to determine costs, the Commission should be guided by the reference in other portions of Section 287.560 to the costs of depositions, transcripts, subpoenas and the like. *Stillwell* stated that the Commission should also be guided by the costs available in civil actions under Section 514.060. *Stillwell*, 922 S.W.2d at 457; as discussed in *Reese*, 990 S.W.2d at 200.

Significantly, the text of Section 287.560 did not refer to attorney’s fees. *Reese*, 990 S.W.2d at 200. It did, however, identify other items for which expenses were customarily incurred in connection with trials and similar evidentiary hearings. *Id.* For example, Section 287.560 identified the need for and permitted the issuance of process, subpoenas for witnesses, and depositions of witnesses, as well as witness fees and mileage. *Id.*

Section 514.060, to which *Stillwell* alluded, permitted costs to be recovered by prevailing parties in civil actions, but did not identify what those costs included. *Reese*, 990 S.W.2d at 200. However, Missouri courts had addressed the issue of whether civil costs included attorney’s fees and had answered that question in the negative. *Id.* As the Southern District observed, Missouri courts adhered to the

“American Rule” that, with certain exceptions, litigants bore the expense of their own attorney’s fees. *Reese*, 990 S.W.2d at 200. Relatedly, costs were unknown at common law and statutory provisions allowing for them were strictly construed. *Reese*, 990 S.W.2d at 200. Hence, an item was not taxable as costs unless it was specifically authorized by statute or by agreement of the parties. *Id.*

Of significance, Section 287.560 referred to payment of costs identified “under this section.” *Reese*, 990 S.W.2d at 201. Further, it provided that those costs that the Division approved were to be paid out of the State Treasury from the fund for the support of the Division. *Id.* It was inconceivable to the Southern District that this provision was intended to include payment of a party’s attorney’s fees. *Id.* Finding that the Commission could only act in accordance with applicable statutes and could only order payments as provided for by those statutes, the Southern District ruled that Section 287.560 did not permit the Commission to order payment of an opposing party’s attorney’s fees as a cost of the proceedings. *Reese*, 990 S.W.2d at 201.

As in the instant case, the employee in *Reese* argued that *PM v. Metromedia Steakhouses Co., Inc.*, 931 S.W.2d 846, 849 (Mo.App.E.D.1996), was authority for holding that Section 287.560, permitting recovery of the costs of the proceedings, included attorney’s fees. *Reese*, 990 S.W.2d at 200. *PM* involved a hearing under Section 287.203, wherein an employee asserted that her employer had wrongfully terminated her compensation payments. *Reese*, 990 S.W.2d at 200. The Commission found for the employee and included payment of her attorney’s fees in the “costs of recovery” it awarded to her as the prevailing party under Section 287.203. *Reese*, 990 S.W.2d at 200. While the employer in *PM* contended that the phrase “costs of recovery” in Section 287.203 did not include attorney’s fees, the *PM* court found

that the phrase contemplated an award of attorney's fees, since legal fees were unquestionably the largest cost incurred when an employee was forced to sue to recover a workers' compensation award. *Reese*, 990 S.W.2d at 201-202.

The Southern District found that the reasoning in *PM* was not applicable to the case before it. *Reese*, 990 S.W.2d at 201. Significantly, the statute that was interpreted in *PM*, Section 287.203, was not the statute that controlled therein, namely Section 287.560. *Reese*, 990 S.W.2d at 201. Moreover, the language in the two statutes differed as to what was recoverable thereunder. *Id.* Section 287.203 permitted allowance of a party's "costs of recovery", whereas Section 287.560 permitted assessment of the "costs of the proceedings." *Id.* Had the legislature intended to permit the Commission to award recovery of the same items in both circumstances, it would have used the same language in both statutes. But it did not. *Id.* Consequently, *PM* did not compel a finding that attorney's fees could be awarded as a "cost of the proceedings" under Section 287.560. *Reese*, 990 S.W.2d at 201.

Eastern District's Opinion

In its Opinion, the Eastern District reversed that portion of the Commission's Award holding that claimant was not entitled to recover attorney's fees as part of the "whole cost of the proceedings" under Section 287.560. (Opinion, 20-26). The Opinion expressly rejected the holding in *Reese*. While taking note of the reasoning in *Reese* that attorney's fees were not historically authorized as part of "costs" and

were not authorized since they were not expressly mentioned in Section 287.560, the Opinion found this reasoning to be unpersuasive and refused to follow it. (Opinion, 22).

The Opinion distinguished between the phrases “all costs under this section” and the “whole cost of the proceedings” contained in Section 287.560, finding that the second phrase was broader than the first. It concluded that the “whole cost of the proceedings” was not limited to those costs listed in Section 287.560, but included attorney’s fees. (Opinion, 22-23).

In its Opinion, the Eastern District found this result to be consistent with that reached in *PM*, 931 S.W.2d at 849. *PM* held that Section 287.203, authorizing an award of the “reasonable cost of the recovery” to the prevailing party, included an award of attorney’s fees, since attorney’s fees were the largest cost “incurred” when an employee was forced to sue to recover a workers’ compensation award. (Opinion, 23-24). The Opinion found the reasoning in *PM* to be equally applicable to Section 287.560, since “attorney’s fees are the bulk of the costs anyone expends in a proceeding.” (Opinion, 24). It construed Section 287.560 in a broader manner than Section 287.203, reasoning that Section 287.560 was intended as a sanction for unreasonable conduct. (Opinion, 24-25). Thus, the Eastern District concluded that attorney’s fees fell within the scope of what ICS could be ordered to pay as costs under Section 287.560. (Opinion, 26).

In holding that an award of the “whole cost of the proceedings” under Section 287.560 included a party’s attorney’s fees, the Opinion failed to take into account the American Rule adhered to by Missouri courts regarding awards of attorney’s fees, as well as long standing Missouri precedent that costs statutes are to be strictly construed and that no item may be taxable as costs unless its taxability is specifically

provided for by statute, pre-existing Missouri precedent relied upon by the Southern District in *Reese* in reaching a contrary construction of Section 287.560.

Reese v. Coleman Was Correctly Decided And

Bars An Award of Attorneys' Fees to Claimant

Reese v. Coleman was correctly decided. In ruling that Section 287.560 did not authorize an award of attorney's fees as a "cost of the proceedings" in a workers' compensation case, *Reese* followed well-established Missouri precedent regarding the recovery of costs and attorney's fees in civil actions.

As the Southern District observed in *Reese*, the concept of "costs" did not exist at common law. *City of St. Louis v. Meintz*, 18 S.W. 30, 31 (Mo.1891); *Townsend v. Boatmen's National Bank of St. Louis*, 159 S.W.2d 626, 628 (Mo. 1942). Missouri courts have long held that costs are creatures of statute. *City of St. Louis*, 18 S.W. at 31; *Dorn Chrysler-Plymouth v. Roderique*, 487 S.W.2d 48, 49 (Mo.App.E.D. 1972); *Townsend*, 159 S.W.2d at 628. No item is taxable as costs unless specifically so provided by statute. *In Re Estate of Dothage v. Dothage*, 727 S.W.2d 925, 928 (Mo.App.W.D.1987); *City of St. Louis*, 18 S.W. at 31. Consequently, where a rule or statute does not specifically authorize an item to be taxed as costs, courts and administrative bodies have no inherent power to award such an item. *Wilson v. Goode*, 749 S.W.2d 17, 19 (Mo.App.W.D.1988); *In Re the Interest of J.P. v. Mo. Div. of Family Services*, 947 S.W.2d 442, 444 (Mo.App.W.D.1997) (courts have no inherent power to award costs). Statutes allowing for the taxation of costs are strictly construed. *Townsend*, 159 S.W.2d at 628; *Dorn Chrysler-Plymouth*, 487 S.W.2d at 49.

Missouri courts consistently hold that a statute providing that a court may make an award of costs is not statutory authorization for an award of attorney's fees. *Gerrard v. Bd. of Election Commissioners*, 913 S.W.2d 88, 91 (Mo.App.E.D. 1995); *Washington Univ. v. Royal Crown Bottling Co.*, 801 S.W.2d 458, 468 (Mo.App.E.D. 1991).⁷ Attorney's fees cannot be allowed as costs except where there is an express statute to that effect. *City of St. Louis*, 18 S.W. at 31.

The Commission does not possess inherent power to award costs. Rather, the Commission possesses only such authority as is vested in it by the Workers' Compensation Act. *Wilson* 749 S.W.2d at 19; *State ex rel Lakeman v. Siedelik*, 872 S.W.2d 503, 505 (Mo.App.W.D. 1994); *Hunt v. Laclede Gas Co.*, 869 S.W.2d 503, 505 (Mo.App.E.D. 1993). Section 287.560 must be strictly construed. *Dorn Chrysler-Plymouth*, 497 S.W.2d at 49; *Townsend*, 159 S.W.2d at 628. Thus, if that statutory provision does not expressly authorize an item to be taxed as costs thereunder, the Commission possesses no authority to award that item as a "cost of the proceedings." *Wilson*, 749 S.W.2d at 19; *Interest of J. P.*, 947 S.W.2d at 44.

On its face, Section 287.560 does not refer to attorney's fees. RSMo. §287.560. Instead, the items of costs that it references are limited to the issuance of process, the subpoenaing of witnesses, the attendance of witnesses, the production of books and papers, the taking of depositions and the transcription thereof, and mileage. RSMo. §287.560. Of importance, the clause in Section 287.560 permitting an award of the "cost of the proceedings" refers to "costs under this section." RSMo. §287.560. This statutory language indicates that the costs to be awarded under Section 287.560 are strictly limited to the types of items that are

⁷ *PM v. Metromedia*, 931 S.W.2d at 848, recognizes this rule of law.

enumerated therein. *See, Pollard v. Bd. of Police Commissioners*, 665 S.W.2d 333, 341 n. 12 (Mo.banc 1984) (rule of “ejusdem generis,” which aids statutory construction, provides that where general words follow a specific enumeration of persons or things, the general words are to be limited to persons or things similar to those specifically enumerated).

Giving Section 287.560 its plain and ordinary meaning, as this Court must, attorney’s fees do not constitute a “cost of the proceedings” recoverable thereunder. R.S.Mo.§ 287.560; *Reese*, 990 S.W.2d at 201; *Simpson v. Saunhegrow Construction*, 965 S.W.2d 899, 903 (Mo.App.S.D. 1998) (in interpreting the Workers’ Compensation Act, the court must ascertain the intent of the legislature by considering the plain and ordinary meaning of the terms used therein). It necessarily follows that the Commission did not possess jurisdiction under Section 287.560 to award attorney’s fees to claimant as a cost of the proceedings. *Reese*, 990 S.W.2d at 201; *City of St. Louis*, 18 S.W. at 31 (city charter allowing an award of the “costs of proceedings” did not encompass attorney’s fees).

In holding that attorney’s fees were not recoverable as a cost of the proceedings under Section 287.560, *Reese* adhered to the American Rule followed by the Missouri courts. *Reese*, 990 S.W.2d at 200. The American Rule provides that litigants are to bear the expense of their own attorney’s fees. *Mayor, Councilmen and Citizens of the City of Liberty v. Beard*, 636 S.W.2d 330, 331 (Mo.banc. 1982); *County Ct. of Washington County v. Murphy*, 658 S.W.2d 14, 16 (Mo.banc. 1983); *Washington Univ.*, 801 S.W.2d at 468; *Harris v. Union Electric*, 766 S.W.2d 80, 89 (Mo. banc 1989). Pursuant to the American Rule, attorney’s fees may only be recovered if they are provided for by contract or statute, where attorney’s fees are incurred because of involvement in collateral litigation, or where they are ordered

as reimbursement by a court of equity to balance the benefits between the parties. *Washington University*, 801 S.W.2d at 468-469; *Harris*, 766 S.W.2d at 89.

Application of the American Rule to the case at bar precludes claimant from recovering attorney's fees as a cost of the proceedings under Section 287.560. There exists no contract between ICS and claimant allowing for payment of the attorney's fees that claimant seeks. *County Court of Washington County*, 658 S.W.2d at 16; *City of Liberty*, 636 S.W.2d at 331; *Washington Univ.*, 801 S.W.2d at 468. Section 287.560 does not expressly permit the recovery of attorney's fees as the cost of the proceedings. *Reese*, 990 S.W.2d at 201; *City of St. Louis*, 18 S.W. at 31; R.S.Mo. §287.560. Nor has a court of equity ordered that ICS pay claimant's attorney's fees in the instant workers' compensation proceedings to balance the equities between the parties. *Washington University*, 801 S.W.2d at 468-469. Since none of the exceptions to the American Rule are applicable herein, that rule barred the Commission from awarding attorney's fees to claimant. *Id.*; *Harris*, 766 S.W.2d at 89; *City of Liberty*, 636 S.W.2d at 331.

In holding that costs of the proceedings includes attorney's fees, the Eastern District relied on the language in *P.M.* that legal fees are the largest cost "incurred" where an employee is forced to sue to recover a compensation award. The Eastern District reasoned that "attorney's fees are the bulk of the costs anyone expends in a proceeding." (Opinion, 24). Its Opinion concludes that the "whole cost of the proceedings" must include "everything the innocent party expended in the proceedings 'brought, prosecuted or defended without reasonable grounds'." (Opinion, 23).

This reasoning ignores the nature of the fee contract between claimant and her attorney. As the Commission Awards demonstrate, claimant's attorney is representing her on a contingency fee basis, not an

hourly fee basis. His fee is twenty-five percent of claimant's Awards. (L.F. 10-29, 63-89, 37-57, 97-124).

Because claimant's attorney is representing her on a contingency fee basis, she has not been required to pay any amount for attorneys' fees or to otherwise become liable for such fees. *Curry v. Dahlberg*, 110 S.W.2d 742, 748 (Mo. banc 1937) (persons who are not financially able to pay fees for legal services may obtain representation by contracting with lawyers on a contingent basis); *In re Apex Oil v. Arctic Bank & Trust*, 265 B.R. 144, 162-163 (8th Cir. 2001) (contingency fee contracts allow plaintiffs who cannot afford to pay a lawyer up front to pay the lawyer out of any recovery; the lawyer in effect lends the value of his services, which are secured by a share in the client's potential recovery). Rather, those fees will come out of the award made to claimant and are a lien on that award. *See*, RSMo. §287.260; *Smith v. Mann, Poger & Wittner, P.C.*, 882 S.W.2d 164, 167 (Mo.App.E.D. 1994) (where there is an express, enforceable contingency fee arrangement, the attorney is limited to the contractual fee); *Burwick v. Wood*, 959 S.W.2d 951, 952 (Mo.App.S.D. 1998) ("incurred" means to become liable for). Thus, claimant has not "incurred" or "expended" any attorneys' fees in prosecuting her Claims. *Id.*

The Eastern District Should Have Followed

The Rule Of Law Pronounced In Reese

In its Opinion, the Eastern District held that the whole cost of proceedings is not limited to just those costs listed in Section 287.560, but also includes attorney's fees. At present, the Eastern District's Opinion and *Reese* are the only decisions of either the Court of Appeals or the Supreme Court to address the issue

of whether attorney's fees may be awarded as a "cost of the proceedings" within the meaning of Section 287.560. These cases reach diametrically opposed results.

However, the rule of law pronounced in *Reese* is entirely consistent with Missouri Supreme Court cases regarding the construction of cost statutes, the recovery of costs and attorney's fees in civil actions, and the American Rule. See, *Townsend*, 159 S.W.2d at 628; *Pollard*, 665 S.W.2d at 341 n. 12; *County Ct. of Washington County*, 658 S.W.2d at 13; *City of Liberty*, 636 S.W.2d at 331. Consequently, the Eastern District should have followed the rule of law pronounced in *Reese*, that an opposing party's attorney's fees are not recoverable as a "cost of the proceedings" under Section 287.560. *Forsthove v. Hardware Dealers*, 416 S.W.2d 208, 213 (Mo.App.E.D.1967) (one district of the Court of Appeals is not absolutely bound to follow the reasoning and rule pronounced by another district of the Court of Appeals; but if the case law decided by the Missouri Supreme Court supports the ruling of one district, then the other district of the Court of Appeals is bound by it).

Further, the Eastern District should have followed the holding in *Reese*, since the Southern District properly applied the public policy of the State of Missouri, as codified in Section 287.560. Workers' compensation law is entirely a creature of statute. As such, the rights of the parties under the Act and the manner of procedure thereunder must be determined by the provisions of the Act. *Sheets v. Hill Brothers Distributing, Inc.*, 379 S.W.2d 514, 516 (Mo. 1964); *Kristanik v. Chevrolet Motors Corp.*, 41 S.W.2d 911, 912 (Mo.App.E.D. 1931).

The legislature was free to dictate those instances in which costs could be recovered in a workers' compensation case and to delineate what those items of costs were to include. *Sheets*, 379 S.W.2d at 516;

Kristanik, 41 S.W.2d at 912. Since the legislature has spoken on the subject of what items may be awarded as a “cost of the proceedings” where a party is found to have prosecuted or defended a workers’ compensation case without reasonable ground, that legislative statement is public policy and the Eastern District should have deferred to that policy determination. *Budding v. SSM Health Care*, 19 S.W.3d 678, 682 (Mo.banc. 2000) (when the legislature has spoken on a subject, the court must defer to its determinations of public policy); *State of Mo. on the Inf. of Dalton v. Miles Laboratories, Inc.*, 282 S.W.2d 564, 574 (Mo.banc. 1995) (where the legislature, acting within its constitutional jurisdiction, has declared the public policy of the state, courts are bound by that policy). ICS respectfully requests that this Court defer to the public policy codified in Section 287.560 and rule that Section 287.560 does not authorize the Commission to award attorney’s fees as part of the “whole cost of the proceedings” in a workers’ compensation action.

II

THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING ICS LIABLE FOR PERMANENT TOTAL DISABILITY ON THE 1999 CLAIM AND IN REFUSING TO ASSESS LIABILITY AGAINST THE SECOND INJURY FUND FOR THE REASONS THAT THE 1999 ACCIDENT, ALONE, DID NOT CAUSE CLAIMANT TO BECOME PERMANENTLY AND TOTALLY DISABLED, CLAIMANT'S PERMANENT TOTAL DISABILITY AROSE FROM A COMBINATION OF ALL HER INJURIES AND RESULTANT DISABILITIES, AND CLAIMANT'S VENOUS STASIS CONDITION WAS A PERMANENT, COMPENSABLE DISABILITY PRIOR TO THE 1999 ACCIDENT, AND THUS, IT DID NOT CONSTITUTE THE LAST INJURY FOR THE PURPOSE OF FUND LIABILITY.

The burden of establishing permanent total disability lies with claimant. *Schuster v. Division. of Employ. Sec.*, 972 S.W.2d 377, 381 (Mo.App.E.D.1998). “Total disability” is 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. RSMo. §287.020.7; *Reeves v. Midwestern Mortgage*, 929 S.W.2d 293, 296 (Mo.App.E.D.1996). Within this definition, the term “any employment” means any reasonable or normal employment or occupation. *Reeves*, 929 S.W.2d at 296. Thus, total disability is not defined in terms of claimant’s former employment. *Johnson v. Terre Du Lac*, 788 S.W.2d 782, 783 (Mo.App.E.D.1990).

The general test for permanent total disability is whether the employee would be able to compete on the open labor market. *Chatmon v. St. Charles County Ambulance Dist.*, 55 S.W.3d 451, 458 (Mo.App.E.D.2001); *Messex v. Sachs Electric*, 989 S.W.2d 206, 210 (Mo.App.E.D.1999). In determining whether an employee is permanently and totally disabled, the pivotal question is whether an employer, in the usual course of business, would reasonably be expected to hire claimant in her present physical condition, expecting her to perform the work for which she was hired. *Messex*, 989 S.W.2d at 210. This test measures an employee's prospects for returning to employment. *Chatmon*, 55 S.W.3d at 458.

Section 287.220 creates the Second Injury Fund and provides when compensation shall be paid from the Fund in all cases of permanent disability where there has been a previous disability. RSMo. §287.220; *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 741 (Mo.App.S.D.1996). Pursuant to Section 287.220, liability may be imposed upon the Fund in two instances: (1) where the combination of a pre-existing disability with a compensable disability results in a greater disability than the sum of the two disabilities considered independently, the Fund is liable for the difference between the sum of the two disabilities and the disability resulting from their combination; or (2) if the compensable disability is partial, but when combined with the pre-existing disability results in permanent total disability, the Fund is liable for the compensation due the employee for permanent total disability, but only after the employer has paid the compensation due the employee on account of the disability resulting from the compensable injury. RSMo. §287.220.1; *Reese v. Gary and Roger Link*, 5 S.W.3d 522, 526 (Mo.App.E.D.1999).

Where an employee is found to be permanently and total disabled, Section 287.220.1 fixes and limits an employer's liability to that part of the employee's disability resulting from the last injury had there been no pre-existing disability. RSMo. §287.220.1; *Kizior v. TWA*, 5 S.W.3d 195, 200 (Mo.App.W.D.1999); *Conley v. Treasurer*, 999 S.W.2d 269, 275 (Mo.App.E..D.1999). When deciding whether the Fund has any liability, the first determination is the degree of disability from the last injury. *Roller*, 935 S.W.2d at 741; *Vaught v. Vaught's Inc./Southern Missouri Construction*, 938 S.W.2d 931, 939 (Mo.App.S.D.1997). If the employee's last injury, in and of itself, renders her permanently and totally disabled, then the Fund has no liability and the employer is responsible for the entire amount. *Roller*, 935 S.W.2d at 743-744; *Vaught*, 938 S.W.2d at 939.

In its Award on the 1999 Claim, the Commission found ICS liable for permanent total disability. (L.F. 97-124). The Commission made two crucial errors in arriving at this conclusion. First, it ignored the overwhelming weight of the evidence demonstrating that claimant was permanently and totally disabled from a combination of her injuries and resultant disabilities and not from the 1999 injury alone. Second, in finding that claimant's venous stasis condition did not rise to the level of a known, compensable condition until 1999, the Commission arbitrarily ignored the undisputed evidence that claimant's venous stasis condition pre-existed her 1999 work accident and constituted a permanent, compensable disability prior to that accident.

**Claimant's Permanent Total Disability Resulted from a Combination
of Her Injuries and Disabilities and Not from the 1999 Work Injury Alone**

It is undisputed that, prior to the 1999 accident, claimant had a pre-existing venous stasis condition that resulted in a 20% permanent partial disability to each lower extremity. (Tr. 198, 201, 202, 203, 335,

441, 405, 414). Additionally, claimant suffered from pre-existing morbid obesity. (Tr. 103, 179, 265-266, 267). This pre-existing obesity condition constituted a hindrance or obstacle to claimant's employment or re-employment in the open labor market. (Tr. 104-105, 117-118- 127, 181-182, 183). Claimant had a pre-existing 15% permanent partial disability to the body as a whole as a result of her weight condition. (Tr. 203-204). RSMo. §287.220.1; *Garibay v. Treasurer*, 930 S.W.2d 57, 60 (Mo.App.E.D.1996); *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo.App.W.D.1997). Due to the 1997 work accident, claimant sustained a 40% permanent partial disability to her left upper extremity at the shoulder level. (Tr. 203). Claimant's shoulder injury was a hindrance or obstacle to employment or re-employment. (Tr. 107, 110, 196-197).

As the testimony of Dr. Poetz and James England clearly demonstrates, it was claimant's pre-existing disabilities from her venous stasis and obesity conditions, when combined with the disability from her 1997 shoulder injury and her 1999 work accident, that rendered claimant permanently and totally disabled. In Mr. England's opinion, claimant was permanently and totally disabled and unable to compete in the open labor market. (Tr. 111-112). Mr. England testified that it was a combination of claimant's leg problems, shoulder problems, and obesity that rendered her permanently and totally disabled. (Tr. 111). The combination of claimant's shoulder impairments and her leg impairments kept her from performing even sedentary employment. (Tr. 109-110). To perform a full range of sedentary activity, an individual had to be able to sit at least six hours a day and use both hands and arms on a repetitive basis. (Tr. 108-109). These requirements were negated in claimant's case, since she did not have the normal use of her left upper extremity and since she could not sit in a regular chair with her legs down. (Tr. 109).

Likewise, Dr. Poetz testified that claimant was permanently and totally disabled and unable to compete in the open labor market. (Tr. 207). It was Dr. Poetz' opinion that claimant was permanently and totally disabled as a result of the combination of her left shoulder injury, her obesity, and the venous stasis condition in her lower extremities. (Tr. 207-208).

While Dr. Altsheler testified that claimant was permanently and totally disabled due to her leg condition alone, his opinion, as a matter of law, could not support an award of permanent total disability against ICS. It was Dr. Altsheler's opinion that the 1999 work incident was the trigger that allowed claimant's system to fall apart, since, after that incident, claimant had inflammation and tissue reactivity. (Tr. 336). To recover permanent total disability against ICS, claimant's expert had to demonstrate that the 1999 injury was a substantial factor in causing her permanent total disability, not just a triggering or precipitating factor in that condition. RSMo. §287.020; *Kasl v. Bristol Care*, 984 S.W.2d 852, 854 (Mo.banc. 1999) (an injury is compensable if work is a substantial factor in the cause of the resulting condition or disability; an injury is not compensable merely because work was a triggering or precipitating factor in the medical condition).

Moreover, Dr. Altsheler's testimony is lacking in probative value in that he failed to give any consideration to the effect of claimant's pre-existing disability resulting from her obesity, shoulder injury, and venous stasis condition in concluding that claimant sustained permanent total disability from the 1999 injury alone. The testimony of Dr. Poetz and James England is more in keeping with the medical evidence, particularly that pertaining to claimant's significant pre-existing conditions and disabilities. Consequently, the Commission erred in rejecting the testimony of Dr. Poetz and James England, and relying on the testimony of Dr. Altsheler, since its acceptance of that testimony was contrary to the overwhelming weight of the

evidence. *Page v. Green*, 686 S.W.2d at 528, 530 (Mo.App.S.D.1985); *Hall v. Wagner Division - McGraw Edison*, 755 S.W.2d 594, 596 (Mo.App.E.D.1988).

Since claimant's permanent total disability resulted from a combination of her injuries and disabilities and not solely from the 1999 injury alone, the Commission erred as a matter of law in finding ICS liable for permanent total disability on the 1999 Claim and in refusing to impose liability on the Fund under RSMo. §287.220. *See for example, Boring v. Treasurer*, 947 S.W.2d 483, 489-490 (Mo.App.E.D.1997), holding that a claimant's last back injury, alone, did not cause his permanent total disability, and that it was a combination of his previous disabilities with his last injury that caused total disability, thus supporting an award of permanent total disability from the Fund. Therein, a doctor testified that claimant's overall disability was greater than the individual disabilities to the particular portions of his body, a vocational specialist testified that claimant could not compete on the open labor market due to the combination of his injuries, and claimant testified that his back problems prevented him from doing even office work, that his pre-existing breathing problems prevented him from doing prescribed back exercises and that all of his symptoms and problems affected each other. *Id.*

And see, Vaught, 938 S.W.2d at 942 (claimant's permanent total disability was not attributable to his last accident alone, but was attributable to a combination of his injuries in that accident and his injuries sustained on earlier occasions); *Moorehead v. Lismark Distrib.*, 884 S.W.2d 416, 419 (Mo.App.E.D.1994) (work related accident, alone, did not cause the employee to be permanently and totally disabled; the employee's medical expert opined that the employee suffered from a combination of

impairments, such as hypertension, arthritis, and previous back problems together with a new work related back injury, all of which caused the employee to be permanently and totally disabled).

**Claimant's Venous Stasis Condition Pre-Existed The 1999 Work Accident,
Constituted A Permanent, Compensable Disability Prior To That Accident And Was
Not The Last Injury For Purposes Of Fund Liability**

In its Award, the Commission found that claimant sustained a work accident on February 27, 1999 resulting in injury to her left leg. It went on to find that claimant's major symptoms following the 1999 accident, including an open lesion on her left leg, were predominately symptoms of her occupational disease of venous stasis, as opposed to the 1999 accident. (L.F. 97-124). The Commission found that claimant's venous stasis condition manifested different symptoms throughout her employment at ICS, but that it didn't rise to the level of a known compensable condition until 1999. (L.F. 97-124). Concluding that this occupational disease occurring in 1999 was claimant's last injury and finding that this last injury, alone, rendered claimant permanently and totally disabled, the Commission assessed permanent total disability against ICS. (L.F. 97-124).

In so finding, the Commission ignored the undisputed evidence that claimant's venous stasis condition was a permanent, compensable disability prior to the 1999 accident. Consequently, that occupational disease did not constitute claimant's last injury for purposes of Fund liability under RSMo. §287.220.1.

The undisputed evidence shows that claimant's venous stasis condition pre-existed her 1999 work event. When claimant was examined at BarnesCare after the 1997 accident, the physician found bilateral, non-pitting edema in both lower extremities, secondary to venous insufficiency and stasis, which pre-existed claimant's 1997 work injury. (Tr. 441). Similarly, Dr. Poetz testified that claimant had a pre-existing condition of venous stasis in both her right and left legs prior to her 1997 accident. (Tr. 198, 201, 203). This condition resulted in a pre-existing permanent disability of 20% of each lower extremity. (Tr. 202, 203).

Like Dr. Poetz, Dr. Altsheler testified that claimant's venous stasis condition pre-existed her 1997 and 1999 work events. While Dr. Altsheler did not know the exact time when claimant's venous stasis process started, it was before claimant injured her leg at work on February 27, 1999. (Tr. 335). As Dr. Altsheler acknowledged, the medical records demonstrated that claimant was having leg lesions as far back as 1995. (Tr. 346).

When the 1999 accident occurred, claimant sustained an "injury" within the meaning of RSMo. §287.020.2. Claimant had a soft tissue injury to her left leg, that resulted in a deep purple bruise and pain in that leg. (Tr. 33-34). Dr. Poetz opined that claimant sustained an additional 10% permanent partial disability of her left lower extremity as a result of the accident. (Tr. 33-34, 202-203).

In its Award, the Commission ignores overwhelming and undisputed evidence in the record, including claimant's own testimony, demonstrating that her occupational disease of venous stasis pre-existed the 1999 accident and resulted in a compensable, permanent disability prior to that accident. The Commission found that, while claimant's venous stasis condition manifested differing symptoms throughout her employment at

ICS beginning in 1995, the condition “didn’t rise⁸ to the level of a known compensable condition until 1999.” (L.F. 97-124).

Dr. Poetz testified that, as of July 26, 1997, Claimant’s pre-existing venous stasis resulted in a 20% permanent partial disability to the right lower extremity, and a 20% permanent partial disability to the left lower extremity. (Tr. 198, 201-202). Given Dr. Poetz’ rating and claimant’s own testimony, it necessarily follows that claimant was “disabled” from her occupational disease of venous stasis prior to the 1999 work accident. Such a finding is consistent with the meaning of the term “disability” as used within the workers compensation context. Within this context, a “disability” is the inability to do something; a physical or mental illness; an injury or condition that incapacitates in any way. *Loven v. Greene County*, 63 S.W.3d 278, 284-285 (Mo.App.S.D.2001). In that claimant’s venous stasis impaired her earning ability, made it difficult for her to accomplish some work tasks, and required her to seek medical treatment, it was a “disabling” condition prior to the 1999 accident, *regardless* of whether it caused her to miss any work.

It is not necessary for an employee to miss work before they are considered “disabled” from an occupational disease. See *Johnson v. Denton Construction*, 911 S.W.2d 286, 287 (Mo.banc. 1995);

⁸ This is not a situation where a work related accident caused a pre-existing, but non-disabling, condition to escalate to a level of disability. Compare, *Weinbauer v. Grey Eagle Distrib.*, 661 S.W.2d 652, 652 (Mo.App.E.D.1984); *Gennari v. Norwood Hills*, 322 S.W.2d 718, 722-723 (Mo.1959). Prior to the 1999 event, claimant’s pre-existing venous stasis condition was symptomatic, necessitated medical treatment, affected claimant’s work and had resulted in permanent disability. (Tr. 28-29, 30-32, 70, 202, 203).

Coloney v. Accurate Superior Scale, 952 S.W.2d 755, 760-761 (Mo.App.W.D.1997). Rather, an employee may become “compensably injured” or “disabled” from an occupational disease when she is unable to perform certain job related activities, when the disease affects the employee’s earning ability, or when it requires the employee to seek medical treatment. *Id.*; *Williams v. Long Warehouse*, 426 S.W.2d 725, 732 (Mo.App.E.D.1968).

Claimant testified that before February of 1999, she worked slower than she would have due to her legswelling and lesions, had difficulty getting around, that climbing stairs caused her pain, and that she climbed the stairs more slowly due to her leg condition. (Tr. 64, 65-66, 70, 84). Additionally, claimant sought treatment for her venous stasis condition prior to the 1999 accident. *Williams*, 426 S.W.2d at 732. That claimant’s pre-existing leg condition affected her earning ability is evidenced by the testimony of Dr. Poetz that, as of July of 1997, claimant’s pre-existing venous stasis condition resulted in a 20% permanent partial disability to each lower extremity (Tr. 198, 201-202, 203). *Johnson*, 911 S.W.2d at 287; *Coloney*, 952 S.W.2d at 760. For the Commission to hold that claimant’s venous stasis only became a “compensable disability” in 1999 is to arbitrarily ignore Dr. Poetz’ testimony demonstrating that claimant’s venous stasis condition pre-existed the 1999 accident and resulted in permanent, compensable disability prior to that accident, as well as the testimony of the employee. *Garibay*, 930 S.W.2d at 61. The competent, substantial and undisputed evidence demonstrates that claimant’s venous stasis condition was a pre-existing, compensable disability. *Johnson*, 911 S.W.2d at 287; *Coloney*, 952 S.W.2d at 760.

Looking to the evidence as a whole, only one reasonable inference can be drawn: claimant’s venous stasis condition pre-existed her 1999 accident and resulted in a permanent, compensable disability before

that work event. *Marcus v. Steel Constructors*, 434 S.W.2d 475, 481 (Mo.1968) (in a workers' compensation case, inferences, to be permissible, must be reasonable). As such, it does not constitute the "last injury" for purposes of Fund liability under Section 287.220.1. Rather, claimant's last injury was the 1999 work accident, which resulted in an additional 10% permanent partial disability to claimant's left leg. (Tr. 202-203). ICS' liability on the 1999 Claim is limited to this amount of permanent partial disability. Any liability for permanent total disability will be that of the Fund, since claimant's occupational disease of venous stasis constituted a permanent previous disability for purposes of Section 287.220.1. *Garibay*, 930 S.W.2d at 61.

To recover against the Fund, claimant must prove a permanent, previous disability. *Messex*, 989 S.W.2d at 204; *Carlson*, at 373. This previous disability, whether known or unknown, must exist at the time when the work related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining re-employment if the employee becomes unemployed. RSMo. §287.220.1; *Messex*, 989 S.W.2d at 214. The proper focus of the inquiry is on the potential that the pre-existing condition may combine with a future work related injury to result in a greater degree of disability than would have resulted in the absence of the prior condition. *Wuebbleing v. West County Drywall*, 989 S.W.2d 615, 620 (Mo.App.E.D.1995); *Carlson*, 952 S.W.2d at 373; *Garibay*, 930 S.W.2d at 60. If an employer could reasonably foresee that there is a potential for the pre-existing injury to combine with a work related injury, and that the combination would result in a greater degree of disability than without the prior condition, then the pre-existing injury would constitute a hindrance or obstacle to employment or re-employment in the event that the employee became unemployed. *Garibay*, 930 S.W.2d at 60. Any pre-

existing injury that could be considered a hindrance to an employee's competition for employment in the open labor market will trigger Fund liability. *Carlson*, 952 S.W.2d at 373; *Garibay*, 930 S.W.2d at 60.

As the undisputed evidence demonstrates, claimant's venous stasis condition resulted in a permanent, previous disability of such a nature as to constitute a hindrance or obstacle to the claimant's employment or re-employment. *Id.*; *Messex*, 989 S.W.2d at 214. For example, claimant testified that her leg condition slowed her down at work prior to the 1997 accident and thereafter. (Tr. 64, 66, 84). Before 1999, claimant had difficulty climbing the steps to make the popsicle mix because of her legs. (Tr. 70). Claimant's testimony shows that her venous stasis condition constituted an impediment to her employment prior to her 1999 work injury. *Messex*, 989 S.W.2d at 214; *Garibay*, 964 S.W.2d at 479. This is also made clear by Dr. Poetz' assessment of 20% permanent partial disability to each of claimant's lower extremities as of July 1997. It necessarily follows that claimant's venous stasis condition resulted in a permanent, previous disability, triggering Fund liability under RSMo. §287.220. *Garibay*, 930 S.W.2d at 60; *Carlson*, 952 S.W.2d at 373.

ICS requests that the Court reverse the award of permanent total disability against it on the 1999 Claim, and remand the Claim to the Commission for a proper assessment of the permanent partial disability arising from the 1999 accident. Once this assessment is made, the Commission can determine the benefits owed to claimant by ICS on the 1999 Claim. After that amount is ascertained, the Commission can deduct it from the compensation due claimant for permanent total disability and hold the Fund liable for the difference. *Vaught*, 938 S.W.2d at 942.

III

THE COMMISSION ERRED AS A MATTER OF LAW IN AWARDING CLAIMANT FUTURE MEDICAL TREATMENT FOR HER LEFT SHOULDER INJURY RESULTING FROM THE 1997 ACCIDENT FOR THE REASONS THAT THE COMMISSION ARBITRARILY IGNORED THE MEDICAL RECORDS OF CLAIMANT'S TREATING PHYSICIAN, WHO FOUND CLAIMANT TO BE AT MAXIMUM MEDICAL IMPROVEMENT REGARDING HER LEFT SHOULDER AND DID NOT RECOMMEND ANY ADDITIONAL MEDICAL TREATMENT TO CURE OR RELIEVE THAT CONDITION, AND ERRED IN RELYING UPON THE OPINION OF DR. POETZ, WHOSE TESTIMONY FAILED TO SHOW HOW THE TREATMENT HE RECOMMENDED FOR CLAIMANT WOULD CURE OR RELIEVE HER SHOULDER INJURY, AS REQUIRED BY RSMo. §287.140.

In its Award on the 1997 Claim, the Commission granted claimant future medical treatment for her left shoulder injury. (L.F. 35-57). This medical care was to include annual visits to an orthopedic surgeon, tests and procedures ordered by the orthopedic surgeon, physical therapy, and medications. Dr. Dusek was to provide this medical treatment. (L.F. 37-57). The Commission erred as a matter of law in awarding future medical treatment to claimant for her left shoulder condition.

Medical aid is a component of the compensation due an injured employee under the Act. *Mathia v. Contract Freighters*, 929 S.W.2d 271, 277 (Mo.App.S.D.1996). Pursuant to Section 287.140, an employer is to provide such medical treatment as may reasonably be required after the injury, to cure and relieve from the effects of the injury or disability. RSMo. §287.140.1.

Future medical benefits are compensable under the Act. *Dean v. St. Luke's Hospital*, 936 S.W.2d 601, 603 (Mo.App.W.D.1997). For future medical care to be awarded, such medical care must flow from a work related accident before the employer is to be held responsible. *Landers v. Chrysler*, 963 S.W.2d 275, 283 (Mo.App.E.D.1998); *Modlin v. Sunmark*, 699 S.W.2d 5, 7 (Mo.App.E.D.1985).

The burden is on the employee to prove her entitlement to an allowance for future medical treatment. *Dean*, 936 S.W.2d at 603. This burden of proof cannot be met simply by offering testimony that it is *possible* that claimant will need future medical care. *Id.*; *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 275, 828 (Mo.App.S.D.1995) (mere possibility of the need for further treatment does not constitute substantial evidence to support an award for future medical care). Rather, claimant must show by reasonable probability that she is in need of additional medical treatment by reason of her work related accident or injury. *Landers*, 963 S.W.2d at 283. Claimant has failed to satisfy this burden of proof.

The employee did not require additional medical treatment to cure or relieve her left shoulder injury resulting from the 1997 accident. RSMo. §287.140.1; *Landers*, 963 S.W.2d at 283; *Modlin*, 699 S.W.2d at 7. It is undisputed that Dr. Dusek, claimant's treating physician, found claimant to be at maximum medical improvement as regards her left shoulder condition on March 3, 2000. (Tr. 569). At that time, Dr. Dusek did not indicate that claimant would require additional treatment for her shoulder injury. (Tr. 569). For example, he did not recommend additional physical therapy, as he had done for claimant on February 4, 2000. (Tr. 564). Instead, Dr. Dusek only prescribed pain medications for claimant. (Tr. 49). It is also undisputed that, at the time of hearing on December 1, 2000, claimant was not receiving any treatment for

her shoulder injury from Dr. Dusek. (Tr. 408). Ironically, the Commission awarded additional medical treatment from Dr. Dusek where the doctor himself did not recommend such treatment. (Tr. 564, 569).

Rather than relying upon the records of claimant's treating physician in determining whether future medical treatment was necessary for her left shoulder injury, the Commission erroneously chose to rely upon the testimony of Dr. Poetz. Like Dr. Dusek, Dr. Poetz found that claimant had reached maximum medical improvement as regards her left shoulder injury on March 3, 2000. (Tr. 206). Despite this fact, Dr. Poetz opined that claimant should receive physical therapy, anti-inflammatory medications, and physician visits to treat her shoulder injury. (Tr. 177, 189-190, 213). These treatment modalities would, in Dr. Poetz' opinion, improve claimant's symptomatology. (Tr. 177, 189-190, 213).

However, Dr. Poetz failed to offer any testimony as to how those treatments would serve to modify claimant's symptoms so as to cure or relieve her shoulder injury. RSMo. §287.140.1. The absence of such testimony is significant, since Dr. Dusek provided the same treatments to claimant in the past, with limited success, particularly as regards her pain complaints. Dr. Dusek obviously felt that such treatments would not improve claimant's symptoms. Had he thought otherwise, he would have recommended additional medical care for claimant or simply continued to treat her for her left shoulder condition.

In that there is no evidence to show that the treatment modalities recommended by Dr. Poetz would be effective so as to "relieve" claimant's shoulder condition and complaints, the Commission erred in awarding future medical treatment. RSMo. §287.140; *Mathia*, 929 S.W.2d at 277. The medical treatment recommended by Dr. Poetz was not reasonable or necessary to treat claimant's work injury, as Section 287.140 requires. *Modlin*, 699 S.W.2d at 7; *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490-491 (Mo.App.W.D.1990) (employer was not responsible to employee for chiropractic treatment she

received after the employer referred her to a physician for treatment of her back injuries, given the lack of any proof that continued therapy from the chiropractor was reasonable and necessary).

The medical records of Dr. Dusek were clearly more probative on the issue of future medical treatment than the testimony of Dr. Poetz. Dr. Dusek was claimant's treating physician. Thus, he was in the best position to know what additional treatment, if any, claimant required for her left shoulder complaints. That Dr. Dusek recommended no future medical treatment for claimant when he found her to be at maximum medical improvement on March 3, 2000, and was not actively treating claimant's left shoulder complaints at the time of hearing demonstrates that claimant did not require any additional medical treatment to cure or relieve her left shoulder injury resulting from the 1997 accident. RSMo. §287.140.1; *Landers*, 963 S.W.2d at 283; *Modlin*, 699 S.W.2d at 7. Since Dr. Poetz had not treated claimant for her shoulder injuries and since he failed to offer any specific testimony as to how the treatment modalities he suggested for claimant would improve her symptoms where such modalities had failed to do so in the past, his testimony is speculative in nature and less probative than that of Dr. Dusek.

In that the medical records of Dr. Dusek were more probative on the issue of future medical treatment, the Commission erred as a matter of law in ignoring this competent, substantial and undisputed evidence. *Garibay v. Treas. of Mo.*, 930 S.W.2d 57, 61 (Mo.App.E.D.1996); *Toole v. Bechtel*, 291 S.W.2d 874, 880 (Mo.1956). Relatedly, the Commission erred in accepting the testimony of Dr. Poetz, since its acceptance of Dr. Poetz' testimony was contrary to the overwhelming weight of the evidence. *Page v. Green*, 686 S.W.2d 528, 529 (Mo.App.S.D.1985); *Hall v. Wagner Division - McGraw Edison*,

755 S.W.2d 594, 596 (Mo.App.E.D.1988). It necessarily follows that the Commission's award of future medical treatment for claimant's left shoulder injury resulting from the 1997 accident must be reversed.

IV

THE COMMISSION ERRED AS A MATTER OF LAW IN FINDING CLAIMANT TO BE TEMPORARILY AND TOTALLY DISABLED FROM JULY 14, 1999 TO AUGUST 10, 1999 BECAUSE OF HER LEFT SHOULDER INJURY RESULTING FROM THE 1997 ACCIDENT AND IN AWARDING CLAIMANT TEMPORARY TOTAL DISABILITY BENEFITS FOR THIS PERIOD FOR THE REASONS THAT CLAIMANT'S TREATING PHYSICIAN DID NOT FIND HER TO BE TEMPORARILY AND TOTALLY DISABLED DURING THIS INTERVAL DUE TO HER LEFT SHOULDER INJURY, DR. POETZ' OPINION ON TEMPORARY TOTAL DISABILITY WAS UNSUPPORTED BY THE MEDICAL RECORDS AND PREMISED UPON AN ASSUMPTION AND THE COMMISSION'S FINDING WAS BASED UPON SPECULATION, CONJECTURE, AND SURMISE.

Pursuant to the Act, compensation must be paid an injured employee during the continuance of temporary total disability, but not for more than 400 weeks. RSMo. §287.170; *Vinson v. Curators of the University of Missouri*, 822 S.W.2d 504, 508 (Mo.App.E.D.1991). The burden of proving entitlement to temporary total disability benefits lies with claimant. *Boyles v. USA Rebar Placement*, 26 S.W.3d 418, 424 (Mo.App.W.D.2000).

Within the context of temporary total disability benefits, “**total disability**” is 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. RSMo. §287.020.7; *Boyles*, 26 S.W.3d at 424. “**Any**

employment” means any reasonable or normal employment or occupation. *Phelps v. Jeff Wolk Construction*, 803 S.W.2d 641, 645 (Mo.App.E.D.1991).

Temporary total disability awards are intended to be paid during the healing period from a work related injury. *Phelps*, 803 S.W.2d at 646. The Act contemplates that temporary total disability compensation is only to be paid prior to the time when the employee can return to work, her condition stabilizes, or the condition has reached the point of maximum medical progress. *Phelps*, 903 S.W.2d at 645; *Boyles*, 26 S.W.3d at 424.

In its Award on the 1997 Claim, the Commission found that claimant was entitled to an additional four weeks of temporary total disability for her left shoulder injury and granted claimant \$1,873.04 in temporary total disability benefits. (L.F. 37-57). Since the parties stipulated that claimant was temporarily and totally disabled due to her shoulder condition for a short period following the accident and for the period from August 11, 1999 to March 3, 2000, the Commission concluded that the only time period in dispute was between July 14, 1999 and August 10, 1999. (L.F. 37-57).

As the Commission observed, claimant was referred to Dr. Dusek by Dr. Mammen on July 14, 1999, but Dr. Dusek could not see claimant until August 11, 1999, due to his schedule. (L.F. 37-57). It went on to state:

“Dr. Poetz opined that Laura Landman was temporarily and totally disabled due to her shoulder condition during this time period. There is no evidence that there was any change in her shoulder condition between the referral on July 14th and the examination by Dr. Dusek on August 11th when it was stipulated that claimant could not work due to her shoulder.

Regardless of an inability to work due to her shoulder, claimant also could not work due to leg conditions during this same time period.”

(L.F. 37-57). The Commission determined that claimant was unable to work and was not at maximum medical improvement as a result of her 1997 shoulder injury for the period between July 14, 1999 and August 10, 1999. (L.F. 37-57).

In so holding, the Commission erred as a matter of law.⁹ There was no sufficient, competent evidence in the record to support an award of temporary total disability benefits for claimant’s 1997 left shoulder injury. RSMo. §287.495.1(4). True, Dr. Poetz testified that claimant was temporarily and totally disabled due to her shoulder injury from July 14, 1999 through March 3, 2000. (Tr. 206). Dr. Poetz purportedly relied upon the records of Dr. Dusek in rendering this opinion. Yet, Dr. Dusek’s records nowhere indicate that claimant was temporarily and totally disabled, due to her shoulder injury, in the interval between July 14, 1999 to August 11, 1999. To the contrary, Dr. Dusek’s records demonstrate that while claimant had been off work since March of 1999, this was due to the leg condition from her 1999 work

⁹ While the case was pending before the Court of Appeals, ICS paid claimant the temporary total disability awarded by the Commission. This payment, however, does not serve as a waiver of the issue of the propriety of the temporary total disability award on the 1997 Claim or as an admission of liability on the employer’s behalf for such benefits. *Trammell v. S & K Industries*, 784 S.W.2d 209, 212 (Mo.App.W.D.1989) (employer’s furnishing of medical treatment to claimant did not constitute an admission that the condition for which treatment was provided resulted from a compensable accident).

injury. (Tr. 540). Consequently, the records of Dr. Dusek could not serve as the basis for Dr. Poetz' opinion regarding temporary total disability.¹⁰

Setting aside Dr. Dusek's records, it becomes clear that Dr. Poetz' opinion on temporary total disability was premised solely upon an assumption. Namely, that claimant was temporarily and totally disabled during the period from July 14, 1999 to August 10, 1999 because Dr. Dusek could not see claimant during this interval. (Tr. 206).

Temporary total disability is only to be paid prior to the time when an employee can return to work. *Phelps*, 903 S.W.2d at 645. That an employee is unable to secure a doctor's appointment does not compel a finding that she is unable to work as a result of the condition for which she is seeking medical treatment. Yet, Dr. Poetz (and the Commission) took this logical leap. In that Dr. Poetz' opinion was premised upon an assumption unsupported by the medical evidence, it was without a substantial basis¹¹ in fact. *See*, *Heisler v. Jetco Service*, 849 S.W.2d 91, 95 (Mo.App.E.D.1993) (facts upon which an expert's opinion is based must meet the legal requirements of substantiality and probative force and must have a substantial

¹⁰Similarly, Dr. Mammen's records do not contain any opinion to the effect that claimant was temporarily and totally disabled, due to her left shoulder injury, in the interval between July 14, 1999 and August 10, 1999. (Tr. 425).

¹¹ Dr. Poetz did not treat or evaluate claimant during the period from July 14, 1999 to August 10, 1999. Thus, he had no personal knowledge that claimant was unable to return to any reasonable employment due to her shoulder injury alone during that period. For this additional reason, Dr. Poetz' opinion was without a substantial basis in fact. *Harp v. Ill. Central R.R.*, 370 S.W.2d 387, 391

(Mo.1963).

basis in the facts established). Dr. Poetz' opinion was premised upon nothing more than speculation, conjecture, and surmise. Consequently, Dr. Poetz' testimony does not constitute competent and substantial evidence to support an award of temporary total disability benefits. *Missouri Pipeline Co. v. Wilmes*, 898 S.W.2d 682, 687 (Mo.App.E.D.1995) (expert's opinion must be founded upon substantial information, not mere speculation or conjecture and there must be a rational basis for that opinion).

The Commission's Award suffers from the same defect. There is no competent or substantial evidence demonstrating that claimant was unable to return to any reasonable employment, due solely to her left shoulder injury, in the interval between July 14, 1999 and August 10, 1999 that could support the award of temporary total disability benefits. Neither Dr. Dusek nor Dr. Mammen made a finding to this effect. (Tr. 425, 540). Dr. Poetz' opinion was based upon an assumption and a misreading of Dr. Dusek's records. Given the nature of the evidence, it is clear that the Commission's award of temporary total disability was premised upon nothing more than speculation, conjecture, or surmise. As such, that award must be set aside. *Marcus v. Steel Constructors*, 434 S.W.2d 475, 481 (Mo.1968) (in a workers' compensation case, no fact may be found nor award be based upon mere suspicion or conjecture).

CONCLUSION

The Industrial Commission erred in finding that ICS acted unreasonably in defending the 1997 and 1999 Claims and in awarding costs on the 1997 Claim. While the Commission properly ruled that claimant could not recover attorney's fees under Section 287.560 as part of the "whole cost of the proceedings," the Eastern District reversed this portion of the Commission's Awards. ICS submits that the Eastern District erred in failing to follow *Reese v. Coleman* and in awarding attorney's fees to claimant. Employer respectfully asks this Court to defer to the public policy codified in Section 287.560 and to rule that costs recoverable thereunder do not include attorney's fees.

The Commission erred in awarding claimant future medical treatment and additional temporary total disability benefits for her shoulder condition on the 1997 Claim. Finally, the Commission erred in awarding permanent total disability against the employer on the 1999 Claim. Employer ICS requests that the Court reverse the Commission's Awards on the 1997 and 1999 Claims in these respects.

Respectfully submitted,
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CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 10th day of January, 2003 to: Mr. Michael Gerritzen, Attorney at Law, One Firststar Plaza, 505 North 7th Street, Suite 2505, St. Louis, MO 63101-1600 and Ms. Plia Lippman Cohen, Attorney at Law, Office of the Attorney General, Laclede Gas Building, 20th Floor, 720 Olive Street, St. Louis, MO 63101.

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CERTIFICATE OF COMPLIANCE

This Brief complies with Special Rule 1 and contains 20,640 words. To the best of my knowledge and belief the enclosed disc has been scanned and is virus-free.

Mary Anne Lindsey