

**IN THE SUPREME COURT OF MISSOURI**

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**Supreme Court No.: SC 84933**

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**LAURA LANDMAN,  
Claimant/Respondent/Cross-Appellant,**

**vs.**

**ICE CREAM SPECIALTIES, INC.  
Employer/Appellant/Cross-Respondent  
and  
OLD REPUBLIC INSURANCE COMPANY,  
c/o CRAWFORD & COMPANY  
Insurer/Appellant/Cross-Respondent**

**and**

**TREASURER OF THE STATE OF MISSOURI  
AS CUSTODIAN OF THE SECOND INJURY FUND,  
Additional Party/Respondent.**

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**SUBSTITUTE RESPONDENT'S BRIEF  
OF  
CLAIMANT LAURA LANDMAN**

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**JURISDICTIONAL STATEMENT**

Claimant/Respondent/Cross-Appellant adopts and incorporates by reference the Jurisdictional Statement filed by Employer/Appellant/Cross-Respondent

### **STATEMENT OF FACTS**

Claimant adopts the Findings of Fact of the Honorable William L. Newcomb, which were affirmed and adopted by the Commission in both Awards.<sup>1</sup> The Awards are extensive, with one 49 pages single

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spaced and the other 21 pages single-spaced. This Statement of Facts will selectively highlight portions of the Awards addressing the issues on appeal and the facts which support the Awards. Employer's Brief has not claimed that any particular Finding of Fact in the Commission's Awards was not supported by the evidence. Instead, Employer argues that different inferences or conclusions should have been drawn from the facts by the Commission. For example, the opinions of an examining family practitioner should have been given greater weight than the opinion of a treating specialist. Claimant does not dispute the Findings of Fact of the Commission, except for the Commission erroneously indicating that Dr. Altsheler's deposition fee was not presented.

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Employer's Statement of Facts omits the facts upon which the Commission based its decision on future medical of the left shoulder, the groundless defense of these claims in violation of §287.560 RSMo., or the finding of Temporary Total Disability. Therefore, this Statement of Facts is included.

In both cases, Employer refused to provide and/or pay temporary disability or for medical care. Injury Number 97-072979 arises from an injury on July 26, 1997, when she fell at work, landing on the left shoulder. She sustained a labral tear and developed adhesive capsulitis (TR 242). Arthroscopic surgical correction was attempted, but it could not be performed due to tissue qualities of Claimant's shoulder (TR 484). Injury Number 99-029378 is an occupational disease claim of venous stasis disease of both legs.<sup>2</sup> As a result of repetitive and prolonged standing and straining in a cold ice cream bar factory, the veins in Claimant's legs became irreversibly damaged, causing venous stasis. Dr. Altsheler explained that veins are subject to stretching more than arteries. With working in a cold ice cream bar factory, the veins in Claimant's legs naturally vasoconstricted, and with activity and not sweating in the cold environment, she became water logged. As a result, the veins in both her legs stretched to the point that the valves in the veins didn't touch. As opposed to a system of locks and dams, the veins became columns of fluid, heavily subject to gravity. Over her 17 plus years of work, her veins became so overstretched, that the valves no longer touch and are nonfunctional. As a result, Claimant has irreversible venous stasis

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<sup>2</sup>Claimant alleged an injury and an occupational disease in the same Claim form, and the Commission found there was an occupational disease, but not an injury. Employer has not alleged any prejudice from these alternative allegations.

disease. As opposed to blood traveling back to the heart in the veins, it diffuses out into the tissues of her leg, unless her legs are above her heart. (TR 286-288, 324-325, 334-335, 345-348).

In Injury Number 97-072979, Claimant was awarded Temporary Total Disability, past and future Medical, Permanent Partial Disability, and Costs under §287.560 RSMo. against the Employer and Permanent Partial Disability against the Second Injury Fund (LF 37-38, A 1-2). Employer has appealed the Award of Temporary Total Disability, future Medical, and Costs. Claimant has cross-appealed the types of Costs that were awarded, including whether attorneys fees are a permissible “whole cost of the proceedings” under §287.560. Based on a Southern District opinion, the Commission found that it was not legally permitted to award attorneys fees under §287.560. The Court of Appeals, Eastern District reversed and specifically found attorneys fees could be awarded under §287.560. It remanded to the Commission for a determination of the amount of attorneys fees. This Honorable Court has never addressed this Issue.

In Injury Number 99-029378, the Commission awarded Claimant Temporary Total Disability, past and future Medical, and Permanent Total Disability against the Employer. Employer appealed Permanent Total Disability and the finding that they defended this claim in violation of §287.560, even though no specific Costs were awarded. Claimant has cross-appealed the issue of the award of Costs, including whether attorneys fees should have been awarded under §287.560. Also, in the alternative to affirming the Award of Permanent Total Disability against the Employer, Claimant has asked that Permanent Total Disability be awarded against the Second Injury Fund. The Court of Appeals, Eastern District, modified the Award by awarding attorneys fees of \$8,795.87, representing 25% of the past medical and temporary total disability Employer refused to pay without reasonable grounds in violation of §287.560.

The evidence consisted of the testimony of Claimant and a vocational rehabilitation expert (James England), the depositions of two physicians (Dr. Poetz and Dr. Altsheler), the reports of two physicians (Dr. Dusek and Dr. Petkovich), and sundry treatment records. Claimant took and submitted both of the physician's depositions. Dr. Poetz is a board certified family practitioner who examined Claimant at her attorney's request and rated all of her conditions. Dr. Altsheler is board certified in internal medicine and nephrology and diagnosed and treated claimant for the occupational disease of venous stasis, which is within his specialty of nephrology. His opinions were limited to the venous stasis and some discussion of Claimant's pre-existing obesity. James England, a vocational rehabilitation expert, examined Claimant at the request of her attorney. Dr. Petkovich was the Employer's examining orthopedic surgeon for the shoulder claim, and his report was admitted into evidence by Claimant. Dr. Dusek was the treating orthopedic surgeon for the shoulder claim. His records and reports were admitted by Claimant.

Claimant was off a short period of time following the July 26, 1997 injury. She went back to work, but then she developed ongoing shoulder symptoms. Dr. Poetz explained, and the records of Drs. Dusek and Petkovich corroborate, that Claimant developed adhesive capsulitis of her shoulder, that required additional treatment in 1999 and 2000 and ongoing treatment.(TR 174-177, 183-185, 189-191, 438, 546, 549, 555, 654, 569, 573) Also, Claimant required treatment in 1999 and thereafter for her venous stasis disease of both her lower extremities. It was undisputed that Claimant could not work after March 18, 1999. Claimant demanded treatment for both conditions and Temporary Total Disability, which Employer denied.

Eventually, an agreement was reached under which Claimant would delay filing a Request for Hardship Setting and Employer would have Claimant examined by a physician of its choice, and if that physician indicated the conditions were work-related, Employer would pay past temporary disability and medical and provide ongoing treatment and temporary disability. Claimant delayed filing the Request for Hardship setting and attended the medical exam. The adjuster then hid and/or refused to provide the medical report produced as a result of the exam and comply with the agreement. The report was requested on six separate occasions, including: 2/11/00; 2/22/00; 2/23/00; 3/3/00; 3/21/00; and 4/26/00 (TR 689-705) Despite the affirmative statutory duty to provide the report under §287.210.3 and the six requests, the report was not produced. Since Employer's attorney did not object, Claimant's counsel requested the report directly from the examining physician, Dr. Petkovich, on 4/26/00. On 5/19/00, Claimant's attorney received the report, which indicated the shoulder condition was work-related and that Employer should not only pay past medical and temporary disability, but provide additional treatment, including potentially surgery. Claimant filed A Request for Hardship Setting on 5/26/00, seven days after Claimant's attorney received the report. (TR 731-740) During the Mediation of the Request for a Hardship Setting on 6/13/00, it was agreed that the Hardship Setting would be delayed until December 1, 2000, in part because Employer agreed to pay some past Temporary Total Disability and the past Medical. At the Hearing on December 1, 2000, none of the past Medical and only some of the temporary disability had been paid. The Award in Injury Number 97-072979 provides:

“Employer/Insurer refused to provide continued care, treatment, and examination in this case. Apparently, the Claims Representative of Crawford & Company, was mailed a copy of Dr. Petkovich's report on February 16, 2000. This letter was apparently properly

addressed. Later, this report was apparently faxed to the Claims Representative. Dr. Petkovich clearly indicated that her left shoulder condition was a result of her injury on July 26, 1997. In addition to noting that the prior treatment was related, he suggested future treatment. Instead of paying the bills and providing treatment pursuant to their chosen doctor's reports, apparently the Claims Representative did not disclose the report. Six separate requests of Claimant's counsel went unanswered, and he didn't receive a copy of the report until it was requested directly from Dr. Petkovich. Section 287.128 may have been violated, however, this forum does not have jurisdiction to determine that. This is a matter to be determined by further investigation of the fraud and noncompliance unit of the Division of Workers' Compensation with possible referral to the Attorney General's Office for prosecution." (LF 55)

It also provides:

"It is stipulated that the past medical expenses listed [(on) sic] below are related to the injury of July 26, 1997, and should be paid by the Employer. At the hearing, the Employer's attorney indicated he thought they were paid. Claimant testified they had not been paid. Then, after the Employer had agreed to pay these bills and temporary total disability, it failed to pay these medical expenses. This was despite 14 separate demands of Claimant's attorney for payment of the charges. . . . Based upon the medical records, medical bills, the testimony of Claimant, the testimony of Dr. Poetz, and the stipulation of the parties, I award \$17,911.30 in past due medical expenses." (LF 52)

There was no evidence adduced at trial that the treatment was not necessary for the July 26, 1997 injury or that the charges totaling \$17,911.30 were not reasonable.

The Award in Injury #99-029378 with regard to past medical was:

“Claimant testified that she incurred the \$15,582.12 in medical charges as the Employer/Insurer would not provide treatment for the venous stasis. Clearly, Claimant’s attorney sent numerous letters to Employer/Insurer’s attorney demanding treatment and payment of the charges. The record clearly establishes that no treatment was provided and no bills were paid. The medical records and bills clearly establish that the \$15,582.12 sought by Claimant was for either treatment or diagnostic tests searching to cure and/or to find the causes of Claimant’s leg conditions and the resulting lesions and edema.” (LF 120)

No evidence was adduced at trial that this treatment was not necessary as a result of the occupational disease or that the resulting charges were not reasonable.

With temporary disability, the Award in Injury 97-072979 provided:

“It was stipulated that Claimant was temporarily and totally disabled due to her shoulder conditions for a period of time following the original injury and then from the time period she first saw Dr. Dusek on August 11, 1999 through the time period Dr. Dusek indicated she was at maximum medical improvement on March 3, 2000. The only time period in dispute is the time period of July 14, 1999 up to and including August 10, 1999. Specifically, Claimant was referred to Dr. Dusek by Dr. Mammen on July 14, 1999. She couldn’t be seen until August 11<sup>th</sup>, because of Dr. Dusek’s schedule. 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 14<sup>th</sup> and the exam by Dr. Dusek on August 11<sup>th</sup> when it is stipulated that Claimant could not work due to her shoulder. Regardless of an inability to work due to the shoulder, Claimant also couldn't work due to her leg conditions during this same time period, as documented in Injury Number 99-029378. The medical evidence though does support that Claimant was unable to work and was not at maximum medical improvement as a result of her July 26, 1997 injury for the time period of July 14, 1999 up to and including August 10, 1999." (LF 51)

The Award in Injury 99-072979 provided:

"Claimant testified that she was unable to work on and after March 18, 1999. This testimony is supported not only by the testimony of James England, Dr. Poetz, and Dr. Altsheler, but numerous medical records. This includes the treatment records of Dr. Mammen, Dr. Beckman, Dr. Squitieri and Lafayette Grand Hospital, and Dr. Altsheler. There are no medical records indicating Claimant could work on or after March 18, 1999, except for the records of Dr. Petkovich. He indicated Claimant could do light duty work, consisting of lifting less than eight pounds with her left arm and no overhead activities. Besides the fact that Employer had no such light-duty position available, it is clear that Dr. Petkovich limited his restrictions to the left shoulder and did not include any limitations imposed by the venous stasis.

Based upon this, the only question with regard to temporary total disability is whether Claimant was already receiving temporary total disability for the shoulder injury and/or when no improvement in the Claimant's condition was expected with further treatment, such that temporary total disability should cease *Plaster, supra.*" (LF 118-119)

Judge Newcomb found Claimant reached maximum medical improvement on September 25, 2000, and she was entitled to Temporary Total Disability under Injury Number 99-029378 from March 18, 1999 to September 25, 2000, except for the time periods she received or was awarded Temporary Total Disability under Injury Number 97-072979.<sup>3</sup>

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<sup>3</sup> Employer has not appealed the Commission's Award of Temporary Total Disability for the 1999 claim. The wage rate is identical in both claims, so if Employer succeeds in its Appeal of the Temporary Total Disability under the 1997 claim, it will owe the exact same compensation under the 1999 claim and there will be no net difference in the compensation that is owed. (LF 119) Also, it is interesting to note that Employer has paid the \$1,873.04 in temporary disability that it is appealing, but it has failed to pay the \$19,601.36 in temporary disability it has not appealed.

There was no evidence submitted by Employer in support of its refusal to pay the Temporary Total Disability and the medical under Injury Numbers 97-072979 and 99-029378. Both Dr. Poetz and Dr. Altsheler testified to Temporary Total Disability and the medical bills. (TR 204-207, 271-272, 294-295, 310-311, 314). This fact, along with the adjusters refusal to abide by the agreement reached before the medical exam with Dr. Petkovich, the adjuster's hiding of Dr. Petkovich's medical report, and the adjusters refusal to abide by the agreement reached at the Mediation support the Commission's finding that these two claims were defended without reasonable grounds in violation of §287.560. The sequence of events dealing with the refusal to abide by the agreements and hiding the medical report are:

<u>Date</u>	<u>Description</u>
08/02/99	Claimant's attorney demands Temporary Total Disability from 03/18/99 to present, payment of past medical for venous stasis, and ongoing medical of venous stasis and left shoulder injury. (TR 706-708)
08/11/99	Claimant's attorney demands additional past medical and makes additional demand for ongoing care. Employer's attorney informed that treatment started with Dr. Dusek of Premier Care Orthopedics and that there will be ongoing treatment of the shoulder. (TR 709-710)
08/31/99	Claimant's attorney provides Dr. Dusek's records to Employer's attorney and informs him that if medical and Temporary Total Disability are not paid, a Request for Hardship Setting would be filed. Employer's attorney is requested to set up any medical exams as soon as possible (TR 711-712)

09/09/99 Claimant's attorney demands evaluation recommended by Dr. Dusek of MRI and arthrogram of shoulder (TR 713)

09/24/99 Adjuster denies further treatment of the left shoulder injury, claiming it is not work-related. No facts are cited in support of the position. (TR 714)

**Date**                      **Description**

10/26/99 Claimant's attorney provides Employer's attorney additional medical records of Dr. Dusek, including arthrogram and MRI results, showing adhesive capsulitis as a result of 7/26/97 injury. Also, Claimant's attorney demands payment of past bills and ongoing treatment. (TR 715)

12/08/99 Claimant's attorney provides Employer's attorney 11/11/99 and 12/8/99 reports of Dr. Dusek, indicating shoulder condition is related to 7/26/97 injury and past treatment is related and additional treatment is necessary. Also, he is provided form filled out by Dr. Squitieri indicating Claimant unable to work due to the venous stasis. Materials faxed to Employers' attorney, as supposedly Employer was reconsidering compensability of the claims.(TR 716-719)

01/06/00 Claimant's attorney again explains to Employer's attorney that Claimant is suffering severe hardship, as she has not had a paycheck since March 18, 1999 and no temporary disability had been paid. It was such a hardship that Claimant was having to borrow money to even pay her medical insurance

premiums. Employer stopped payment of union benefits, including medical insurance in September of 1999. Employer's attorney informed that a Request for Hardship Setting was going to be filed, if the Employer didn't make

<u>Date</u>	<u>Description</u>
	(Cont.) a decision regarding compensability soon and that Dr. Dusek was recommending arthroscopic surgery. (TR 720, 733)
01/13/00	Claimant's attorney again informs Employer's attorney of severe economic hardship and that Dr. Dusek will perform surgery on January 17, 2000. It was confirmed that need for surgery was not in dispute and the only issue being reviewed by Employer was whether need for surgery was caused by 7/26/97 injury. Also, it was agreed between Claimant's attorney and Employer's attorney that Employer will set up an immediate exam of Claimant to determine whether the condition was work-related and provide report to Claimant's attorney. Time was of the essence, because of the economic hardship suffered by Claimant. Claimant would continue to delay filing a request for hardship setting while Employer reviewed both claims. If the examining physician found that the conditions were work-related, Employer would pay the prior medical and Temporary Total Disability and provide ongoing care and disability. (TR 721, 733-734)
02/01/00	Adjuster set up an appointment for Claimant to be examined by Dr. Frank Petkovich for February 16, 2000. (TR 689)

02/11/00 Claimant's attorney makes additional demand for additional past medical and ongoing care.  
Employer's attorney informed arthroscopic surgery attempted

**Date**                      **Description**

(Cont.) by Dr. Dusek, but could not be effectively performed due to tissue qualities of Claimant's shoulder. Therefore, Claimant would have conservative care. Also, Employer's attorney provided 2/4/00 prescription of Dr. Dusek, indicating Claimant unable to work indefinitely because of shoulder injury. Also, Employer's attorney informed that due to severe economic hardship, Request for Hardship Setting would be filed, if temporary disability was not paid shortly after exam by Dr. Petkovich. (TR 722-723)

02/16/00 Dr. Petkovich examined Claimant at the request of the Employer. He opines: shoulder condition is related to 7/26/97 injury; past treatment was for injury; additional treatment and examination is necessary, including diagnostic tests and potentially surgery; and Claimant has work limitations due to 7/26/97 injury. (TR 434-438) The report of the exam was properly addressed to the adjuster (TR 704-705, 714)

02/22/00 Claimant's attorney again requested from Employer's attorney a copy of Dr. Petkovich's report as soon as possible. He also requests that Employer's attorney indicate whether he is maintaining the report is that of an examining physician, such that Claimant's attorney can't request the report directly from Dr Petkovich. (TR 691)

**Date**                      **Description**

- 02/23/00 Employer's attorney indicates that he will send report of Dr. Petkovich as soon as possible, but fails to indicate his position regarding Claimant's attorney directly requesting the report from Dr. Petkovich. (TR 692)
- 03/03/00 Claimant's attorney makes additional demand to Employer's attorney for payment of past medical bills. Also, Employer's attorney informed that if Temporary Total Disability and medical not paid by March 15, 2000, a Request for Hardship Setting would be filed. Additional records of Dr. Dusek provided (TR 693)
- 03/21/00 Claimant's attorney makes additional demand to Employer's attorney for payment of additional past medical.
- 04/26/00 Claimant's attorney makes additional demand to Employer's attorney for payment of additional medical and provides additional records. Letter specifically states:

“Finally, in your letter of February 23<sup>rd</sup>, you indicated that you would send Dr. Petkovich's records and reports as soon as possible. Dr. Petkovich obviously examined Ms. Landman back in February, and I cannot believe the records and reports have not been obtained by today's date. I have re-examined the Act, and I believe I am entitled to a copy of any records and reports generated by any treating or

**Date**

**Description**

(Cont.) examining physician. Accordingly, we have sent the enclosed letter to Dr. Petkovich's office requesting records.” (TR 697-699)

Claimant's attorney simultaneously separately requested records directly from Dr. Petkovich. (TR 694-696)

05/19/00 Claimant's attorney receives Dr. Petkovich's February 16, 2000 report records directly from Dr. Petkovich's office. (TR 700-702)

05/26/00 Claimant files verified Request for Hardship Setting. Medical records and reports, including report of Dr. Petkovich, were attached to the Request for Hardship Setting Agreement before exam by Dr. Petkovich and manner in which Dr. Petkovich's report had to be obtained is set forth in the verified Request for Hardship Setting. Also, additional past medical is sent to defense attorney. (TR 735-740)

06/12/00 Employer's attorney provides Claimant's counsel a copy of Dr. Petkovich's February 16, 2000 report. (Ex. BB) This is identical report provided by Claimant's counsel to Employer's counsel on May 26, 2000. The report provided by Employer's attorney shows that it was faxed on 04/25/00 (TR 703-705)

06/13/00 Mediation before Judge Percy. Case was set for trial and all parties indicated they would be ready for Hearing by December 1, 2000. It was noted that

**Date**

**Description**

(Cont.) the only Temporary Total Disability that had been paid was \$334.45 for the time period of August 7, 1997 through August 11, 1997. The case was not set for immediate trial, but on December 1, 2000, because Employer conceded it would pay all past medical and all temporary disability for the shoulder claim, which was to be \$15,588.38 for the time period of July 15, 1999 through March 3, 2000. (Ex. GG)

06/27/00 Claimant's attorney received check in the amount of \$13,780.22, representing temporary disability for the time period of 8/11/99 through 3/3/00 (This was not the time period or amount discussed at the mediation. Furthermore, no medical was paid.)

06/28/00 Judge Percy approved 25% attorneys fee of \$3,445.05 as reasonable and necessary on temporary disability paid of \$13,780.22.

12/01/00 Trial before Judge Newcomb.

02/28/01 Judge Newcomb enters Awards in both claims

10/24/01 Industrial Commission affirmed and adopted both Awards.

07/09/02 Employer paid \$15,582.12 in medical awarded under Injury 99-029378. Please note Employer has still failed to pay \$19,601.36 in temporary disability awarded. It did not appeal this, so it is not subject to reduction. (See August 15, 2002 letter to the Court of Appeals, Eastern District.)

**Date**                      **Description**

07/15/02 Employer paid \$45,621.72, representing payment of Award of temporary total disability of \$1,873.04, medical of \$17,911.30, and permanent partial disability of \$25,873.38. (See August 15, 2002 letter to the Court of Appeals, Eastern District.)

08/20/02 Oral Argument before Court of Appeals, Eastern District

09/17/02 Opinion issued by the Honorable Glenn A. Norton, with Judge Crandall and Sullivan concurring.

In both claims, Judge Newcomb specifically found that the Claims for Compensation were defended without reasonable grounds in violation of §287.560 RSMo., but he was not allowed to award

attorneys fees. (LF 55, 123) In Injury Number 97-072979, he awarded the fee of Dr. Poetz in the amount of \$600.00 for his time in giving a deposition. (LF 55) In Injury Number 99-029378, he did not award any costs, specifically finding there was no specific proof as to what Claimant's costs of the proceedings were.(LF 123) In fact, there was evidence of Dr. Altsheler's fee for his time in giving a deposition, which was \$525.00 (TR 398). In addition, there was evidence of costs by virtue of the length of the transcripts. Dr. Altsheler's transcript was 90 pages (TR 258-349) and Dr. Poetz's transcript was 64 pages (TR 168-232). Furthermore, the actual bills from the court reporters in the amount of \$259.00 for Dr. Poetz's deposition and \$402.80 for Dr. Altsheler's deposition were presented to the Commission in the Appendix of Respondent's brief filed with the Commission.

Claimant also requested attorneys fees, including 25% attorneys fees on the temporary disability and medical, which Judge Newcomb found that the Employer unreasonably refused to pay or delayed in paying without reasonable grounds, in violation of §287.560. As a result of the filing of the Request for Hardship Setting, Claimant incurred 25% attorneys fees for the temporary disability and the past medical, which were paid as a result of the mediation or included in the Awards. Judge Newcomb or Judge Percy approved these attorneys fees as reasonable and necessary. (LF 38, 98) The Commission affirmed and adopted Judge Newcomb's Awards, which indicated a prohibition from awarding attorneys fees pursuant to §287.560 under Reese, supra. (LF 55, 123) The Court of Appeals, Eastern District, reversed and increased the Award of Costs under 99-029378 by \$8,795.87 in attorneys fees and remanded 97-072979 for a determination of the attorneys fees related to the Hardship Setting, consistent with the Opinion.

Besides the issue of costs, Employer has appealed the award of future treatment and examination of the shoulder. The 97-072979 Award states:

“Based upon the medical records, the medical bills, the testimony of Claimant, the testimony of Dr. Poetz, and the stipulation of the parties, I award \$17,911.30 in past medical expenses....

I further find that the Claimant is in need of additional care, treatment, and examination. The evidence establishes that she has a labral defect. It could not be corrected with the arthroscopic procedure of January 24, 2000 due to the lack of ability to get good visualization with the arthroscope. Dr. Petkovich suggested that a repeat MRI be performed, and if the labral defect is shown, surgery should be attempted. Claimant continues to suffer numerous symptoms including pain as a result of the July 26, 1997 injury. She continues to take pain medicine prescribed by Dr. Dusek.<sup>4</sup> Dr. Poetz opined she needed future care. Based on the MRI, the arthrogram, the testimony of Claimant, the records and findings of Dr. Dusek, the records and findings of Dr. Petkovich, and the records, findings and testimony of Dr. Poetz, I award future care of the shoulder.

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<sup>4</sup> Employer’s Brief indicates that it’s undisputed Claimant was not receiving any treatment at the time of the Hearing. Claimant was still taking narcotic pain medicine prescribed by Dr. Dusek at the time of the Hearing (TR 48-49), and the assertion in Employer’s Brief is incomprehensible, unless it maintains that the prescription of narcotic pain medicine is not treatment.

This future care shall include at least annual screening visits with an orthopedic surgeon and more frequent visits if determined necessary by that orthopedic surgeon. This orthopedic surgeon shall have the discretion to order appropriate tests. Also, I award a future MRI as recommended by Dr. Petkovich. I also award future shoulder surgery, if this becomes necessary within the next three years and the operation is feasible. This will include hospital, doctor, post-operative physical therapy, and associated charges. Next, I find that Claimant could benefit from physical therapy at various times in the future, and I award this in the discretion of an orthopedic surgeon. Finally, I award pain medicines. I specifically award this care with Dr. Dusek. He has treated Claimant the longest and performed the only attempted operation. The Employer never instructed Claimant to be seen by a particular healthcare provider. Under §287.140.1 RSMo., I find that the Employer/Insurer has not been diligent in providing needed treatment or paying for same. Based upon this, they have forfeited their right to choose the treating healthcare provider. If Dr. Dusek is unable or unwilling to continue to treat Claimant, then Claimant shall have the right to choose another orthopedic surgeon to provide said care, treatment, and examination.(LF 52-53)”

The record in support of this includes the testimony of Dr. Poetz and the report of Dr. Petkovich. Dr. Poetz recommended future treatment, including additional physical therapy, certain prescription medicines, and doctor visits. (Tr 177-178, 189-191, 242) Dr. Poetz did testify that the additional forms of care would modify symptoms, as opposed to cure (Tr 177-178, 189-191, 213), but he explained that his use of the phrase “modifying symptoms” meant decreased pain and a change in the symptoms to make her more comfortable, as opposed to increasing her physical ability or curing her. (Tr 213) Dr. Petkovich’s report

also contains recommendations of future care, which are correctly noted in the Award. (TR 436) There was no evidence admitted which indicated that Claimant did not need future treatment of the 7/26/97 injury.

Regarding the occupational disease of venous stasis, Dr. Altsheler testified that Claimant's work was not only a substantial factor, but the substantial factor of the cause of her venous stasis condition. In fact, he expressly stated that work seemed to be the only cause and there was no medical or surgical evidence indicating otherwise. (Tr 292-293) Dr. Poetz opined that part of the condition was pre-existing and that she had an occupational disease element, which aggravated the pre-existing condition. (Tr 198-204, 208-209, 227-228) Dr. Poetz admitted he was not a specialist like Dr. Altsheler and that he didn't order any tests to evaluate Claimant's venous stasis or its cause. (TR 226-227) Dr. Altsheler, in contrast, was a specialist, who treated venous stasis as part of his practice. (TR 263-265) He ordered a variety of tests, including: a M-Mode, 2-D Echocardiogram; Cardiac Doppler Exam; EKG; urinalysis; blood tests; CT scan; and chest x-rays (TR 286-288, 318-331) The Commission accepted the testimony of the specialist, over the family practitioner. (LF 117-118, 121-123)

In terms of Claimant have a pre-existing leg condition and resulting disability, Dr. Poetz thought Claimant had a congenital disorder, Milroy's disease. (TR 186-189) The Award states:

“The Employer suggests that Claimant's leg condition is from Milroy's disease, as opposed to venous stasis. Dr. Poetz is the only physician to suggest Claimant had Milroy's disease. Dr. Altsheler had five reasons why Claimant did not have Milroy's disease. First, there was usually a family history, and Claimant did not have one. Second, this condition starts early in life, and it didn't with Claimant. Third, any patient with a lymphatic channel disorder usually has red [sic. red] streaks emanating from any wounds, and she did not have this.

Fourth, there is a lumpy swelling associated with Milroy's disease, and she did not have this. Fifth, the chest x-rays and CT scans were negative for any enlargement of lymph nodes. Dr. Altsheler's testimony is credible and supported by the records of Dr. Mammen, Dr. Lee, Dr. Carmody, and Dr. Squitieri. Furthermore, Dr. Poetz testified Claimant had venous stasis disease, regardless of whether she also had Milroy's disease. Therefore, I find Claimant suffers from venous stasis disease of her legs and not Milroy's disease." (LF 118)

This is directly from Dr. Altsheler's testimony. (TR 286-288, 292-293, 318-331) Dr. Poetz also opined that Claimant was pre-disposed to venous stasis, but then admitted that Claimant did not have any of the various conditions which would pre-dispose her to venous stasis, with the sole exception of obesity. (TR 186-189, 228-230) Dr. Altsheler specifically explained that obesity was not a substantial factor in causing Claimant's venous stasis, but work was. (TR 334-335, 347-348) The Commission accepted the testimony of Dr. Altsheler over Dr. Poetz. (LF 117-118, 121-123)

Claimant did not miss any time from work as a result of the venous stasis disease before March of 1999. (Tr 64-66) Based upon this, this is when the Industrial Commission found the occupational disease arose under §287.063.1 RSMo(1993). Dr. Altsheler explained that when her lesions first started in 1995, they would go away in a month or two with treatment. By the time she had worked an additional four years up to February of 1999, the veins had blown out a little bit more and the valves in her veins had become less functional, such that her lesions did not go away with treatment. It was simply a natural progression of the effects of the occupational disease. (Tr 345-346) Dr. Altsheler explained that the venous stasis disease continued to get worse with her 17+ years of work to the point she could no longer work after March 18,

1999. (Tr 348) Dr. Poetz was of the opinion that there was a pre-existing element to the venous stasis. He didn't ascribe any particular disability to the February 27, 1999 injury, but instead to the occupational disease. (TR 198-204, 208-209, 227-228) He testified to the elements of the occupational disease of venous stasis, like Dr. Altsheler. (TR 198-201, 292-293) In fact, Dr. Poetz testified that the local leg trauma with 2/27/99 injury did not speed up the venous stasis.(TR 211)There is some confusion with his testimony, based on a letter from Claimant's attorney. The letter stated:

“Basically, we would like a report from you addressing any permanent partial disability as a result of the primary claims, along with the pre-existing obesity. For the purposes of the primary claims, you can treat the February 27, 1999 injury and the occupational disease claim as the same, if you believe that the February 27, 1999 injury was simply a symptom of the occupational disease of venous stasis. Basically, she hit her left leg on a metal bar, and this developed into an open lesion, as I understand it, due to her venous stasis disease.” (Tr 247-248)

Dr. Poetz explained that he agreed with this. (Tr 202-203, 227-228, 247-248) There is no testimony of Dr. Poetz as to any specific Permanent Partial Disability due to the 2/27/99 accident considered alone, without consideration of the occupational disease. The following testimony graphically explains this point.

“Q: And do you have an opinion whether she sustained any permanent partial disability as a result of the injury of 2/27/99?

A: Yes.

Q: And what is that opinion?

A: That is was my opinion that she had an additional 10% to the left lower extremity resulting from the 2/27/99 injury.

Q: Now, for purposes of the letter I sent you I told you to assume that 2/27/99 injury was the same as the occupational disease; did I not?

A: Yes.

Q: Is that what you indicated with this report?

A: It is.

Q: Would that then, the 2/27/99, refer to the venous stasis condition?

A: Yes." (TR 202-203)

Therefore, there is no medical testimony in conflict with the Commission's Award, which states in pertinent part:

"There is no medical opinion indicating that the claimant's leg conditions did not result from her exposure at work, other than the initial notations of the doctors at BarnesCare. They simply opined that the open lesions she had on her left leg in March of 1999 were not attributable solely to the injury of February 27, 1999. They didn't offer any opinions as to whether claimant's leg conditions or venous stasis were due to repetitive trauma and/or an occupational disease . . . .

Based upon all of the above, I find that claimant was exposed with her job for employer to conditions that caused her venous stasis of both lower extremities and the exposure was greater than or different from that which affects the public generally. Her work might not have been the sole cause of the venous stasis disease, but clearly her work

was a substantial and major factor causing the disease. *Kelley, supra*. I find that an accident did occur on February 27, 1999, but the major symptoms that followed the accident, including the open lesion on her shin, were predominantly a symptom of the occupational disease of venous stasis, as opposed to an accident. (LF 118)”

### **STANDARD OF REVIEW**

In reviewing an award of the Industrial Commission in a workers’ compensation proceeding the Court is limited to a determination of whether the findings are authorized by law and supported by competent and substantial evidence. §287.495; Gilley vs. Raskas Dairy, 903 S.W.2d 656, 658 (Mo.App. E.D. 1995). 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. §287.495.1 RSMo.; Rogers vs. Pacesetter Corp., 972 S.W.2d 540, 542 (Mo.App. E.D. 1998).

Issues involving matters of law are reviewed independently. Rogers, 972 S.W.2d at 542. Therefore, decisions of the Industrial Commission which are clearly an interpretation or application of the law are not binding on this Court and reviewed de novo. Endicott v Display Technologies, 77 SW3d 612, 615 (Mo banc 2002) This includes the specific issue raised by Claimant of whether attorneys fees are a cost that can be awarded under §287.560 RSMo (1993) .

Where the Industrial Commission’s decision is based upon a determination of facts, the Court reviews the whole record in light most favorable to the decision. Lammert vs. Vess Beverages, Inc., 968

S.W.2d 720, 723 (Mo.App. E.D. 1998). 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. Gilley, supra at 658. Facts found by the Industrial Commission are binding on the reviewing Court, so long as those facts are supported by substantial evidence and are not contrary to the overwhelming evidence that was before the Commission. Landers v Chrysler Corp., 963 S.W.2d 275, 279 (Mo. App. E. D. 1997)

**POINTS RELIED ON**

## ISSUE I

THE INDUSTRIAL COMMISSION DID NOT ERR IN AWARDING COSTS UNDER §287.560 RSMO. CONSISTING OF DR. POETZ'S \$600.00 DEPOSITION FEE FOR THE EMPLOYER'S DEFENSE OF THE JULY 26, 1997 INJURY CLAIM WITHOUT REASONABLE GROUNDS IN VIOLATION OF §287.560 AND IN FINDING THAT THEY VIOLATED §287.560 IN THEIR DEFENSE OF THE 1999 OCCUPATIONAL DISEASE CLAIM WITHOUT REASONABLE GROUNDS, BUT THE COMMISSION DID ERR IN FAILING TO AWARD DR. ALTSHELER'S \$525.00 FEE FOR GIVING HIS DEPOSITION, REASONABLE COSTS FOR THE TRANSCRIPTS OF DR. ALTSHELER'S AND DR. POETZ'S DEPOSITIONS, AND ATTORNEYS FEES. THE EMPLOYER'S ARGUMENT SUBDIVIDES THIS ISSUE INTO SUBPART (A) DEALING WITH THE COMMISSION'S FINDING OF A VIOLATION OF §287.560 AND SUBPART (B) DEALING WITH WHETHER ATTORNEYS FEES SHOULD BE INCLUDED AS A WHOLE COST OF THE PROCEEDINGS UNDER §287.560. THIS BRIEF SHALL FOLLOW THE SAME FORMAT TO FACILITATE REVIEW BY THIS COURT, WITH DR. ALTSHELER'S DEPOSITION FEE AND THE COURT REPORTER CHARGES ADDRESSED IN SUBPART (C).

(A) THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION IN FINDING THAT BOTH CLAIMS WERE DEFENDED WITHOUT REASONABLE GROUNDS, IN VIOLATION OF §287.560, AS:

1. THE RECORD ESTABLISHES THAT THE EMPLOYER EXHIBITED REPREHENSIBLE CONDUCT IN THE HANDLING OF BOTH OF THESE CLAIMS.
  2. IT WAS WITHIN THE DISCRETION OF THE COMMISSION TO DETERMINE WHETHER THERE WAS A VIOLATION OF §287.560 AND THEY DID NOT ABUSE THAT DISCRETION.
  3. THE STATUTE SHOULD BE ENFORCED AS WRITTEN, AND THERE IS NO REQUIREMENT THAT THE DEFENSE OF THE ENTIRE CASE BE GROUNDLESS OR THAT THERE BE A FINDING OF BAD FAITH FOR FINDING A VIOLATION OF §287.560 RSMO.
- (B) THE COMMISSION DID ERR IN FAILING TO AWARD ATTORNEYS FEES, AS THE EMPLOYER'S DEFENSE OF BOTH OF THESE CLAIMS CONSTITUTE AN ENTIRE COURSE OF UNREASONABLE CONDUCT, WHICH MANDATES THE AWARD OF ATTORNEYS FEES. §287.560 RSMO. SHOULD INCLUDE ATTORNEYS FEES, AS:
1. §287.203 RSMO. HAS BEEN DETERMINED TO INCLUDE ATTORNEYS FEES AND "WHOLE COST OF PROCEEDINGS" UNDER §287.560 IS BROADER THAN "COST OF RECOVERY" PROVIDED UNDER §287.203;
  2. THE LARGEST INCURRED COST FOR A CLAIMANT IN A WORKER'S COMPENSATION CLAIM IS ATTORNEYS FEES, AND THEY SHOULD BE AWARDED WHEN FEES ARE INCURRED, BECAUSE CLAIMS ARE DEFENDED WITHOUT REASONABLE GROUNDS.

3. ONE OF THE PRIMARY PURPOSES BEHIND THE WORKERS' COMPENSATION ACT WAS TO PROVIDE A QUICK RECOVERY FOR THOSE WHO ARE INJURED WITHOUT INCURRING THE COSTS OR DELAYS ASSOCIATED WITH PROTRACTED LITIGATION. If §287.560 DOESN'T INCLUDE ATTORNEYS FEES IN CASES WHERE THE EMPLOYER UNREASONABLY REFUSES TO PROVIDE AND/OR PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE, ONE OF THE PRIMARY PURPOSES BEHIND THE ENACTMENT OF THE WORKERS' COMPENSATION ACT WILL BE THWARTED.
4. CASES INTERPRETING CIVIL COURT COST STATUTES, WHICH INDICATE SAID STATUTES SHOULD BE STRICTLY CONSTRUED DO NOT APPLY TO §287.560, AS §287.800 EXPRESSES THE DECLARED PUBLIC POLICY OF THIS STATE THAT THE ACT, INCLUDING §287.560, SHOULD BE LIBERALLY CONSTRUED.
5. OTHER RULES AND LAWS REGARDING CLAIMS OR DEFENSES BEING BASED UPON REASONABLE GROUNDS, INCLUDING SPECIFICALLY MISSOURI SUPREME COURT RULE 55.03(B), PROVIDE GUIDANCE AS TO THE INTENT OF THE LEGISLATURE WITH §287.560.
6. MISSOURI SUPREME COURT RULE 57, WHICH GOVERNS THE TAKING OF DEPOSITIONS IN CIVIL CASES, HAS BEEN SPECIFICALLY HELD TO CONTROL THE USE OF DEPOSITIONS IN WORKERS' COMPENSATION

PROCEEDINGS. THE SUPREME COURT RULES REGARDING DEPOSITIONS SPECIFICALLY STATE THAT A COURT CAN AWARD SANCTIONS AS PROVIDED IN RULE 61.01, WHICH ALLOWS THE COURT TO AWARD ATTORNEYS FEES, EXPENSES, AND EVEN TO STRIKE A PARTY'S PLEADINGS. IN THIS CASE, THE NEED TO TAKE THE DEPOSITIONS OF DR. POETZ AND DR. ALTSHELER AROSE IN PART DUE TO THE EMPLOYER'S UNREASONABLE REFUSAL TO PROVIDE AND/OR TO PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE WITHOUT REASONABLE GROUNDS.

(C) THE COMMISSION DID HAVE EVIDENCE OF DR. ALTSHELER'S DEPOSITION FEE AND THE COURT REPORTER'S CHARGES, AND THEY SHOULD HAVE BEEN AWARDED, AS PART OF THE WHOLE COST OF THE PROCEEDINGS UNDER §287.560.

P.M. v Metromedia Steakhouses Co., Inc., 931 SW2d 846 (MoApp ED 1996)

Fisher v Waste Management of Missouri, Inc., 58 SW3d 523 (Mo banc 2001)

McCormack v Carmen Shell Construction, 2002 WL 1363006 (Slip Opinion No 60771, Mo App WD 2002)

Wolfgeher v Wagner Cartage Service, Inc., 646 SW2d 781 (Mo banc 1983)

§287.127 RSMo (1992)

§287.140 RSMo (1998)

§287.160 RSMo (1998)

§287.170 RSMo (1998)

§287.203 RSMo (1993)

§287.210 RSMo (1998)

§287.260 RSMo (1986)

§287.560 RSMo (1993)

§287.800 RSMo (1965)

§514.060 RSMo (1939)

Missouri Supreme Court Rule 55.03 (1994)

Missouri Supreme Court Rule 57.03 (1994)

Missouri Supreme Court Rule 61.01 (1994)

Black's Law Dictionary (7<sup>th</sup> Edition, 1999)

## **ISSUE II**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING THE EMPLOYER LIABLE FOR PERMANENT TOTAL DISABILITY, AS CLAIMANT HAD SEVERE RESTRICTIONS FROM THE OCCUPATIONAL DISEASE OF VENOUS STASIS CONSIDERED ALONE, SUCH THAT SHE WOULD NOT EVEN BE ABLE TO PERFORM SEDENTARY WORK AND THE FACT THAT CLAIMANT EXPERIENCED SYMPTOMS OF THE OCCUPATIONAL DISEASE WITHOUT MISSING WORK BEFORE FEBRUARY 27, 1999 HAS NO EFFECT UPON THE EMPLOYER'S RESPONSIBILITY FOR PERMANENT TOTAL DISABILITY. IN THE ALTERNATIVE TO AFFIRMING THE AWARD OF PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER, CLAIMANT MAINTAINS**

**THAT THE INDUSTRIAL COMMISSION ERRED AND THAT PERMANENT TOTAL DISABILITY SHOULD BE AWARDED AGAINST THE SECOND INJURY FUND DUE TO THE COMBINATION OF HER PRIMARY CONDITION OF VENOUS STASIS WITH HER PRE-EXISTING LEFT SHOULDER INJURY AND OBESITY.**

Hughey v Chrysler Corporation, 34 SW3d 845 (MoApp ED 2000)

Carlson v Plant Farm, 952 SW2d 369 (MoApp WD 1997)

Pruteanu v Electro Core, Inc., 847 SW2d 203 (MoApp ED 1993)

Akers v Warson Garden Apartments, 961 SW2d 50 (Mo banc 1998)

§287.063 RSMo (1993)

§287.220 RSMo (1998)

### **ISSUE III**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN AWARDING CLAIMANT FUTURE MEDICAL TREATMENT OF THE LEFT SHOULDER RESULTING FROM THE JULY 26, 1997 INJURY, AS:**

- (A) THE FINDING OF MAXIMUM MEDICAL IMPROVEMENT IS NOT IN ANY WAY AN INDICATION THAT FUTURE MEDICAL SHOULD NOT BE AWARDED;**
- (B) THE UNDISPUTED, COMPETENT, SUBSTANTIAL EVIDENCE INDICATED CLAIMANT WAS STILL UNDER TREATMENT FOR HER LEFT SHOULDER INJURY AT THE TIME OF THE HEARING AND WILL REQUIRE TREATMENT IN THE FUTURE; AND**

**(C) THE TREATMENT RECORDS OF DR. DUSEK, THE PHYSICAL THERAPY RECORDS, THE REPORT OF DR. PETKOVICH (EMPLOYER'S EXAMINING PHYSICIAN), THE TESTIMONY OF DR. POETZ (CLAIMANT'S EXAMINING PHYSICIAN), AND THE TESTIMONY OF CLAIMANT ALL SUPPORT THE AWARD OF FUTURE MEDICAL CARE.**

Mathia v Contract Freighters, Inc., 929 SW2d 271 (MoApp SD 1996)

Kaderly v Race Brothers Farm Supply, 993 SW2d 512 (MoApp SD 1999)

Sifferman v Sears, Roebuck and Co., 906 SW2d 823 (MoApp SD 1995)

Sullivan v Masters Jackson Paving Co., 35 SW3d 879 (MoApp SD 2001)

#### **ISSUE IV**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY FROM JULY 14, 1999 TO AUGUST 10, 1999, BECAUSE OF THE JULY 26, 1997 INJURY, AS SAID AWARD WAS SUPPORTED BY THE TESTIMONY OF CLAIMANT, THE TREATMENT RECORDS, AND THE UNDISPUTED TESTIMONY OF DR. POETZ. ALSO, CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY FOR THIS SAME TIME PERIOD UNDER THE 1999 OCCUPATIONAL DISEASE CLAIM, AND TO THE EXTENT THIS COURT WOULD EVER REVERSE THE AWARD OF TEMPORARY TOTAL DISABILITY UNDER THE 1997 INJURY, THEN THE SAME TEMPORARY TOTAL DISABILITY AT THE SAME RATE WOULD BE OWED UNDER THE 1999 OCCUPATIONAL DISEASE CLAIM. THE EMPLOYER HAS NOT APPEALED THAT ISSUE, AND AS SUCH, THEY**

**ARE ASKING THIS COURT TO ADDRESS AN ISSUE FOR WHICH NO PARTICULAR  
RELIEF CAN BE GRANTED.**

Riggs v Daniel Intern., 771 SW2d 850 (MoApp WD 1989)

Plaster v Dayco Corp., 760 SW2d 911 (MoApp SD 1988)

Cope v House of Maret, 729 SW2d 641 (MoApp ED 1987)

Peterson v National Carriers, Inc., 972 SW2d 349 (MoApp WD 1998)

§287.560 RSMo (1993)

§490.065 RSMo (1989)

**ARGUMENT**

## ISSUE I

THE INDUSTRIAL COMMISSION DID NOT ERR IN AWARDING COSTS UNDER §287.560 RSMO. CONSISTING OF DR. POETZ'S \$600.00 DEPOSITION FEE FOR THE EMPLOYER'S DEFENSE OF THE JULY 26, 1997 INJURY CLAIM WITHOUT REASONABLE GROUNDS IN VIOLATION OF §287.560 AND IN FINDING THAT THEY VIOLATED §287.560 IN THEIR DEFENSE OF THE 1999 OCCUPATIONAL DISEASE CLAIM WITHOUT REASONABLE GROUNDS, BUT THE COMMISSION DID ERR IN FAILING TO AWARD DR. ALTSHELER'S \$525.00 FEE FOR GIVING HIS DEPOSITION, REASONABLE COSTS FOR THE TRANSCRIPTS OF DR. ALTSHELER'S AND DR. POETZ'S DEPOSITIONS, AND ATTORNEYS FEES. THE EMPLOYER'S ARGUMENT SUBDIVIDES THIS ISSUE INTO SUBPART (A) DEALING WITH THE COMMISSION'S FINDING OF A VIOLATION OF §287.560 AND SUBPART (B) DEALING WITH WHETHER ATTORNEYS FEES SHOULD BE INCLUDED AS A WHOLE COST OF THE PROCEEDINGS UNDER §287.560. THIS BRIEF SHALL FOLLOW THE SAME FORMAT TO FACILITATE REVIEW BY THIS COURT, WITH DR. ALTSHELER'S DEPOSITION FEE AND THE COURT REPORTER CHARGES ADDRESSED IN SUBPART (C).

(A) THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION IN FINDING THAT BOTH CLAIMS WERE DEFENDED WITHOUT REASONABLE GROUNDS, IN VIOLATION OF §287.560, AS:

4. THE RECORD ESTABLISHES THAT THE EMPLOYER EXHIBITED REPREHENSIBLE CONDUCT IN THE HANDLING OF BOTH OF THESE CLAIMS.
  5. IT WAS WITHIN THE DISCRETION OF THE COMMISSION TO DETERMINE WHETHER THERE WAS A VIOLATION OF §287.560 AND THEY DID NOT ABUSE THAT DISCRETION.
  6. THE STATUTE SHOULD BE ENFORCED AS WRITTEN, AND THERE IS NO REQUIREMENT THAT THE DEFENSE OF THE ENTIRE CASE BE GROUNDLESS OR THAT THERE BE A FINDING OF BAD FAITH FOR FINDING A VIOLATION OF §287.560 RSMO.
- (B) THE COMMISSION DID ERR IN FAILING TO AWARD ATTORNEYS FEES, AS THE EMPLOYER'S DEFENSE OF BOTH OF THESE CLAIMS CONSTITUTE AN ENTIRE COURSE OF UNREASONABLE CONDUCT, WHICH MANDATES THE AWARD OF ATTORNEYS FEES. §287.560 RSMO. SHOULD INCLUDE ATTORNEYS FEES, AS:
1. §287.203 RSMO. HAS BEEN DETERMINED TO INCLUDE ATTORNEYS FEES AND "WHOLE COST OF PROCEEDINGS" UNDER §287.560 IS BROADER THAN "COST OF RECOVERY" PROVIDED UNDER §287.203;
  2. THE LARGEST INCURRED COST FOR A CLAIMANT IN A WORKER'S COMPENSATION CLAIM IS ATTORNEYS FEES, AND THEY SHOULD BE AWARDED WHEN FEES ARE INCURRED, BECAUSE CLAIMS ARE DEFENDED WITHOUT REASONABLE GROUNDS.

3. ONE OF THE PRIMARY PURPOSES BEHIND THE WORKERS' COMPENSATION ACT WAS TO PROVIDE A QUICK RECOVERY FOR THOSE WHO ARE INJURED WITHOUT INCURRING THE COSTS OR DELAYS ASSOCIATED WITH PROTRACTED LITIGATION. If §287.560 DOESN'T INCLUDE ATTORNEYS FEES IN CASES WHERE THE EMPLOYER UNREASONABLY REFUSES TO PROVIDE AND/OR PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE, ONE OF THE PRIMARY PURPOSES BEHIND THE ENACTMENT OF THE WORKERS' COMPENSATION ACT WILL BE THWARTED.
4. CASES INTERPRETING CIVIL COURT COST STATUTES, WHICH INDICATE SAID STATUTES SHOULD BE STRICTLY CONSTRUED DO NOT APPLY TO §287.560, AS §287.800 EXPRESSES THE DECLARED PUBLIC POLICY OF THIS STATE THAT THE ACT, INCLUDING §287.560, SHOULD BE LIBERALLY CONSTRUED.
5. OTHER RULES AND LAWS REGARDING CLAIMS OR DEFENSES BEING BASED UPON REASONABLE GROUNDS, INCLUDING SPECIFICALLY MISSOURI SUPREME COURT RULE 55.03(B), PROVIDE GUIDANCE AS TO THE INTENT OF THE LEGISLATURE WITH §287.560.
6. MISSOURI SUPREME COURT RULE 57, WHICH GOVERNS THE TAKING OF DEPOSITIONS IN CIVIL CASES, HAS BEEN SPECIFICALLY HELD TO CONTROL THE USE OF DEPOSITIONS IN WORKERS' COMPENSATION

**PROCEEDINGS. THE SUPREME COURT RULES REGARDING DEPOSITIONS SPECIFICALLY STATE THAT A COURT CAN AWARD SANCTIONS AS PROVIDED IN RULE 61.01, WHICH ALLOWS THE COURT TO AWARD ATTORNEYS FEES, EXPENSES, AND EVEN TO STRIKE A PARTY'S PLEADINGS. IN THIS CASE, THE NEED TO TAKE THE DEPOSITIONS OF DR. POETZ AND DR. ALTSHELER AROSE IN PART DUE TO THE EMPLOYER'S UNREASONABLE REFUSAL TO PROVIDE AND/OR TO PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE WITHOUT REASONABLE GROUNDS.**

**(C) THE COMMISSION DID HAVE EVIDENCE OF DR. ALTSHELER'S DEPOSITION FEE AND THE COURT REPORTER'S CHARGES, AND THEY SHOULD HAVE BEEN AWARDED, AS PART OF THE WHOLE COST OF THE PROCEEDINGS UNDER §287.560.**

This Honorable Court has never determined whether attorneys fees can be awarded under §287.560 RSMo as part of the "whole cost of the proceedings" incurred due to groundless defenses. Since this issue is purely an interpretation of law, this Court reviews the issue de novo. Endicott v Display Technologies, 77 SW3d 612, 615 (Mo banc 2002). The Court of Appeals, Southern District, has specifically ruled that attorneys fees cannot be awarded. Reese v Coleman, 990 SW2d 195, 199-201 (MoApp SD 1999) Judge Newcomb thought the defense of the shoulder claim was so reprehensible that it should be referred to the Fraud and Noncompliance Unit for possible prosecution. (LF 28) He specifically found he

was unable to award attorneys fees under Reese. (LF 57) It is clear though that Judge Newcomb wanted to award attorneys fees, as the Award states, “However, there was no specific evidence provided as to what those exact costs (were) other than the \$600.00 deposition bill of Dr. Poetz which I award in addition to the attorney’s lien of 25% (emphasis ours).” (LF 55, A 19) This Award was adopted by and incorporated by the Commission without qualification. (LF 57) The Eastern District disagreed with the Southern District’s Opinion in Reese and reversed the Commission’s decision, finding that attorney’s could be awarded as a “whole cost of the proceedings” under §287.560. Therefore, there is a direct conflict between the Southern and Eastern Districts, and this Court accepted transfer.

Claimant maintains Administrative Law Judges and the Commission should have the authority under §287.560 to award attorneys fees to prevent the type of reprehensible conduct that occurred in the defense of these claims. In contrast to Employer’s Brief, Claimant is not maintaining §287.560 mandates cost of the proceedings, including attorneys fees, to the prevailing party. Instead, Claimant is maintaining that this Statute gives discretion to the Commission and to Administrative Law Judges to award the whole cost of proceedings the innocent party expended in claims brought, prosecuted, and defended without reasonable grounds. This is the same discretion guaranteed to circuit courts underneath Supreme Court Rule 55.03. Clearly, the intent of the Legislature was to ensure that all claims are brought, prosecuted or defended upon reasonable grounds, and to give to the Commission the discretion to sanction those who violate that intent and to compensate those who have been victims of violations of that intent. Claimant is asking that whole cost of the proceedings

include attorneys fees, as it will give effect to the Legislature's intent. Lincoln County Stone Co, Inc v Koenig, 21 SW3d 142, 146 (MoApp ED 2000).

§287.560 RSMo. (1993) provides in pertinent part:

“ . .if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. . .”

**(A) THE INDUSTRIAL COMMISSION DID NOT ABUSE ITS DISCRETION IN FINDING THAT BOTH CLAIMS WERE DEFENDED WITHOUT REASONABLE GROUNDS, IN VIOLATION OF §287.560, AS:**

7. THE RECORD ESTABLISHES THAT THE EMPLOYER EXHIBITED REPREHENSIBLE CONDUCT IN THE HANDLING OF BOTH OF THESE CLAIMS.

Employer<sup>5</sup> argues that Judge Newcomb focused on one aspect of its defense, as opposed to the entire case, and as such, he improperly awarded costs. In fact, the record reflects an entire pattern of contemptible, if not criminal, behavior in the defense of these claims, including the following:

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<sup>5</sup>Throughout this Brief, the defense is referred to as the Employer for brevity. For a point of clarification, the insurance company and those that were hired to defend or adjust the claims have delayed or denied these claims. Claimant has received separate correspondence from Ice Cream Specialties, her Employer, thanking her for her 17 plus years of service and acknowledging that her condition is related to her work. This is not being stated to influence the decision on the compensability of either claim, but to disburse with any suggestions that Ice Cream Specialties promulgated this “defense”.

- (4) Hiding and concealing medical reports of its examining physician, despite six separate requests for same and the mandate of §287.210.3 RSMo (TR 437, 689-705, 733-734, LF 55);
- (5) Refusing to comply with an agreement to pay for past medical and temporary disability and provide medical care and temporary disability pursuant to the opinion of its examining physician (TR 721, 733-734);
- (6) Refusing to pay temporary disability, when it is owed pursuant to not only all of the medical records and treating physician's report, but its own examining physician's report (TR 434-438, 539-573, 733-734, LF 51, 118-119);
- (7) Refusing to pay medical bills for past treatment, when all of the medical records and reports indicate same should be paid, including the report of its own examining physician (TR 434-438, LF 52-53, 120-121);
- (8) Refusing and/or failing to pay for past due medical expenses, after it agreed to pay same at a mediation before the Honorable Howard Percy (LF 52, 55, 120-121); and
- (9) Refusing to pay for or provide additional treatment, when all of the medical records and reports, including that of its examining physician, indicated same should be provided (LF 52, 55, 120-121, TR 434-438).

Clearly, a review of the entire case shows that these claims were defended without reasonable ground. There is overwhelming evidence to support the Commission's finding of a defense without reasonable grounds of both claims under §287.560, and the findings should be affirmed. Stillwell v Universal Const. Co, 922 SW2d 448, 457 (MoApp WD 1996)

Employer repeatedly cites Desselle v Quadpac, Inc., 995 WL 765370 (Inds Cmsn 1995) in support of its defense of these claims. Hiring a defense attorney, filing an Answer, filing a Report of Injury, and deposing the claimant, does not mean that a claim has been defended with reasonable ground. The Commission's docket would be backlogged for years, if all cases were defended such as this one. There has to be some basis in law or fact for a defense to be reasonable. In this case, Employer refused to pay temporary disability and past medical and provide future medical contrary to all the facts and well-established jurisprudence. This type of defense, if it can legitimately be called a "defense", is reprehensible. If this Court doesn't sanction this type of "defense", it will be condoning it. Basically, in all future cases, an employer could unreasonably refuse to pay any medical bills or any temporary disability with impunity, as long as they filed an Answer and hired a defense firm. Since the Workers' Compensation Act is to be liberally construed in favor of the claimant and the awarding of compensation, Wolfgeher v Wagner Cartage Service, Inc., 646 SW2d 781 (Mobanc 1983), these types of "defenses" should not be condoned, but instead, severely sanctioned. Trying to compare the 1997 claim to Desselle, Employer argues the following in its Brief,

"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 arguments and offered competent medical evidence and expert testimony to support these 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.(Employer’s Brief, Page 51)”

First, it is interesting to note that there is no cite to any medical evidence that supposedly supports these arguments, whether they were believed by ICS in good faith or not. Second, no legitimate arguments have yet to be offered why it refused to pay or delayed paying the temporary disability or past medical. Third, the record unequivocally establishes that Employer presented no medical evidence or expert testimony, in support of its position or otherwise. The only medical records or deposition testimony was offered by Claimant. (See index to Transcript) Fourth, Employer only paid \$334.45 in temporary disability prior to Claimant uncovering the concealed medical report of Dr. Petkovich, filing the verified Request for Hardship Setting, and appearing at the Mediation. (TR 735-740) Then, Employer only paid \$13,780.22 in temporary disability, even though \$15,588.38 was the amount discussed at the mediation on 6/13/00. This \$13,780.22 was paid on 6/27/00, but it was for the time period of 8/11/99 through 3/3/00, far past the maximum two week period for payment of temporary disability under the Act. [See §287.160.2 RSMo (1998) providing, “Compensation shall be payable as the wages were paid prior to the injury, but in any event at least once every two weeks . . .” and §287.170.2 RSMo (1998) providing, “Temporary total disability payments shall be made to the claimant by check or other negotiable instruments approved by the director which will not result in delay in payment. . .”] Fifth, Employer did not provide medical treatment in 1999 or thereafter. Claimant had to seek it on her own, as the Employer would not provide treatment. (TR 26-27) Employer only set up an appointment with Dr. Petkovich and then refused to follow his recommendations. (TR 27, 434-438, LF 55) With payment of the bills

totaling \$17,911.30 for the medical treatment Claimant obtained on her own, Employer agreed to pay this at the Mediation on 6/13/00, but it did not pay the medical until 7/15/02. Basically, all the assertions in the above section of Employer's Brief, in the mildest terms, would be described as a gross distortion of the truth. It is just one more example of the Employer's delay and denial of these claims without reasonable grounds.

The only argument that Employer has raised, which had any potential merit at the trial level or before the Commission, was who is liable for Permanent Total Disability under the 1999 claim. This issue though did not justify the groundless defense of every other issue in the 1999 claim. Trying to compare the 1999 claim to Desselle, Employer argues the following in its Brief:

"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 permanent disability and which party was liable to claimant for that disability, arguments that the Commission itself found to be appropriate. (Employer's Brief, pg 53)"

Once again, there is no cite to the record. In particular, there is no evidence, case law, or portions of the Act, which supports its failure to pay temporary disability and medical. Dr. Poetz testified that Claimant had a compensable occupational disease, consisting of an aggravation of a pre-existing condition, which resulted in Permanent Partial Disability. (TR 198-204, 208-209, 227-228) Dr. Altsheler testified that Claimant did not have any pre-existing condition and had a compensable occupational disease, which resulted in Permanent Total

Disability. (TR 286-288, 292-293, 314, 318-331, 334-335, 347-348 ) Both physicians testified though that all of the medical bills for treatment of the venous stasis were due to the occupational disease, and that Claimant was temporarily disabled because of the occupational disease of venous stasis.(TR 204-207, 271-272, 310-311, 314) Regardless of who was liable for Permanent Total Disability, there is no evidence indicating that Employer was not liable for temporary disability and medical expenses under the venous stasis occupational disease claim. Contrary to the above assertion in Employer's brief, there was no basis or grounds, reasonable or otherwise, under the Act, caselaw, or evidence for the denial of the issue of temporary disability and medical in the 1999 claim. The same is true with regard to the July 26, 1997 injury, as there is no opinion contrary to Dr. Poetz's opinion and Dr. Petkovich's opinion. (TR 205-206, 434-438) As such, there is more than sufficient evidence to affirm the Commission's finding that both claims were defended without reasonable grounds, in violation of §287.560. Stillwell v Universal Const. Co, 922 SW2d 448, 457 (MoApp WD 1996)

**2. IT WAS WITHIN THE DISCRETION OF THE COMMISSION TO DETERMINE WHETHER THERE WAS A VIOLATION OF §287.560 AND THEY DID NOT ABUSE THAT DISCRETION.**

Clearly, the Statute provides that the Commission may award the whole cost of the proceedings, so it would necessarily be within the Commission's discretion. For purposes of review, the evidence and inferences are to be reviewed in the light most favorable to the finding of the Commission and the exercise of that discretion. Akers vs. Warson Garden Apartments, 961 S.W.2d 50, 53 (Mo.banc 1998). It should only be set aside when it is clearly

contrary to the overwhelming weight of the evidence. Akers, supra. In this case, the Employer has still not come forward with any basis or grounds, reasonable or otherwise, for its failure to promptly pay the temporary disability or medical care for either claim. Before one even gets into the lack of any explanation for hiding Dr. Petkovich's medical report or refusing to comply with agreements before the exam with Dr. Petkovich and at the Mediation before Judge Percy (TR 721, 733-734, LF 52-55), there is more than sufficient evidence to support the Commission's Award. Stillwell, supra This shall not be repeated, as it was adequately stated in subpart A(1) of this Issue.

**3. THE STATUTE SHOULD BE ENFORCED AS WRITTEN, AND THERE IS NO REQUIREMENT THAT THE DEFENSE OF THE ENTIRE CASE BE GROUNDLESS OR THAT THERE BE A FINDING OF BAD FAITH FOR FINDING A VIOLATION OF §287.560 RSMO.**

Employer repeatedly argues in its Brief that §287.560 requires a finding that the defense of the entire case was without reasonable grounds.<sup>6</sup> Clearly, Employer is adding extra words to the Statute. §287.560 does not read, ". . . if the commission determines that an (any) entire proceeding(s) have been brought, prosecuted or defended without reasonable grounds,

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<sup>6</sup>As noted by the Court of Appeals in its Opinion, page 19, "In fact, urging such an approach has been characterized as a tacit admission that some issues raised in the defense are not reasonable. See *Crowell v Sigma Chemical Co.*, 97-072989, 2002 WL 1400967, at 2 Mo. Lab. Ind. Rel. Com. (June 28, 2002)."

. . .” [underlined words added to Statute]. Employer is adding extra words to the Statute, which completely distorts the meaning given by the Legislature. §287.560 clearly does not use the word “entire” or even imply the word “entire”. The legislature used the word, “any proceedings”, which necessarily includes any portion of the bringing, prosecution or defense of a claim. The Court must interpret the intent of the Legislature from the words that are used, and not create some additional verbiage to create a higher standard and frustrate the intent of the Legislature. Lincoln County Stone Co., Inc. v Koenig, 21 SW3d 142, 146 (MoApp ED 2000)

Furthermore, all appellate decisions, interpreting §287.560, have not required a finding that defense of the entire case be without reasonable grounds. In Stillwell v Universal Construction Co., 922 SW2d 448, 456 (MoApp WD 1996), the Court found that the Commission abused its discretion in failing to award costs under §287.560, because there was absolutely no ground, reasonable or otherwise, for the employer’s failure to pay \$2,000.00 in burial expenses it clearly owed. It remanded to the Commission for the determination of the amount of costs. No specific costs had been requested by the claimant. Clearly, there was no requirement that the entire case was defended without reasonable grounds. In Reese v Coleman, 990 SW2d 195, 201 (MoApp SD 1999), the Court did not reach a determination of whether the case was defended with reasonable grounds when the employer refused to pay for treatment he directed and scheduled. It simply refused the award of attorneys fees, indicating it was not a permissible whole cost of proceedings under §287.560. In the case at bar, the Court of Appeals, Eastern District affirmed the Commission’s finding that there was no reasonable grounds in defense of some issues of both claims and that justified an award

of costs under §287.560. In McCormack vs. Carmen Shell Construction, 2002 WL 1363006 (Slip Opinion No 60771, MoApp WD 2002), the Court held at page 11:

“In addition, the Commission found that although Shell had not been unreasonable in defense of all issues, ‘the discontinuation of the temporary total disability benefits [when Mr. McCormack was unable to go to the Mayo Clinic] was clearly unreasonable and arbitrary. Accordingly, [Mr. McCormack was] awarded costs pursuant to section 287.560.’ As a result, ‘in weighing the nature of the offensive behavior, and the expenses incurred, [the Commission found Shell and its insurer] should pay the cost of the deposition fees of the medical experts. . . in the amount of \$5,162.50’.”

All appellate decisions, interpreting §287.560, are contrary to the Employer’s argument that the defense of the entire case must be without reasonable grounds to justify an award of whole cost of the proceedings under §287.560.

This establishes that the standard for a violation of §287.560 is not the same standard for a finding of a frivolous appeal, as advocated by Employer in its brief. The distinction is with a frivolous appeal, all issues raised on appeal have to be baseless. If that one distinction is set aside, it is clear that Employer’s defense of these claims was frivolous. In Gilleylen v Surety foods, Inc., 963 SW2d 15, 18 (MoApp ED 1998), the Court held:

“An appeal is frivolous if it presents no justiciable question and is so readily recognizable as devoid of merit on the face of the record that there is little prospect that it can ever succeed.”

Employer refused to pay \$17,911.30 in medical or provide treatment under Injury # 97-072979, when all medical records, medical reports and physician testimony indicated same was related to the underlying injury, even the reports of its examining physician. Clearly, there was no prospect for succeeding, but it refused to pay. In Injury # 99-029378, it refused to pay \$15,582.12 in medical or provide treatment when all medical records and medical testimony was that it was related to a compensable occupational disease. Without any evidence, the Employer refused to provide treatment, even though it had a statutory obligation to provide treatment under §287.140 RSMo. Next, there is absolutely no opinion evidence or medical record to contradict the Commission's finding of Temporary Total Disability for the occupational disease. (LF 118-119) Without any evidence to refute it owed Temporary Total Disability, there was no prospect for Employer to succeed. Clearly, Employer had to reasonably know that it would owe Temporary Total Disability of \$21,474.40 and medical of \$33,493.42 and it had little to no prospect of avoiding payment. Under the standard for a frivolous appeal, the Employer's defense of both claims was without reasonable grounds.

Gilleylen, supra.

Also, there is no necessity for finding bad faith, even though bad faith is abundant in the defense of both claims. Contrary to Employer's Brief, bad faith is established by the failure to promptly pay the medical and temporary disability in both claims, the hiding of Dr. Petkovich's report, the refusal to comply with the agreement reached before the exam by Dr. Petkovich, the refusal to comply with the agreement reached at the Mediation, the refusal to pay and delay in paying benefits that were awarded and not appealed until shortly before Oral Argument in the Court of Appeals, and the continued refusal to pay the \$19,601.36 in

temporary disability awarded in the 1999 claim but not appealed. Even though Claimant does not have to establish bad faith under §287.560, it is clearly established throughout the entire handling of both claims.

It is also clear that Employer's position, that the defense of the entire claim has to be without reasonable grounds for whole costs of proceedings to be awarded under §287.560, would frustrate the intent of the Statute. This is vividly seen, when Employer's position is applied to a typical claim. Most claims do not result in permanent total disability. Instead, the claimant is off of work for a period of time and requires medical care and temporary disability. A large percentage do result in some permanent disability, but it is predominantly permanent partial. A large number of these claims are handled pro se, and they are negotiated with the assistance of a legal advisor. Under the Employer's argument, as long as one aspect of the defense was reasonable, such as nature and extent of Permanent Partial Disability, which is always subject to debate, it could refuse to pay all other benefits, such as medical care or temporary disability. This would mean that every single case would be litigated. Certainly, it would benefit the insurance companies, because they would hold on to the benefits they should properly be paying, but it would be contrary to the entire purpose of the Workers' Compensation Act to provide a simple and expedient manner for redress of work-related injuries. Fisher v Waste Management of Missouri, Inc., 58 SW3d 523, 527 (Mo banc 2001). As noted by this Court in Fisher, supra at 527, "The efficient operation of the system depends upon the informal resolution by settlement of the overwhelming majority to the cases." The Employer's position is untenable and contrary to the entire method by which the Workers Compensation system is set up. Is it too much to ask to have some reasonable ground for a

defense of an issue, to not hide medical reports in violation of §287.210.3, or to comply with agreements you enter? The Legislature did not think so, and it enacted §287.560.

**(B) THE COMMISSION DID ERR IN FAILING TO AWARD ATTORNEYS FEES, AS THE EMPLOYER'S DEFENSE OF BOTH OF THESE CLAIMS CONSTITUTE AN ENTIRE COURSE OF UNREASONABLE CONDUCT, WHICH MANDATES THE AWARD OF ATTORNEYS FEES. §287.560 RSMO. SHOULD INCLUDE ATTORNEYS FEES, AS:**

- 1. §287.203 RSMO. HAS BEEN DETERMINED TO INCLUDE ATTORNEYS FEES AND "WHOLE COST OF PROCEEDINGS" UNDER §287.560 IS BROADER THAN "COST OF RECOVERY" PROVIDED UNDER §287.203;**

In P.M. vs. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846 (Mo.App. E.D. 1996), the court held that "cost of recovery" under §287.203 RSMo. included attorneys fees. The court specifically held at 849:

"Finally we think that the phrase 'cost of recovery' contemplates an award of attorney's fee on its face, since legal fees are unquestionably the largest cost incurred when an employee is forced to sue to recover a Worker's Compensation award. We hold that the LIRC correctly interpreted §287.203 when it awarded P.M. her attorney's fee pursuant to that provision."

This Court denied transfer of P.M., supra on November 19, 1996. Therefore, it has been established that "cost of recovery" under §287.203 does include attorneys fees. In a case interpreting §287.560, the Court of Appeals, Southern District, held that "whole cost of

proceedings” did not include attorneys fees. Reese vs. Coleman, 990 S.W.2d 195, 199-201 (Mo.App. S.D. 1999). It specifically reversed the Industrial Commission’s award of attorneys fees against the employer. An Application for Transfer was not filed in Reese, and this was only a decision of the Missouri Court of Appeals, Southern District.

When a term is not defined in a Statute, the intent and purpose of the Legislature are examined. Intent is derived from the Statute’s words used in their plain and ordinary meaning. Dictionary definitions are utilized. Fisher v Waste Management of Missouri, Inc., 58 S.W.3d 523, 526 (Mo banc 2001). Black’s Law Dictionary (7<sup>th</sup> Edition, 1999) defines “recovery” and “proceedings” in pertinent part, as follows:

“Proceeding. 1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment. 2. Any procedural means for seeking redress from a tribunal or agency. 3. An act or step that is part of a larger action. 4. The business conducted by a court or other official body; a hearing . . .”

“Recovery. 1. The regaining or restoration of something lost or taken away. 2. The obtainment of a right to something (esp. damages) by a judgment or decree. 3. An amount awarded in or collected from a judgement or decree.”

Clearly, “proceeding” is broader than “recovery”, and if “cost of recovery” includes attorneys fees under §287.203 RSMo. (1993), then “whole cost of proceedings” under §287.560 RSMo. (1993) should include attorneys fees. This is particularly true, as §287.560 includes the “whole cost”. Also, it is clear that with a workers compensation case, there are no jury fees and no court reporter charges for preparing the trial transcript. If the Court were to give “whole cost

of proceedings”, it would necessarily have to include attorneys fees or it would be virtually meaningless to award costs. Fisher, supra As noted by the court in PM, supra, the largest incurred cost for a claimant in a worker’s compensation claims is attorneys fees. Claimant should not be denied recovery of this largest incurred cost, in light of the reprehensible conduct in the defense of these claims.

The Eastern District specifically held that attorneys fees are recoverable under both §287.560 and §287.203. They specifically noted that the court in Reese focused on the word, cost, and the cases narrowly construing court costs, when §287.560 used the phrase “whole cost of the proceedings”. Employer’s Brief also misses the mark, as it concedes that attorneys fees are permissible under §287.203.

To discover the legislative intent, Courts examine the problems the Legislature sought to address with the Statute. Lincoln County Stone Co. v Koenig, 21 SW3d 142, 146 (MoApp ED 2000). §287.203 applies when an employer has paid some temporary disability and then stops those payments without reasonable basis. §287.560 applies when a claim has been brought, prosecuted or defended without reasonable grounds. Under Employer’s argument, attorneys fees should be awarded, when the Employer paid some temporary total disability and then unreasonably stops payments of same, but attorneys fees should not be awarded, if an employer unreasonably refuses to pay any temporary disability or medical at all. This would be an incentive to employers to not pay any benefits. This argument is juxtaposed to §287.800 RSMo (1965), which mandates that the Act be liberally construed with a view to the public welfare. In Mickey v City Wide Maintenance, 996 SW2d 144, 148 (MoApp WD 1999), the Court held:

“The purpose of the compensation law, since its adoption by the legislature in 1925, is to make industry bear the burden of compensating employees for injuries arising out of, and in the scope and course of their employment, and is to be broadly and liberally construed and interpreted to extend benefits to the largest possible class and any doubt as to the right of compensation is to be resolved in favor of the employee. *Bass v. National Super Markets, Inc.*, 911 S.W.2d 617, 619 (Mo.banc 1995); *West vs. Posten Construction Co.*, 804 S.W.2d 743, 746 (Mo.banc 1991); *Gaston v. J.H., Ware Trucking, Inc.*, 849 S.W.2d 70, 75 (Mo.App. 1993). ‘The very object and purpose of the entire act is that substantial rights are to be enforced,’ *Wiele v. National Super Markets, Inc.*, 948 S.W.2d 142, 146 (Mo.App. 1997), and the act ‘should be liberally construed as to effectuate its purpose and humane design.’ *Rogers v. Pacesetter Corp.*, 972 S.W.2d 540, 542 (Mo.App. 1998). The following language is taken from this court’s opinion in *Betz v. Columbia Telephone Co.*, 224 Mo.App. 1004, 24 S.W.2d 224, 228 (1930) is apropos: ‘Different sections of a statute bearing on the same subject must be harmonized, if possible. . . . Apparently conflicting provisions must be reconciled, if possible, with the general legislature purpose. . . . It is a useful and safe rule of construction to resolve any ambiguity or obscurity in a statute in favor of such reading as will best meet the demands of natural justice, so far as that can be done without violence to settled legal principles.’”

In Mickey, the Court reversed the Industrial Commission and held that the modifications to a van so a paraplegic could get in and out of the van was proper future medical treatment under §287.140 RSMo. In this case, it clearly would effectuate the purposes of the Act for attorneys fees to be awarded in cases where medical benefits and temporary disability benefits are denied without reasonable grounds. Respondent is asking that substantial justice for the attorneys fees, experts' fees, and court reporter charges she had to pay for the baseless denial of the medical and temporary disability and for this Court to harmonize §287.203 and §287.560 Mickey, supra. If attorneys fees can be awarded in a situation where a party pays some benefits but then unreasonably refuses to pay further benefits, PM, supra, then attorneys fees should be awarded to a party whose benefits are denied from the outset completely without reasonable grounds. Mickey, supra.

Claimant maintains the Legislature used different language in §287.560 and §287.203, as it wanted to grant the Commission discretion and greater latitude under §287.560. With §287.203, a hearing must occur within 60 days, and the cost of recovery would be limited to preparation for that hearing and the hearing itself. In contrast, §287.560 gives the Commission the discretion to award the whole cost of the proceedings, as opposed to preparation for one hearing. The broader discretion under §287.560 should not be a basis for holding both don't include attorneys fees. If the two Statutes are harmonized, State ex rel Rothermich v Gallagher, 816 SW2d 194 (Mo banc 1991), the same categories of costs (attorneys fees, copy charges, experts' fees, and court reporter charges) would be recoverable under both. The difference would be there would be no discretion under §287.203 whether to award costs, but the costs would be limited to preparation for the hearing and the hearing,

whereas with §287.560, the award of costs would be discretionary, but could include costs with any part of the proceedings. This is the result which is reached when the Statutes are harmonized, State ex rel Rothermich, supra.

**2. THE LARGEST INCURRED COST FOR A CLAIMANT IN A WORKER'S COMPENSATION CLAIM IS ATTORNEYS FEES, AND THEY SHOULD BE AWARDED WHEN FEES ARE INCURRED, BECAUSE CLAIMS ARE DEFENDED WITHOUT REASONABLE GROUNDS.**

An Administrative Law Judge and the Commission must have jurisdiction to award something greater than experts' fees for giving depositions, when an employer defends a case such as these two claims. Claimant suffered great hardship due to the Employer's refusal to pay and delay in paying the Temporary Total Disability. Her husband had to work three jobs just to pay their bills (TR 27-28). Due to the medical bills not being paid, she could not obtain any credit (TR 43). Employer did not pay Temporary Total Disability for the time period of 8/11/99 to 3/3/00 until 6/27/00, and that was only after Claimant's attorney obtained Dr. Petkovich's report, filed the verified Request for Hardship setting, and the Mediation before Judge Percy. (TR 735-740) Employer did not pay for the time period of 7/15/99 to 8/10/99 until 7/15/02. (See 8/15/02 letter to Court of Appeals, Eastern District) Claimant had regularly worked for this Employer for over 17+ years from 1982 through 1999, and she should not have had her disability benefits delayed like this. Judge Newcomb found she was temporarily and totally disabled for the time period of 3/18/99 to 9/25/00. (LF 118-119) Employer has still not paid Temporary Total Disability for the time periods of 3/18/99 through 7/14/99 and 3/4/00 through 9/25/00. This is \$19,601.36 under Injury Number 99-029378. (LF 98) Claimant was

denied payment of these weekly benefits without any medical basis and contrary to all the medical evidence. Claimant should have been paid this compensation without a trial. The failure to pay the temporary disability, contrary to all medical opinions, should result in an award of “whole cost of the proceedings”, greater than \$600.00

If §287.560 RSMo (1993) doesn't include attorneys fees in situations like this, then employers will be able to unreasonably refuse to provide and/or pay temporary disability or medical care with almost impunity. If all they have to fear is the payment of \$1,125.00 (\$600.00 for Dr. Poetz and \$525.00 for Dr. Altsheler) for hiding medical reports, possibly criminally, then §287.560 RSMo. will fail its legislative intent of sanctioning those that defend claims without reasonable grounds. Employer withheld payment of \$35,254.62 in temporary disability and \$33,493.42 in medical bills over a period of years. The interest earned on these sums will exceed the whole cost of the proceedings, if whole cost is limited to physician's fees and court reporter charges. Certainly, unreasonable, baseless positions should not be rewarded. In fact, it is unbelievable that Employer still maintains that it is defending these claims with reasonable grounds. It has not appealed the Award of \$19,601.36 in Temporary Total Disability under Injury Number 99-029379 (L 97-98, A 22-23). Since it did not raise this Issue before the Commission, the Issue cannot be raised on appeal in this Court. Brown v Sunshine Chevrolet GEO, Inc., 27 SW3d 880, 883 (MoApp SD 2000) These Awards were entered on February 28, 2001 (LF 10-29, 63-89) by Judge Newcomb and on October 24, 2001 by the Commission (LF 37-57, 97-124). Employer knew Claimant was suffering severe economic hardship (TR 27-28, 43), but rather than pay all portions of the Award that it indisputably will have to pay, it continues to defend the claims without reasonable ground and

refuses to pay. Brown, supra This is further evidence of the baseless defense of these claims to the damage of Claimant.

Claimant was basically without any benefits from July 15, 1999 through June of 2000 (TR 27-28, 43). Then, Employer paid some weekly benefits, but the payment was significantly delayed and cost Claimant 25% as and for an attorneys fee, which was approved by Judge Percy. Specifically, Employer paid \$13,780.22 in Temporary Total Disability, and Judge Percy approved an attorneys fee in the amount of \$3,445.05. Judge Newcomb awarded \$1,873.04 in Temporary Total Disability and \$17,911.30 in past medical expenses under Injury Number 97-072979. (LF 38, A 23) In Injury Number 99-029378, Judge Newcomb awarded \$19,601.36 in unpaid Temporary Total Disability and \$15,582.12 in past due medical expenses. Clearly, Claimant would not have incurred 25% attorneys fees for recovering this Temporary Total Disability or medical expenses, (LF 38, 98, A 2, 23) if these claims were defended with reasonable defenses, as opposed to totally unsupported, baseless ones. Claimant's "whole cost of proceedings" should include attorneys fees, including attorneys fees on these benefits, for which payment was denied without any reasonable ground. Claimant is requesting at least \$17,187.01 in attorneys fees, which is 25% attorneys fees on these amounts, which total \$68,748.04, based on the following breakdown:

**Injury Number 97-072979**

Temporary Total Disability Paid After Mediation with Judge Percy .....	\$13,780.22
Temporary Total Disability Awarded by Judge Newcomb .....	\$1,873.04
Medical Awarded by Judge Newcomb.....	<u>+\$17,911.30</u>
Subtotal:	\$33,564.56

**Injury Number 99-029378**

Temporary Total Disability Awarded by Judge Newcomb .....	\$19,601.36
Medical Awarded by Judge Newcomb.....	<u>+\$15,582.12</u>
Subtotal:	\$35,183.48
<b>Total:</b>	<b>\$68,748.04</b>

25% of \$68,748.04 = \$17,187.01. This consists of \$8,391.14 in attorneys fees under Injury Number 97-072979 and \$8,795.87 in attorneys fees under Injury Number 99-029378. The Commission found it was prohibited from awarding attorneys fees under Reese, supra. (LF 55, 123, A 19, 48) It is contrary to the required liberal construction of the Act to deny Claimant attorneys fees under §287.560 RSMo in a case defended like this one. Wolfgeher v Wagner Cartage Service, Inc., 646 SW2d 781 (Mo banc 1983).

Employer argues that Claimant did not incur any attorneys fees, as Claimant's counsel handled the claims on a contingency fee basis. (Employer's brief, pg 65-66) This is absurd, as the 25% approved by Judge Percy and Judge Newcomb, will be taken from the above \$68,748.04. These fees were only owed, as Employer contested payment. Attorneys fees are not charged on voluntary payments, and in fact, all attorneys fees charged a claimant have to be approved as reasonable and necessary. §287.260.1 RSMo (1986) Both Awards explicitly found that the attorneys fees were reasonable and necessary, including the 25% attorneys fees for the \$68,748.04 in benefits that were denied without any grounds, reasonable or otherwise. (LF 38, 98) The contingency fee of 25% was properly approved as to the entire Award in each claim, including the award of medical expenses. Wilmeth v TMI, Inc., 26 SW3d 476 (MoApp SD 2000) If Employer would have paid the benefits pursuant to the agreement

reached before the exam by Dr. Petkovich, there would not have been any attorneys fees charged on this \$68,748.04. Having Employer pay the attorneys fees Claimant had to incur for the groundless defense of these benefits will fulfill the clear legislative intent of sanctioning those who present defenses without reasonable grounds and compensating the victims of those defenses, by awarding them their “whole cost of proceedings”. Lincoln County Stone Co., Inc v Koenig, 21 SW3d 142 (MoApp ED 2000). In fact, it is Claimant’s position that §287.560 gives the discretion to the Commission to award attorneys fees for the entire claim, as opposed to simply attorneys fees on the benefits that were defended without reasonable grounds, as §287.560 clearly states “whole cost of the proceedings” and is not limited to those aspects which were defended unreasonably. This should be subject to the Commission’s discretion, which discretion is subject to review like any other aspect of a workers compensation claim. Rogers v Pacesetter Corp., 972 SW2d 540, 542 (MoApp ED 1998) If this Court doesn’t feel inclined to award a specific amount for attorneys fees, Claimant would respectfully request that this Court specifically find that attorneys fees are recoverable under §287.560 as part of the “whole cost of the proceedings” and remand the case to the Commission for a determination of Claimant’s “whole cost of the proceedings” in both claims, including attorneys fees.

**3. ONE OF THE PRIMARY PURPOSES BEHIND THE WORKERS’ COMPENSATION ACT WAS TO PROVIDE A QUICK RECOVERY FOR THOSE WHO ARE INJURED WITHOUT INCURRING THE COSTS OR DELAYS ASSOCIATED WITH PROTRACTED LITIGATION. If §287.560 DOESN’T INCLUDE ATTORNEYS FEES IN CASES WHERE THE EMPLOYER**

**UNREASONABLY REFUSES TO PROVIDE AND/OR PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE, ONE OF THE PRIMARY PURPOSES BEHIND THE ENACTMENT OF THE WORKERS' COMPENSATION ACT WILL BE THWARTED.**

As was held in McCormack v Stewart Enterprises, Inc., 916 SW2d 219 at 225-226 (MoApp WD 1995):

“The primary purpose behind the Workers’ Compensation Act was to mitigate losses sustained from accidental injuries sustained in the work place. . . The system was enacted to provide quick recovery to those who are injured without their incurring the cost or delay associated with litigation.”

§287.560 RSMo. was enacted to punish those who violate this purpose. In this case, the Employer maximized Claimant’s losses with significant delays and costs. As this Court recently held in Fisher v Waste Management of Missouri, Inc., 58 SW3d 523, 527 (Mo banc 2001):

“. . . The purpose of the workers compensation proceedings under chapter 287 is to give employees expeditious and simple means of compensation for injuries suffered in the course of employment. St. Lawrence v Trans World Airlines, Inc., 8 S.W.3d 143, 149 (Mo. App. 1999). Discovery relies largely upon reports including the report of injury and reports of physicians. Section 287.127 and 287.210. Section 287.210.3, for instance, provides for exchange of medical reports. This informal exchange system is not just for the purpose of preparing for adjudication, but to encourage settlement. The efficient operation

of the system depends upon the informal resolution by settlement of the overwhelming majority of the cases.”

In this case, the adjuster hid medical reports in violation of §287.210 RSMo. The clear purposes behind the Act will be frustrated, if severe sanctions cannot be awarded under §287.560. Fisher, supra.

**4. CASES INTERPRETING CIVIL COURT COST STATUTES, WHICH INDICATE SAID STATUTES SHOULD BE STRICTLY CONSTRUED DO NOT APPLY TO §287.560, AS §287.800 EXPRESSES THE DECLARED PUBLIC POLICY OF THIS STATE THAT THE ACT, INCLUDING §287.560, SHOULD BE LIBERALLY CONSTRUED.**

Employer’s Brief strenuously argues for a strict construction of §287.560 such that it only includes taxable court costs, as was advocated in Reese v Coleman, 990 SW2d 195 (MoApp SD 1999). Claimant admits, that by case law, civil court cost taxation statutes are to be strictly construed, Townsend v Boatmen’s National Bank of St. Louis, 159 SW2d 626, 628 (Mo 1942), but this is not true with §287.560. There is a clear directive from the Legislature that the all provisions of the Act, including §287.560, are to be liberally construed in favor of the Claimant and the awarding of compensation. §287.800 RSMo (1965) Wolfgeher v Wagner Cartage Service, Inc., 648 SW2d 781 (Mo banc 1983) Where the Legislature, acting within its constitutional jurisdiction, has declared the public policy of the State, such declared public policy is sacred ground and courts are bound by that policy. State of Mo on the Inf. of Dalton v Miles Laboratories, Inc., 282 SW2d 564, 574 (Mo banc 1955). The Southern District should have deferred to the clear public policy of a liberal construction of

§287.560, as opposed to a strict, narrow one. Budding v SSM Healthcare, 19 SW 3d 678, 682 (Mo banc 2000) All of the cases cited throughout Employer's brief dealing with strict construction of taxable court costs do not apply to this Workers Compensation claim, as Civil cost statutes are to be construed strictly and narrowly, but §287.560 is to be construed liberally with a view to the public welfare. Townsend, supra; §287.800

It is important to note that the Court in Reese, supra cited Stillwell v Universal Construction Co., 922 SW2d 448 (MoApp WD 1996) in support of its position that §287.560 should be limited to taxable court costs. In Stillwell, supra, the Court was not reviewing the appropriateness of any type of cost under §287.560. The Court simply found that the Commission's finding of no violation of §287.560 was contrary to the overwhelming weight of the evidence and not supported by competent and substantial evidence. It remanded for a determination of costs and stated in Stillwell, supra at 457:

“For these reasons, we remand to the Commission with directions that it award the entire cost of the proceeding to Mr. Stillwell. While there are no reported cases under Section 287.560 directing the Commission how to determine these costs, it may be guided by the reference in other portions of Section 287.560 to costs of depositions, transcripts, subpoenas, and the like. It may also be guided by the costs available in civil actions under Section 514.060 and by its own past practice in this regard.”

This was clearly dicta and the precedential value is thus limited. Furthermore, the Western District issued a later decision specifically affirming the Commission's Award of expenses under §287.560, including deposition fees of experts. McCormack v Carmen Shell

Construction Co., 2002 WL 1363006 (Slip Opinion WD 60771, MoApp WD 2002) Clearly, experts' fees are not a taxable court cost in a civil case. By this holding, the Western District has found that "whole cost of the proceedings" is something greater than court costs. The obvious question then is why it should not include a Claimant's greatest cost, attorneys fees. In this case, to collect the \$68,748.04 in benefits that were defended without any grounds, reasonable or otherwise, Claimant incurred \$17,187.01 in attorneys fees (25%), \$1,125.00 in experts fees, and \$661.80 in court reporter charges. (LF 38, 98, TR 398) 91% is attorneys fees, and they should be recoverable under §287.560.

The Eastern District's Opinion is in line with the clear directive of the legislature of a liberal construction of the Act and with the reality of costs with Workers Compensation claims. "Whole cost of the proceedings" must include something greater than taxable court costs or the Legislature intended an absurd and illogical result. There are no filing fees for workers' compensation claims, and there are no court cost bills that are sent out. The undersigned has been litigating Missouri Workers Compensation claims for over sixteen years and has never received a court cost bill. If §287.560 RSMo. is limited to court costs, then the Legislature enacted a meaningless provision, as there are no taxable court costs in workers' compensation cases. The decision in Reese, supra violates a fundamental rule of statutory construction that you assume that the Legislature did not intend an absurd and illogical result. In re Beyersdorfer, 59 SW3d 523, 526 (Mo banc 2001) The only logical result in this circumstance is that "whole cost of proceedings" include something greater than taxable court costs.

**5. OTHER RULES AND LAWS REGARDING CLAIMS OR DEFENSES BEING BASED UPON REASONABLE GROUNDS, INCLUDING SPECIFICALLY MISSOURI SUPREME COURT RULE 55.03(B), PROVIDE GUIDANCE AS TO THE INTENT OF THE LEGISLATURE WITH §287.560.**

Under the Rules of Statutory Construction, this Honorable Court can also examine other law to determine the intended meaning of §287.560, State ex rel. Rothermich v Gallagher, 816 SW2d 194, 200 (Mo banc 1991) Clearly, §287.560 was intended to prevent workers compensation claims from being brought, prosecuted, or defended without reasonable grounds. This type of provision is common to all types of litigation, and when comparing them, it is apparent that §287.560 was designed to give the Commission discretion to award a greater degree of sanctions.

Missouri Supreme Court Rule 55.03(b)(1994) provides in pertinent part:

**“(b) Representation to the Court.** By presenting or maintaining a claim, defense, request, demand, objection, contention, or argument in a pleading, motion, or other paper filed with or submitted to the court, an attorney or party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

(1) the claim, defense, request, demand, objection, contention, or argument is not presented or maintained for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”

This Supreme Court Rule provides guidance as to the meaning of “reasonable ground” under §287.560, State ex rel Rothermich, supra, and the “defense” of this case contrary to all the evidence and well-established jurisprudence deserves the award of costs. In this case, the “defense” did cause an unnecessary delay and needless increase in costs in violation of subparagraph (1). Payment of Temporary Total Disability and medical was delayed for long periods of time, and it cost Claimant in doctors’ deposition fees, court reporter transcripts, and attorneys fees. Under subparagraph (2), the “defense” was contrary to all established precedent, and there was no novel argument made. Under subparagraphs (3) and (4), all the medical records and reports, even its own examining physician’s report, indicated past medical should be paid, additional medical should be provided, and temporary disability should be paid. The “defense” of this case violates all four subparagraphs of Missouri Supreme Court Rule 55.03(b) (1994). It is important to note that sanctions can be awarded

under Missouri Supreme Court Rule 55.03 (1994) for a violation of any one of the four subparagraphs. In this case, Employer has violated all four subparagraphs.

This Supreme Court Rule also provides guidance as to the meaning of “costs” under §287.560 RSMo. State ex rel Rothermich, supra. Missouri Supreme Court Rule 55.03(c)(2) (1994) provides in pertinent part:

“(2) *Nature of Sanction—Limitations*. A sanction imposed for violation of this Rule 55.03 shall be limited to that which is sufficient to deter repetition of the conduct or comparable conduct by others similarly situated. Subject to the limitations in Rule 55.03(c)(1), the sanction may consist of or include directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys fees and other expenses incurred as a direct result of the violation. (emphasis ours)”

As a direct result of the violation of §287.560, Claimant incurred attorneys fees, experts’ fees for depositions, and court reporters’ charges. These costs should be awarded under §287.560. In fact, the sanctions, which can be imposed under §287.560, are greater than what can be imposed under 55.03, as (c)(2) limits them, whereas §287.560 gives the Commission the discretion to award the “whole cost of the proceedings”.

Claimant maintains that the broader category of sanctions under §287.560 was by legislative intent. This Court expressly found that one of purposes of the free exchange of information in workers compensation cases was to encourage settlement of issues, and that the efficient operation of the system depends upon the informal resolution of the overwhelming

majority of the cases. Fisher, supra at 527 It only follows that the effect of claims being brought, prosecuted, or defended without reasonable grounds, will have a greater effect in the workers compensation system. Based on this, the category of sanctions available to the Commission should be broader, and the Legislature provided for this, by giving them the discretion to award the whole cost of the proceedings, as opposed to limiting the sanctions as was done in Mo S. Ct Rule 55.03.

Also, with reference to Fisher, supra, it is important to note that the Act and entire workers compensation system is designed to informally resolve cases. Employer in this case has done everything to frustrate that design. An agreement was reached that Claimant would not file a Request For Hardship Setting, and instead, Employer would perform an exam with a doctor of its choice, Dr. Petkovich, and if he found the condition was work related, Employer would pay for the past treatment of the shoulder, provide treatment, and pay temporary disability. Instead of living up to this agreement, the adjuster hid Dr. Petkovich's report, refused to pay any past bills, and refused to provide treatment or temporary disability. (LF 44, 55, TR 730-735) Then, Employer agreed to pay temporary disability and medical at the Mediation before Judge Percy, but then it failed to pay the correct amount of temporary disability and any of the medical. (LF 52) If parties cannot be held to their word in Pre-Hearings and Mediations, any efficiency in the workers compensation system will break down. Hopefully, this Court would not have any compunction about awarding attorneys fees to a party, who had to incur fees, based upon another party breaking its word to this Court. Administrative Law Judges and the Commission should be found to have similar authority and

discretion to award attorneys fees under §287.560, when parties break their word and it cost the opposing party attorneys fees, experts fees, and court reporter charges.

**6. MISSOURI SUPREME COURT RULE 57, WHICH GOVERNS THE TAKING OF DEPOSITIONS IN CIVIL CASES, HAS BEEN SPECIFICALLY HELD TO CONTROL THE USE OF DEPOSITIONS IN WORKERS' COMPENSATION PROCEEDINGS. THE SUPREME COURT RULES REGARDING DEPOSITIONS SPECIFICALLY STATE THAT A COURT CAN AWARD SANCTIONS AS PROVIDED IN RULE 61.01, WHICH ALLOWS THE COURT TO AWARD ATTORNEYS FEES, EXPENSES, AND EVEN TO STRIKE A PARTY'S PLEADINGS. IN THIS CASE, THE NEED TO TAKE THE DEPOSITIONS OF DR. POETZ AND DR. ALTSHELER AROSE IN PART DUE TO THE EMPLOYER'S UNREASONABLE REFUSAL TO PROVIDE AND/OR TO PAY TEMPORARY TOTAL DISABILITY AND/OR FOR MEDICAL CARE WITHOUT REASONABLE GROUNDS.**

Being able to award attorneys fees under §287.560 would comply with the Missouri Supreme Court Rules, which govern the taking of depositions in civil cases. Specifically, it has been held that Rule 57 controls the use of depositions in workers' compensation proceedings. Tillman v Wedge Mobile Service Station, 565 SW2d 653 (MoApp 1978). This Court has repeatedly held that comparable sections of the Rules of Civil Procedure apply in workers' compensation cases as they pertain to depositions. State ex rel McConaha v Allen, 979 SW2d 188 (Mo banc 1998); Fisher v Waste Management of Missouri, 58 SW3d 523, 525 (Mo

banc 2001). Subpart (e) of Missouri Supreme Court Rule 57.03 (1994) titled, "Depositions Upon Oral Examination" specifically states that a court can award sanctions as provided in Rule 61.01(d) and (g) (1994), which allows the court to award attorneys fees, expenses, and even to strike a party's pleadings. Under McConaha, supra and Fisher, supra, an Administrative Law Judge should be able to award attorneys fees under §287.560. Clearly, the need to take the depositions of Dr. Poetz and Dr. Altsheler arose in part due to Employer's refusal to pay Temporary Total Disability and/or for medical care without reasonable cause or excuse. If the Supreme Court Rules regarding depositions do apply in workers compensation cases, Tillman, supra; McConaha, supra; and Fisher, supra, then Claimant should be awarded attorneys fees under Missouri Supreme Court Rule 57.03(e) (1994) and Missouri Supreme Court Rule 61.01(d) and (g) (1994).

3. THE COMMISSION DID HAVE EVIDENCE OF DR. ALTSHELER'S DEPOSITION FEE AND THE COURT REPORTER'S CHARGES, AND THEY SHOULD HAVE BEEN AWARDED, AS PART OF THE WHOLE COST OF THE PROCEEDINGS UNDER §287.560.

Judge Newcomb awarded \$600.00 for the deposition of Dr. Poetz. He was unaware that there was a fee of \$525.00 for Dr. Altsheler's deposition (LF 123, TR 398). He indicated he would have awarded costs, if any were presented. (LF 123) This \$525.00 charge was presented (TR 398), and it should also be awarded at a minimum. Claimant admitted into evidence a letter from Claimant's counsel to Dr. Altsheler dated 9/20/00. It stated in pertinent part:

“...You will enclosed please find my check number 6823 in the amount of \$525.00, payable to Paul Altsheler, MD, as and for a deposition retainer. It is my understanding that your fee for a deposition is \$350.00 per hour, and this retainer is payment of one and half hours. Obviously, if the deposition exceeds one and half hours, we will pay you the remaining balance....(TR 398)”

The deposition of Dr. Altsheler was taken and submitted into evidence. (TR 258-349) Also, it is clear that Dr. Altsheler’s transcript was 90 pages (TR 258-349), and Dr. Poetz’s transcript was 64 pages (TR 168-232). It is true that the court reporter’s charges were not introduced at the hearing before Judge Newcomb, showing charges of \$402.80 for Dr. Altsheler’s deposition transcript and \$259.00 for Dr. Poetz’s transcript, but the Commission had enough evidence before it to award a reasonable costs for these transcripts. The Commission has direct knowledge of this from the numerous transcripts that are prepared and the court reporter charges associated with same. Furthermore, the court reporter bills in the amount of \$402.80 and \$259.00 were presented to the Commission in the Appendix of Claimant’s brief before the Commission.

The Award stating that no costs were submitted in the 1999 claim, other than the request for attorneys fees, is not supported by competent and substantial evidence and is contrary to the overwhelming weight of the evidence, and it should be reversed. Gilley v Raskas Dairy, 903 SW2d 656, 658 (MoApp ED 1995) The Commission did not acknowledge Dr. Altsheler’s deposition fee and refuse to award same, they simply overlooked it in the record. As such, the Award of “whole cost of the proceedings” in the 1999 claim should include \$525.00 for the deposition fee for Dr. Altsheler. Also, the Award of whole costs in the

1997 claim should be increased by \$259.00 for the court reporter charge for Dr. Poetz's deposition and in the 1999 claim by \$402.80 for the court reporter charge for Dr. Altsheler's deposition.

## **ISSUE II**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING THE EMPLOYER LIABLE FOR PERMANENT TOTAL DISABILITY, AS CLAIMANT HAD SEVERE RESTRICTIONS FROM THE OCCUPATIONAL DISEASE OF VENOUS STASIS CONSIDERED ALONE, SUCH THAT SHE WOULD NOT EVEN BE ABLE TO PERFORM SEDENTARY WORK AND THE FACT THAT CLAIMANT EXPERIENCED SYMPTOMS OF THE OCCUPATIONAL DISEASE WITHOUT MISSING WORK BEFORE FEBRUARY 27, 1999 HAS NO EFFECT UPON THE EMPLOYER'S RESPONSIBILITY FOR PERMANENT TOTAL DISABILITY. IN THE ALTERNATIVE TO AFFIRMING THE AWARD OF PERMANENT TOTAL DISABILITY AGAINST THE EMPLOYER, CLAIMANT MAINTAINS THAT THE INDUSTRIAL COMMISSION ERRED AND THAT PERMANENT TOTAL DISABILITY SHOULD BE AWARDED AGAINST THE SECOND INJURY FUND DUE TO THE COMBINATION OF HER PRIMARY CONDITION OF VENOUS STASIS WITH HER PRE-EXISTING LEFT SHOULDER INJURY AND OBESITY.**

Claimant's testimony, that she could not work, is supported by all the medical and vocational opinions, and it constitutes substantial and competent evidence. Pruteanu v Electro Core, Inc., 847 SW2d 203 (MoApp ED 1993). The definition of "total disability" is the inability to return to any employment, not merely the inability to return to the employment in which the

employee was engaged at the time of the accident. Crum v Sachs Electric, 769 SW2d 131 (MoApp WD 1989). The term “any employment” means any reasonable or normal employment or occupation. Crum, supra. It is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. Brown v Treasurer of Missouri, 795 SW2d 479, 483 (MoApp ED 1990). The primary definition with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his/her present physical condition and reasonably expect him/her to perform the work for which he/she is hired, Brown, supra, or whether employee is able to compete in the open labor market. Story v Southern Roofing Co., 875 SW2d 228 (MoApp SD 1994); Talley v Runny Meade Estates, Ltd., 831 SW2d 692, 694 (MoApp ED 1992). Under §287.220.1 RSMo. (1998), the Second Injury Fund is liable for Permanent Total Disability, if the total disability is not the result of the last injury considered alone. Any pre-existing injury or condition, which would be considered a hindrance or obstacle to claimant’s competition for employment in the open labor market, should trigger Second Injury Fund liability. Carlson v Plant Farm, 952 SW2d 369 (MoApp WD 1997). If the last injury considered alone renders Claimant permanently and totally disabled, then the Second Injury Fund has no liability, and the Employer is liable for the whole amount. Hughey v Chrysler Corporation, 34 SW3d 845, 847 (MoApp ED 2000). The first analysis is whether Claimant is permanently and totally disabled due to the last injury considered alone. If so, Employer is liable for permanent total disability and there is no need to review any pre-existing injuries or conditions. Hughey, supra

Clearly, the finding of the Industrial Commission that Claimant was disabled as a result of the venous stasis condition alone is a Finding of Fact, as opposed to an interpretation of Law. The Commission's Award finding the Employer liable is authorized by law and supported by the overwhelming competent and substantial evidence, and as such, it should be affirmed. Gilley v Raskas Dairy, 903 SW2d 656, 658 (MoApp ED 1995).

The only dispute under Injury Number 99-029378 was whether the liability for Permanent Total Disability was due to the last injury considered alone or due to the combination of the primary injury with the pre-existing injuries and conditions. No one testified Claimant could work in any capacity. Claimant believes that the Commission was correct in determining that the Employer was liable for Permanent Total Disability, due to the seriousness of the limitations from the primary injury/condition of venous stasis. To the extent this Honorable Court would reverse the Commission and determine that Claimant is not permanently and totally disabled due to the venous stasis condition alone, Claimant maintains that Permanent Total Disability should be awarded against the Fund due to the combination of the primary injury with the pre-existing injuries and conditions. Carlson v Plant Farm, 952 SW2d 369 (MoApp WD 1997). Please note this is only being argued in the alternative, and Claimant verily believes that Permanent Total Disability should be awarded against the Employer under Injury Number 99-029378.

Employer, in essence, has made two arguments, but both are based upon the same premise of rejecting Dr. Altsheler's opinion and giving greater weight to the opinion of Dr. Poetz. First, it argues that if you accept the opinion of Dr. Poetz that Claimant is permanently and totally disabled due to a combination of injuries and conditions and reject the opinion of

Dr. Altsheler that Claimant is permanently and totally disabled due to the occupational disease of venous stasis considered alone, then the Commission's Award is contrary to the evidence.

Second, it argues that if you accept the opinion of Dr. Poetz that Claimant had both a pre-existing and occupational disease component to her venous stasis and reject Dr. Altsheler's opinions that all of the venous stasis was from the occupational disease, then the Commission's Award is contrary to the evidence. Both of these arguments fail as they violate the standard of review. As was held in Dudley v City of Des Peres, 72 SW3d 134, 137 (MoApp ED 2002)

“The Commission is the sole judge of the weight of the evidence and credibility of the witnesses. Sanderson v Porta Fab Corp, 989 SW2d 599, 601 (Mo. App. ED 1999). The Commission has sole discretion to determine the weight to be given expert opinions, and that determination cannot be reviewed by appellate courts. Id.

We will not disturb the choice of one medical opinion over another by the Commission unless the choice clearly results from an abuse of discretion. Cuba, 33 SW3d at 547.”

In this case, the Commission gave greater weight to the opinions of the nephrology subspecialist who regularly treats venous stasis over the opinions of a family practitioner. They also specifically noted that Dr. Altsheler's opinions were supported by the prior treatment records and the urinalysis, x-rays, blood tests, EKG's, echocardiograms, venograms, CT scans, Dopplers, and physical examination. (LF 117, A 42) This choice was not an abuse of discretion, and since the Commission has sole discretion to determine the weight to be given

to expert's opinions, both of the Employer's arguments fail and the Commission's Award of Permanent Total Disability against the Employer should be affirmed. Dudley, supra

Appellant, in essence, is urging the wrong of standard of review. When reviewing the sufficiency of the evidence, the evidence and inferences are reviewed in the light most favorable to the Award. Akers v Warson Garden Apartments, 961 SW2d 50, 53 (Mo banc 1998). They are only set aside when they are clearly contrary to the overwhelming weight of the evidence. Akers, supra. In this case, Appellant is adopting one aspect of the testimony of one witness, being Dr. Poetz, to argue an abuse of discretion for the Commission's Finding, which is supported by the testimony of every other witness and every other piece of evidence. This clearly violates the standard of review. Akers, supra

The Employer's first argument focuses heavily on the limitations from pre-existing injuries and conditions. That is not the threshold issue though, as under the case law, you first determine whether Claimant was permanently and totally disabled as a result of the last injury considered alone. If that is found, then the Employer is liable for Permanent Total Disability, and there is no reason to look at the pre-existing injuries and conditions. Hughey v Chrysler Corporation, 34 SW3d 845, 847 (MoApp ED 2000). Employer suggests that Dr. Altsheler's testimony lacks probative value, because he didn't consider the effect of Claimant's pre-existing disabilities when he opined that Claimant was permanently disabled due to the primary injury considered alone. (Employer's Brief, pg 47) This argument fails as a matter of law, as clearly under the case law and the directive of §287.220.1 RSMo. (1998), any physician should have looked first at the effects of the primary injury considered alone, without consideration of the prior injuries. Hughey, supra.

The Commission's decision is supported by the evidence and is not contrary to the overwhelming weight of the evidence. Claimant testified to various limitations due to her venous stasis. She has constant pain in her legs (TR 52). She can only sit for five minutes without her feet elevated above her heart (TR 55). She can't stand or walk at all without her legs wrapped (TR 54). Even with her legs wrapped, she instantly gets swelling. After five minutes, the pain is too bad, and she has to get off of her feet (TR 54-55). She also has problems lifting due to her legs (TR 55-56). As a result of these limitations, her husband and daughter do all the cooking and shopping (TR 60). Both Dr. Poetz and Dr. Altsheler agreed that the following were reasonable limitations due to the venous stasis condition alone:

- (1) Pain increased with walking, significantly increased if she walks 15 to 20 feet;
- (2) Increased pain with standing, with maximum standing of 20 minutes;
- (3) Increased pain with sitting without feet elevated for five minutes and 15 minutes maximum without feet elevated;
- (4) Increased pain with lifting that causes straining;
- (5) Limited activities due to being in a seated position most of the day with feet elevated above her head;
- (6) Having to use compression pump at least twice per day;
- (7) Limited endurance;
- (8) Having to urinate frequently due to water pill;
- (9) Difficulty riding in or driving a car (TR 197-198, 308-310).

She basically has to sit throughout the day with her feet elevated above her heart due to the venous stasis condition or primary injury considered alone. Due to the severity and type of

limitations from the primary injury considered alone, Permanent Total Disability should be with the Employer. Hughey, supra. The testimony of Dr. Altsheler and Dr. Poetz support Claimant's limitations from the occupational disease of venous stasis, and as such it constitutes substantial and competent evidence Pruteanu v Electro Core, Inc., 847 SW2d 203 (MoApp ED 1993).

Claimant testified that she was unable to return to work and unable to return to any job she had in the past. This was based not only upon her leg condition, but also her shoulder and weight (TR 16, 59). James England, the vocational expert, testified that Claimant was permanently and totally disabled and unable to compete in the open labor market, due to the combination of her leg conditions with the pre-existing conditions of her shoulder and her obesity (TR 111-112). He admitted though that the substantial factor in her inability to compete in the open labor market was her leg condition or venous stasis (TR 135). Basically, as a result of the venous stasis condition of her legs, she has to have her legs elevated for most of the day, and he did not know of any job where an employee could work with her feet elevated above her heart. (TR 110-111, 134-135) Vocational rehabilitation was not an option for her until she could sit in a normal fashion with her legs down in front of her (TR 112), and she was not capable of even sedentary work because of her venous stasis. (TR 134) In other words, even though James England indicated she was permanently and totally disabled as a result of her combined injuries and conditions, his testimony shows she could not work and was not fit for vocational rehabilitation because of her limitations from the primary injury of venous stasis considered alone. (TR 112, 134) Under the analysis mandated by §287.220.1

RSMo (1998), that should be the end of the inquiry, and there is no need to even inquire as to the prior injuries and conditions. Hughey, supra

Dr. Altsheler, the specialist, opined that Claimant was literally paralyzed by this particular venous stasis process. She was physically unable to maintain an upright posture, because of the venous stasis considered alone. (TR 293-294) He explained that any activity, which increases pressure in the chest that would be transmitted down to the lower extremities, or any activity, where her legs would be lower than her heart, would perpetuate the problem. This would include normal sitting, walking, standing, and any gravity-assisted stress situations, such as coughing, sneezing, lifting, bending, and stooping. With sitting, her feet would have to be above her heart, and they can't be equal to her hips (TR 293-294, 308-310). Judge Newcomb noted she sat like this during the hearing (TR 55). He, in fact, observed the gross swelling in her legs, when she momentarily removed the elastic wraps during the hearing. Judge Newcomb found her testimony credible and compelling (LF 116).

Dr. Altsheler opined that Claimant is permanently and totally disabled as a result of the venous condition alone (TR 314). Dr. Poetz opined that Claimant is permanently and totally disabled due to the combination of the venous stasis condition with her pre-existing injuries and conditions (TR 207-208). The Commission was free to give greater weight to Dr. Altsheler's opinion, and the Award of permanent total disability against the Employer should be affirmed. Cuba v Jon Thomas Salons, 33 SW3d 542, 547 (MoApp ED 2000).

The second argument of the Employer why it is not responsible for Permanent Total Disability is based upon accepting Dr. Poetz's opinion that some of the venous stasis was pre-existing and rejecting the opinion of Dr. Altsheler that all of the venous stasis is from the

occupational disease. This argument starts off with a complete misstatement of the facts and then confuses the law on when an occupational disease arises and the date a claimant first experiences symptoms. The argument fails both factually and under well-established precedent.

First, Employer states, "It is undisputed that, prior to the 1999 accident, claimant had a pre-existing venous stasis condition, and that this condition resulted in a 20% permanent partial disability to each lower extremity." (Employer's Brief, pg 72) This is a gross distortion of the record. Dr. Poetz testified that it was his opinion that Claimant suffered a 20% Permanent Partial Disability of the body as a whole due to a predisposition for venous stasis condition. (TR 201-202) Dr. Altsheler, the specialist, completely disagreed with this and gave explicit reasons why he disagreed.(TR 287-294, 345-348) Judge Newcomb and the Commission adopted Dr. Altsheler's opinion, and specifically noted that his opinions were supported by various tests, including urinalysis, x-rays, blood tests, EKG's, echocardiograms, venograms, CT scans, Dopplers, physical examination, and review of the records of Dr. Mammen, Dr. Lee, and Dr. Carmody (LF 117) In fact, Dr. Altsheler expressly stated that work seems to be the only cause, and there was no medical or surgical evidence indicating otherwise. (TR 292-293) Therefore, Employer's use of the word, "undisputed" is totally devoid of the truth. Not only was the issue of whether there was a pre-existing component to the venous stasis in dispute, but in fact, the Commission accepted the testimony of Dr. Altsheler and found that the venous stasis condition was not pre-existing and was all caused by work (LF 117-118). The Commission specifically found that the venous stasis condition manifested different symptoms at different times, but it didn't rise to the level of a known compensable

condition until 1999 (LF 118, A 43). Under Cuba, supra, the Commission was free to give greater weight to Dr. Altsheler's opinions, and Employer's argument fails factually on the record.

Employer's argument also fails as a matter of law. It confuses the concept of the date when an occupational disease arises for purposes of a claim being filed and the date a claimant first experiences symptoms. All three appellate courts, interpreting §287.063.3 RSMo. (1993), have agreed that an occupational disease arises when a Claimant is unable to work. Hinton v National Lock Corp., 879 SW2d 713, 717 (MoApp SD 1994); Bryan v Summit Travel, Inc., 984 SW2d 185, 188-189 (MoApp WD 1998); Wiele v National Supermarkets, Inc., 948 SW2d 142, 146 (MoApp ED 1997). Under the clear established caselaw, a compensable occupational disease did not occur under §287.063 until March of 1999, as the undisputed evidence establishes that Claimant was first unable to work due to her venous stasis condition on March 18, 1999 (TR 64-66, 74, 348). As such, that is the date when Claimant's occupational disease of venous stasis arose. Hinton, supra. While it is true that Claimant had symptoms of the venous stasis disease, consisting of various lesions which were amenable to treatment and effected the speed which she did work prior to February of 1999, there is absolutely no evidence that it caused her to miss work. Therefore, these symptoms before February of 1999 are not relevant to this case. Hinton, supra.

If a different standard was used, it would cause great confusion in all occupational disease claims. For example, in a carpal tunnel syndrome case, an employee does not all of a sudden have complete loss of the use of hands on one day, but instead, it is a gradual degenerative or deteriorating process by which an employee slowly loses use of his or her

hand. If Employer's argument was adopted, all conditions due to the carpal tunnel syndrome before Claimant missed time from work would be the responsibility of the Second Injury Fund. This is contrary to all established precedent, and it would cause great confusion in every occupational disease claim. Also, it is contrary to the whole concept of an occupational disease, which makes the Employer liable for gradual and progressive injuries due to repeated or constant exposure to work conditions over a period of time. Smith v Climate Engineering, 939 SW2d 429 (MoApp ED 1996); Wolfgeher v Wagner Cartage Service, Inc., 646 SW2d 781 (Mobanc 1983).

The fact that the symptoms started in 1995 and progressed up to February of 1999 due to Claimant continuing to work and progression of the occupational disease of venous stasis is supported by the testimony of Dr. Altsheler and Claimant. Dr. Altsheler, the nephrology specialist, explained that the longer she worked at Ice Cream Specialities, the greater the exposure to the risk that created the venous stasis disease (TR 345). When her lesions started in 1995, they would go away in a month or two with treatment. By the time she worked an additional four years up to February of 1999, the veins had blown out a little bit more and the valves in her veins had become less functional, such that her lesions did not heal or go away with treatment. It was simply a natural progression of the effects of the occupational disease (TR 345-346). Claimant explained she first missed time from work due to her legs on March 18, 1999 (TR 64-66, 77). Dr. Altsheler explained that the venous stasis disease continued to get worse with her 17+ years of work to the point she could no longer work after March 18, 1999 (TR 348). Therefore, it is clear that the evidence shows that the occupational disease did not rise until 1999 and Employer's reference to symptoms before 1999 is of no

significance. Claimant finally developed a compensable occupational disease due to her repeated and constant exposure to work conditions on March 18, 1999. Hinton, supra; Smith, supra; and Wolfgeher, supra.

Employer also maintains that Dr. Altsheler's opinion does not support an Award for Permanent Total Disability against the Employer, as Dr. Altsheler did not say that the accident of February 27, 1999 was a substantial factor in the cause of the disability (Employer Brief, Pgs 73-74). This argument clearly misses the mark. It is true that the original Claim for Compensation alleged an injury on February 27, 1999, but it also alleged an occupational disease. Judge Newcomb and the Commission specifically found that the Permanent Total Disability was a result of the occupational disease and not the individual accident. (LF 117, A 42) Accordingly, this argument regarding the causal connection between the accident and Permanent Total Disability is spurious at best. It has nothing to do with the Award of the Commission, which was for an occupational disease.

Appellant is also misguided when it cites various cases dealing with shifting liability from one employer to a previous employer under §287.067.7 RSMo., as was the area of discussion in Johnson v Denton Construction Co., 911 SW2d 286 (Mo banc 1995); and Coloney v Accurate Superior Scale Co., 952 SW2d 755 (MoApp WD 1997) Respondent worked only for one employer for over 17 years, and there is no other employer to whom liability can be shifted. In fact, Appellant is attempting to shift liability to the Second Injury Fund. This is more than a novel argument, and it is juxtaposed to the conclusive presumption of an exposure to an occupational disease explicitly stated in §287.063.1 RSMo (1993). This was

clearly explained by this Court recently. Endicott v Display Technologies, Inc., 77 SW3d 612 (Mo banc 2002)

In the alternative, the Second Injury Fund should be liable for Permanent Total Disability due to the combination of the primary condition with the pre-existing obesity and left shoulder injury. Carlson v Plant Farm, 952 SW2d 369 (MoApp WD 1997) Dr. Poetz and James England both testified that the pre-existing obesity and left shoulder injury were hindrances and obstacles to employment or re-employment (TR 103-108, 183, 196). Dr. Poetz and Dr. Altsheler testified that the following limits were reasonable for Claimant's obesity:

- (1) Difficulty getting up and down from a sitting position;
- (2) Difficulty doing any activity with crouching, bending, and stooping; and
- (3) Limited endurance. (TR 182-183, 269-270).

Dr. Poetz opined that she had a pre-existing Permanent Partial Disability of 15% of the person as a whole due to obesity (TR 203-204). Claimant is 5'6" tall and has weighed 225 pounds or more for years. She weighed over 300 pounds at the time of trial (TR 44-46). Dr. Altsheler explained that she is morbidly obese by weighing more than 185 pounds (TR 266). Dr. Poetz testified she is morbidly obese by weighing 162 pounds or more (TR 179-180). Dr. Altsheler explained that there is a genetic component to Claimant's obesity (TR 180, 267), and that due to venous stasis, she has multiple factors working against her losing weight (TR 266-270). Dr. Poetz agreed and testified that the obesity was chronic and permanent (TR 181-182).

Dr. Poetz testified that the following limits were reasonable from Claimant's left shoulder injury of July 26, 1997:

- (1) Problems sleeping and sleeping during the day as a result;

- (2) Problems grooming and washing her hair;
- (3) Problems getting dressed;
- (4) Difficulty with any activity requiring use of both hands such as cooking, cleaning, grocery shopping, and driving;
- (5) Difficulty doing any activity overhead;
- (6) Difficulty doing any activity away from her body;
- (7) Difficulty lifting and loss of strength;
- (8) Inability to do repetitive lifting with left arm;
- (9) Loss of range of motion of left arm;
- (10) Pain and stiffness of left arm;
- (11) Grogginess and difficulty concentrating while taking Hydrocodone (TR 193-196).

Dr. Poetz opined she had a 40% Permanent Partial Disability of the left shoulder due to the July 26, 1997 injury (TR 203-204). Dr. Poetz also opined that she had a pre-existing condition of her legs, unassociated with her work, that he rated at 20% Permanent Partial Disability of each leg. He opined a 10% Permanent Partial Disability of the left leg due to the occupational disease of venous stasis (TR 201-202).

Considering all of the evidence, it is clear that Claimant cannot return to any work, even sedentary work. This was the opinion of the two physicians and the vocational expert (TR 109-112, 207-208, 314). There is no contrary opinion. If this Court determines that this permanent total disability is not due to the venous stasis condition considered alone, Permanent Partial Disability should be awarded against the Employer, and Permanent Total Disability should be

awarded against the Second Injury Fund due to the combination of the venous stasis condition with the pre-existing obesity and July 26, 1997 left shoulder injury. Carlson, supra.

### **ISSUE III**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN AWARDING CLAIMANT FUTURE MEDICAL TREATMENT OF THE LEFT SHOULDER RESULTING FROM THE JULY 26, 1997 INJURY, AS:**

- (A) THE FINDING OF MAXIMUM MEDICAL IMPROVEMENT IS NOT IN ANY WAY AN INDICATION THAT FUTURE MEDICAL SHOULD NOT BE AWARDED;**
- (B) THE UNDISPUTED, COMPETENT, SUBSTANTIAL EVIDENCE INDICATED CLAIMANT WAS STILL UNDER TREATMENT FOR HER LEFT SHOULDER INJURY AT THE TIME OF THE HEARING AND WILL REQUIRE TREATMENT IN THE FUTURE; AND**
- (C) THE TREATMENT RECORDS OF DR. DUSEK, THE PHYSICAL THERAPY RECORDS, THE REPORT OF DR. PETKOVICH (EMPLOYER'S EXAMINING PHYSICIAN), THE TESTIMONY OF DR. POETZ (CLAIMANT'S EXAMINING PHYSICIAN), AND THE TESTIMONY OF CLAIMANT ALL SUPPORT THE AWARD OF FUTURE MEDICAL CARE.**

Employer maintains that since Dr. Dusek and Dr. Poetz found Claimant was at maximum medical improvement on March 3, 2000, the Commission should not have awarded future medical care. It argues that Dr. Dusek did not have the opinion that additional treatment would have cured and/or relieved Claimant from the effects of the July 26, 1997 injury, or he would have ordered additional ongoing care, besides the prescription of the hydrocodone elixir. There was no actual written opinion of Dr. Dusek to this effect, and it is simply an assumption. Employer then alleges that their unsupported assumption of Dr. Dusek's opinions is more probative than the actual opinions of Dr. Poetz given during his deposition. Based on this gymnastics of logic or the lack thereof, Employer maintains that the Commission's Award of future medical should be reversed. It has not appealed the specific types of future care that were awarded, but rather, any type of future care. Employer's arguments are not supported by the record, and in addition, they fail as a matter of law.

First, Employer's argument regarding the significance of maximum medical improvement is incorrect. As was held by the Court in Mathia v Contract Freighters, Inc., 929 SW2d 271, 277-278 (MoApp SD1996):

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

Therefore, it is clear as a matter of law that the opinions of Dr. Dusek and Dr. Poetz that Claimant was at maximum medical improvement on March 3, 2000 is not in any way inconsistent with an Award of future medical care. Mathia, supra. Employer's argument to the contrary is misplaced. Claimant is entitled to future medical care, even though the future medical care will only relieve the effects of the injury, as opposed to provide restoration and cure. Mathia, supra at 277; Williams v A.B. Chance Co., 676 SW2d 1, 4 (MoApp WD 1984).

The Act does not require Claimant to provide evidence as to specific medical treatments or procedures that will be necessary in the future, as that would put an impossible and unrealistic burden upon the Claimant. Sifferman v Sears, Roebuck and Co., 906 SW2d 823, 828 (MoApp SD 1995). It is sufficient for the Claimant to show the need for additional medical treatment by reason of compensable accident is a "reasonable probability". "Probable" means founded on reason and experience which inclines the mind to believe, but leaves room for doubt. Sifferman, supra. Future medical treatment should not be denied because past treatment had been unsuccessful or only produced temporary results. Kaderly v Race Brothers Farm Supply, 993 S.W.2d 512, 517 (Mo. App. S.D. 1999). Employee is entitled to future care even if treatment for the work-related condition overlaps with treatment of a pre-existing condition. Sullivan v Masters Jackson Paving Co., 35 SW3d 879, 888-889 (MoApp SD 2001)

The fact that a claimant is still suffering symptoms and taking prescription medication because of a work-related condition is strong evidence of the need for future care. Talley v Runny Meade Estates, Ltd., 831 SW2d 692, 694-695 (MoApp ED 1992)

In this case, Claimant reached maximum medical improvement, but she clearly needs future medical care to relieve her from the effects of the July 26, 1997 left shoulder injury. The Commission's Award is supported by Claimant's testimony, Dr. Poetz's testimony (Claimant's examining physician), Dr. Petkovich's report (Employer's examining physician), Dr. Dusek's records and reports (treating physician), and the radiologist's interpretation of the MRI and arthrogram. These medical records establish that Claimant has a labral defect and adhesive capsulitis as a result of the July 26, 1997 injury, which required ongoing care. The radiologist had the following impression of the October 8, 1999 MRI of Claimant's left shoulder, ". . . Abnormal superior labral anchor at the attachment of the bicipital tendon representing old trauma and/or tear and/or degeneration" (TR 545). The radiologist had the following summary of the October 8, 1999 arthrogram, "The shoulder joint was tight and appears somewhat small. This raises the possibility of adhesive capsulitis. . ." (TR 546) According to Dr. Dusek, the treating orthopedic surgeon, the MRI showed a glenoid labrum tear at the biceps attachment (TR 549). He explained in a report, "My diagnosis is that of a post-traumatic adhesive capsulitis or frozen shoulder. All treatment and examinations as well as diagnostic procedures were related to the injury in July, 1997 (TR 573)." Both conditions could not be corrected with the arthroscopic surgery on January 24, 2000 due the lack of ability to get good visualization with the arthroscope (TR 568). Dr. Petkovich, the Employer's chosen physician, suggested that a repeat MRI be performed, and if the labral defect is shown, surgery should be attempted (TR 438). In fact, Dr. Petkovich indicated in his February 16, 2000 report:

"Apparently there is a question as to whether she has a labral defect along the anterior border of the glenoid. My recommendation would be that she should

have a new updated MRI on her left shoulder which would give us a more definitive answer as to what is going on. She may very well ultimately need surgery for an arthroscopy and possible arthrotomy with repair of the labral defect, but this would depend upon the results of this MRI. From all the information which I have available to me, it does appear that her left shoulder problem is a result of an injury which she describes as occurring at work on 7/26/97. . . To reiterate, my diagnosis is a possible internal derangement left shoulder with a possible labral tear or defect. My recommendations are that she needs to have an updated study, specifically a current MRI on her left shoulder or else a CT scan/arthrogram. Further treatment would depend upon the result of these studies. I do feel that she would most likely benefit from further surgery on her shoulder but this would depend upon the results of these studies (TR 438).”

After the failed arthroscopic surgery, Dr. Dusek indicated on February 4, 2000, “I certainly do not think that her shoulder will get well, although I think she should have physical therapy for the next several weeks to regain what motion and strength is possible (TR 564).” There were indications in the physical therapy records that she did gain some range of motion, but they also show she had minimal improvement in strength or decreased pain (TR 555 and 569). At the last visit on March 3, 2000, Dr. Dusek indicated Claimant was at maximum medical improvement, but he continued to prescribe the narcotic pain medicine (TR 569). In fact, his records indicate he refilled this prescription on March 28, 2000 (TR 569). Claimant testified and the prescription records show that Claimant continued to take this narcotic pain medicine

through the time of trial (TR 48-49, 669-673). Therefore, contrary to what the Employer has indicated in its Brief, all of the medical records and reports indicate Claimant needed, needs, and is obtaining ongoing treatment of her shoulder.

As opposed to Dr. Dusek indicating no further treatment is indicated, his records support the continuing need to relieve the effects of the injury, as he continued to prescribe narcotic pain medicine to Claimant after the date he thought she was at maximum medical improvement. Mathia v Contract Freighters, Inc., 929 SW2d 271 (MoApp SD 1996); Talley, supra. Employer basically takes the position that a physician continuing to prescribe a narcotic is not care. This is preposterous. It is one of the types of future care awarded by the Commission. It is true that Claimant wasn't in physical therapy or other forms of treatment at the time of trial, but that was more or less a matter of economics. Even though Employer stipulated that the \$17,911.30 in past medical charges were for the July 26, 1997 injury and should be paid by the Employer (LF 39, A 3), it failed to pay the bills. Claimant has been contacted by collection agencies, and due to the Employer's refusal to pay Temporary Total Disability, she had no resources to pay for treatment. It is more than a little paradoxical that Employer argues Claimant should not be awarded future care because she did not obtain more care, when their refusal to pay was a major factor in Claimant's ability to obtain more care.

Besides the records of Dr. Dusek, Dr. Petkovich, the radiologist, and the physical therapist, Claimant's testimony also supports the Award of future medical care of the shoulder. Talley, supra At the hearing, Claimant testified to continuing to suffer numerous symptoms from the July 26, 1997 injury (TR 49-51). Specifically, she testified to: constant

pain; can't lift over her head; has trouble sleeping, dressing, and grooming herself; has trouble cooking and cleaning; can lift five pounds maximum with her left arm and could not do any repetitive lifting; couldn't lift her left arm above her head and had significant trouble lifting in front of her or to her side (TR 49-51, 70). She continued to take pain medicine prescribed by Dr. Dusek (TR 48-49), and as such, she was still under the care of Dr. Dusek. These continued symptoms support the Award of future care. Talley, supra.

Dr. Poetz's testimony clearly supports the Award of future care. He was the only physician to actually testify regarding future treatment of the left shoulder. It was his opinion that Claimant not only had a labral tear, but adhesive capsulitis as a result of the July 26, 1997 injury (TR 174-175). He explained that the labrum is the cartilaginous ring that holds the humerus in the glenoid facet. (Tr 174-175) The tear could not be corrected with the arthroscopic surgery in January of 2000(Tr 175), and it would affect range of motion, strength, and endurance with the use of Claimant's left arm and cause pain. (Tr 175) Dr. Poetz further explained that there is a capsule in the shoulder joint, which is a sac-like structure around the joint. With adhesive capsulitis, the capsule is inflamed and the inflammation causes portions of the capsule to be adhered to other structures within the joint, so there is a reduced ability to move freely. (Tr. 174-175) He explained that typically, adhesive capsulitis gets worse with time, because movement is painful, and less movement will result in greater adherence. (Tr. 176-177) Also, since the labral tear causes a restriction in motion and the adhesive capsulitis progresses with less movement, the two could feed off one another to cause an even greater loss of movement. At the time of his exam, Claimant was only able to elevate and abduct to 90 degrees actively and 100 degrees passively, within 180 degrees being normal. He also

found a 25% decrease in external rotation. (Tr 183-185) He recommended additional physical therapy, certain prescription medicines, and doctor visits. (Tr 177-178, 189-191, 242) There is no contrary testimony.

Clearly, Dr. Poetz's opinions support Claimant's testimony and the Commission's Award. Employer alleges in its Brief that Dr. Poetz testified these additional future forms of care would simply modify symptoms, as opposed to cure and relieve from the effects of the injury. (Employer's Brief, Pages 85-86) This argument is flawed. Dr. Poetz did explain that these treatments would not cure her condition, but at the same time, he explained that they would relieve the effects of the injury (TR 177-178, 189-191, 213). His use of the phrase "modifying symptoms" meant decreased pain and a change in the symptoms to make her more comfortable, as opposed to increasing her physical ability (TR 213). This is exactly what relieving from the effects of the injury means in an Award for future care. Mathia v Contract Freighters, Inc., 929 SW2d 271 (MoApp SD 1996); Williams v A.B. Chance, Co., 676 SW2d 1 (MoApp WD 1984)

Besides the undisputed opinion testimony of Dr. Poetz, it is clear that when surgery was of no benefit, Dr. Dusek continued to prescribe physical therapy (TR 564). In contrast to Employer's assertion that the prior treatment was of no benefit, it is clear that an increase in range of motion and a decrease in pain was observed with the physical therapy and conservative treatment prescribed by Dr. Dusek (TR 549, 555). Also, future medical treatment should not be denied because past treatment only produced unsuccessful or temporary results. Kaderly v Race Brothers Farm Supply, 993 SW3d 512, 517 (MoApp SD 1999). Dr. Poetz explained the natural progression of the adhesive capsulitis and that physical therapy

could be of benefit in the future (TR 175-178, 189-191, 213, and 242). There is absolutely no evidence of any type indicating that Claimant does not continue to suffer pain and symptoms of her left shoulder that are amenable to some forms of treatment, by at least reducing the effects of the injury. The MRI, the arthrogram, the testimony of Claimant, the records and findings of Dr. Dusek, the records and findings of Dr. Petkovich, and the records, findings, and testimony of Dr. Poetz all support an Award of future medical care of the shoulder. Sifferman v Sears, Roebuck, and Co., 906 SW2d 823 (MoApp SD 1995). The Commission's Award should be affirmed.

#### **ISSUE IV**

**THE INDUSTRIAL COMMISSION DID NOT ERR IN FINDING CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY FROM JULY 14, 1999 TO AUGUST 10, 1999, BECAUSE OF THE JULY 26, 1997 INJURY, AS SAID AWARD WAS SUPPORTED BY THE TESTIMONY OF CLAIMANT, THE TREATMENT RECORDS, AND THE UNDISPUTED TESTIMONY OF DR. POETZ. ALSO, CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY FOR THIS SAME TIME PERIOD UNDER THE 1999 OCCUPATIONAL DISEASE CLAIM, AND TO THE EXTENT THIS COURT WOULD EVER REVERSE THE AWARD OF TEMPORARY TOTAL DISABILITY UNDER THE 1997 INJURY, THEN THE SAME TEMPORARY TOTAL DISABILITY AT THE SAME RATE WOULD BE OWED UNDER THE 1999 OCCUPATIONAL DISEASE CLAIM. THE EMPLOYER HAS NOT APPEALED THAT ISSUE, AND AS SUCH, THEY**

**ARE ASKING THIS COURT TO ADDRESS AN ISSUE FOR WHICH NO PARTICULAR RELIEF CAN BE GRANTED.**

An employee's testimony of an inability to work is sufficient, substantial evidence to support an award of temporary total disability. Riggs v Daniel Intern., 771 SW2d 850 (MoApp WD 1989). It is reasonable to conclude that an employee is entitled to temporary total disability and unable to work until he is cleared by his treating physician. Cope v House of Maret, 729 SW2d 641, 643 (MoApp ED 1987). Temporary total disability should end when the medical evidence indicates that the employee would not be able to return to work and no improvement in the condition was expected with future treatment. Plaster v Dayco Corp., 760 SW2d 911, 914 (MoApp SD 1988). In this case, the testimony of Claimant of her inability to work due to the shoulder injury from July 14, 1999 through March 3, 2000 is supported by the medical records of Dr. Dusek, the MRI records, the arthrogram records, and the opinion testimony of Dr. Poetz. As such, there is sufficient, substantial, competent evidence to support the Commission's Award. Riggs, supra. In fact, there is absolutely no evidence that Claimant was not temporarily and totally disabled as a result of the shoulder injury alone from July 14, 1999 to August 10, 1999. The Commission was correct when it indicated there was no indication of a change in Claimant's condition between July 14, 1999 and August 11, 1999 when Dr. Dusek indicated Claimant couldn't work. Specifically, Claimant had sustained no injury to her shoulder other than the July 26, 1997 injury (TR 51-52).

Employer refused to provide any care, treatment, and examination of Claimant's shoulder after March of 1999, except for an evaluation by Dr. Petkovich on February 16, 2000. (TR 22-26) As a result of this, Claimant was required to seek treatment on her own. She

sought out a referral from her family physician, Dr. Mammen, who referred her to Dr. Dusek (TR 26, 572). She called Dr. Dusek on July 14, 1999, but she could not be seen until August 11, 1999, due to Dr. Dusek's schedule.(LF 44) Dr. Dusek then clearly indicated Claimant could not work due to her shoulder alone from his first office visit on August 11, 1999 through March 3, 2000, the date she reached maximum medical improvement. (TR 569, 573) Claimant's testimony establishes that she did not have any change in her symptoms up until seeing Dr. Dusek (TR 51-52), so there is evidence that Claimant was temporarily and totally disabled due to the shoulder injury alone during the time period of July 14, 1999 through August 10, 1999. Dr. Poetz specifically testified that Claimant was temporarily and totally disabled due to the 1997 injury from July 14, 1999 through March 4, 2000 (TR 205-206). His opinion is not only based upon his review of Dr. Dusek's records, but also the history which he received from Claimant and a hypothetical question as to the scheduling of the appointment with Dr. Dusek's office (TR 205-206). Therefore, the record supports the Commission's Award of Temporary Total Disability. Plaster, supra.

Appellant's argument that Dr. Poetz's opinion was based purely on speculation, conjecture, or surmise is totally misplaced. Clearly, expert witnesses after §490.065 RSMo (1989) are able to rely upon hearsay as a basis for their opinion. Peterson v National Carriers, Inc., 972 SW2d 349 (MoApp WD 1998). §490.065 RSMo (1989) provides in pertinent part:

- “3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by

experts in the field in forming opinions or inferences on the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case."

Clearly, Dr. Poetz's opinion was properly based upon a hypothetical question, as noted by the Commission in its Award. (LF 44, TR 206-207) In fact, when hypothetical questions are used, it has been held that claimant only has to include hypothetical facts which support his or her theory, as opposed to the employer's theory. Lytle v T-Mac, Inc., 931 SW2d 496 (MoApp WD 1996). The Commission did not award Temporary Total Disability, because Claimant could not schedule a medical appointment, but instead, they awarded Temporary Total Disability, as there was evidence in the record that Claimant could not work due to her shoulder from July 14, 1999 to March 3, 2000. (LF 51-52) Claimant's testimony of the inability to work, the treatment records of Dr. Dusek, the various radiological studies, and the testimony of Dr. Poetz are strong and compelling evidence to affirm that Claimant was temporarily and totally disabled. Riggs, supra; Cope, supra. There is no contrary evidence, so the Commission's Award should be affirmed.

To the extent this Court would determine that Temporary Total Disability is not owed for the time period of July 14, 1999 to August 10, 1999 under the 1997 claim, it is owed under

the 1999 occupational disease claim. The Commission specifically found in Injury Number 99-029378:

“Based upon the weight of the evidence, I find Claimant was temporarily and totally disabled from March 18, 1999 through September 25, 2000 as a result of her occupational disease of venous stasis, and that she reached maximum medical improvement on September 25, 2000 excluding the time period of temporary total disability for her 1997 shoulder injury. I further find that she has already been paid or will be paid temporary total disability under Injury Number 97-072979 for the time period of July 14, 1999 through August 10, 1999 and has been paid additional temporary total disability for that injury up to March 3, 2000. Therefore, I award Claimant temporary total disability for the time period of March 18, 1999 through July 13, 1999 and from March 4, 2000 through September 25, 2000 or 41 6/7 weeks.” (LF 119)

Therefore, Claimant would be entitled to Temporary Total Disability from July 14, 1999 to August 10, 1999 under Injury Number 99-029378, if this Court were to find that the Commission abused its discretion in awarding same under Injury Number 97-072979. If this Court were to reverse the Award of Temporary Total Disability in the 1997 Award, Claimant would request that same be added to the 1999 Award or that the 1999 claim be remanded to the Commission to add same. Since both claims are at the same rate for Temporary Total Disability, there will be no difference in the compensation that is owed.

Employer has not appealed the Award of Temporary Total Disability under Injury Number 99-029378. Basically, Employer is asking this Honorable Court to review a portion

of the 1997 Award, which will, in fact, have no effect. Since the rate is the same under both Injury Numbers, the Temporary Total Disability would simply be owed under the 1999 injury, as opposed to the 1997 injury. This type of meaningless appeal should be rebuked by this Court, as it is contrary to the meaning of §287.560 RSMo. There is no net change in the compensation that would be payable, and there is no prospect for the Employer to succeed and not have to pay temporary total disability for the time period of July 14, 1999 to August 10, 1999.

### **CONCLUSION**

WHEREFORE, under the Facts, Points and Authorities, and Argument, Claimant respectfully requests that this Court affirm both Awards of the Industrial Commission, including an order that Interest is owed on all past due benefits from Judge Newcomb's Awards entered on February 28, 2001, except for:

(1) finding that attorneys fees are recoverable under §287.560 RSMo, and award attorneys fees of \$8,391.14 under Injury Number 97-072979 and \$8,795.87 in attorneys fees under Injury Number 99-029378 or remand both claims to the Industrial Commission for a determination of the amount of attorneys fees to award Claimant under both Injury Numbers;

(2) finding that costs of deposition transcripts are recoverable as costs under §287.560 without admission of a court reporter's charges for preparing the transcript and awarding \$259.00 for the cost of Dr. Poetz's transcript under Injury Number 97-029378 and \$402.80 for the cost of Dr. Altsheler's transcript under Injury Number 99-029378 or remand both claims to the Industrial Commission for a determination of the amount to be awarded for the costs of the transcripts of Dr. Poetz and Dr. Altsheler;

(3) modifying the award under Injury Number 99-029378 by awarding Claimant \$525.00 for Dr. Altsheler's deposition fee as a cost under §287.560 or remanding Injury Number 99-0029378 to the Commission for a determination of whether said deposition fee should be awarded under §287.560; and/or

(4) such further relief as the Court deems just and proper.

Or, in the alternative to affirming the Award for Permanent Total Disability against the Employer under Injury Number 99-029378, awarding Permanent Partial Disability against the Employer and Permanent Total Disability against the Second Injury Fund and also the specific relief requested in paragraphs One through Four.

Respectfully submitted,

GERRITZEN & GERRITZEN

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**CERTIFICATE OF SERVICE**

The undersigned hereby certified that on this \_\_\_\_\_ day of \_\_\_\_\_, 2003, two (2) true and correct copies of the foregoing Brief and one (1) disk containing the foregoing Brief were mailed, postage prepaid, to: Ms. Mary A. Lindsey, Attorney for Employer-Insurer/Appellant/Cross-Respondent, 515 Olive Street, 1100 Millennium Center, St. Louis, Missouri 63101-1836 and Ms. Plia D. Cohn, Attorney for Additional Party Second Injury Fund/Respondent, Laclede Gas Building, 720 Olive Street, Suite 2000, St. Louis, Missouri 63101.

\_\_\_\_\_  
Michael A. Gerritzen

**CERTIFICATE OF COMPLIANCE**

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

\_\_\_\_\_  
Michael A. Gerritzen

**APPENDIX**

Claimant/Respondent/Cross-Appellant Laura Landmann adopts and incorporates by reference the Appendix filed by Employer/Appellant/Cross-Respondent Ice Cream Specialties.

