

SUPREME COURT OF MISSOURI
en banc

CAUSE NO. SC92116

TERRY HORNBECK,

Appellant,

vs.

SPECTRA PAINTING, INC.,

and

TREASURER OF THE STATE OF MISSOURI SECOND INJURY FUND,
AS CUSTODIAN OF THE SECOND INJURY FUND,

Respondents.

On Appeal from the Labor and Industrial Relations Commission of Missouri
Injury No. 06-124920

APPELLANT'S SUBSTITUTE BRIEF

Respectfully Submitted:

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ARGUMENT:

I. THE COMMISSION ERRED IN ENTERING A FINAL PPD AWARD BECAUSE THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW AND ITS FINDINGS THAT CLAIMANT REACHED MMI IN APRIL 2007 AND FAILED TO PROVE THAT HIS SUBSEQUENT TREATMENT AND INABILITY TO WORK WAS CAUSALLY RELATED TO HIS COMPENSABLE WORK ACCIDENT ARE NOT SUPPORTED BY THE RECORD AND ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:

A. THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW IN REQUIRING CLAIMANT TO PROVE THAT HIS COMPENSABLE WORK ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING HIS MEDICAL CONDITION

AND DISABILITY FOR WHICH TREATMENT WAS REASONABLY REQUIRED AFTER APRIL 2007;

B. THE COMMISSION EXCEEDED ITS POWER IN FAILING TO CONSIDER CLAIMANT'S UNCONTRADICTED AND UNIMPEACHED TESTIMONY AND HIS MEDICAL RECORDS WHICH PROVIDED SUBSTANTIAL COMPETENT EVIDENCE THAT HIS MEDICAL TREATMENT AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT UNDER §287.140.1 RSMO.;

C. THE COMMISSION EXCEEDED ITS POWER IN REQUIRING CLAIMANT TO DEPOSE HIS SELECTED MEDICAL PROVIDERS TO SATISFY HIS BURDEN TO PROVE THE CAUSE FOR HIS TREATMENT AFTER APRIL 2007;

D. THE COMMISSION'S RELIANCE ON THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERTS TO CONCLUDE CLAIMANT REACHED MMI IN APRIL 2007 IS NOT SUPPORTED BY THE RECORD BECAUSE THEIR OPINIONS WERE BASED UPON INCOMPLETE INFORMATION AND NONE OF THE EXPERTS EXAMINED CLAIMANT, TOOK AN ADDITIONAL HISTORY OR REVIEWED HIS ADDITIONAL TREATMENT RECORDS AFTER RELEASING CLAIMANT AND DECLARING HIM TO BE AT

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F. CLAIMANT IS ENTITLED TO TTD BENEFITS AND INTEREST SINCE THE UNCONTRADICTED EVIDENCE ESTABLISHED HIS INABILITY TO WORK AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT;

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- A. CLAIMANT’S MEDICAL CARE AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT, INCLUDING TREATMENT FOR HIS BILATERAL FOOT, SHOULDER AND BACK PAIN, DEPRESSION, ANXIETY AND INSOMNIA;
- B. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT THE ADDITIONAL TREATMENT HELPED ALLEVIATE THE EFFECTS OF CLAIMANT’S COMPENSABLE WORK-RELATED INJURIES;
- C. CLAIMANT DEMANDED, AND THE EMPLOYER FAILED OR REFUSED TO PROVIDE ADDITIONAL TREATMENT; AND
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JURISDICTIONAL STATEMENT

On June 24, 2009, the parties appeared for hearing on Terry Hornbeck's ("Claimant") request for a temporary award §287.203 RSMo. in Injury No. 06-124920 (D/O/I: 11/9/06). The claim was tried before the Honorable Joseph Denigan ("ALJ") in the City of St. Louis, Missouri [Transcript ("Tr.") 1].

On July 30, 2009, the ALJ entered a final award which was partially in favor of Claimant [Legal File ("L.F.") 15-31]. Claimant filed an application for review to the Labor and Industrial Relations Commission ("Commission") on August 18, 2009 [L.F. 32-49]. On September 21, 2010, the Commission's majority modified the decision of the ALJ [L.F. 61-90]. Claimant filed a notice of appeal to the Missouri Court of Appeals for the Eastern District on October 18, 2010 [L.F. 101-135].

On September 6, 2011, the Court of Appeals filed its published opinion in Claimant's appeal and in Employer's Cross-Appeal. The Eastern District affirmed in part and reversed and remanded in part the decision of the Commission. On September 21, 2011, pursuant to Rules 84.17 and 83, Claimant filed his motion for rehearing or transfer to the Missouri Supreme Court of those portions of the opinion which affirmed the Commission's decision to deny Claimant a temporary award and reversed the 15% penalty on the amounts awarded against the Second Injury Fund ("Fund"). On October 20, 2011, the Eastern District denied Claimant's motion for rehearing and transfer. On November 4, 2011, Claimant filed his application for transfer to the Supreme Court. On December 6, 2011, the Court sustained Claimant's application and transferred the cause pursuant to Supreme Court Rule 83.04.

STATEMENT OF FACTS

PROCEDURAL HISTORY

The parties stipulated that on 11/9/06, Claimant sustained an accident and injuries arising out of and in the course of his employment with Spectra Painting, Inc. who was insured by Allied Insurance Co. (collectively “Employer”). Employer paid \$32,801.15 in medical expenses and \$16,754.88 in temporary total disability (“TTD”) benefits at the rate of \$698.12 from 11/9/06 through 4/27/07 [Tr. 1:22-3:24, 18:21-19:6].

Claimant sought a temporary award under §287.203. He claimed that he remained temporarily totally disabled since his work accident and in need of medical treatment. Claimant sought reimbursement for his past medical expenses and interest and future medical treatment, continuing TTD benefits and interest and a 15% penalty under §287.120.4 RSMo. Employer requested a final award, asserting Claimant reached maximum medical improvement (“MMI”) on 4/24/07 and that his subsequent treatment was unauthorized, unnecessary and unreasonable [Tr. 2:11-4:25].

On 7/30/09, the ALJ entered a final award. Against Employer, Claimant was awarded 5% permanent partial disability (“PPD”) of each foot at the 155 week level, 20% PPD of the left biceps at the 222 week level, 2.5% PPD referable to the low back and 5% multiplicity for a total of \$26,036.89. Against the Fund, Claimant was awarded 42.4 weeks of permanent partial disability for a total of \$15,965.72 [L.F. 15-16].

On review, the Commission modified the ALJ’s decision, awarding Claimant a 15% penalty under §287.120.4 because Employer violated the Scaffolding Act [L.F. 65-67]. The

penalty was imposed on the amounts awarded by the ALJ [L.F. 68]. The Commission unanimously rejected the ALJ's rationale for denying Claimant relief under §287.203. The majority, however, affirmed the final award for different reasons [L.F. 62-65]. John Hickey, Member, filed a dissenting opinion, explaining why a temporary award was proper [L.F. 70-73].

SUMMARY OF THE EVIDENCE

At the time of the hearing, Claimant was 45 years old (D/O/B 6/24/63). He is 5'11" and weighed approximately 185 lbs [Tr. 20:4-19]. He was married to Susan Kay Wicklein on 4/27/83. Three children were born of their marriage [Tr. 20:20-23:1].

Claimant dropped out of high school in the twelfth grade, but earned his GED. In 1982, he joined the Marine Corps [Tr. 24:1-23]. Following his discharge, he worked in a factory for about a year and thereafter, as a laborer and painter/taper until of his 11/9/06 work injury.¹ Claimant lived in Warrenton with his family and worked in the St. Louis area for about 20 years [Tr. 25:5-28:16].

As a painter/taper, Claimant was required to move and lift 5 gallon buckets of paint and joint compound, which weighed about 65 lbs. each. He spent the majority of his day walking or standing. He was required to push, pull, bend and kneel throughout the day. He worked from the floor and on scaffolding, ladders and lifts [Tr. 28:17-30:21].

¹Approximately a year before the hearing, Claimant and his wife moved to Reeds Spring, Missouri, which is about 30 miles from Springfield because of financial difficulties [Tr. 23:2-23].

In or about 1998, Claimant began to drink heavily and was depressed and anxious, after his wife's friend was murdered [Tr. 84:11-86:23]. He was prescribed anti-depressants for about eight months and stopped drinking. Soon thereafter, his depression abated [Tr. 135:14-136:1].

On 5/1/00, Claimant injured his dominant right upper extremity while working for River City Drywall. Claimant had two surgeries to address his shoulder impingement and partial rotator cuff tear [Tr. 998-999, 1021]. After he was released, he was able to perform his regular duties but he was less efficient [Tr. 34:13-35:12]. Claimant settled his claim for 28.5% of the right shoulder [Tr. 1056; 33:4-34:11; 87:24-88:7].

Claimant injured his left shoulder on 5/23/03 while working for Shamrock Drywall. On 7/11/03, Dr. James Emanuel decompressed the shoulder [Tr. 1034-1035]. Following a course of physical therapy, he was returned to full duty on 10/27/03 [Tr. 1044]. In March 2004, Dr. Emanuel injected his left shoulder. On 4/19/04, Claimant reported that the injection helped and he "could live with his shoulder." He had full range of motion and no popping, crepitus or grinding and was released to full duty without restrictions [Tr. 1047]. Claimant settled his primary claim for 20% of the left shoulder and his Fund claim for \$5,740.55, representing a 15% load factor in combination with his prior right shoulder disability [Tr. 36:14-38:7, 1102, 1106].

Claimant began working for Employer a year before his 2006 work accident. At the time of his injury, his hourly rate was \$27.79. Customarily, he worked 40 hours per week and overtime whenever it was available. On average, he earned about \$1,100.00 per week [Tr.

31:22-32:23].

On 11/9/06, he was assigned to assist his foreman in painting the roof at a McDonald's Restaurant in South St. Louis. The edge of the roof was approximately 10 feet above the ground. Employer supplied an 8 foot A-frame ladder and 6 foot scaffold. The foreman directed Claimant to place the ladder on the scaffold to reach the roof [Tr. 38:23-40:19].

The scaffolding and ladder had no warnings. Employer did not provide a safety harness or any means to secure the ladder to the scaffold platform or the building [Tr. 121:10-122:19]. Claimant stepped onto the first rung to check for stability. When he got to the roof line, the ladder and scaffolding went out from underneath him. Claimant grabbed for the edge of the roof with his left arm as he fell about 10 feet to the concrete. He landed on his feet and his body folded, ending up on his left side [Tr. 40:2-45:5].

Claimant was taken by ambulance to St. Louis University Hospital, where he complained of left shoulder, back, leg and foot pain. X-rays showed a narrowing of the L5-S1 disc space [Tr. 123:17-21, 168 & 181]. He was seen at Unity Health on 11/13/06. He complained of pain radiating into his legs and underwent an MRI that showed bulging discs at the L4-5 and L5-S1 levels [Ex. A-2; Tr. 186 & 191].

Claimant had no problems and sought no treatment for his back, legs and feet before the fall [Tr. 75:19-76:2]. Thereafter, he had an aching sharp pain in the front of his left shoulder whenever he moved it. His back pain radiated down his legs into his feet. Claimant also had headaches and blurred vision [Tr. 45:7-47:17]. He had pain and numbness on the

outside of his feet that ran toward the front of his feet [Tr. 56:6-13].

He became anxious and depressed because of his medical condition and that he was not working [Tr. 61:25-62:21]. On 12/12/06, he went to the hospital because he broke into a sweat and had difficulty breathing. He followed up with Dr. Matthew Meier, who prescribed Lexapro, which he took for two months [Tr. 61:12-62:13, 96:11-22; Ex. B-27, Tr. 949]. After moving to Reed Springs, Dr. Paul Geiger prescribed Xanax to help with his insomnia and anxiety [Tr. 123:20-124:11; Id., Tr. 958].

Claimant saw Dr. George Paletta between 11/15/06 and 3/28/07 [Tr. 197-239]. When Dr. Paletta examined his shoulder, he pulled his arm up, causing intense pain. Thereafter, he was guarded when Dr. Paletta attempted to raise his arm [Tr. 58:19-59:3]. Dr. Paletta prescribed physical therapy for his shoulder and low back, which did not cure his problems [Tr. 49:11-19, 101:2-8; Ex. A-4, 11/20/06-3/9/07, Tr. 246-281].

On 1/4/07, Claimant had a functional capacity evaluation (“FCE”). Claimant reported that since the accident, he had severe headaches, blurred vision, left shoulder and back pain, problems with prolonged sitting and standing, weakness in both legs, shooting pains down to his feet and bilateral foot/heel pain [Ex. A-7, Tr. 323, 330-331]. It was determined that Claimant was not capable of performing the duties of a painter/taper and he was kept off work [Tr. 303].

On 1/13/07, Claimant slipped on ice in Warrenton, landing on his left side. He was seen in the emergency room and released. X-rays were negative and a CT scan of his brain was normal [Tr. 59:19-60:17, 100:15-20].

Although Claimant faithfully participated in physical therapy, it was not curing his problems and he wanted to try something other than medications. He told Dr. Paletta that he was frustrated and asked about the possibility of back injections. Dr. Paletta said that he would not know where to inject the needle [Tr. 101:9-102:5].

Three or four months after the accident, Employer referred Claimant to Dr. Craig Aubuchon for the burning and tingling of his feet and to Dr. Chabot for his back complaints [Tr. 103:15-21]. Dr. Aubuchon prescribed custom orthotics, pain medication and physical therapy [Tr. 54:22-55:12, 57:10-12]. Dr. Chabot diagnosed Claimant with bursitis in his left hip and gave him an injection. Dr. Chabot also prescribed physical therapy, anti-inflammatories and pain medications [Tr. 59:4-18].

The orthotics helped, but did not solve his foot problem [Tr. 105:11-15]. When Claimant was released from treatment in April 2007, he continued to have problems with his feet, legs, back and left shoulder. He also had headaches, blurred vision, anxiety and depression [Tr. 60:21-61:10]. He attempted to go back to work at Knaust Drywall in May 2007, but was miserable. During the day, he had to take frequent breaks, sitting and laying down. At night he could not sleep. After a couple weeks, he told his boss he couldn't finish the job [Tr. 62:22-63:20].

Claimant spoke to his attorney, Andrew Weigley, about getting more treatment [Tr. 106:19-107:7, 111:6-10]. Weigley, spoke with Employer's counsel regarding additional medical treatment [Tr. 8:21-23]. When Employer refused, he had no choice but to seek treatment on his own [Tr. 63:21-64:10; 107:21-108:1]. Weigley asked for a denial letter so

Claimant could get treatment using his private insurance [Tr. 12:11-15]. On 9/13/07, Weigley left a voice mail message, followed by a letter dated 9/14/07, requesting confirmation that Employer would not authorize any further care [Tr. 8:10-20, 1204]. Nearly 5 weeks later, on 10/22/07, Employer responded, refusing to provide a denial letter and failing to arrange for additional treatment [Tr. 1205-06, 9:7-27]. Claimant changed attorneys and on 11/12/07, Employer was notified Claimant would seek treatment on his own and look to Employer for reimbursement [Tr. 1207-08]. On 11/16/07, Employer was informed Claimant had undergone injections to his feet and would receive a second set of injections in 2 weeks. Employer was also told that Claimant was scheduled for back injections in a week and shoulder surgery the next month. Claimant also requested his TTD benefits reinstated, retroactive to 11/8/07, when his new orthopedist, Dr. Timothy Graven, ordered him off work [Tr. 1213-14].

Employer scheduled Claimant for an IME with Dr. Russell Cantrell on 1/8/08 [Id., Tr. 1217]. According to Employer's letter dated 2/25/08, Dr. Cantrell believed that Claimant was not at MMI for his shoulder. Dr. Cantrell made no follow up appointments and made no recommendations for treatment [Tr. 1219-20]. Employer did not refer Claimant back to Drs. Paletta, Aubuchon or Chabot [Tr. 64:11-65:2, 137:19-138:1].

On 1/31/08, Claimant filed his verified motion for a hearing under §287.203. He requested additional medical treatment, the continuation of temporary total disability benefits and his reasonable attorney's fees and expenses² [Tr. 65:3-12; Ex. B-37, Tr. 1222-23].

²Up to the date of hearing, Claimant's attorney's fees and expenses were \$39,602.32 [Tr. 1230-40]. On review, Claimant moved to update his fees and expenses

Before the accident, Claimant did not wear glasses. At first, Claimant thought his blurred vision was a result of the medication that he was taking. When he was later checked by his eye doctor, he was told that he had a damaged nerve. The medical records from Ernest Eye Health Associates confirm Claimant had a significant change in his field of vision and his optic nerve was stretched. Claimant was prescribed progressive lenses [Ex. A-11, Tr. 550, 557-558, 560].

On 3/9/07 and 5/8/07, Claimant saw Dr. Meier for complaints of headaches, fatigue, back pain and depression relating back to November 2006 [Ex. A-10, Tr.539]. Dr. Meier ordered an MRI in May 2007 that showed a narrowing of L4-5 disc space and the L5-S1 disc space was normal. Dr. Meier referred Claimant to Drs. Graven, Theodore Rummel and Brian Martin [Tr. 66:3-8].

After examining Claimant on 10/23/07, Dr. Rummel scheduled him for left shoulder surgery at St. Joseph's Hospital West on 12/26/07. Between 1/15/08 and 2/4/08, Claimant took physical therapy at Skaggs Community Health Center in Branson, Missouri [Tr. 66:9-67:11; Ex. A-16, Tr. 710-712]. Claimant missed the last 2 or 3 therapy sessions because his private insurance refused to pay [Tr. 117:19-118:4].

Although the biceps tendon could not be repaired, the surgery lessened the sharpness of his pain in the front of his shoulder and the intense ache lightened [Tr. 66:12-68:8; 118:12-19]. Post-surgery, he continued to have muscle spasms when he lifted his with arm and at about 90 degrees, he felt pain in the front of his shoulder and it crunched [Tr. 118:20-119:5].

[L.F. 50-60]. The Commission denied Claimant's motion as moot [L.F. 69].

Between 10/24/07 and 2/6/08, Dr. Martin treated Claimant's ongoing foot and ankle problems [Ex. B-17, Tr. 723-733]. With additional treatment, his foot complaints improved by about 60% [Tr. 725]. Dr. Martin prescribed medications and injected Claimant's feet 3 times. The injections lightened the pain for a week or two. Dr. Martin also adjusted the padding in Claimant's orthotics and prescribed night splints and wraps, which he continued to use. The night splints and wraps help keep the tendons stretched. The padding provided additional support and helped with walking [Tr. 70:8-71:18]. Although his condition improved, he continued to have problems with his feet, the right worse than the left. The pain, numbness and tingling in his feet increased with prolonged walking or standing of 20-25 minutes and he cannot tolerate walking barefoot [Tr. 71:1-5].

Dr. Graven began treating Claimant's back problems on 10/26/07 [Ex. A-14, Tr. 630-685]. On 11/6/07, he had an MRI/CT scan of the spine that showed a bulging disc at the L4-5 level with encroachment on L-4 nerves and mild narrowing at the L5-S1 level [Ex. A-15, Tr. 690-692]. Claimant also had steroid injections on 11/12/07, 11/21/07 and 1/2/08 that reduced his pain for a day or two [Ex. A-15, Tr. 687-689; Ex. B-18, Tr. 746-748]. Dr. Graven prescribed pain medications and recommended a discogram, followed by surgery [Tr. 664-665]. On 12/11/08, Dr. Chad Shelton performed a discogram to identify the source of his pain [Tr. 72:1-73:8]. The discogram showed problems at the L4-L5 and L5-S1 levels, the latter being the worst. Based upon the discogram, Dr. Graven recommended a back fusion at the L5-S1. Claimant was prescribed a back brace [Ex. B-20, Tr. 778]. Claimant underwent pre-operative physicals at St. John's Clinic Branson West on 2/19/09 and 3/12/09 [Ex. B-21,

Tr. 797-798]. He had a pre-surgery EKG at Barnes Jewish St. Peters on 2/11/09 [Ex. B-23, Tr. 924-930]. Claimant also sought a second surgical opinion from Dr. Thomas Briggs in Springfield, Missouri on 3/13/09 [Tr. 73:9-14; Ex. B-22, Tr. 801-810]. On 3/18/09, Drs. Graven and Kenneth Hacker performed surgery [Tr. 73:15-74:23]. When Claimant was discharged from the hospital on 3/21/09, he was prescribed Percocet and ordered not to do any lifting over 5 lbs., no bending, stooping or squatting and to walk a half mile a day [Ex. B-23, Tr. 821-822]. At the time of the hearing, Claimant had not been released from treatment by Dr. Graven and was prescribed 6 weeks of physical therapy [Tr. 74:24-75:9].

Before his back surgery, Claimant had a lot of pain with tingling that fanned out across his lower back, just below the belt line. His pain shot down in a distinct line on the back of both of his legs. His left leg was numb into the knee and from the calf into his foot. After surgery, the tingling in his low back was just about gone, but he had lingering numbness in his left lower extremity that wrapped across the front of his thigh. The surgery did not improve the burning and tingling in his feet [Tr. 76:3-77:17].

Since the accident, and following his back surgery, it was difficult for him to sleep, waking up after a couple hours because of his pain [Tr. 77:18-24]. Throughout the day, he is up and down trying to get relief from his back and feet pain. He lays down an hour to two a day [Tr. 77:25-78:13, 128:17-25]. During the hearing, he laid down for a little over an hour because of his back pain [Tr. 138:2-23]. Over the course of a little over three hours, "Claimant was up and down all afternoon," moving about every 15 minutes because of his back pain. He explained that when he stands up, he gets numbness in his left leg, his feet hurt

and they begin to burn and tingle [Tr. 125:9-126:9]. Claimant has to continuously adjust to try to find a comfortable position. Before the accident, he had no problems standing or sitting [Tr. 126:5-127:3].

Since the accident, Claimant has been on prescriptive medications. At the time of the hearing, he was taking Vicodin, Ibuprofen and Xanax [Tr. 139:11-17]. Although the medications lighten his pain, they upset his stomach, make him constipated and cause grogginess and problems with concentration and memory [Tr. 116:9-21; 129:1-13].

He continues to have headaches and wears eye glasses to correct his double vision. His depth perception has also changed since the accident. He experiences headaches 2 to 3 times per week, for which he takes Ibuprofen [Tr. 129:24-130:24].

The treatment records and itemized statement of charges were introduced into evidence, without objection [Tr. 16, 537-983; Ex. A-10; Ex. B-17-27]. Claimant identified Exhibit B-28, which summarized his subsequent treatment and the charges, all of which he related to the injuries he sustained on 11/9/06 [Tr. 69:4-70:7]. The costs of his treatment, including prescriptive medication costs through 4/20/09, totaled \$111,853.65 [Tr. 984-985].

Testimony and Reports of Dr. Paletta

When Dr. Paletta first examined Claimant on 11/15/06, his feet were tender to palpation, particularly in the region of the heel pads and heel bone and he walked with a limp. He had painful limited range of motion in his back. He was tender about the shoulder and had some weakness of the rotator cuff [Tr. 1613:1-22]. Dr. Paletta thought that Claimant had a low back sprain, contusions of both heels and a probable left rotator cuff strain and tear

of the long head of the biceps tendon [Tr. 1616:14-1617:1]. Dr. Paletta ordered physical therapy for his back and shoulder and narcotic pain and anti-inflammatory medications. For the heels, he prescribed heel cups [Tr. 1617:13-1618:6]. Dr. Paletta did not believe that it was reasonable or possible for him to do any work because he had difficulty walking and standing [Tr. 1651:14-19].

On 12/11/06, Dr. Paletta changed Claimant's medications and injected his left shoulder bursa due to the lack of significant pain relief [Tr. 1623:19-1624:7]. On 1/8/07, Claimant noted improvement in his shoulder and the pain was confined more to the front of his shoulder, although he was still having difficulty raising his arm over head and there was more obvious asymmetry of the biceps [Tr. 1626:5-14]. There was, however, no significant improvement in his heel and back pain [Tr. 1624:19-1625:3].

Dr. Paletta ordered a FCE that was completed on 1/4/07. Claimant was able to function at a light work level, meaning no significant heavy lifting, pushing or pulling [Tr. 1627:14-1628:8]. The evaluation did not necessarily represent his ability to actually work, but rather how he performed over a period of a couple of hours [Tr. 1657:14-24].

Claimant was seen by Dr. Paletta on 1/17/07 stating that he had fallen on the sidewalk on 1/13/07, which increased the pain in his back. Dr. Paletta ordered an EMG and nerve conduction study that was normal [Tr. 1632:21-1636:14].

On 2/7/07, Claimant described shooting pains along the biceps and continuing back and foot pain. Dr. Paletta recommended that Claimant be seen by a pain management specialist to better manage his complaints. He recommended against surgery because it could

take weeks or months for the crampiness in his biceps muscle to settle down [Tr. 1638:15-24]. Dr. Paletta would not consider surgery until at least 3 months after the rupture [Tr. 1678:2-24].

When Dr. Paletta last saw Claimant on 3/28/07, continued to complain of aching discomfort and crampiness in the biceps muscle and occasional discomfort in the shoulder. Claimant had pain at the end ranges of motion and a Popeye deformity [Tr. 1641:18-1643:3]. Dr. Paletta felt that Claimant was at MMI with respect to his left shoulder and released Claimant to return as needed [Ex. A-3, Tr. 197; 1645:21-23]. In his opinion, Claimant suffered a 5% PPD at the shoulder. He did not feel that he had any prior disability to the shoulder [Tr. 1646:7-1648:4]. The work injury was the prevailing factor in causing his complaints of pain as well as his diagnosed condition [Tr. 1648:25-1649:4]. All of his treatment was reasonable and necessary to help cure and alleviate the effects of Claimant's work injuries to his low back, feet and left shoulder [Tr. 1649:5-22].

Dr. Paletta did not identify any permanent disability as a result of Claimant's fall in January 2007 [Tr. 1665:5-9; 1666:7-15]. Up to when Dr. Paletta released Claimant, he restricted Claimant to no lifting with his left shoulder up to 20 lbs. and no lifting or working above the head [Tr. 1668:11]. When he released Claimant, he changed his restrictions to "as tolerated" [Tr. 1681:25-1682:6]. After 3/28/07, Employer never asked him to re-examine Claimant or to review any additional treatment records [Tr. 1679:18-1680:5].

Testimony and Reports of Dr. Aubuchon

Dr. Aubuchon first saw Claimant approximately 4 months after the work accident. As

of 3/13/07, he had not been given any specific treatment for his foot or ankle problems [Tr. 1746:4-9]. Claimant complained that his feet hurt him when he was lying down and walking. His heel pain was constant and he had to quit golf and exercise [Tr. 1738:11-14]. Dr. Aubuchon found that Claimant had a lot of pain in the bottom and sides of his heels and above his heels. Dr. Aubuchon felt that Claimant had traumatic contusions of the fat pads of his feet, which caused scaring and pain in his heels. His medical condition was consistent with the mechanism of his work-related injury of falling and landing on his heels on concrete. Dr. Aubuchon prescribed custom made orthotics to cushion his heels, physical therapy and continued him on anti-inflammatories [Tr. 1740:14-1742:1].

The 3/15/07 ProRehab note reported that Claimant's foot pain varied between sharp and dull and achy. His pain increased with standing, walking, stair climbing and walking while barefoot and was relieved by sitting and at rest [Ex. A-7, Tr. 357]. Claimant had swelling at the lateral left foot just distal to the lateral malleolus over the tarsal bones. He also had mild atrophy of the bilateral gastric muscles. His gastric flexibility was significantly limited bilaterally [Id., Tr. 358, 1754:14-1755:15]. There was also an approximate 20% loss of the plantarflexion. He had some difference in inversion and a slight difference in inversion/eversion and a dorsiflexion was at about neutral [Tr. 357-358; 1756:21-1757:15].

Claimant attended all 13 scheduled sessions. The objective findings showed evidence of injury and limitations [Tr. 350, 352-53; 355, notes dated 3/21, 4/2, 4/9 & 4/16/07]. His last session was on 4/16/07. Under the "objective" section, Claimant walked with a limp and ambulated with toeing out patterning bilaterally with diminished dorsiflexion at terminal

stance and diminished great toe extension. He had loss of strength on dorsiflexion, plantarflexion, inversion and eversion. While walking on the treadmill, he displayed compensatory patterning and overt signs of discomfort [Id., Tr. 349].

When Dr. Aubuchon last examined Claimant on 4/24/07, he complained of foot pain, without improvement. Dr. Aubuchon opined that as a result of his work-related injury, he sustained a permanent partial disability of 3% of the heel pads in both feet and released him from his treatment [Tr. 1744:1-19]. The November 2006 fall was the prevailing factor in causing Claimant's diagnosed condition and disability [Tr. 1762:11-20]. He recommended Claimant continue his home exercise stretching program, use his orthotics, take anti-inflammatories and wear tie shoes so he could adjust the volume and the pressure in his feet. As a result of the 11/9/06 injury, it would be reasonable and necessary that he be examined by a physician and his orthotics be replaced every 2 or 3 years [Tr. 1748:8-1749:20].

Testimony and Reports of Dr. Chabot

Claimant first saw Dr. Chabot on 2/14/07 for his back complaints. Claimant's range of motion of the lumbar spine was limited in all planes and had mild hamstring tightness [Tr. 1577:15-1578:23]. Dr. Chabot concluded that Claimant suffered from hip pain, trochanteric bursitis, back pain, back strain, heel pain and heel contusion [Tr. 1554:11-13]. Dr. Chabot injected the left greater trochanteric bursa to treat his inflammation and continued his pain and anti-inflammatory medications and physical therapy [Tr. 1575:6-21].

The 3/5/07 physical therapy note showed tightness in the hamstrings, a 20% loss of strength in the hip flexors and abductors on the left, a 20% loss of the strength in the

abductors and some diminishment of strength in the extensors on the left [Ex. A-4, Tr. 111]. Similarly, there was loss of strength in the left knee extensors and flexors as compared to the right by about 20% [Tr. 1580:8-1581:8]. Pain was noted with mobilization of L5 and there was limited range of motion with sitting, standing and bending [Ex. A-4, Tr. 111]. Dr. Chabot returned Claimant to limited work activities of no lifting more than 20-25 lbs. and ordered an FCE, which was done on 3/27/07 [Tr. 1558:24-1559:6].

The Waddell Test has been specifically developed to detect malingering in patients with back complaints [Tr. 1585:14-17]. In both FCE's in January and March, the examiner checked for Waddell signs and found that they were not clinically significant [Tr. 1586:8-12]. Based on objective testing and Claimant's subjective complaints, he was functioning below light work demand level [Tr. 1582:21-1583:20].

Dr. Chabot last saw Claimant on 4/2/07. Claimant was noted to have left SI region tenderness and limitation on forward flexion, extension and side bending. Hip log roll testing and Faber's test produced left groin pain [Tr. 1560:17-21]. Range of motion again was essentially identical to the initial examination, except extension improved by 5 degrees. Claimant continued to complain of back pain, left leg pain and numbness and left foot aching [Tr. 1587:19-22]. It was Dr. Chabot's impression that a large portion of Claimant's disability was associated with psychological factors and symptom magnification. He felt Claimant could return to his regular work duties and that there was no further need for medical treatment with respect to his back, but that he should continue his home exercises [Tr. 1561:7-1562:8]. He prescribed no further medications and made no follow-up appointments.

At the time of release, he anticipated that Claimant would continue to have complaints [Tr. 1587:9-1588:9]. Dr. Chabot concluded that Claimant sustained a permanent partial disability of 2% of the body as a whole as a result of his 11/9/06 injury with respect to his back [Tr. 1564:10-13]. The treatment that he provided Claimant was reasonable and necessary to help alleviate the effects of his 11/9/06 injury [Tr. 1566:2-6].

Claimant listed a previous history of depression, anxiety and hospitalization. Dr. Chabot acknowledged that depression and anxiety can impact a person's perception of pain, as well as the progression following a course of treatment for injuries [Tr. 1568:20-18]. Dr. Chabot agreed that doctors are to treat a patient as a whole and that if Claimant was having psychological problems which limited his ability to get back to work, it would have been appropriate that he be referred for a psychological evaluation. Dr. Chabot, however, did not discuss with Claimant whether he was having psychological issues, make a clinical assessment or refer him for a psychological evaluation [Tr. 1584:14].

Testimony and Reports of Dr. David Volarich

Claimant was examined by Dr. Volarich on 3/17/08 and 5/22/09. He prepared 4 reports dated 5/7, 7/18, 9/12/08 and 5/22/09. Dr. Volarich testified in his original deposition (11/7/08) that as a result of Claimant's work-related accident on 11/9/06, Claimant sustained a traction-type injury to his left shoulder, resulting in a biceps tendon injury and impingement of the shoulder. He also sustained compression injuries to his back and feet. X-rays of the back showed that there was a narrowing of L5-S1 space. The axial compression injury to the spine was consistent with the diagnosis and the findings that were made on physical exam

[Tr. 1387:21-1388:25]. He diagnosed Claimant with plantar fasciitis, inflammation of the facial structures, the tendons, ligaments that support the arch of the foot, which was traumatically induced [Tr. 1389:4-12]. Claimant's complaints, as well as his diagnosed conditions, were consistent with the mechanism of the 11/9/06 accident [Tr. 1389:13-17]

& Left Shoulder:

Claimant's left shoulder strength was weak. There was a 50% loss of power on external rotation. There was a 30% loss on the rest of the muscle groups. The biceps was also weak at 3/5 in the left, representing a 40% loss of strength [Tr. 1390:5-12]. There was a 30% loss of motion in the left shoulder. Impingement testing was moderately positive and there was also a click was circumduction of the shoulder. O'Brien's test was weakly positive, indicating a labral injury. There was 1/4 crepitus with motion and 2/4 atrophy at the deltoid rotator cuff. There were puncture scars from past arthroscopies and a Popeye deformity of the left arm consistent with a tear of the long head of the biceps tendon [Tr. 1392:12-1393:18]. Grip strength testing showed that the left arm overall was generally weaker than the right arm, which was consistent with the testing of the other muscle groups, providing objective proof of injury. The left shoulder was weaker due to the 11/9/06 injury [Tr. 1396:3-1397:4].

Claimant had left shoulder surgery in 2003 by Dr. Emanuel to relieve his impingement. The work injury of 11/9/06 caused recurrent impingement and injured the biceps tendon. Dr. Rummel did a bursectomy to reopen the space and relieve the impingement, but was unable to reattach the biceps tendon [Depo. 11/7/08, Tr. 1432:13-

1433:23]. Dr. Volarich rated Claimant's disability to his shoulder as 30% pre-existing and 35% as a result of the 11/9/06 accident [Tr. 1412:8-1415:24].

& Right Shoulder:

Claimant had problems to his right shoulder dating back to 2000 that required 2 surgeries. There was a 20% loss of motion on the right and impingement testing was positive. There was some pain using the O'Brien's test and 1/4 crepitus and 1/4 atrophy of the shoulder, for which Dr. Volarich gave a 45% PPD rating at the right shoulder [Tr. 1412:8-1415:24, 1492].

& Feet:

There was weakness in the dorsiflexors and plantar flexors of both feet with a 20% loss because of pain in the feet. There was pain with palpation of the fat pad of the heel along the plantar surface in each foot. There was also some pain at the insertion of the plantar fascia consistent with plantar fasciitis [Tr. 1398:20-1399:5]. The photographs of Claimant's feet [Ex. B-29, Tr. 986-988] depict ecchymosis and significant swelling along the interior myelosis. There is bruising as well as on the area of each foot that shows considerable discomfort, certainly tissue damage in each [Tr. 1472:2-9]. As a result of the 11/9/06 accident, Claimant has a 25% permanent partial disability of each foot rated at the heel. The rating took into account Claimant's difficulties in weight-bearing, impact activities and need to wear orthotics to help cushion his feet [Tr. 1401:12-1402:14].

& Low Back, Hips and Lower Extremities:

Before back surgery, Claimant walked with a limp favoring the left lower extremity

because of back and hip pain and some groin pain. Toe walking increased the limp. He was unable to heel walk because of heel and foot pain. He was able to stand, walk and stand on each foot, but he was weak and somewhat wobbly. He could squat about 3/4's of normal, but stopped because of back discomfort. He had to hold onto the exam table to steady himself [Tr. 1390:14-25].

There was a 15-20% loss of range of motion in all planes and muscle weakness in the hips, but no advanced arthritis. There was some pain in the left groin and left upper thigh, which was consistent with L5 radiculopathy. There was a 1 centimeter atrophy of the left thigh, which was also consistent with impingement of the L5 nerve, causing left leg problems [Tr. 1397:15-1398:13].

The low back was restricted in all planes. There was a 27% loss of flexion, 60% loss of extension and a 44% loss in right side bending and 60% loss in left side bending. On palpation, there was pain at the L5-S1 junction at the paraspinal muscle at the L3 through S1 and trigger points in the midline at S1. Straight leg raising was accomplished at 70 degrees to the right where he stopped because of back discomfort. On the left, he was able to go to 70 degrees, but pain radiated into his spine. The trigger points were an objective finding, establishing irritation in the area of the muscle and soft tissue. Limitation of straight leg raising on the left suggested that there was an irritation of the sciatic nerve [Tr. 1390:13-1392:7].

The asymptomatic degenerative disc disease and bone spurs seen on the MRI scans pre-existed Claimant's 11/9/06 work injury. The fall, however, caused the disc and the disc

spaces and the nerves coming from the disc spaces to become symptomatic, giving him back pain and radicular symptoms. Swelling from the original injury, increased pressure exerted from the disc onto either the nerve roots at the L4-5 or the internal disc derangement at the L5-S1, which caused symptomatology [6/18/09 Depo., Tr. 1185:11-1186:8].

Because of the confusion over the November 2007 MRI reading showing impingement of the L4 nerve root, Dr. Volarich recommended a discogram [Tr. 1430:5-1431:11]³. The 11/9/07 MRI showed a disc osteophyte complex which meant there was both a bulging disc and boney hypertrophy.

A discogram is typically done when the other diagnostic studies do not show overt impingement of a nerve root, but the patient has radicular symptoms characteristic of a ruptured disc. The discogram is the next step in the treatment protocol [Tr. 1447:1-11]. The examiner inserts a needle into the disc while the patient is being x-rayed under a fluoroscope. The patient does not know which level is being injected. If the patient responds that he is in pain, that is the level that is considered a pain generator. Once the problem disc is identified, the standard of care is to fuse the disc space [Id., Tr. 1447:12-1449:1].

Following Claimant's discogram and back surgery, Dr. Volarich examined Claimant on 5/22/09. The discogram findings were consistent with the history of Claimant's 11/9/06 accident. It identified degenerative changes and annular tears with extravasation of contrast

³The transcript of Dr. Volarich's deposition taken on 11/7/08 had a number of transcription mistakes. He clarified his testimony in his deposition taken on 6/18/09 [Tr. 1182:16-1185:7].

that probably was the thing that would be the most acute of the problems. The annular tear was in the ligament that held the disc in place. When torn, there was leakage of the contents of the disc, which can be annulus or a piece of cartilaginous disc. Any of those things can leak out or they can stay internally fixed, causing significant derangement of the disc and pain. The fact that Claimant had radicular symptoms indicated that one or more nerve roots along the sciatic nerve distribution were impinged, causing the radiating pain and a serious sign of a back problem [Tr. 1142:22-1143:4]. Based on Claimant's history, the L5-S1 pathology occurred as a result of the 11/9/06 accident [Depo. 6/18/09, Tr. 1179:21-1181:17].

Based upon the discogram findings and looking at the prior medical history, the work accident was the cause of the L5-S1 disc and his symptoms because it was identified as being concordant with causing his problem [Tr. 1154:16-1155:5]. In Claimant's case, there was no obvious disc herniation posteriorly pressing on the nerve. The pain generator was the disc itself. The best treatment was to do a complete discectomy and fusion procedure so that there would be no movement at the level, which is the standard of care [Tr. 1158:21-1159:3].

Dr. Volarich did not think it made a difference if Claimant's depression was driving his pain level. You have to take the patient the way he is and treat him appropriately for what the problems are. If there is a problem with depression, it has to be treated in addition to the principal problem [Id. Tr. 1442:2-10]. Dr. Volarich did not think that the doctors were treating a psychiatric condition, but rather the pathologic condition in Claimant's back [Tr. 1171:21-23]. Claimant had no back pain before the November 2006 fall. From what was found on the discogram and on the MRI scans, his back symptoms and complaints matched

his pathology [Tr. 1171:25-1172:4].

There were specific pathology changes that occurred as a result of the accident. To address the changes, Dr. Graven took out the bad disc, replaced it with spacers and fused the level. Claimant did not have a spinal decompression posteriorly, a laminectomy, a laminotomy to address any of the pre-existing degenerative changes [Tr. 1174:1-21].

& Reasonableness and Necessity of Treatment:

The treatment provided by Dr. Martin was reasonable and necessary to help cure and alleviate the effects of Claimant's work-related feet injuries on 11/9/06. The charges for these services were reasonable and customary [Tr. 1409:6-1411:15].

The treatment provided by Dr. Meier and St. Peters Bone & Joint for Claimant's back, including MRI's, steroid injections at St. Peters Surgery Center and surgery to the left shoulder at SSM St. Joseph West Hospital with follow-up physical therapy at Skaggs Community Center were reasonable and necessary to help cure and relieve the effects of Claimant's work-related injury [Tr. 1404:4-1409:5].

The discogram was necessary and reasonable to help treat Claimant's work injuries. Likewise, his back surgery, based upon the discogram findings, was reasonable and necessary to help relieve the effects of Claimant's work-related accident in November 2006 [Tr. 1134:2-22]. The charges associated with the discogram and surgery at Barnes Hospital, as well as the pre-operative testing and second opinion, were all reasonable and necessary [Tr. 1135:1-15]. The prevailing factor in requiring surgery was Claimant's accident on 11/9/06 when he fell. Claimant's slip and fall in January 2007 was not the prevailing factor,

it was simply a factor. Had he not slipped and fallen, he would have required the same treatment [Tr. 1141:15-1142:18].

& Need for Future Treatment:

When Claimant was seen by Dr. Volarich on 5/22/09, he had not reached maximum medical improvement and was still in the immediate post-operative period. With treatment, it will probably be a year before he will be at MMI [Tr. 1143:22-1144:2]. Claimant continued to have problems because the buildup of 2½ years of scar tissue from the original accident and no specific intervention. It is going to be several years before the final outcome is known. At this stage, Claimant has some improvement, which is a good sign, and hopefully he will have some more improvement over the next year [Tr. 1159:24-1160:11]. The surgery brought him some relief from his low back pain, as well as a lessening of tingling and discomfort across his low back. Claimant continues to experience painful numbness and tingling radiating from the spot that he points to at his left thigh, just below his hip, diagonally across the thigh to the medial aspect of the left knee and persistent pain in the posterior thigh with muscle cramping in the calves. It is too early to say what is going to happen with his radicular symptoms [Tr. 1160:23-1161:9]. There is continued weakness and diminished pin prick sensation in the S1 nerve root [Tr. 1161:10-24]. After surgery, there was slight improvement in his back motion [Tr. 1169:10-13].

Claimant is in need of pain management for the foreseeable future because of his continuing radicular symptoms and ongoing back and foot pain. The next year will be a critical time to get Claimant's pain under control and, through physical therapy and rehab,

to try to get him back to a more functional state [Tr. 1145:5-1146:11].

Regardless of the ultimate outcome from his surgery, it was still reasonable and necessary. If Claimant does not get any better, the next step is to repeat the diagnostic studies at the L4-5 to see if it is a new pain generator and then make the decision whether the level needs to be fused [Tr. 1169:24-9].

& Total Disability:

Before back surgery, Dr. Volarich gave permanent restrictions to Claimant's activities, referable to his back and feet as a result of the 11/9/06 accident. He also gave permanent restrictions with respect to his upper extremities, right and left shoulders. Dr. Volarich believed that Claimant was permanently and totally disabled from competing in the open labor market as a result of a combination of his pre-existing and work-related injuries on 11/9/09 [Id., Tr. 1420:3-13]. Now that Claimant has had surgery, Dr. Volarich may modify his opinion, depending upon how he responds to follow-up treatment [Tr. 1144:3-19]. His permanent and total disability may prove to be the result of the 11/9/06 injury alone [Tr. 1178:19-1179:14].

Vocational Reports and Testimony

Donna Abram

At the request of Employer, Claimant was seen by Ms. Abram, a vocational rehabilitation professional, on 3/10/09 [Tr. 1784:13-1785:23]. Ms. Abram's administered a battery of aptitude tests. Claimant worked steady, but at a slow speed. Overall, his aptitudes were at the middle school level [Tr. 1789:13-1790:24].

Claimant's move to Reed Springs could be problematic for Claimant to be able to successfully compete for a job [Tr. 1799:7-11, 1846:2-1847:25]. Claimant's physical complaints are also likely to interfere with his ability to work. If Claimant's ability to drive is limited and he can only sit for 15 to 20 minutes, stand for 10 to 15 minutes, needs to lay down periodically during the day and needs to take narcotic medications, it would be difficult for him to find a job [Tr. 1863:15-1866:24]. The fact that Claimant has to lay down several times a day precludes his ability to work [Tr. 1867:4-15]. It would be difficult and improbable that he could find a job [Tr. 1868:15-12].

Timothy Lalk

Timothy Lalk is a Certified Vocational Rehabilitation Counselor [Tr. 1334:15-1335:8]. On 8/11/08, Mr. Lalk evaluated Claimant. Based upon his interview and record review, Claimant has not been able to secure and maintain employment in the open labor market since his work injury [Tr. 1285:4-22, 1345:21-1346:7].

During their 2 hour session, Claimant exhibited symptoms, which would be evident to any potential employer, demonstrating difficulty in performing the simple activities of walking and sitting. Any employer would be very reluctant to hire him and certainly would not chose him as a prime candidate in any competitive position because he would not be dependable [Tr. 1346:10-1348:13]. Without improvement in the control of his symptoms and his level of functioning, Claimant cannot work in a sedentary level of physical exertion through a full work day and on a regular basis [Tr. 1351:21-1352:20]. Claimant's orthopedic problems referable to his feet and low back alone would keep him from working in the open

labor market [Tr. 1359:3-12]. His pre-existing conditions may complicate his employability but are not the primary reason for his inability to work [Tr. 1359:13-1361:5]. Further, Claimant is not an appropriate candidate for vocational rehabilitation [Tr. 1352:8-12].

POINTS RELIED ON

- I. THE COMMISSION ERRED IN ENTERING A FINAL PPD AWARD BECAUSE THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW AND ITS FINDINGS THAT CLAIMANT REACHED MMI IN APRIL 2007 AND FAILED TO PROVE THAT HIS SUBSEQUENT TREATMENT AND INABILITY TO WORK WAS CAUSALLY RELATED TO HIS COMPENSABLE WORK ACCIDENT ARE NOT SUPPORTED BY THE RECORD AND ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:**
- A. THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW IN REQUIRING CLAIMANT TO PROVE THAT HIS COMPENSABLE WORK ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING HIS MEDICAL CONDITION AND DISABILITY FOR WHICH TREATMENT WAS REASONABLY REQUIRED AFTER APRIL 2007;**
- B. THE COMMISSION EXCEEDED ITS POWER IN FAILING TO CONSIDER CLAIMANT’S UNCONTRADICTED AND UNIMPEACHED TESTIMONY AND HIS MEDICAL RECORDS WHICH PROVIDED SUBSTANTIAL COMPETENT EVIDENCE THAT HIS MEDICAL TREATMENT AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT UNDER §287.140.1**

RSMO.;

- C. THE COMMISSION EXCEEDED ITS POWER IN REQUIRING CLAIMANT TO DEPOSE HIS SELECTED MEDICAL PROVIDERS TO SATISFY HIS BURDEN TO PROVE THE CAUSE FOR HIS TREATMENT AFTER APRIL 2007;**
- D. THE COMMISSION'S RELIANCE ON THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERTS TO CONCLUDE CLAIMANT REACHED MMI IN APRIL 2007 IS NOT SUPPORTED BY THE RECORD BECAUSE THEIR OPINIONS WERE BASED UPON INCOMPLETE INFORMATION AND NONE OF THE EXPERTS EXAMINED CLAIMANT, TOOK AN ADDITIONAL HISTORY OR REVIEWED HIS ADDITIONAL TREATMENT RECORDS AFTER RELEASING CLAIMANT AND DECLARING HIM TO BE AT MMI;**
- E. THE COMMISSION EXCEEDED ITS POWER IN REJECTING THE UNCONTRADICTED MEDICAL CAUSATION OPINIONS OF DR. VOLARICH THAT CLAIMANT WAS NOT AT MMI IN APRIL 2007 AND HIS SUBSEQUENT TREATMENT WAS REASONABLE AND NECESSARY TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES;**
- F. CLAIMANT IS ENTITLED TO TTD BENEFITS AND INTEREST SINCE THE UNCONTRADICTED EVIDENCE ESTABLISHED HIS INABILITY TO WORK AFTER APRIL 2007 FLOWED FROM HIS**

COMPENSABLE WORK ACCIDENT;

G. CLAIMANT IS ENTITLED TO RECOVER HIS ATTORNEY’S FEES AND COSTS SINCE EMPLOYER DENIED HIM ADDITIONAL BENEFITS WITHOUT REASONABLE CAUSE; AND

H. THE PPD AWARDS ARE NOT SUPPORTED BY THE RECORD SINCE THEY FAIL TO TAKE INTO ACCOUNT CLAIMANT’S ADDITIONAL TREATMENT AND DISABILITIES.

Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511 (Mo.App. W.D. 2011)

Fogelson v. Banquet Foods Corp., 526 S.W.2d 886 (Mo.App. 1975)

Daly v. Powell Distributing, Inc., 328 S.W.3d 254 (Mo.App. W.D. 2010)

Townser v. First Data Corp., 215 S.W.3d 237 (Mo.App. E.D. 2007)

§287.140.1 RSMo.

§287.495.1 RSMo.

§287.190.6(2) RSMo.

§287.203 RSMo.

II. THE COMMISSION ERRED IN FAILING TO AWARD CLAIMANT PAST DUE MEDICAL EXPENSES, INTEREST AND FUTURE MEDICAL CARE BECAUSE THE COMMISSION MISAPPLIED THE LAW AND THE AWARD IS NOT SUPPORTED BY THE RECORD AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:

- A. CLAIMANT’S MEDICAL CARE AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT, INCLUDING TREATMENT FOR HIS BILATERAL FOOT, SHOULDER AND BACK PAIN, DEPRESSION, ANXIETY AND INSOMNIA;**
- B. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT THE ADDITIONAL TREATMENT HELPED ALLEVIATE THE EFFECTS OF CLAIMANT’S COMPENSABLE WORK-RELATED INJURIES;**
- C. CLAIMANT DEMANDED, AND THE EMPLOYER FAILED OR REFUSED TO PROVIDE ADDITIONAL TREATMENT; AND**
- D. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT CLAIMANT NEEDED FUTURE MEDICAL TREATMENT TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES.**

Martin v. Town and Country Supermarkets, 220 S.W.3d 836 (Mo.App. S.D. 2007)

Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo.banc 1989)

Landers v. Chrysler Corp., 963 S.W.2d 275 (Mo.App. E.D. 1997)

Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326 (Mo.App. S.D. 1986)

§287.140.1 RSMo.

§287.495.1 RSMo.

III. THE COMMISSION ERRED IN LIMITING THE 15% PENALTY AGAINST EMPLOYER FOR VIOLATING THE SCAFFOLDING ACT TO THE AMOUNTS AWARDED BY THE ALJ BECAUSE THE COMMISSION MISAPPLIED THE LAW, AS REVIEWABLE UNDER §287.495.1, IN THAT UNDER §287.120.4, CLAIMANT WAS ENTITLED TO RECOVER THE PENALTY ON ALL AMOUNTS PROVIDED BY EMPLOYER UNDER CHAPTER 287 *ET SEQ.*, INCLUDING TTD AND MEDICAL BENEFITS VOLUNTARILY PROVIDED OR AWARDED CLAIMANT.

Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29 (Mo.banc 1988)

Bowers v. Hiland Dairy Co., 132 S.W.3d 260 (Mo.App. S.D. 2004)

Pavia v. Smitty's Supermarket, 118 S.W.3d 228 (Mo.App. S.D. 2003)

Martin v. Star Cooler Corp., 484 S.W.2d 32 (Mo.App. 1972)

§287.120.4 RSMo.

§287.170 RSMo.

§287.180 RSMo.

§287.190 RSMo.

§287.200 RSMo.

§287.220 RSMo.

§292.090 RSMo.

ARGUMENT

- I. THE COMMISSION ERRED IN ENTERING A FINAL PPD AWARD BECAUSE THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW AND ITS FINDINGS THAT CLAIMANT REACHED MMI IN APRIL 2007 AND FAILED TO PROVE THAT HIS SUBSEQUENT TREATMENT AND INABILITY TO WORK WAS CAUSALLY RELATED TO HIS COMPENSABLE WORK ACCIDENT ARE NOT SUPPORTED BY THE RECORD AND ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:**
- A. THE COMMISSION EXCEEDED ITS POWER WHEN IT MISAPPLIED THE LAW IN REQUIRING CLAIMANT TO PROVE THAT HIS COMPENSABLE WORK ACCIDENT WAS THE PREVAILING FACTOR IN CAUSING HIS MEDICAL CONDITION AND DISABILITY FOR WHICH TREATMENT WAS REASONABLY REQUIRED AFTER APRIL 2007;**
- B. THE COMMISSION EXCEEDED ITS POWER IN FAILING TO CONSIDER CLAIMANT’S UNCONTRADICTED AND UNIMPEACHED TESTIMONY AND HIS MEDICAL RECORDS WHICH PROVIDED SUBSTANTIAL COMPETENT EVIDENCE THAT HIS MEDICAL TREATMENT AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT UNDER §287.140.1**

RSMO.;

- C. THE COMMISSION EXCEEDED ITS POWER IN REQUIRING CLAIMANT TO DEPOSE HIS SELECTED MEDICAL PROVIDERS TO SATISFY HIS BURDEN TO PROVE THE CAUSE FOR HIS TREATMENT AFTER APRIL 2007;**
- D. THE COMMISSION'S RELIANCE ON THE TESTIMONY OF EMPLOYER'S MEDICAL EXPERTS TO CONCLUDE CLAIMANT REACHED MMI IN APRIL 2007 IS NOT SUPPORTED BY THE RECORD BECAUSE THEIR OPINIONS WERE BASED UPON INCOMPLETE INFORMATION AND NONE OF THE EXPERTS EXAMINED CLAIMANT, TOOK AN ADDITIONAL HISTORY OR REVIEWED HIS ADDITIONAL TREATMENT RECORDS AFTER RELEASING CLAIMANT AND DECLARING HIM TO BE AT MMI;**
- E. THE COMMISSION EXCEEDED ITS POWER IN REJECTING THE UNCONTRADICTED MEDICAL CAUSATION OPINIONS OF DR. VOLARICH THAT CLAIMANT WAS NOT AT MMI IN APRIL 2007 AND HIS SUBSEQUENT TREATMENT WAS REASONABLE AND NECESSARY TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES;**
- F. CLAIMANT IS ENTITLED TO TTD BENEFITS AND INTEREST SINCE THE UNCONTRADICTED EVIDENCE ESTABLISHED HIS INABILITY TO WORK AFTER APRIL 2007 FLOWED FROM HIS**

COMPENSABLE WORK ACCIDENT;

- G. CLAIMANT IS ENTITLED TO RECOVER HIS ATTORNEY’S FEES AND COSTS SINCE EMPLOYER DENIED HIM ADDITIONAL BENEFITS WITHOUT REASONABLE CAUSE; AND**
- H. THE PPD AWARDS ARE NOT SUPPORTED BY THE RECORD SINCE THEY FAIL TO TAKE INTO ACCOUNT CLAIMANT’S ADDITIONAL TREATMENT AND DISABILITIES.**

Standard of Review.

Appellate review is governed by Article V, Sec. 18 of the Missouri Constitution and Sec. 287.495 RSMo. The Court is required to examine the whole record to determine if it contains sufficient competent and substantial evidence to support the award. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 223 (Mo.banc 2003). An award is unsupported by competent and substantial evidence if it is contrary to the overwhelming weight of the evidence. *Id.* Judicial review is to be conducted objectively, without reviewing the evidence and all reasonable inferences drawn therefrom in the light most favorable to the award. *Kliethermes v. ABB Power T & D*, 264 S.W.3d 626, 630 (Mo.App. W.D. 2008).

The Court is not bound by the Commission’s conclusions of law. *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo.banc 2007). “Where findings of ultimate fact are reached not by the process of natural reasoning from the facts alone, but rather by application of law, it is a conclusion of law and subject to reversal by the Court.” *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504, 507 (Mo.App. W.D. 1997) (*overruled on other*

grounds by *Hampton*, 121 S.W.3d at 226).⁴ “Where the evidentiary facts are not disputed, the award that should be entered by the . . . Commission may become a question of law and the Commission’s conclusions are not binding on the appellate court.” *Corp v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo.banc 1960).

The Commission is free to disbelieve uncontradicted and unimpeached testimony. *Alexander v. D.L. Sitton Motor Lines*, 851 S.W.2d 525, 527 (Mo.banc 1993). Where the record, however, shows no conflict in the evidence or impeachment of the witness, “[t]he reviewing court may find the award was not based upon disbelief of the witness. *Corp, Id.* The Commission may not arbitrarily disregard and ignore competent, substantial and undisputed evidence of witnesses *who are not shown by the record to have been impeached*, and the Commission may not base their finding upon conjecture or their own mere personal opinion unsupported by sufficient competent evidence.” *Id.* (quoting, *Sanderson v. Producers Commission Ass’n*, 229 S.W.2d 563, 567 (Mo. 1950)); *see also, Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 179 (Mo.App. S.D. 2004) (reversing the Commission’s PPD award because the uncontradicted and unimpeached testimony supported an award of PTD against the Fund).

The Commission’s finding of the absence of medical causation must be based upon sufficient competent evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 599 (Mo. 1994)*. The Commission cannot reject uncontradicted expert testimony on medical causation

⁴Cases cited herein that have been overruled on other grounds by *Hampton* are designated with an asteric (*).

and substitute its own personal opinion on the issue. *Id.* at 600.

If the Commission's decision is unsupported by sufficient competent evidence, the Court has discretion to modify, reverse or remand for rehearing or set aside the Commission's decision. §287.495.1; *Wright Id.* at 600. "When there is not sufficient competent evidence to support a particular finding, the appellate court reverses the commission's finding and remands the case for entry of an appropriate decision consistent with the evidence." *Id.*

1. The Commission misapplied the law in denying Claimant's temporary total disability and medical benefits beyond April 2007 because it held Claimant to a heightened standard of proof not required under the Missouri Workers' Compensation Act.

The Commission disagreed with the standard of proof utilized by the ALJ.⁵ In a two-

⁵The Commission's majority concluded that the ALJ applied the wrong standard by requiring Claimant to prove "poor medical treatment" or "misconduct" on the part of Employer to prevail on a hearing under §287.203 [L.F. 62]. The Commission further found that the absence of expert testimony to explain "gaps in treatment" was not strictly relevant to the question of causation [Id.]. The Commission also found that the ALJ improperly made a medical conclusion that was not supported by any expert testimony when he suggested that Claimant's slip and fall in January 2007 caused encroachment of the L4 nerve. Finally, the Commission noted that the ALJ's failure to cite the standard of proof for medical causation raised a question of whether the appropriate standard was

to-one decision, the Commission, however, affirmed the ALJ's ultimate determination that Claimant reached MMI on April 24, 2007 and held that Claimant failed to prove that the November 6, 2006 accident was the *prevailing factor* in causing a resulting medical condition and disability for which treatment was reasonably required after Claimant reached MMI [L.F. 64]. The Commission misapplied the law in requiring Claimant to prove that his compensable work accident was the *prevailing factor* in causing his need for additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo.App. W.D. 2011).

In *Tillotson*, the claimant sustained a compensable accident to her right knee resulting in a torn lateral meniscus. Because of the claimant's pre-existing degenerative arthritis, the best treatment option was total knee replacement. Employer refused to authorize knee replacement surgery because, according to one of its medical experts, her pre-existing arthritis was the "major prevailing factor for the need for this surgery." *Id.* at 514. After the claimant had total knee replacement on her own, she filed a claim for workers' compensation seeking the costs of the surgery, future medical treatment, temporary total disability for the recuperative period following surgery and for residual permanent partial disability of the right leg. *Id.* The claimant's medical expert opined that her work injuries were the prevailing factor in causing the need for total knee replacement. The ALJ found, amongst other things,

applied [L.F. 62-63]. Mr. Hickey, in his dissent, also criticized the ALJ's misapplication of the law and the Commission's resolution of the claim [L.F. 70-73].

that her pre-existing arthritis was the prevailing factor in causing her need for total knee replacement. The ALJ also expressly found the testimony of claimant's expert, as to the cause for her total knee replacement, not credible. *Id.* at 515. Claimant appealed the decision to the Commission. In a two to one decision, the Commission adopted the ALJ's findings and rulings as its own. On appeal, the Western District reversed, holding that the Commission erroneously employed a prevailing factor analysis to conclude that the claimant was not entitled to compensation associated with her total knee replacement. *Id.* at 525.

The central question in *Tillotson* and this case is whether the Commission erroneously interpreted and applied the law when it denied the claimant compensation because the conceded compensable injury was not the "prevailing factor" requiring additional medical treatment under §287.140.1. "The clear and unambiguous terms of Section 287.140.1 requires nothing more than a demonstration that certain medical care and treatment is reasonably required to cure and relieve the effects of an injury." *Id.* at 520. In both cases, the Commission erroneously incorporated the "prevailing factor" test into the determination of medical care and treatment required to be afforded for a compensable injury as provided under §287.140.1. *Id.*

Here, as in *Tillotson*, the Commission confused the determination of whether a compensable injury was established with the determination of what medical care and treatment an employer is obligated to provide to care for and relieve an established compensable injury. *Id.* at 518-519. "[O]nce it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication

(under §287.140.1) flow from the work injury.” *Id.* at 519 (citing *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. S.D. 2006)).

The Commission misapplied the law and thereby exceeded its power in holding Claimant to an impermissible heightened standard of proof. *See* §287.495.1(1) and *Bock v. City of Columbia*, 274 S.W.3d 555 (Mo.App. W.D. 2008). Had the Commission applied the proper standard described in §287.140.1 to Claimant’s case, the Commission may have reached a different conclusion. Accordingly, the final award should be reversed and remanded to the Commission for further proceedings.

2. Claimant Met His Burden of Proof on the Issue of Causation.

Considering the entire record, there is also insufficient competent evidence to support a final award in this case. Moreover, this is one of those rare cases where the award is contrary to the overwhelming weight of the evidence and must be reversed with directions to enter a temporary award. *Hampton*, 121 S.W.3d at 223.

Claimant had the burden of proving the essential elements of his claim and had to establish a causal connection between the accident and injury. *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo.App. E.D. 1996). He was required to establish each element to a reasonable probability. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. E.D. 1999)*. Probability is found on reason and experience which inclines the mind to believe, even though it leaves room for doubt. *Id.*

Evidence of causation may be inferred from the entire record. “The testimony of the claimant or other lay witnesses as to facts within the realm of lay understanding can

constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or supported by, some medical evidence.” *Fogelson v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo.App. 1975) (quoting, *Davis v. Brezner*, 380 S.W.2d 523, 528 (Mo.App. 1964)); *see also*, *Eubanks v. Poindexter Mechanical Plumbing & Heating*, 901 S.W.2d 246 (Mo.App. S.D. 1995); *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 51 (Mo.App. W.D. 2007). “A claimant’s credible testimony as to work-related functioning can constitute competent and substantial evidence.” *Hampton*, 121 S.W.3d at 223-24.

In denying Claimant a temporary award under §287.203, the Commission found Dr. Volarich’s testimony did not provide a convincing basis for the award sought by Claimant and adopted the opinions of the Employer’s medical experts that Claimant reached MMI in April 2007 [L.F. 64]. Setting aside for the moment the medical opinions of the testifying medical experts, the Commission’s majority erred in ignoring Claimant’s uncontradicted and unimpeached testimony and his medical records, which provided substantial competent evidence that his need for additional treatment and the continuation of his temporary total disability beyond April 2007 flowed from his compensable work accident.⁶

The parties stipulated that Claimant sustained an accident and injuries arising out of and in the course of his employment on 11/9/06 [Tr. 24]. The uncontested facts and indeed

⁶The evidence also provided substantial competent evidence that Claimant’s work accident was the “prevailing factor” in causing his need for additional treatment and TTD benefits.

the Commission's findings establish that Claimant's injuries to his feet, legs, back and left shoulder occurred when the ladder and scaffolding that he was standing on collapsed. It is also beyond dispute that Claimant had no back, leg or foot pain until 11/9/06 and Drs. Paletta, Aubuchon and Chabot all agreed that the accident was the prevailing factor in causing his complaints of pain [Paletta, Tr. 1648:25-1649:4; Aubuchon, Tr. 1762:11-20; Chabot, Tr. 1564:10-13].

Near the end of Claimant's authorized treatment in April 2007, the objective testing by the physical therapist established that he still was having significant problems with his feet and back [Tr. 349-355]. According to the 3/27/07 FCE, Claimant was functioning in the light duty range and had not been able to work [Tr. 1582:8-12]. When Drs. Paletta, Aubuchon and Chabot released Claimant, he was still having problems [Chabot, Tr. 1587:9-1588:9; Paletta, Tr. 1641:13-1643:3; Aubuchon, Tr. 1761:5-9]. Despite the recommendations of Dr. Paletta, Employer failed to schedule Claimant for pain management to better manage his complaints [Tr. 1638:15-17].

When Claimant was released by the authorized treating physicians, he continued to have problems with his feet, legs, back and left shoulder, headaches, blurred vision, anxiety and depression [Claimant, Tr. 60:21-61:10]. Claimant tried to work, but was miserable. He had to take frequent breaks sitting and laying down. At night he could not sleep. After a couple of weeks, he told his boss he could not finish the job [Id., Tr. 62:22-63:20].⁷

⁷The award does not show Claimant's testimony was disbelieved by the Commission. Indeed, the Commission did not comment on Claimant's credibility. The

Claimant promptly sought additional medical treatment for his conditions. The delays between Claimant's assessment by Dr. Meier in May 2007 and the resumption of treatment in October 2007 with Drs. Rummel, Graven and Martin was due to Employer's refusal to provide timely additional treatment or a denial letter so that Claimant could use his private insurance to obtain needed treatment on his own [Claimant, Tr. 8:10-12:15, 12:11-15; Ex. B, Tr. 1204-06].

There was no evidence that Claimant sustained any trauma or developed any non-compensable conditions after April 2007 that explained his need for additional treatment and inability to work [Tr. 52:10-53:1]. In fact, all of the subsequent treatment records consistently recounted a history that related his problems to his November 2006 accident [Ex. B-12 (shoulder), Tr. 576; Ex. B-14, Tr. 631-32; Ex. B-17 (feet), Tr. 717; Ex. B-14 (back), Tr. 633]. Further, the records of treatment after April 2007 established objective evidence of injury and a positive response to treatment [Tr. (feet) 723-725; (back) 633-635; (shoulder) 632, 638].

The specialists selected by Claimant treated his physical complaints based upon their objective findings and diagnostic testing. None of the subsequent records suggest that Claimant's complaints were disproportionate of their findings on examination or testing. There is also no note of a psychological component to Claimant's physical complaints. In fact, prior to clearing Claimant for his discogram, Dr. Shelton did a psychiatric evaluation,

Court may not assume that the Commission discounted or rejected Claimant's testimony as not credible simply because such a finding would be consistent with the result reached.

Hampton, 121 S.W.3d at 223.

which was clinically insignificant [Ex. B-19, Tr. 759-760].

The Commission's majority found that Claimant reached MMI in April 2007 when he was released by Employer's authorized medical providers. The majority's finding, however, is belied by the uncontroverted fact that with additional treatment, his medical condition improved.

Assuming Claimant was required to produce explicit medical expert testimony on the issue of causation, Dr. Volarich explained the cause of Claimant's conditions and disabilities and need for additional treatment. In discussing Claimant's failure of proof on causation, the Commission's majority stated:

Surprisingly, given the nature of the dispute over medical causation in this case, [Claimant] did not offer testimony from any of the doctors who provided his self-directed treatment after [E]mployer's doctors released him . . . Essentially, [Claimant] asks this Commission to find that he remains in need of treatment as a result of the work injury, despite extensive treatment by six difference specialists, none of whom identified the November 2006 accident as the prevailing factor causing a medical condition and disability that warranted treatment after April 2007 [L.F. 65].

The majority's finding is not supported by the record and misapplies the law. The treatment records of Drs. Martin, Rummel and Graven all include a history that Claimant's medical condition was solely the result of his work accident. There is no requirement that the treatment notes include the phrase "the prevailing factor" or that Claimant had to produce

testimony from the specialists he selected, to establish that his work accident was the prevailing factor in causing his medical condition and disability that warranted treatment after April 2007. Under the Workers' Compensation Act, a single medical opinion will support a finding of compensability and that opinion may be based on a written report alone. *Townser v. First Data Corp.*, 215 S.W.3d 237, 242 (Mo.App. E.D. 2007) (reversing the Commission's denial of compensation, in part, because it erred as a matter of law, elevating Claimant's burden of proof by requiring an ergonomic study and misapplying §287.067.7 to attempt to limit recovery in repetitive motion cases).

While it is true that where there are conflicting medical opinions on causation it is the task of the Commission to determine which opinions are most persuasive, the expert opinions and the Commission's reasons for its determination must be supported by substantial competent evidence and follow the law. See e.g., *Kliethermes v. ABB Power T& D*, 264 S.W.3d 626 (Mo.App. W.D. 2008); *Daly v. Powell Distributing, Inc.*, 328 S.W.3d 254, 259 (Mo.App. W.D. 2010), citing, *Kuykendall v. Gates Rubber Co.*, 207 S.W.3d 694, 711 (Mo.App. S.D. 2006); and *Townser v. First Data Corp.*, 215 S.W.3d 237, 241 (Mo.App. E.D. 2007).

Admittedly, the facts are different in each of the cases cited and are distinguishable from those in Claimant's case. However, the court's analysis in each of those cases is the same and equally applicable here. The cases illustrate the court's methodical review of the medical records and the expert deposition testimony to determine whether the Commission's denial of benefits because of a failure of proof on causation was supported by competent and

substantial evidence. In each case, the court began its analysis with reviewing the medical testimony offered by the employer, which the Commission found to be more credible than the expert testimony offered by the claimant. In every case, the court held that the Commission's reliance on the opinions of the employer's experts was not supported by substantial competent evidence and, in two of the cases, the Commission failed to follow the governing legal standards for establishing causation. *See e.g., Daly*, 328 S.W.3d at 259 and *Townser*, 215 S.W.3d at 243-44.

For example, in *Kliethermes*, *supra*, the claimant introduced the medical records of his treating physicians and the deposition testimony of Dr. Kanagawa, the claimant's treating cardiologist, which established a causal connection between the electrical shock the claimant sustained at work and the worsening of his pre-existing heart condition. *Id.*, 264 S.W.3d at 629. The employer countered with the deposition testimony of another cardiologist, Dr. Shuman, who testified that he could not say within a reasonable degree of medical certainty that there was a causal connection and suggested the changed condition was a natural and expected consequence of the disease. *Id.*

The *Kliethermes* court independently concluded that Dr. Shuman's opinions on the lack of proof of causation were undermined by the fact that he failed to notice or believe the objective evidence that the claimant's severe weakness, fatigue and arrhythmia occurred in close proximity to the injury. In ignoring the data, the court concluded Dr. Shuman's opinions were an irrational explanation for how the claimant's condition declined. *Id.* at 631. Further, the court found that the Commission erred in disregarding Dr. Kanagawa testimony

because his opinions were not “scientific” and no better than a “suspicion.” *Id.* at 634. Because there was no medically plausible explanation for the claimant’s deterioration, other than the work injury, the court reversed the Commission. *Id.* at 636.

In *Daly, supra*, the issue was whether the claimant’s neck, right shoulder and abdominal (hernia) injuries were compensable. Dr. Cohen testified by deposition that the injuries were compensable. To rebut the claimant’s case, the employer countered with the deposition testimony of Dr. Hime. The Commission found that the injury was not compensable. On appeal, the court found that Dr. Hime’s opinions were based upon inaccurate findings and that the Commission itself disregarded Dr. Hime’s testimony because he did not have “the background to adequately evaluate” the claimant. *Id.* 328 S.W.3d at 260. This left the Commission with only the testimony of Dr. Cohen. The court reversed the Commission, reasoning that, “[b]ecause no expert testimony conflicted with Dr. Cohen’s testimony supporting a finding of a direct causal connection between the injuries and work, the Commission’s decision is not supported by the record.” *Id.* at 261.

The court in *Townser, supra*, reviewed the Commission’s award denying benefits because the claimant failed to prove that her carpal tunnel syndrome (“CTS”) was caused by her work. The claimant offered deposition testimony from Dr. Cohen, who established causation. The employer offered Dr. Crandall’s deposition testimony and the report of Dr. Zahad as evidence to support the denial of compensation. On appeal, the court found that the Commission’s determination was not supported by the report of Dr. Zahad. *Id.*, 215 S.W. 3d at 242. The court also found that the Commission erred in relying on an ergonomic study that

indicated that the claimant's work was not a contributing factor in the development of CTS because it lacked relevance since it did not take into account the claimant's most recent hand-intensive activities, where she worked a significant amount of time. *Id.* at 243. The Commission's determination that the claimant did not prove causation by probative evidence because Dr. Cohen's opinion was not based upon an ergonomic study and, alternatively, Dr. Crandall's opinion was more probative because it was based upon the ergonomic study, was not supported by competent and substantial evidence. The court reversed the Commission's decision, holding it was contrary to the overwhelming weight of the evidence. *Id.*

Here, the Commission found that the testimony of Drs. Paletta, Aubuchon and Chabot that Claimant reached maximum medical improvement in April 2007 was more credible than the testimony of Dr. Volarich [L.F. at 65]. None of the physicians testified in person. The Commission had no opportunity to personally discuss the facts and conclusions with the doctors. The Commission had access only to medical reports and to the depositions of Drs. Volarich, Paletta, Aubuchon and Chabot. "This [C]ourt is also capable of reading the depositions and reports." *Kliethermes*, 264 S.W.3d at 637.

The ultimate conclusions of Employer's medical experts that Claimant reached MMI in April 2007 were not supported by competent substantial evidence. None of the experts took an additional history, examined Claimant or reviewed his medical records after April 2007. As in *Kliethermes*, *Daly* and *Townser*, their opinions were based on incomplete information which failed to take into consideration subsequent objective medical findings on physical examination, diagnostic testing and the fact that the care provided by the other

physicians specializing in the treatment of the feet, shoulders and spine was beneficial. Moreover, Employer's experts did not testify that the subsequent treatment was unrelated to Claimant's work accident or that the treatment was unreasonable because it failed to meet the applicable standard of care. *Martin v. Town and Country Supermarkets*, 220 S.W.3d 836, 846 N.4 (Mo.App. S.D. 2007) (holding the issue of what may be reasonably required pursuant to §257.140.1 must be decided on an objective basis). The Commission, therefore, was left with only the testimony of Dr. Volarich, which it could not reject and substitute its own personal opinion on medical causation. *Wright v. Sports Associated, Inc.*, 887 S.W.2d at 600.

In *Angus v. Second Injury Fund*, the uncontroverted evidence established that the claimant suffered from rheumatoid arthritis and degenerative osteoarthritis; of which, only the latter could be related to claimant's work. 328 S.W.3d 294 (Mo.App. W.D. 2010). The Commission found that the claimant's rheumatoid arthritis and the profound effect that it had upon him alone rendered him permanently and totally disabled. The court held the Commission could not reject Dr. Koprivic's uncontradicted medical opinion that the cause for the claimant's total disability was due to a combination of both types of arthritis and substitute its own contrary medical opinion using "logic and common sense." *Id.* at 302. The court, accordingly, reversed the Commission, finding that its decision was not supported by sufficient competent evidence, was contrary to the overwhelming weight of the evidence and the Commission failed to make findings on causation within the bounds of the governing legal standards and the evidence before it. *See also, VanWinkle v. Lewellens Professional*

Cleaning, Inc., 258 S.W.3d 889 (Mo.App. W.D. 2008).

Here, the Court is left with the question of whether the Commission could reasonably discard the uncontradicted medical opinions of Dr. Volarich and whether its reasoning is supported by substantial competent evidence within the bounds of the governing legal standards and the evidence before it. See *Wright*, 887 S.W.2d at 600; *Daly*, 328 S.W.3d at 259; *Townser*, 215 S.W.3d 243-4; *Angus*, 328 S.W.3d at 300-3; and *VanWinkle*, 258 S.W.3d at 897.

“The Commission . . . did not fully appreciate the significance of the logical difficulty of purporting to deny a claim based upon a failure of proof when the particular facts of the case so poorly lend themselves to such a determination.” *Kliethermes*, 264 S.W.3d at 636. Claimant was only required to prove causation to a reasonable probability. *Sanderson*, 989 S.W.2d at 603. The facts in this case most easily lend themselves to the conclusion that Claimant’s need for additional treatment flowed from his compensable accident. Indeed, there was no other medically plausible explanation for the additional treatment Claimant received. The Commission held Claimant to a higher standard of proof than required by the law and went out of its way to find reasons for discrediting the opinions of Dr. Volarich and to deny Claimant a temporary award for additional medical and TTD benefits. *Kliethermes*, 264 S.W.3d at 635. Rather than objectively reviewing the entire record and applying the proper burden of proof standard, the Commission’s majority focused on the lack of evidence on issues which are largely unrelated to the question of causation and erred in rejecting Dr. Volarich’s unrefuted opinions and substituted its own medical causation opinions, which

were not supported by competent substantial evidence. In comparison, Mr. Hickey, in his dissent, reached the more probable determination that he was not at MMI in April 2007 and that the work accident was the cause for Claimant's conditions and need for additional treatment [L.F. 70-73].

& Treatment of the Left Shoulder.

The Commission's majority criticized Dr. Volarich's failure to explain why shoulder surgery was reasonably required to cure the effects of the work injury. The majority commented that the oversight was particularly glaring because Dr. Paletta strongly discouraged surgery and that Claimant's 2003 surgery caused a pre-existing 30% disability to the left upper extremity, according to Dr. Volarich [L.F. 64]. The Commission's logic is neither readily apparent nor supported by substantial competent evidence.

Because Dr. Rummel's subsequent treatment flowed from Claimant's work injury, it is compensable, even if the treatment also provided treatment for a non-compensable condition. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 270 (Mo.App. S.D. 2004). If the Commission is suggesting the sole cause for Dr. Rummel's treatment was Claimant's pre-existing shoulder problems, the finding is not supported by substantial competent evidence. When Claimant last saw Dr. Emmanuel in 2004, he had full range of motion and no signs of popping, crepitis or grinding [Tr. 1047]. Dr. Paletta was aware that Claimant had surgery in 2003, but he did not feel that he had any prior disability, suggesting it was not a contributing cause for his ongoing shoulder problems [Tr. 1647:22-1648:4].⁸ Although Dr. Volarich did

⁸The burden was on Employer to prove Claimant's pre-existing left shoulder

ascribe pre-existing disability to Claimant's left shoulder, he never suggested that the surgery performed by Dr. Rummel in December 2007 was done to treat Claimant's pre-existing condition.

Dr. Paletta ordered injections of steroids into the bursa of the left shoulder on 12/10/07. On 1/8/07, Claimant reported improvement and the pain was confined more to the front of the shoulder, although he was still having difficulty raising his arm overhead [Tr. 1624:8-1625:1]. On 2/7/07, Claimant described shooting pains along the biceps. Dr. Paletta thought that ultimately he might need surgery [Tr. 1662:2-9]. Dr. Paletta did not recommend surgery at that time because it could take weeks or months for the crampy discomfort in his biceps to settle down [Tr. 1638:15-24]. Dr. Paletta thought that surgery was premature [Tr. 1638:15-24, 1673:2-24, 1678:2-24]. He did not, however, preclude the possibility of surgery when he released Claimant to be seen in the future as needed [Ex. A-3, Tr. 197].

After Employer was notified that Claimant was seeking additional treatment for his shoulder, it did not refer Claimant back to Dr. Paletta [Tr. 1746:4-9]. Dr. Rummel scheduled Claimant for shoulder surgery to address his diagnosed torn biceps tendon and impingement syndrome after failing non-operative treatment. According to the surgical note dated 12/26/07, upon inspection, the biceps tendon was 25% attached and could not be repaired [Tr. 576]. Dr. Rummel, however, was able to surgically treat Claimant's bursitis, thereby

condition was the cause for Claimant's need for additional treatment. *Garrison v.*

Campbell '66' Express, Inc., 297 S.W.2d 22, 30 (Mo.App. 1956). Employer offered no such evidence.

improving his condition, as testified to by Claimant. The surgery lessened the sharpness of pain in the front of Claimant's shoulder and the intense ache lightened, which is the very area of complaint noted by Dr. Paletta on 1/8/07 [Tr. 66:12-68:8, 118:12-19]. This evidence alone was a sufficient basis on which to award Claimant TTD benefits and the cost of additional medical treatment for the left shoulder.

Contrary to the majority's finding, Dr. Volarich adequately explained why surgery was reasonably required to treat the effects of Claimant's work accident. Simply because the tendon could not be reattached does not mean that surgery was unreasonable. Dr. Volarich explained the utility of the bursectomy to relieve Claimant's impingement syndrome [Tr. 1432:3-1433:23]. Dr. Volarich also explained his reasoning for evaluating Claimant's pre-existing left shoulder disability, which the Commission inferentially found more creditable than Dr. Paletta's testimony – based its adoption of the ALJ's award against the Fund [Tr. 1397:4, 1415:25-1417:16; L.F. 75, 88-89].

& Treatment of the Feet.

The Commission's majority found fault with Dr. Volarich's testimony because he never specifically explained why Claimant remained in need of treatment for his feet after April 2007; while admitting that he could find no improvement in Claimant's heel condition in any of the treatment notes and that Claimant's continued complaints of pain were unusual because plantar fasciitis usually improves with time [L.F. 64-65]. The majority's rationale for denying Claimant the cost of additional medical treatment for his feet misapplies the law and is not supported by substantial and competent evidence.

The majority ignores that Dr. Aubuchon also diagnosed Claimant with contusions of the fat pads of both heels, which caused scaring and pain in his heels [Tr. 1741:18-1742:1]. Dr. Volarich did not testify that this diagnosed condition would improve with time. The majority also misstated Dr. Volarich's testimony. Dr. Volarich testified that plantar fasciitis typically improves over time with rest and treatment [Tr. 1436:18-1438:10]. Although Dr. Volarich did testify he did not see any improvement noted in the treatment records, Dr. Martin's records recount that with additional treatment, Claimant's pain improved by about 60% [Ex. B-17, Tr. 725]. Given the fact that Claimant's condition did improve with additional treatment suggests that 6 weeks of treatment was not enough and that Dr. Aubuchon prematurely released him from treatment and placed him at MMI.

There is no genuine dispute that Claimant's ongoing foot pain was caused by the work accident. To recover the cost of his additional treatment, there is no statute or case law that required Claimant to introduce expert medical testimony to explain why his condition did not improve by the time he was released by Dr. Aubuchon. Rather, it was sufficient that Claimant show that there remained reasonable treatment options for his diagnosed condition. *Martin*, 220 S.W.3d at 844. Claimant did just that.

On the salient issue, the Commission's majority overlooked Dr. Volarich's uncontradicted testimony that Dr. Martin's treatment was reasonable and necessary to help alleviate the effects of Claimant's work injuries to his feet [Tr. 1409:6-1411:15]. Dr. Martin described Claimant's pain as "chronic." Based upon his neurological exam, he felt that Claimant's low back problems were the root of his symptoms with underlying plantar

fasciitis, which he treated [Tr. 715-733]. The treatment included prescriptive medications, bracing, additional padding and injections to decrease the inflammation of the lower extremities [Id.].

Dr. Martin's records describe the additional treatment provided without any contrary medical evidence that the treatment was objectively unreasonable [Ex. B-17, Tr. 715-733]. Dr. Martin adjusted the padding in Claimant's orthotics and prescribed night splints and wraps, which he continued to use. Claimant explained the night splints and wraps kept his tendons stretched and the padding provided additional support and helped with walking. The injections given by Dr. Martin also improved his pain for a week or two [Tr. 70:8-71:18]. Although Dr. Martin's treatment did not fully solve the pain, he was still entitled to recover the cost of his treatment, even if it is assumed that he was at MMI in April 2007 with regard to his feet. *Martin, Id.* at 844.

The majority also rejected Dr. Aubuchon's testimony that Claimant remained in need of prescriptive orthotics because he also testified that further treatment would not benefit Claimant [L.F. 64-65]. The majority unreasonably used this as a basis for refusing to award Claimant future treatment for his feet.

When Dr. Aubuchon released Claimant, he recommended he continue his home exercise stretching program, use of his orthotics and to take anti-inflammatories. He also recommended that he wear tie shoes so that he could adjust the volume and the pressure in his feet [Tr. 1749:16-18]. As a result of the 11/9/06 injury, Dr. Aubuchon testified it was reasonable and necessary that he be examined by a physician and his orthotics be replaced

every 2 or 3 years [Tr. 1748:8-1749:20]. Dr. Volarich also testified that Claimant would benefit from form-fitted orthotics to provide arch support and appropriate padding to make sure that the foot was kept in the proper position and future treatment, such as that provided by Dr. Martin, for flare-ups of his condition, which the majority ignored [Tr. 1410:19-1411:9].

The Commission unreasonably accepted Dr. Aubuchon's speculative statement that Claimant would not benefit from further treatment over his detailed recommendations for future care. This is particularly glaring given Dr. Volarich's unimpeached testimony that Claimant would benefit from treatment in the future and Claimant's testimony that Dr. Martin's treatment helped, as corroborated by his treatment notes.

& Treatment of the Low Back.

According to the Commission's majority, Dr. Volarich was the only doctor to opine that the narrowing of the L5-S1 was traumatic in origin based on early x-ray findings and dismissed his reasoning connecting his back surgery to the work injury as circular [L.F. 64]. Its basis for rejecting Dr. Volarich's opinion is not supported by substantial competent evidence and improperly substituted its lay logic for that of the uncontradicted testimony of Dr. Volarich, which is corroborated by Claimant's testimony and the medical records.

When Claimant was admitted to the emergency room, he reported back and leg pain [Ex. A-1, Tr. 68:174-181]. The 11/13/09 Unity Health records note complaints of back pain radiating through his legs [Ex. A-2, Tr. 186]. The Excel physical therapy records, dated 11/20/06, recorded Claimant's complaints of "constant low back pain, pain in the posterior

thighs and occasionally into the calves bilaterally . . . He is painful to palpation over the right lumbar paraspinals and left SIJ and sacrospinous ligament” [Ex. A-4, Tr. 261]. Similarly, before Claimant’s slip and fall in Warrenton⁹, the therapy records reflect through 1/5/07 complaints of back and leg pain [Tr. 262-271].

Employer waited nearly 3 months before referring Claimant to a back specialist. When Dr. Chabot first examined Claimant on 2/14/07, his lumbar range of motion was limited and he had difficulty toe walking and standing on his heels. He had tenderness to palpation involving the left greater trochanteric bursa, increased sensation along the left lateral and anterior thigh and tenderness to palpation over the heels. Dr. Chabot’s initial impression was heel pain, trochanteric bursitis, back pain, back strain, heel pain and contusions. He injected the left greater trochanteric bursa to treat inflammation in the region and continued Claimant on anti-inflammatory medications and physical therapy. The 11/13/06 MRI showed a disc laceration involving primarily the L4-5, the L5-S1 levels and to a lesser extent, the L3-4 level. There was also evidence of disc bulging at the L3-4 and L4-5, resulting in some

⁹The burden was on Employer to prove Claimant’s subsequent fall in Warrenton was the cause of Claimant’s continuing temporary total disability and need for medical treatment after April 2007. *Mashburn v. Chevrolet-Kansas City Division, General Motors Corp.*, 397 S.W.2d 23, 28 (Mo.App. 1966). The Commission correctly found that the ALJ improperly made a medical conclusion that was not supported by any expert testimony when he suggested that Claimant’s slip and fall in January 2007 caused encroachment on the L4 nerves [L.F. 63].

evidence of diminished spinal canal area showing “primarily, mild degenerative changes” [Tr. 1551:25-1556:15]. Dr. Chabot testified that the compression of the back, back strain and hip bursitis were consistent with Claimant’s fall on 11/9/06 [Tr. 1572:5-22]. Physical therapy records also showed objective evidence of loss of strength in the lower extremities and hip flexors and abductors by about 20% [Tr. 1580:4-1581:8].

With treatment, there was no tenderness over the greater trochanter bursa when he was last examined by Dr. Chabot on 4/2/07 [Tr. 1586:17-1587:8]. Dr. Chabot, however, was unable to get Claimant back to his pre-accident condition where he had no complaints of pain in his low back. When he released Claimant, Dr. Chabot thought that Claimant would continue to have pain [Tr. 1588:1-4].

From October 2007 to the date of hearing, Claimant was under the continuous care of Dr. Graven for his back. Following a series of injections administered between November 2007 and January 2008, that temporarily improved his condition, Dr. Graven, on 2/7/08, recommended surgery and ordered a discogram [Tr. 664-665]. Dr. Graven, thereafter, continued to treat Claimant with pain medications [Ex. A-14, Tr. 666, 680-681]. As noted in Dr. Graven’s records, delays in scheduling the discogram were due to insurance problems [Id., Tr. 668 & 683]. Based on the December 2008 discogram, Dr. Graven recommended disc replacement. Because Claimant’s private insurance refused to approve the procedure, Dr. Graven scheduled a fusion, which was performed on 3/18/09 [Id., Tr. 672-673].

Dr. Volarich testified Claimant suffered an axial compression injury of the spine when he fell at work, as evidenced by x-rays taken on 11/9/06 that showed a narrowing of the L5-

S1 disc space [Ex. A-1, Tr. 181, 1388:15-1389:33]. Before surgery, Dr. Volarich found objective medical evidence of injury to Claimant's feet and back, with radiating pain into the legs. His findings were similar to the physical therapist's objective findings. There was pain upon palpation at the L5-S1 junction and paraspinal muscles at the L3 through S1. Trigger points were found at the midline of the S1. On straight leg raising, there was irritation of the sciatic nerve. Claimant also had pain in the groin and left thigh area and there was atrophy in the left leg. These objective findings were consistent with L5 radiculopathy [Tr. 1390:13-1392:7].

After Claimant was released by Dr. Chabot, he had an MRI in May 2007 which showed disc bulging and minor narrowing of the L4-5 disc space [Tr. 616]. The MRI ordered by Dr. Graven in November 2007 showed encroachment at the L4-5 with impingement of the L4 nerve root [Tr. 690]. Dr. Volarich testified that the encroachment on the L4 nerves could not be explained by the bulging disc at the L4-5 level. Because the November 2007 MRI did not clarify Claimant's pathology directly, Dr. Volarich recommended a discogram [Tr. 1431:9-10]. A discogram is done when a patient has radicular symptoms characteristic of a ruptured disc and the diagnostic tests do not show overt impingement of a nerve root [Tr. 1447:1-11]. It allows the doctor to visualize internal disc derangement or a tear that would not show on an MRI [Tr. 1450:3-7].

The December 2008 discogram confirmed Dr. Volarich's diagnosis of L5 radiculopathy. The test also identified internal disc derangement at the L5-S1 level. Because testing of the L5-S1 level produced significant pain which was consistent with Claimant's

daily pain, Dr. Graven correctly chose to do a one level fusion at the L5-S1 level [Tr. 1133:7-1134:1].

Dr. Volarich testified that the work injury caused Claimant's pre-existing degenerative disc disease to become symptomatic and the surgery was done to treat the disc that was damaged in Claimant's fall. Dr. Volarich explained that physicians do not treat the test itself; rather, they treat the patient's symptoms and try to assess why they started. In this case, his back pain started when he fell off the scaffolding [Tr. 1449:17-23]. Prior to the injury, he had no radicular symptoms [Tr. 1456:17-25]. Although there was some degenerative processes present before 11/9/06, they were asymptomatic and non-disabling. As analyzed by Mr. Hickey, Dr. Volarich logically and without contradiction by any other testifying medical expert related Claimant's radicular symptoms and need for surgery to the 11/9/06 accident [L.F. 72-73; Tr. 1457:1-15].

3. Claimant Met His Burden of Proof on the Issue of TTD Benefits.

A claimant is entitled to total disability benefits if he is unable to compete in the open labor market because of the claimant's physical condition, whether the condition is temporary or permanent in nature. *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App.W.D. 1997). The purpose of temporary total disability benefits is to cover the claimant's healing period while he cannot work. Benefits are owed until the claimant can find work or reaches MMI. *Id.*

The basis for Claimant's request for relief under §287.203 was that he was unable to work after being released by Employer's doctors [Tr. 1222-1223]. "A claimant is capable of

forming an opinion as to whether [he] is able to work and [his] testimony alone is sufficient evidence on which to base an award of temporary total disability (citations omitted). An award is further supported where the claimant's testimony is corroborated by medical evidence and the employer has presented no evidence to refute the temporary disability claim." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo.banc 2003). Such is the case here.

Dr. Paletta initially took Claimant off work because he was having difficulty walking and standing and it was unreasonably to think he could do any work [Tr. 1651:14-19]. According to the physical therapy records, near the end of treatment, Claimant was objectively still having substantial difficulties walking and standing [Tr. 349-355]. Additionally, the FCE performed in late March 2007 established that Claimant was functioning below the light duty demand level [Tr. 1582:8-12]. Based on the objective testing, there is no substantial evidence to support the conclusion that Claimant was ready to return to work in April 2007.

As argued above, the subsequent treatment records and competent expert and lay testimony all support the finding that Claimant remained totally disabled and in need of additional medical treatment when he was released by the initial providers and Employer terminated benefits in April 2007 [Appellant's Brief, pp. 50-70].

Claimant testified he was unable to successfully return to work in May 2007 and, thereafter, remained unable to work because of his disabilities. Claimant's testimony is corroborated by the subsequent treatment records and medical and vocational expert

testimony. Dr. Graven ordered him off work in November 2007 and Claimant had not been released to return to work at the time of the hearing. It is also unreasonable to believe that Claimant was able to work while taking physical therapy following his December 2007 shoulder surgery. Additionally, Dr. Volarich and Mr. Lalk testified that Claimant remained totally disabled since the date of his work-related injury [Volarich Tr. 1144:3-1145:1; Walk, Tr. 1281:22-1282:5, 1285:4-22]. To the same effect, Employer's vocational expert, Ms. Abram, testified that it would be difficult and improbable that Claimant could find work [Tr. 1863:15-1868:12]. In sum, the substantial and, indeed, overwhelming weight of the evidence established Claimant remained temporarily totally disabled throughout the relevant period because of the work accident. Accordingly, the award should be reversed and remanded to the Commission with directions to award TTD benefits from 4/28/06 until Claimant reaches MMI or is released to return to work, together with interest at the rate of 10% per annum under §287.160.3.

4. Claimant Met His Burden of Proof to Support an Award of Attorneys Fees and Costs.

Under §287.203, if a claimant prevails on his claim for additional TTD benefits, he is entitled to recovery of his reasonable costs incurred in the prosecution of his hardship hearing if the Commission determines the proceeding was defended without reasonable grounds. Costs of recovery includes attorney fees. *P.M. v. Metromedia Steakhouses Co., Inc.*, 931 S.W.2d 846 (Mo.App. E.D. 1996).

The record supports the finding that Employer defended Claimant's request for additional benefits without just cause. The Employer failed to follow the directives of Dr. Paletta to schedule Claimant for pain management to better deal with his complaints. Also, the Employer neither returned Claimant for additional treatment nor asked the authorized treating physicians to review the subsequent treatment records.

Claimant further offered evidence of his attorney's fees and costs incurred in the prosecution of his hardship hearing. Upon review by the Commission, Claimant moved to supplement the record on his attorney's fees [L.F. 50]. Based upon the Commission's decision to uphold the ALJ's denial of additional temporary total disability, the motion was denied as moot [L.F. 69]. If the Court reverses the Commission's decision denying Claimant TTD benefits beyond April 27, 2007, it is appropriate to direct the Commission to reconsider awarding Claimant his attorney's fees and expenses.

5. The Final Award is Not Supported by Substantial and Competent Evidence.

In addition to the arguments above, the Commission erred in awarding Claimant PPD at the level between the shoulder and elbow (222 weeks). The award is contrary to the testimony of Drs. Paletta and Volarich that his disability is at the shoulder level (232 weeks) [Tr. 1646:7-1647:1]. See §287.190 RSMo. Further, the PPD award of 20% of the left biceps failed to take into account Claimant's additional treatment, pain, lost motion, crepitus and atrophy at the shoulder level. Considered alone, 35% PPD of the left upper extremity at the 232 week level is appropriate, as testified by Dr. Volarich [Tr. 1401:23-1402:7].

The Commission erred as a matter of law in determining Claimant's PPD at only 5% of each foot at the 155 week level [L.F. 74]. The percentages of disability fails to take into account Claimant's additional treatment, inability to walk barefoot, need for orthotics and the severally limiting effects on his ability to stand and walk. Considered alone, Dr. Volarich's rating of 25% of each foot is a more accurate assessment of Claimant's disability [Tr. 1402:8-14].

Finally, assuming the nature and extent of Claimant's back disability was ripe for determination, the award of 2.5% of the body is not supported by the substantial competent evidence in light of his back fusion and Claimant's residual problems. Furthermore, the 5% multiplicity award fails to take into account the career-ending effect of his 11/9/06 accident and his inability to work.

If the Court finds that the Commission properly entered a final award on one or more of his conditions, it is appropriate to remand the case to the Commission for further consideration of his claim for permanent and total disability against Employer or the Fund. Additionally, the Commission should be ordered to consider the rights of his surviving dependents to TTD benefits upon Claimant's death. *See Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo.banc 2007); *see also, Bennett v. Treasurer of State of Missouri-Custodian of Second Injury Fund*, 271 S.W.3d 49 (Mo.App. W.D. 2008).

II. THE COMMISSION ERRED IN FAILING TO AWARD CLAIMANT PAST DUE MEDICAL EXPENSES, INTEREST AND FUTURE MEDICAL CARE BECAUSE THE COMMISSION MISAPPLIED THE LAW AND THE AWARD

IS NOT SUPPORTED BY THE RECORD AND IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE, AS REVIEWABLE UNDER §287.495.1, IN THAT:

- A. CLAIMANT’S MEDICAL CARE AFTER APRIL 2007 FLOWED FROM HIS COMPENSABLE WORK ACCIDENT, INCLUDING TREATMENT FOR HIS BILATERAL FOOT, SHOULDER AND BACK PAIN, DEPRESSION, ANXIETY AND INSOMNIA;**
- B. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT THE ADDITIONAL TREATMENT HELPED ALLEVIATE THE EFFECTS OF CLAIMANT’S COMPENSABLE WORK-RELATED INJURIES;**
- C. CLAIMANT DEMANDED, AND THE EMPLOYER FAILED OR REFUSED TO PROVIDE ADDITIONAL TREATMENT; AND**
- D. THE UNCONTRADICTED AND UNIMPEACHED EVIDENCE ESTABLISHED THAT CLAIMANT NEEDED FUTURE MEDICAL TREATMENT TO HELP ALLEVIATE THE EFFECTS OF HIS WORK-RELATED INJURIES.**

The standard of review on Point II is the same as under Point I [Appellant’s Brief, pp. 45-47].

- 1. Claimant Met His Burden of Proof on the Issue of Past Medical Expenses and Interest.

An employer’s duty to provide statutorily required medical aid under §287.140.1 to

an employee is absolute and unqualified. *Martin*, 220 S.W.3d at 836. If the employer is on notice that the claimant needs treatment and fails or refuses to provide it, the claimant may select his/her own medical provider and hold the employer liable for the cost thereof. *Id.*

After being put on notice, Employer failed or refused to offer Claimant any additional treatment, as argued in Point I. Claimant further met his burden that his ongoing medical problems and the need for additional treatment flowed from his work accident [Appellant's Brief, pp. 50-70]. The subsequent treatment records and Claimant's testimony that the treatment prescribed gave him some relief belie the Commission's finding on causation. Additionally, the Commission's unreasonably discounted the unrefuted expert testimony of Dr. Volarich, which further established the necessity of the additional treatment and reasonableness of the charges [Id.].

The parties did not dispute Dr. Volarich was qualified to testify to the reasonableness of the charges or object that his testimony lacked foundation. Employer did not cross-exam Dr. Volarich on this issue and did not offer any contrary evidence. Further, Dr. Volarich did discuss the regional differences in charges, commenting that the cost of physical therapy at Skaggs Community Center was a little bit less than that charged in the St. Louis area [Tr. 1406:2-25].

Disregarding the testimony of Dr. Volarich, the ALJ's denial of medical benefits (and presumably the Commission) was not supported by substantial evidence and misapplied the proper standard for making a submissible case for an award of past due medical expenses as set forth in *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo.banc

1989). Claimant testified that his subsequent treatment was the product of his work-related fall. He further stated that the bills he received were the result of that treatment [Tr. 69:3-70:6]. Given Claimant's testimony, in combination with the bills which related to the professional services rendered, as shown by the medical records, a sufficient factual basis existed for an award of past due treatment totaling \$111,853.15 [Tr. 69:2-70:6]. *Id.* at 211-212. Claimant is also entitled to interest on his medical expenses at 9% per annum under §408.020 RSMo. from the date of demand or when the expenses were paid. *State ex rel. Otte v. Missouri State Treasurer*, 182 S.W.3d 638, 642 (Mo.App. E.D. 2005).

2. Claimant Met His Burden of Proof on the Issue of Future Medical Care.

Claimant sought future medical care for the treatment of his feet, legs, back, left shoulder insomnia and depression. Claimant was not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. E.D. 1997)*. Future medical benefits may be awarded if the claimant shows a reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based upon reason and experience that inclines the mind to believe but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. S.D. 1986).

Dr. Aubuchon testified that Claimant should be examined by a physician and his orthotics replaced every 2 to 3 years [Tr. 1748:8-1749:20]. Claimant is further in need of

immediate physical therapy and prescriptive medications to help with his insomnia, anxiety and pain. Dr. Volarich opined that in order to maintain his current state, he will require ongoing care for his pain syndrome using modalities, including but not limited to, narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints [Tr. 1197]. Dr. Volarich testified that Claimant will need pain management for the foreseeable future to try to get him back to a more functional state to treat for his back and feet conditions [Tr. 1145:5-1146:11].

Dr. Volarich also explained that once one level is fused, the level above it is at risk of failure because stresses are increased at the level adjacent to the fusion. Typically, the probability for additional surgery is about 40%. In Claimant's case, he is at a high risk of needing a fusion at the L4-5 level because it has already been identified as abnormal [Volarich Deposition, 6/18/09, Tr. 1145:2-1151:6]. Accordingly, the Court should remand the award to the Commission with directions to hold Employer liable for future medical care to treat Claimant's left shoulder, back, legs and feet complaints and his depression, insomnia and anxiety.

III. THE COMMISSION ERRED IN LIMITING THE 15% PENALTY AGAINST EMPLOYER FOR VIOLATING THE SCAFFOLDING ACT TO THE AMOUNTS AWARDED BY THE ALJ BECAUSE THE COMMISSION MISAPPLIED THE LAW, AS REVIEWABLE UNDER §287.495.1, IN THAT UNDER §287.120.4, CLAIMANT WAS ENTITLED TO RECOVER THE

PENALTY ON ALL AMOUNTS PROVIDED BY EMPLOYER UNDER CHAPTER 287 *ET SEQ.*, INCLUDING TTD AND MEDICAL BENEFITS VOLUNTARILY PROVIDED OR AWARDED CLAIMANT.

Point III raises a question of law. The Court reviews conclusion of law *de novo* and without deference to the Commission's judgment. *Schoemehl*, 217 S.W.3d at 901.

The Commission's finding that Employee's injuries were caused by Employer's failure to comply with §292.090 (the Scaffolding Act) is supported by competent and substantial evidence. The Commission consequently reversed the ALJ and awarded Claimant a 15% penalty under §287.120.4 RSMo. The Commission erred, however, when it limited the penalty to the compensation awarded by the ALJ [L.F. 68].¹⁰

The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to its intent, if possible, and to consider the words used in their plain and ordinary meaning. *WolffShoe Co. v. Director of Revenue*, 762 S.W.2d 29, 31 (Mo.banc 1988). Each word or phrase in a statute must be given meaning, if possible. Related statutes are also relevant to further clarify the meaning of the statute. *Bolen v. Orchard Farm R-V School Dist.*, 291 S.W.3d 747, 751 (Mo.App. E.D. 2009). "A court will look beyond the plain meaning of the statute only when the language is ambiguous or would

¹⁰Claimant filed a motion to clarify the calculation of the penalty. In reply, Employer argued that the penalty should not include the amounts awarded against the Fund [L.F. 99]. The Commission denied Claimant's motion because it had no authority to grant the relief requested [L.F. 100].

lead to an absurd or illogical result.” *Akins v. Director of Revenue*, 303 S.W.3d 563, 565 (Mo.banc 2010). “The plain and unambiguous language of the statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different than that expressed in the statute’s clear and unambiguous language.” *Wolff Shoe Co.*, 762 S.W.2d at 31.

Section 287.120.4 provides:

Where the injury is caused by the failure of the employer to comply with any statute of this state or any lawful order of the division or the commission, the compensation and death benefits provided for under this chapter shall be increased by fifteen percent.

The word or phrase is ambiguous if it is capable of being read differently by reasonably well informed individuals. *Spradlin v. City of Fulton*, 982 S.W.2d 255, 258 (Mo.banc 1998). Section 287.120.4 unambiguously states that the penalty is to be assessed against compensation provided under Chapter 287 *et seq.* (“the Act”). Compensation provided for under the Act includes temporary total and temporary partial disability benefits (§§287.170 and 287.180) and permanent partial and total disability benefits against the Employer and the Fund (§§287.190, 287.200 and 287.220). Likewise, the cost of past and future medical aid is a component of compensation due a claimant under §287.140.1. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d at 266.

Section 287.120.4 is one sentence divided into two parts. The first part states the conditions for imposing a penalty (a violation of a safety statute by the employer, which

caused the claimant's injury). The second part states how the penalty is to be calculated (against amounts provided under the Act). Giving plain meaning to the language of §287.120.4, it makes clear that the legislature did not intend to limit the penalty to the amounts awarded by the ALJ. In other words, the penalty should be imposed on all benefits provided Claimant under the Act, whether voluntarily provided or as mandated by the award.

This interpretation is neither absurd nor illogical and does not undercut the purpose of the penalty section "to encourage employers to comply with the laws governing safety." *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 244 (Mo.App. S.D. 2003). On the contrary, excluding the amounts voluntarily paid by the employer in calculating the penalty would reward the employer, resulting in an absurd interpretation of the penalty section.

Awarding a penalty on the amounts voluntarily paid by the employer is also consistent with the past interpretations of the penalty provision. For instance, in *Pavia*, the court upheld the penalty as applied to claimant's medical expenses and the amounts paid in temporary total and permanent total disability benefits. *Id.*, 118 S.W.3d at 244-245; *see also*, *Martin v. Star Cooler Corp.*, 484 S.W.2d 32, 36 (Mo.App. 1972) (holding that the Commission properly included the amounts paid in medical in computing the penalty under §287.120.4). Accordingly, the Court should modify the decision of the Commission and direct that it include the amounts voluntarily paid or awarded Claimant in TTD and medical benefits.

CONCLUSION

Based upon the foregoing facts and authorities cited, Claimant requests this Honorable Court to reverse the final award and remand the claim to the Commission to enter a temporary award with directions to find that: Claimant did not reach maximum medical improvement in April 2007 and remained temporarily totally disabled and in need of medical care to cure or relieve the effects of his work-related injuries; Claimant is entitled to recover the costs of his reasonable and necessary medical expenses incurred to the date of hearing in the sum of \$111,853.15, together with interest at 9% per annum; Claimant is entitled to recover his post hearing medical expenses and future treatment of his feet, back and left shoulder, insomnia, depression and anxiety; Claimant is entitled to past due TTD benefits from 4/27/07, together with interest at 10% per annum, until he reaches maximum medical improvement or is returned to work; to reconsider whether Claimant is entitled to recover his reasonable attorney's fees and costs incurred in the prosecution of his §287.203 motion; Claimant is entitled to recover a 15% penalty under §287.120.4 RSMo. on all amounts provided under the Act, whether voluntarily provided or as ordered by the award, and such other and further relief deemed just and proper in the premises.

Respectfully Submitted,

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APPELLANT'S CERTIFICATIONS

1. The undersigned hereby certifies that on the 17th day of January, 2012, a copy of the foregoing Substitute Brief was electronically filed with the Clerk of the Court to be served by operation of the court's electronic filing system upon all attorneys of record.
2. This brief complies with the limitations contained in Rule 84.06(b) and it is within the word limitation set forth therein.
3. There are 19,662 words in this brief, prepared in proportional space type.
4. This brief was prepared by WordPerfect X5 computer software and has been scanned for viruses and is virus free.

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