SC94724

IN THE SUPREME COURT OF MISSOURI

CARL GREER,
Appellant and Cross-Respondent,

vs.

SYSCO FOOD SERVICES OF ST. LOUIS, LLC,
Respondent and Cross-Appellant,

and

THE TREASURER OF MISSOURI as
CUSTODIAN OF THE SECOND INJURY FUND,
Respondent.

On Appeal from the Labor and Industrial Relations Commission
Injury No. 06-013976

SUBSTITUTE REPLY BRIEF AND BRIEF OF THE CROSS-RESPONDENT

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Reply of the Appellant

In his sole point in his opening brief, Appellant Carl Greer explained that the Labor and Industrial Relations Commission erred in denying him permanent and total disability benefits (Opening Brief of the Appellant ("Aplt.Br.") 17-25).

As Mr. Greer explained, the Commission's decision was against the overwhelming weight of the substantial and competent evidence, which plainly showed that Mr. Greer is unable to obtain gainful employment in the open labor market due to his injuries (Aplt.Br. 17-19). The evidence included voluminous medical records concerning multiple injuries to Mr. Greer's neck, back, shoulder, and foot, all of which are a hindrance and obstacle to his employment or reemployment in the open labor market (Aplt.Br. 17-19).

Both Respondent Sysco Food Services ("Employer") and Respondent Treasurer of Missouri, Custodian of the Second Injury Fund ("SIF") initially argue that the testimony of "vocational rehabilitation expert" Terry Cordray outweighed all this evidence (Brief of Respondent Sysco Food Services ("Employer Br.") 46-47; Brief of Respondent Treasurer ("SIF Br.") 8-9). Employer argues Mr. Greer is attacking the "credibility" of Mr. Cordray (Employer Br. 46-47), which was solely for the Commission to determine.

This is untrue. While of course this Court may not reweigh witness credibility, it nonetheless will look at "the whole record in reviewing the [agency's] decision, not merely at that evidence that supports its decision," and "'no longer view[s] the evidence in the light most favorable to the agency's decision.'" *Lagud v. Kan. City Bd. of Police Comm'rs*, 136 S.W.3d 786, 791 (Mo. banc 2004). Thus, the question is, whether taken at

face value, whatever that may be, Mr. Cordray's singular testimony outweighs the voluminous evidence that Mr. Greer is permanently and totally disabled.

Especially compared with the other evidence, the value of Mr. Cordray's testimony is low to nonexistent. He admitted he never met with, saw, or examined Mr. Greer prior to rendering his opinion – which he also openly admitted flew in the face of his own best practices (Transcript 2740-46, 2764-67). Mr. Greer pointed this out in his opening brief (Aplt.Br. 18), but neither Employer nor the SIF answer it at all. Mr. Cordray's baseless, speculative, conclusory opinion that there were jobs available for Mr. Greer, despite the fact he neither met with Mr. Greer nor attempted actually to place Mr. Greer in any job, is dubious at best. Even accepting that Mr. Cordray was telling the truth when he said he *believed* that, his opinion is insufficient to outweigh the rest of the evidence plainly showing that Mr. Greer was permanently and totally disabled.

Employer and the SIF also briefly point to the passing opinions of Dr. Johnson and Dr. Schmidt as to Mr. Greer's employability (Employer Br. 45-47; SIF Br. 8). Both witnesses, however, admitted that, unlike Mr. Dolan, the *only* vocational expert who actually examined Mr. Greer, they were not vocational experts and could not actually determine Mr. Greer's employability (Tr. 337-38, 2337-40). As a result, like Mr. Cordray' opinion on employability in the open labor market, even accepting the doctors were telling the truth, their opinions cannot be given the same weight as Mr. Dolan's.

Finally, Employer and the SIF also point to a surveillance video showing Mr. Greer walking, climbing stairs, leaning on his left foot, standing, driving, and not using his cane all the time (Employer Br. 14, 46-47; SIF Br. 13-14). Mr. Green does not

dispute what is in that video – because it bears nothing on whether he is permanently and totally disabled.

For, nothing in the video contradicts Mr. Greer's, Dr. Johnson's, or Mr. Dolan's testimony, or anything in Mr. Greer's medical records, none of which stated Mr. Greer could not walk, climb stairs, or lean. The video, totaling less than ten minutes, simply does not answer the ultimate question before the Commission: whether Mr. Greer is employable in the open labor market – that is, whether he is capable of obtaining full-time employment in a competitive labor market.

The actual substantial and competent evidence is that Mr. Greer has continued, permanent problems with his left foot that affect his ability to walk and stand, including permanent pain without likelihood of improvement (Aplt.Br. 17-19). Mr. Greer has never argued he could not perform the basic activities of daily living such as the things found in the videos. Rather, he testified he could not do these things eight hours a day, five days a week. His medical records show this, and the only vocational expert who examined him agreed.

The Commission's finding that Mr. Greer is not permanently and totally disability is contrary to the overwhelming weight of the substantial and competent evidence. This Court should reverse the Commission's decision and remand this case for an award of permanent and total disability benefits from Employer or the SIF.

Argument of the Cross-Respondent

Standard of Review as to All of Cross-Appellant's Points

In an appeal from an administrative agency's decision, this Court determines "whether the agency's findings are supported by competent and substantial evidence on the record as a whole; whether the decision is arbitrary, capricious, unreasonable or involves an abuse of discretion; or whether the decision is unauthorized by law." *Coffer v. Wasson-Hunt*, 281 S.W.3d 308, 310 (Mo. banc 2009).

The Court looks at "the whole record in reviewing the [agency's] decision, not merely at that evidence that supports its decision," and "'no longer view[s] the evidence in the light most favorable to the agency's decision.'" *Lagud*, 136 S.W.3d at 791 (citation omitted). Still, this Court will not "redetermine the issues on appeal," but rather it "will look at the entire record, not just those parts of it supporting the ruling, to determine whether it is supported by competent and substantial evidence …. If so, the ruling will be affirmed, even though the evidence would also have supported a contrary determination." *Id.* at n.5.

The Workers' Compensation Law mandates that its provisions be strictly construed. § 287.800.1, R.S.Mo. This means it "can be given no broader application than is warranted by its plain and unambiguous terms." *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010) (citation omitted). "When [an] agency's decision involves a question of law, the Court reviews the question de novo." *Stone v. Mo. Dep't of Health & Senior Servs.*, 350 S.W.3d 14, 20 (Mo. banc 2011).

I. The Commission properly awarded Mr. Greer temporary total disability benefits for the period from June 22, 2010, to February 4, 2011.

(Response to Cross-Appellant's Point I)

In its first point on cross-appeal, Employer argues the Commission should not even have awarded Mr. Greer temporary total disability benefits after April 23, 2007, because its doing so violated §§ 287.149 and 287.170, R.S.Mo., which Employer argues only allowed these benefits until that date, when it argues Mr. Greer had reached "maximum medical improvement" (Employer Br. 22-34).

Employer's argument is without merit. Substantial, competent evidence in the record supports the Commission's finding that Mr. Greer was temporarily and totally disabled while recovering from surgery related to his primary work-related injury between June 2010 and through February 2011. The phrase "maximum medical improvement" is not found in the Workers' Compensation Law, which must be strictly construed. The actual statutory guideline is whether this period was during Mr. Greer's "rehabilitative process." As the evidence supports the Commission's decision that it was, the Commission was within its right to award Mr. Greer temporary total disability benefits for that period.

A. The Commission's decision was not in excess of its statutory authority.

In awarding Mr. Greer temporary total disability benefits from June 22, 2010, to February 4, 2011, the Commission did not act in excess of its statutory authority. Rather, the Commission properly interpreted the Workers' Compensation Law, strictly construed as the General Assembly has required since 2005. After reviewing the entire record, it

properly found Mr. Greer was entitled to $18,913.32 in temporary total disability benefits covering the period of his rehabilitative process when he was recovering from surgery from June 2010, the date of the surgery, through February 2011, when Dr. Johnson released him following that surgery.

As the Commission found, the phrase "maximum medical improvement," on which Employer relies, is a pre-2005 judicial invention not found in the Workers' Compensation Law. As a result, the Commission was not bound by that phrase, but rather had to look at the entire record to determine when the rehabilitative process was continuing and whether Mr. Greer was temporarily and totally disabled during it. It did so and reached a proper, statutorily valid and authorized result.

1. **Strictly construed, the only questions the Workers' Compensation Law poses for whether a claimant is entitled to temporary total disability are: (1) whether he is unable to work during his rehabilitative process; and (2) what the period of that rehabilitative process is.**

In 2005, the General Assembly amended the Workers' Compensation Law to eliminate any liberal construction and, instead, require that its terms be strictly construed. Specifically, it amended § 287.800.1, R.S.Mo., which now provides, "Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, *and any reviewing courts* shall construe the provisions of this chapter strictly." (Emphasis added).

Thus, all courts, including this Court, must use principles of strict construction in applying all provisions of the Workers' Compensation Law. Strict construction means a

"statute can be given no broader application than is warranted by its plain and unambiguous terms." *Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo. App. 2009). "A strict construction of a statue presumes nothing that is not expressed." *Robinson*, 323 S.W.3d at 423 (citation omitted). The statute's operation must be confined to "matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter." *Allcorn v. Tap Enters., Inc.*, 277 S.W.3d 823, 828 (Mo. App. 2009).

The Workers' Compensation Law lays a comprehensive, open framework governing an award of temporary total disability. Section 287.020.6, R.S.Mo., defines "total disability" as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." An award for total disability can be either permanent (Aplt.Br. 17) or temporary. Section 287.149.1, R.S.Mo., provides, "Temporary total disability … benefits shall be paid throughout the rehabilitative process." Section 287.170, R.S.Mo., then sets conditions on the length and amount of temporary total disability, including limiting it to "not more than four hundred weeks," which equals approximately 7.6 years.

Nothing in any of these statutes – or indeed any other statute in the Workers' Compensation Law – mentions "maximum medical improvement." None sets any requirement that temporary total disability compensation to the claimant cease at the point of "maximum medical improvement." To the contrary, "Temporary total disability" benefits "*shall* be paid *throughout the rehabilitative process*," § 287.149.1, limited only to a maximum of 7.6 years. § 287.170.1.

"Shall" is mandatory language. *Jarman v. Eisenhauser*, 744 S.W.2d 780, 781 (Mo. banc 1988). Thus, strictly construed, the Workers' Compensation Law's provisions governing temporary total disability *require* it be paid throughout any portion of "the rehabilitative process" when the claimant is unable to return to employment, terminating when "the rehabilitative process" is over or 400 weeks have passed, whichever is earlier.

Employer and its amicus correctly cite these statutes. Nothing in the statutes' plain language, however, limits when the rehabilitative process may occur following a work-related injury. Without a definite delineation by the General Assembly defining "rehabilitative process," in some manner it is *the Commission* who is authorized to determine when a claimant is entitled to temporary total disability benefits as a question of *fact*. The Commission does so by reviewing the substantial and competent evidence in the record to determine the period of that rehabilitative process and, whether, during it, the claimant cannot return to work.

In its brief, after acknowledging both that strict construction precludes looking beyond the words of the Workers' Compensation Law and also that the phrase "maximum medical improvement" is a pre-2005 judicial construction *not* found in the Workers' Compensation Statute, Employer nonetheless argues Mr. Greer was not entitled to temporary total disability benefits because *one doctor* found him at "maximum medical improvement" as of April 2007. Employer's argument flies in the face of what § 287.800.1 expressly requires. In invalidly seeking to limit the powers of the Commission to review the evidence and record in its entirety to determine the period of the rehabilitative process, it untenably seeks to turn a question of fact into one of law.

Post-2005, neither the Commission nor this Court may rely on terms not in the Workers' Compensation Law, including "maximum medical improvement," to determine whether a claimant is entitled to temporary total disability benefits. Instead, today, the *only* fulcrum as to this question is what the substantial and competent evidence shows the period of his "rehabilitative process" was during which he was totally disabled.

2. As the phrase "maximum medical improvement" does not appear in the Workers' Compensation Law, the Commission is not bound to hold as a matter of law that a claimant's rehabilitative process ended on the date a witness testified he had reached "maximum medical improvement."

Employer nonetheless argues temporary total disability payments somehow are precluded once the claimant reaches "maximum medical improvement," despite the fact the Workers' Compensation Law neither defines, mentions, nor contemplates this term. To the contrary, temporary total disability benefits cover the cost of a worker's rehabilitation period and, under the statute, expressly are paid until he can return to work because his rehabilitation has ended. *Seely v. Anchor Fence Co.*, 96 S.W.3d 809, 821 (Mo. App. 2002); *Minnick v. S. Metro Fire Prot. Dist.*, 926 S.W.2d 906, 909 (Mo. App. 1996). Logically his total disability during the temporary rehabilitation process ends when that process is over.

The test of the "total disability" part is whether an employee can compete in the open labor market given his physical condition. *Cooper v. Med. Ctr. of Indep.*, 955 S.W.2d 570, 575 (Mo. App. 1997). As such, if there was substantial, competent evidence in the record that Mr. Greer was unable to work due to rehabilitative treatment he was

receiving for the primary injury from June 2010 through February 2011, the Commission was within its power to award him temporary total disability benefits during that period.

Mr. Greer recognizes that other, lower Missouri courts have used "maximum medical improvement" as the standard for calculating the term of temporary total disability payments, even after the enactment of the "strict construction" mandate in 2005. *See, e.g., Lewis v. Treasurer of Mo.*, 435 S.W.3d 144, 154 (Mo. App. 2014). The problem, however – and the reason the Court of Appeals transferred this case to this Court – is that their continuing to do so is error.

The phrase "maximum medical improvement" plainly is a judicial fiction that created an extra-statutory standard. It originated in *Vinson v. Curators of Univ. of Mo.*, 822 S.W.2d 504, 508 (Mo. App. 1991), in which the Commission had invented it as the point at which temporary benefits become permanent. The Court of Appeals, reviewing the Commission's decision under the pre-*Hampton* standard, held this interpretation was "reasonable, and, thus, we have no permissible grounds for substituting another interpretation for it." *Id.* From then on, it appears this phrase became enshrined in the law of Missouri.

In the nearly 25 years since *Vinson*, however, both the standard of appellate review in workers' compensation actions (a review of the whole record with *de novo* review of questions of law) *and* the manner in which the Workers' Compensation Law is interpreted (strict construction) have changed. As "maximum medical improvement" is not in the statute, which must be strictly construed, this Court can and must hold that it is

not a reasonable interpretation of the statute, regardless of what the Court of Appeals may have thought in 1991.

Employer points to the Court of Appeals' decision in *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 909-10 (Mo. App. 2008), as contrary authority (Employer Br. 28-29). Employer argues *Cardwell* rejected "that the Commission could not use the date of maximum medical improvement to determine when temporary total disability benefits end and permanent partial disability benefits end because the phrase 'maximum medical improvement' was not in the statute" (Employer Br. 28-29).

Cardwell is useless as authority here for several reasons. First, as a Court of Appeals decision, *Cardwell* is not binding on this Court. Second, as Employer admits, the Court of Appeals' statement in *Cardwell* was mere dicta, as in that case, unlike here, the Court of Appeals "was not bound by strict construction because the injury in that case occurred before August 28, 2005," when the General Assembly's amendment to § 287.800.1 became effective (Employer Br. 29).

Most importantly, *Cardwell* has no bearing on this case. The question here is not whether the Commission *can* use "maximum medical improvement" as a guideline to determine when temporary total disability payments end, as it was in *Cardwell*. The Commission rejected doing so. Rather, the question here is whether the Commission *must* use it as a standard to cut off benefits as a matter of law, even if, as the Commission found here, Mr. Greer's rehabilitative process lasted longer and he was totally disabled during it. *Cardwell* does not decide that question.

Today, at most, "maximum medical improvement" should be considered an informal legacy guidepost for when temporary total disability payments might end, not an extra-statutory sword to cut them off as a matter of law. As the phrase is not found in the Workers' Compensation Law, reliance on it to *require* an end to benefits upon reaching it is erroneous. When the evidence supports a contrary factual finding of entitlement to benefits – that the rehabilitative process was ongoing during a period when the claimant was unable to return to employment – a court's use of "maximum medical improvement" to cut off the benefits anyway as a matter of law now is prohibited by § 287.800.1.

3. Inserting a cut-off date of "maximum medical improvement" into the Workers' Compensation Law anyway would violate § 287.800.1, R.S.Mo.

There simply is no indication the General Assembly intended for some amorphous date of "maximum medical improvement" to be the date for when temporary total disability payments must end as a matter of law, no ifs, ands, or buts. If it had, it would have inserted this requirement in the statute. For example, a statute expressly delineates the timing of payments by the SIF and their cut-off. *See* § 287.220.13, R.S.Mo. But no such section exists for payments by an employer. Employer's and its amicus's arguments otherwise are without merit.

Instead, the Court should look to the purpose and intent of temporary total disability, strictly construed from the statutes' plain language. So viewed, the General Assembly's plain goal was to return employees to their employment as soon as possible while ensuring they received the maximum benefits to which they are entitled. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755, 758 (Mo. App. 1997), *overruled on*

other grounds by Hampton, 121 S.W.3d at 226. If the General Assembly had intended for temporary total disability to end at "maximum medical improvement," without any further authority for the Commission to hold otherwise, it should have – and would have – crafted a statute clearly defining the term and delineating the timing of payments by an employer under that standard, as it did with the SIF.

To hold otherwise would ignore § 287.800.1, vitiate the General Assembly's requirement of strict construction, and instead once again open the door to courts and the Commission imposing their own interpretations of the Workers' Compensation Law, despite what the evidence shows. Plainly, by requiring strict construction, the General Assembly *did not intend* – indeed, thought it was *barring* – courts or the Commission overlooking and ignoring substantial and competent evidence that injured workers may receive the full benefits to which the express terms of the statute entitles them.

In effect, in arguing otherwise Employer and its amicus ask this Court to prove a negative: that because the General Assembly *did not exclude* consideration of "maximum medical improvement" from the Workers' Compensation Law, the Commission should be required to base its decisions on that phrase. Truly construing the statute strictly, that would be an absurd result. Section 287.800.1 plainly prevents the Commission *and all courts* from guessing or surmising the rationale behind the statute. Instead, it requires them to rely *only* on the words *expressly* in the statute itself.

Simply put, the Commission was right to reject Employer's invitation to impose "maximum medical improvement" as any sort of mandatory bright-line standard. It was particularly right to do so in this case, where, as the Commission held, substantial and

competent evidence showed Mr. Greer's rehabilitation process, during which he could not work, continued long after the "maximum medical improvement" date Employer advocated. The Commission was within its authority to award Mr. Greer payments for his inability to work while recovering from his surgery.

For, as it is the Commission who has both the power and duty to identify as a matter of fact the point at which temporary benefits become permanent – when "the rehabilitative process" is over – it certainly had the power to determine that, while still in treatment for the initial injury and while unable to work, Mr. Greer was entitled to the temporary total disability benefits provided by the Workers' Compensation Law. To give full effect to the Workers' Compensation Law, the Commission must and does have authority to evaluate the full evidence before it without confining it to extra-statutory phraseology.

Thus, so long as substantial and competent evidence supported a finding that Mr. Greer could not obtain employment in the open labor market during the rehabilitative process, and that rehabilitative process included the period of from June 22, 2010, to February 4, 2011 (a period far less than 7.6 years), the Commission had the statutory authority to award the temporary total disability payments it did. Here, under this standard, the Commission properly found the rehabilitative process included June 22, 2010, to February 4, 2011, when Mr. Greer was recovering from his surgery, which the Commission properly found was related to Mr. Greer's primary work-related injury.

B. Substantial, competent evidence supports the Commission's decision that Mr. Greer was totally disabled during his rehabilitative process between June 2010 and February 2011.

While Employer raises four points on cross-appeal, unlike its previous cross-appeal in the Court of Appeals it *does not* appeal Mr. Greer's award for past medical bills and treatment, which includes the surgery the recovery for which the Commission awarded temporary total disability benefits. Employer therefore now has "abandoned" that issue. Rule 83.08(b). As a result, that Mr. Greer is entitled to temporary total disability benefits between June 22, 2010, and February 4, 2011, is even plainer, as it is undisputed that the surgery from which he was recovering during that period was necessary and was directly related to his primary work-related injury.

Mr. Greer had surgery in June 2010, as recommended by Dr. Johnson (Tr. 325-26). Dr. Johnson testified the reason for the surgery stemmed directly from the primary work-related injury in February 2006 (Tr. 340, 540), and the Commission agreed. Employer does not appeal this finding. Dr. Johnson further testified that Mr. Greer was not released from his care until February 4, 2011, during which entire period Mr. Greer was recovering from his surgery and could not work (Tr. 337-38).

Therefore, there was substantial, competent evidence that, following the June 2010 surgery, Mr. Greer was not employable during the period of his rehabilitative process, which lasted until February 2011. The Commission was within its power to find Mr. Greer was entitled to temporary total disability benefits under § 287.149.1 during this period. The Court should affirm the Commission's decision.

II. The Commission properly found the safety penalty in § 287.120.5, R.S.Mo., did not apply to reduce Mr. Greer's benefits, because Employer did not meet three of the four elements required to activate that penalty.

(Response to Cross-Appellant's Point II)

In its second point on cross-appeal, Employer argues it was entitled to a reduction of Mr. Greer's benefits under § 287.120.5, R.S.Mo., because Mr. Greer violated this "safety statute" by failing to follow Employer's "Preferred Work Methods" for forklift operators, Exhibit 11 (Employer Br. 34-38). Specifically, Employer argues that, at the time of the work related injury, Mr. Greer violated Part 3, "Traveling," which states, "Keep all body parts inside the running lines of equipment" ("the Rule").

As the Commission found, however, Employer failed to prove it met all four elements entitling it to a reduction of benefits under § 287.120.5. The Commission's decision is supported by substantial and competent evidence. Employer's second point is without merit, and this Court should affirm the Commission's decision refusing to reduce Mr. Greer's benefits under § 287.120.5.

Section 287.120.5 provides:

> Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted

> by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

Whether an employee violated § 287.120.5., thereby entitling the employer to a reduction in benefits, is an affirmative defense the burden of proof for which falls on the employer. *Thompson v. ICI Am. Holding*, 247 S.W.3d 624, 629-30 (Mo. App. 2011). This is as true in a workers' compensation proceeding as it is in an ordinary civil lawsuit: "In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808, R.S.Mo.

To meet its burden of proof for a safety rule violation under § 287.120.5, employers must establish the following four express statutory elements:

> 1. that the employer adopted a reasonable rule for the safety of employees;
>
> 2. that the injury was caused by the failure of the employee to obey the safety rule;
>
> 3. that the employee had actual knowledge of the rule; and
>
> 4. that prior to the injury the employer had made a reasonable effort to cause his or her employees to obey the safety rule.

Carver v. Delta Innovative Servs., 379 S.W.3d 865, 869 (Mo. App. 2012).

The rule to which Employer points here requires employees traveling in equipment to keep all body parts within the running lines of the equipment. Mr. Greer

concedes Employer met its burden for the first element of § 287.120.5, as it is undisputed Employer adopted reasonable rules for the safety of its employees.

But that is all it met. First, and as the Commission found, Employer failed to meet its burden for the second element of the test: it could not prove a sufficient causal connection between any alleged safety violation by Mr. Greer and his injury. Although Mr. Greer would not have sustained an injury to his foot "but for" it being outside the running lines of the forklift, his injury was not caused by *his* violation of the safety rule but instead by multiple rule violations *by a co-worker*. Mr. Greer did not cause the accident. Rather, the proximate cause of the injury was the co-worker violating three safety rules so as ultimately to back into and pin Mr. Greer's foot between two forklifts.

"Under § 287.120.5, there must be a causal connection between the violation of the employer's safety rule and the employee's injury." *Thompson*, 347 S.W.3d at 630. *Thompson* referenced principles of proximate causation to determine whether a necessary causal connection had been established. *Id*. at 631. "The failure of an employee to obey a safety rule does not authorize the reduction of an award unless the injury is caused by such failure." *Id*. And under § 287.120.5, it is only the failure of "the employee" whose claim is at issue that can be weighed for such cause – not the failure of someone else.

Both Mr. Greer and Employer's representative testified the accident occurred as a result of the other driver's safety violations (Tr. 43-44, 45, 50, 52, 142, 150-51). Mr. Greer testified his forklift was not moving at the time of impact and his back was to the other driver when the crash occurred (Tr. 43-44, 45, 50, 52). There is substantial, competent evidence in the record supporting that Mr. Greer's violation of the Rule was

not the proximate cause of his injury.

Next, employer also failed to meet its burden to prove the third element: that Mr. Greer had actual knowledge of the Rule. The ALJ initially found Mr. Greer had actual knowledge of the Rule based on testimony from Employer's representative that Mr. Greer had received a written copy of it (Legal File 45). The ALJ assumed receipt of a written policy confers actual knowledge of the meaning of that policy (L.F. 45). The Commission properly found this to be error (L.F. 60).

As the Commission pointed out, the document titled "SYSCO Safe Preferred Work Methods" provides various rules applicable to warehouse employees, and the specific rule at issue here is in the section titled "Traveling" (L.F. 60). The section includes rules that speak to circumstances of an employee operating equipment traveling from one place to another, including proscribing excess speeds of travel and "right of way" instructions (Tr. 2568; L.F. 60). Thus, while Mr. Greer was aware of the Rule, the application of the Rule to these demonstrably non-traveling circumstances is in dispute, leading the Commission to conclude Employer had not met its burden to prove the third element of § 287.120.5 (L.F. 60).

In reviewing this, it is important to remember that, at the time of the injury, Mr. Greer's forklift was stationary, and was *not* traveling. Mr. Greer testified he understood the "traveling" rule about keeping all body parts inside the running lines of the equipment applied when the equipment was *moving* (Tr. 50) – when it was *traveling*. Conversely, Mr. Greer sustained his injury while his forklift was *not moving*. While Employer's representative testified that, though the Rule was listed under "Traveling," it was to be

applied anytime employees were on a stationary forklift (Tr. 139), his self-serving interpretation would create ambiguity and confusion for anyone who would attempt to follow the Rule.

For example, if that interpretation were accurate, following the Rule would be impossible: body parts inevitably would be outside the running lines of the equipment, violating the Rule, whenever an employee got into and out of a non-traveling, stationary forklift. As the Commission observed, under a plain reading of the Rule Employer cannot meet its burden. Either taking the plain meaning of "traveling" or looking at the fact Mr. Greer did not understand the rule to be in effect when the forklift was stationary, he plainly did not have actual knowledge of the Rule as the law of Missouri understands it. As the Commission held, Employer cannot justly receive the benefit of a safety penalty based on its own ambiguous, unclear, and confusing wording.

Employer also asks this Court to reconsider the credibility of Mr. Greer's testimony in light of the counseling form Employer presented to him that he signed on March 7, 2006 (Employer Br. 37). As Employer points out in its response to Mr. Greer's point on appeal, the Court "cannot" "reassess the credibility of the evidence, *including the credibility of Appellant*" (Employer Br. 47) (emphasis added) (citing *Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 631-32 (Mo. banc 2012)).

Regardless, though, as the Commission found, Mr. Greer's testimony was not dispositive of this issue. First, on its face, the form to which Employer points does not contain any specific admission by Mr. Greer that he knew the Rule applied when the forklift was stationary (Tr. 2598). Rather, it merely contains a supervisor's personal

opinion that the injury could have been prevented if Mr. Greer had followed the Rule (Tr. 2598). Once again, that statement is purely self-serving for Employer.

Second, as the Commission also found, Employer presented the form to Mr. Greer in the days following his serious injury, and Mr. Greer credibly testified he was not thinking about ambiguities in the policies at the time of the crash (L.F. 94). As the Commission noted, "Employee's testimony suggests (and we so find) that on March 7, 2006, employee was more concerned about receiving authorized treatment for his serious and disabling work injury than quibbling with his supervisor over the meaning of the employer's work rule" (L.F. 94).

Finally, Mr. Greer's signature on that form does not undo the contradiction inherent in asking for a penalty against an employee whose forklift was stationary for violating a rule whose express terms apply to employees who are traveling in equipment. Travel means "to move, advance or undergo transmission from one place to another" or "to move in a given direction or path through a given distance. WEBSTER'S 3D NEW INT'L DICT. 2433 (2002). Mr. Greer testified, and Employer did not contest, that his forklift was *stationary* at the time of his injury. Therefore, as Mr. Greer also testified, it was his understanding he was not in violation of the safety rule. Mr. Greer was not aware the rule applied to him when his forklift was stationary. The Commission found that testimony to be credible, and this Court cannot second-guess that determination.

As the Commission observed, at best Employer proved Mr. Greer "engaged in a momentary, inadvertent, technical violation of an unclear rule, the application of which he was not actually aware of at the time of the work injury" (L.F. 94-95). As knowledge

is a necessary element of § 287.120.5, Employer failed to meet its burden to prove a reduction in compensation is required.

Lastly, Employer also did not meet its burden to prove it made reasonable efforts to ensure employees in Mr. Greer's position followed the Rule. Mr. Greer testified his forklift was stopped at the time of his injury. He testified the scanner "fogged up" due to the extremely cold temperature in the warehouse (Tr. 46). In order to get close enough for the malfunctioning scanner to read the bar code, he leaned forward, causing his left foot to extend outside the line of his forklift (Tr. 47-48). Indeed, it was common knowledge that the scanners often malfunctioned in the freezer in this manner, and he not only had personally used this method of leaning forward out of the forklift to get close enough to make scanners work, but commonly had seen other coworkers do so as well (Tr. 47-48). Employer's representative agreed, and testified he had never given any counseling reports to any employees for violating the Rule by leaning forward in this manner to use their fogging scanners in the freezer (Tr. 152-53).

The law of Missouri is Employer failed to meet its burden to support any penalty assessment under § 287.120.5. Its evidence was factually and legally inadequate to support the second, third, and fourth elements of that statutory defense.

If the Court somehow were to find that the safety penalty applied, however, Mr. Greer urges the Court not to apply the maximum penalty, but instead to apply the minimum of 25%. Any failure by Mr. Greer to follow the Rule was due solely to the fact the Rule was unclear – not because of any willful or negligent conduct on his part.

III. The Commission properly found Mr. Greer was entitled to future medical treatment for the injuries he sustained in the primary work-related accident. (Response to Cross-Appellant's Point III)

In its third point on cross-appeal, Employer argues the Commission erred in awarding Mr. Greer future medical expense benefits (Employer Br. 38-43). It argues the facts the Commission found do not support such an award and there was insufficient evidence for the award, because there was no evidence that Mr. Greer was in need of future medical care and that any such future medical treatment was required to relieve effects of his 2006 crush injury (Employer Br. 38-43).

Employer's arguments are without merit. Through substantial, competent evidence, Mr. Greer established a reasonable probability – to a reasonable degree of medical certainty – that he needed future care for his 2006 crush injury, from which that future treatment would flow. That is all the law of Missouri required him to establish. The Court should affirm the Commission's decision.

The Worker's Compensation Law permits an allowance for the cost of future medical treatment in an award. Under § 287.140.1, R.S.Mo., the employer must provide "such medical, surgical, chiropractic, and hospital treatment … as may reasonably be required … to cure and relieve [the employee] from the effects of the injury." *Poole v. City of St. Louis*, 328 S.W.3d 277, 291-92 (Mo. App. 2010); *see also Pennewell v. Hannibal Reg'l Hosp.*, 390 S.W.3d 919, 926 (Mo. App. 2013).

Future treatment can be awarded even if a claimant has reached "maximum medical improvement" or where permanent partial disability has been determined.

Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248-49 (Mo. banc 2003). What activates an employer's responsibility for future treatment is evidence establishing to a reasonable degree of medical certainty that the need for future care flows from the accident. *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 351 (Mo. App. 2007).

To show this, a claimant need not present conclusive evidence of a need for treatment, *Fitzwater v. Dep't of Pub. Safety*, 198 S.W.3d 623, 628 (Mo. App. 2006), or show evidence of the specific treatment required, *Stevens v. Citizens Mem'l Healthcare Found.*, 244 S.W.3d 234, 237 (Mo. App. 2008), but rather merely must show some "reasonable probability" he will need future care. *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. 2002); *Chatmon v. St. Charles Cnty. Ambulance Dist.*, 55 S.W.3d 451, 459 (Mo. App. 2001). It is not even necessary that treatment be prescribed or recommended at the time of the hearing. *Mathia v. Contract Firefighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996).

"Probable" in this context means founded on reason and experience that inclines the mind to believe but may leave room for doubt. *Tate v. S.W. Bell Tel. Co.*, 715 S.W.2d 326, 329 (Mo. App. 1986). Future treatment "must flow from the accident" for an employer to be held responsible. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo. App. 1985). An employer even "may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury." *Stevens*, 244 S.W.3d at 238.

Under these guidelines, ample substantial, competent evidence in the record supports the Commission's award to Mr. Greer for future medical treatment from his 2006 crush injury. Mr. Greer experienced chronic left foot pain since the injury (Tr. 29-40). He has restricted range of motion, takes medication, and walks with a cane (Tr. 71-74). He testified, and records show, that future treatment, including possible additional surgery, has been recommended (Tr. 107-18).

Even Dr. Schmidt, Employer's expert, concurred that the treatment Mr. Greer's doctors recommended would be the next step in treatment (Tr. 2364-66). Mr. Greer testified he desires more treatment (Tr. 67). Further, Dr. Berkin prescribed treatment recommendations in his report including nonsteroidal anti-inflammatory medication and a possible fusion in the future (Tr. 180, 230-40). Dr. Johnson testified Mr. Greer requires future treatment, including pain management and a tendon transfer (Tr. 330-32). Plainly, the substantial, competent evidence shows Mr. Greer met his burden to establish a "reasonable probability" he will need future care from the 2006 injury. *Smith*, 73 S.W.3d at 764; *Chatmon*, 55 S.W.3d at 459. The record supports the Commission's award.

Employer harps on the fact that any future medical compensation must conform to § 287.140.1 (Employer Br. 39), which requires an employer to provide treatment "as may be reasonably required to cure and relieve from the effects of the injury." The Commission's award in this case fits that mandate well.

Mr. Greer's medical records show suffered a crush injury to the left foot, for which he was diagnosis with tarsal tunnel syndrome and tendon and nerve damage (Tr. 183-84, 187-88). Dr. Johnson's records detail the need for additional treatment related to

the 2006 injury (Tr. 330-32). Conversely, *no expert testified* that, within a reasonable degree of medical certainty, Mr. Greer suffered any *additional* injury to his left foot besides the 2006 work-related crush injury. As a result, the Commission's award requires Employer to pay for that treatment which plainly is "reasonably required to cure and relieve from the effects of" that injury. § 287.140.1.

Therefore, this Court should affirm the Commission's award. Having found a compensable injury, the statute required that award. Mr. Greer met his burden to prove he is in need of future treatment from his injury. He continues to experience pain. Substantial and competent evidence shows he needs additional care and evaluation for pain that flows from the initial work-related injury. All of the statute's requirements are met. Employer's arguments otherwise are without merit.

Conclusion

This Court should reverse the Commission's decision and remand this case for an award of PTD benefits from Employer or the SIF. It should affirm the rest of the Commission's decision.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that I prepared this brief using Microsoft Word 2013 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that this brief contains 7,637 words.

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Certificate of Service

I hereby certify that, on May 8, 2015, I filed a true and accurate Adobe PDF copy of this Substitute Reply Brief and Brief of the Cross-Respondent via the Court's electronic filing system, which notified the following of that filing:

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