SC94724

IN THE SUPREME COURT OF MISSOURI

CARL GREER,
Appellant/Cross-Respondent,

vs.

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

and

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

Appeal from the Labor and Industrial Relations Commission of the State of Missouri
Injury No. 06-013976

SUBSTITUTE BRIEF OF RESPONDENT/CROSS-APPELLANT

RESTOVICHALLEN, LLC
John M. Allen, #49642
Cynthia L. Parnell, #61280
214 North Clay Avenue, Suite 210
Kirkwood, MO 63122
Telephone: (314) 434-7700
Facsimile: (314) 480-3355
john@restovichallen.com
cynthia@restovichallen.com
Attorneys for Respondent/Cross-Appellant Sysco Food Services of St. Louis, LLC

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JURISDICTIONAL STATEMENT

This appeal is from a final decision issued by the Labor and Industrial Relations Commission of Missouri modifying the decision of an Administrative Law Judge of the Missouri Division of Workers' Compensation, St. Charles Office. This case does not fall within this Court's exclusive jurisdiction pursuant to Art. V, § 3 of the Missouri Constitution. Pursuant to § 287.495 RSMo[1], appeal of the award is to the appellate court. Pursuant to §§ 287.495, 287.640, and 477.050, venue is in the Missouri Court of Appeals, Eastern District. Upon Appellant's timely motion for rehearing and/or transfer, the Missouri Court of Appeals, Eastern District transferred the appeal to this Court after opinion by order of the majority of the judges. This Court thus has jurisdiction pursuant to Art. V, § 10 of the Missouri Constitution.

[1] All statutory references are to RSMo, unless otherwise noted.

STATEMENT OF FACTS

Procedural History

This case arises out of an injury sustained by Appellant/Cross-Appellee Carl Greer ("Appellant") while working for Appellee/Cross-Appellant Sysco Food Services ("Employer") on February 23, 2006. Appellant, Employer and the Second Injury Fund proceeded to hearing on May 7, 2013 for determination of issues relating to (1) medical causation of Appellant's injuries, (2) liability of Employer for past and future medical expenses and treatment, (3) liability of Employer for permanent partial disability, (4) liability of Employer for temporary total disability, (5) liability of Employer or Second Injury Fund for permanent partial and/or permanent total disability, and (6) reduction in benefits due to Appellant's violation of Employer's safety policy.

Administrative Law Judge Kohner ("ALJ") issued his Findings of Fact and Rulings of Law and Award ("Award") following hearing on May 7, 2013. (L.F. 62–84). The ALJ granted Appellant unpaid past medical expenses, future medical treatment, and permanent partial disability. (L.F. 62-63). Appellant was denied permanent total disability and unpaid temporary total disability benefits. (L.F. 62-63). Appellant's benefits were reduced by 25% because his injuries were the result of his failure to obey Employer's reasonable safety rule. (L.F. 62-63, 84). Employer and Appellant appealed the ALJ's award to the Labor and Industrial Relations Commission (the "Commission"). (L.F. 47-54). The Commission modified the ALJ's award and granted Appellant unpaid temporary total disability benefits, additional unpaid medical expenses, and overturned the reduction of Appellant's benefits for violation of Employer's safety policy. (L.F. 61).

The Commission adopted and affirmed the remaining award and decision of the ALJ. (L.F. 61).

Appellant appealed the Commission's denial of permanent total disability benefits to the Missouri Court of Appeals, Eastern District. Employer cross-appealed the Commission's award of unpaid past medical expenses, future medical treatment, unpaid temporary total disability, and the Commission's failure to reduce Appellant's benefits due to his violation of Employer's reasonable safety rule. The Eastern District reversed the Commission's award of unpaid temporary total disability and affirmed all other findings of the Commission. Appellant thereafter filed a Motion for Rehearing and/or Transfer to the Missouri Supreme Court. By Order dated January 6, 2015, the Eastern District denied Appellant's motion for rehearing and granted Appellant's application for transfer to the Supreme Court.

Appellant – Carl Greer

Appellant was 53 years old at the time of hearing. (Tr. 16). He is a high school graduate, and he participated in computer training and electronics courses after graduating. (Tr. 17-18). Appellant worked for Employer from 1989 to 2007 as an order picker and then a forklift operator. (Tr. 20-21). Appellant held various unskilled labor jobs before coming to work for Employer. (Tr. 18-19). Appellant is currently receiving Social Security Disability benefits. (Tr. 13).

Appellant had sustained several injuries that gave him problems doing his job before the February 2006 accidental injury. (Tr. 26). Appellant fell out of a picker that was 12 feet in the air and sustained a bulging disc in his cervical spine. (Tr. 29).

Appellant admitted he has had headaches since that neck injury. (Tr. 30). Even after Appellant was done treating for the neck injury he continued to miss about one day per month due to ongoing headaches. (Tr. 102). Appellant's neck pain was an 8 on a scale of 1 to 10, and his neck pain was still an 8 even after the February 2006 accidental injury. (Tr. 102). Appellant sustained an injury to his lower lumbar spine in 1995. (Tr. 103). Appellant missed work about once every two months due to low back pain. (Tr. 103). Appellant's low back pain was an 8 on a scale of 1 to 10, and his low back pain continued to be an 8 even after the February 2006 accidental injury. (Tr. 103-104). Appellant also hurt his right shoulder in 1999, which required rotator cuff surgery. (Tr. At 37). After the surgery, Appellant continued to have difficulty lifting, reaching overhead, and operating his forklift as a result of the injury. (Tr. 37-38). Appellant testified his right shoulder pain was an 8 on a scale of 1 to 10 after the accident injury in February 2006. (Tr. 104-105). Appellant testified all of these injuries that he sustained prior to the February 2006 accidental injury were a hindrance and obstacle to his job. (Tr. 40-41).

On February 23, 2006, Appellant testified he was trying to scan a pallet while standing on a forklift inside the freezer at Employer's warehouse. (Tr. 43). He leaned forward to scan the pallet, which caused his left leg to extend outside the running lines of the forklift. (Tr. 43). At that point a co-employee drove another forklift into the freezer. (Tr. 43). The co-employee's forklift grabbed Appellant's left foot and crushed his left foot between the forklifts. (Tr. 43).

Appellant went to see Dr. Vilray Blair at Orthopedic Associates on February 28, 2006 – just five days after the accident on February 23, 2006. (Tr. 2610). Dr. Blair

initially diagnosed Appellant with a crush injury to his left ankle and a medial malleolar fracture. (Tr. 2610). Dr. Blair later ruled out the medial malleolar fracture as related to the February 23, 2006 accident. (Tr. 2611). Dr. Jeffrey Johnson, Appellant's surgeon, also opined that the medial malleolar fracture predated Appellant's February 23, 2006 accident. (Tr. 352). After he ruled out the medial malleolar fracture, Dr. Blair continued to diagnose Appellant with a healing crush injury. (Tr. 2609).

Dr. Blair ordered two MRIs. The first MRI was performed on June 20, 2006. That MRI revealed moderate to severe posterior tibial tendinitis and some scar tissue, but it did not show any fractures or other injuries. (Tr. 2614). The second MRI was performed on October 2, 2006. According to Dr. Blair, this MRI was essentially normal. (Tr. 2617). Appellant showed improvement over the next couple months; his range of motion improved and his swelling went down. (Tr. 2618-19).

On August 17, 2006 Appellant participated in a functional capacity evaluation that showed he could work at the heavy demand level. (Tr. 2655). Appellant returned to work for several months. (Tr. 2709). Appellant had another functional capacity evaluation on October 24, 2006 that showed he could work at the medium demand level. (Tr. 2687).

On February 5, 2007, Dr. Blair noted some tenderness over Appellant's tarsal tunnel, so he sent him for an EMG and nerve conduction test to rule out tarsal tunnel syndrome. (Tr. 2621). Appellant could not get through the nerve conduction test, but he completed the EMG, and Dr. Blair said the EMG appeared to be normal. (Tr. 2621). Dr. Blair released Appellant to fully duty on March 19, 2007. (Tr. 2621). Appellant saw Dr.

Blair for the last time on April 23, 2007, at which point Dr. Blair released Appellant at maximum medical improvement and gave him a 5% permanent partial disability of his left ankle associated with pain and somewhat limited range of motion. (Tr. 2623).

Appellant testified that he was still having problems with his left foot, so he sought treatment on his own. (Tr. 112). Appellant was referred to pain management specialist Dr. John Graham. Dr. Graham gave Appellant a psychological test that showed dramatic elevations on every scale tested. (Tr. 2710). These dramatic elevations led Dr. Graham to say there was a strong likelihood of functional overlay in Appellant. (Tr. 2710). Dr. Graham said patients like Appellant with functional overlay will often have subjective complaints out of proportion to objective findings. (Tr. 2710). Dr. Graham also said these patients have subjective complaints that are often recalcitrant to treatment. (Tr. 2710). For these reasons, Dr. Graham said he had nothing to offer from a pain management standpoint and he did not recommend surgery or any other invasive treatment. (Tr. 2710). Nonetheless, Appellant was surgically treated by Dr. Johnson and Dr. Susan MacKinnon with tarsal tunnel release, tendon lengthening, removal of cutaneous neuromas, and internal neurolysis on June 22, 2010. (Tr. 466).

Appellant attempted to return to work for Employer on several occasions after the February 2006 accidental injury, but he testified he was not able to perform his job duties so he left Employer in 2007. (Tr. 58, 60-61, 126).

Appellant testified he has pain in his left foot on a daily basis. (Tr. 70). According to Appellant, he cannot stand or sit for long periods of time because of that

pain. (Tr. 74). Appellant testified that any activity involving his left foot causes that foot to swell. (Tr. 74). Appellant testified that he has to use a cane for balance. (Tr. 75).

Video surveillance demonstrates Appellant does not use his cane all the time. (Tr. 117-22). The video surveillance also demonstrates Appellant is able to walk up and down stairs without much difficulty, lean forward and put pressure on his left foot, and drive a truck. (Tr. 117-22). The video surveillance also demonstrates Appellant can stand on a sidewalk for more than 20 minutes without having to sit down. (Tr. 119).

Dr. Berkin

Dr. Berkin is a family practitioner. (Tr. 166). He is not an orthopedic surgeon and he does not specialize in foot and ankle. (Tr. 250). Dr. Berkin examined Appellant on August 8, 2007, January 22, 2009, and March 30, 2011, reviewed Appellant's medical records, and obtained a medical history from Appellant. (Tr. 266, 278).

On August 8, 2007 Dr. Berkin diagnosed Appellant with a crush injury to his left foot, a fracture of the medial malleolus of the left ankle, plantar fasciitis of the left foot, and tendonitis involving the posterior tibial tendon and the Achilles tendon of the left foot. (Tr. 176-77). Dr. Berkin's diagnosis of a medial malleolus fracture was based on an x-ray that was taken on February 28, 2006, but he did not personally review those x-rays. (Tr. 210-11). Dr. Berkin opined that those conditions were the direct result of the February 2006 accident. (Tr. 177). Based on those diagnoses, Appellant's condition and problems and the physical examination, Dr. Berkin opined that Appellant had a 30% permanent partial disability of the left lower extremity at the level of the ankle. (Tr. 177). Dr. Berkin also attributed a 35% permanent partial disability due to Appellant's prior

neck injury, a 20% permanent partial disability due to Appellant's prior back injury, a 35% permanent partial disability at the level of the shoulder due to Appellant's prior shoulder injury, and a 10% permanent partial disability at the level of the metatarsal phalangeal joint due to Appellant's unrelated injury to the big toe on his right foot. (Tr. 178).

Dr. Berkin saw Appellant again on January 22, 2009. (Tr. 181). Dr. Berkin reviewed additional recent x-rays and an MRI scan of the left foot. (Tr. 182). The MRI showed a medial malleolus fracture that had not healed and it showed marked tendinopathy of the distal posterior tibial tendon. (Tr. 182-83). Dr. Berkin also reviewed the Appellant's prior EMG study. (Tr. 183). Dr. Berkin diagnosed Appellant with left tarsal tunnel syndrome, and he opined that condition was from the February 2006 accident. (Tr. 188). Dr. Berkin opined that Appellant had a 45% permanent partial disability at the level of the left ankle because Appellant's condition was clearly worse. (Tr. 190).

Dr. Berkin saw Appellant for the last time on March 30, 2011. (Tr. 194). Dr. Berkin had learned that Dr. Mackinnon and Dr. Johnson performed surgery on Appellant's leg for the tarsal tunnel syndrome. (Tr. 194). Based on Dr. Berkin's review of the medical records, he said they released the posterior tibial nerve, removed a neuroma and lengthened the tibial tendon. (Tr. 197-99). Dr. Berkin testified the lengthening of the tibial tendon was proximally caused by the February 2006 accident. (Tr. 199). Dr. Berkin's opinion was that his symptoms were about the same from the prior visit. (Tr. 199).

Dr. Berkin issued his report from the March 30, 2011 visit on August 1, 2011. (Tr. 278). In that report, Dr. Berkin opined that Appellant suffered a 60% permanent partial disability to the left foot and placed restrictions to avoid excessive squatting, kneeling, stooping, turning, twisting, lifting, and climbing, standing on feet longer than 20 to 30 minutes at a time, climbing ladders, stairs, working at heights above ground level, walking on uneven surfaces, lifting with right arm extended from his body, and excessive lifting or working with his right arm above shoulder level. (Tr. 285-86). Dr. Berkin further restricted Appellant to lifting 20 to 25 pounds occasionally and 15 pounds frequently and he said Appellant should pace himself and take frequent breaks. (Tr. 285-86). Dr. Berkin testified that these restrictions were based upon a combination of the February 2006 injury and his prior neck, back, shoulder and toe injury. (Tr. 204-05).

With respect to Appellant's surgery, Dr. Berkin opined that he did not have a good result from the surgery, that the surgery did not make him any better, and that Appellant's functioning was not any better after the surgery. (Tr. 235-37). Dr. Berkin testified Appellant was worse when he saw him in 2011 than when he saw him in 2009 before surgery. (Tr. 237).

Dr. Johnson

Dr. Johnson is a board certified orthopedic surgeon with subspecialty training in foot and ankle surgery. (Tr. 305-06). Dr. Johnson examined and treated Appellant's left foot injury, including a tarsal tunnel release and tendon lengthening on June 22, 2010. (Tr. 466). Dr. Johnson's operative note indicates that the posterior tibial tendon was very thickened and that the posterior tibial tendon itself was scarred distally. (Tr. 467). Dr.

Johnson debrided the tibial tendon to remove some of the thickness and then opened the tendon sheaths and lengthened the tendons. (Tr. 467). At that point, Dr. MacKinnon came in to the operating room and performed procedures on both the saphenous nerve and the internal neurolysis of the tibial nerve. (Tr. 467). Dr. Johnson was not in the operating room when Dr. MacKinnon performer her surgical procedures, and he did not observe any damage to the nerves in Appellant's foot. (Tr. 541).

Dr. Johnson last saw Appellant post-operatively on December 12, 2011, at which time Appellant's pain was definitely improved from what it was pre-operatively. (Tr. 531). Appellant could bring his left ankle into about the neutral position passively and actively. (Tr. 532). Appellant was able to do a single leg stand on his left leg during the examination on December 12, 2011. (Tr. 532). Appellant had 5 out of 5 strength except for the posterior tibula, and he had more than 4 out of 5 strength in the posterior tibula. (Tr. 532-33).

Dr. Schmidt

Dr. Schmidt is a board certified orthopedic surgeon who has specialized in foot and ankle for more than 15 years. (Tr. 2317). Dr. Schmidt examined Appellant on February 21, 2008 and May 2, 2011, reviewed Appellant's medical records, and obtained a medical history from Appellant. (Tr. 2438). Dr. Schmidt opined that Appellant suffered a 5% permanent partial disability of the left foot. (Tr. 2310, 2463). Dr. Schmidt agreed with Dr. Blair's opinion that Appellant was at maximum medical improvement as of April 23, 2007, and he also opined that the surgery performed by Dr. Johnson and Dr.

MacKinnon was not reasonably necessary, had a predictably poor result, and that further surgical intervention would have a predictably poor result. (Tr. 2438, 2441).

J. Stephen Dolan

J. Stephen Dolan, a certified rehabilitation counselor, evaluated Appellant on June 16, 2011, and testified that prior to the February 2006 accidental injury Appellant had limitations that prevented him from doing many types of jobs that he otherwise could have done. (Tr. 736, 757-58). Mr. Dolan concluded that based on Appellant's education, work experience, academic skills, work skills, and Dr. Berkin's permanent restrictions, including the restrictions that were related to the injuries Appellant sustained before the February 2006 accidental injury, Appellant is unable to perform any employment for which a reasonably stable market exists. (Tr. 764-769).

Terry Cordray

Terry Cordray, a certified rehabilitation counselor, performed a vocational assessment based on Appellant's medical records and testified Appellant cannot perform his past work as a forklift operator, pallet jack operator, standing forklift operator, or order picker, but it is his opinion Appellant maintains the capacity to work and earn wages in the competitive labor market. (Tr. 2740, 2747-752). Mr. Cordray opined that there are a significant number of jobs in the labor market that Appellant could perform with Dr. Berkin's restrictions, such as cashier at a parking garage, surveillance system monitor, collections clerk, and telemarketer. (Tr. 2747-48). Mr. Cordray did not opine Appellant was unemployable solely because of the February 2006 accidental injury.

Barry Flakes

Barry Flakes, Appellant's direct supervisor at the time of the injury, and the individual responsible for enforcing Employer's safety rules, testified regarding Employer's safety policies, specifically, SYSCO*Safe* Preferred Work Method number three under traveling. SYSCO*Safe* Preferred Work Method number three under traveling requires all employees to "[k]eep all body parts within the running lines of the equipment." (Tr. 135, 2568). Mr. Flakes testified that SYSCO*Safe* Preferred Work Method number three under traveling was applicable whether equipment was moving or stationary, a fact that was communicated to Appellant. (Tr. 139). Mr. Flakes testified the SYSCO*Safe* Preferred Work Methods were adopted for the safety of the employees. (Tr. 137). He also testified Employer communicated the SYSCO*Safe* Preferred Work Methods to employees by distributing copies to employees and discussing them at daily pre-shift safety meetings. (Tr. 137). Mr. Flakes confirmed that SYSCO*Safe* Preferred Work Method number three under traveling was communicated to Appellant, and that Appellant signed an acknowledgment of receiving SYSCO*Safe* Preferred Work Method number three under traveling. (Tr. 137-39). Mr. Flakes testified the SYSCO*Safe* Preferred Work Methods were enforced by Employer with daily Hazardous Work Assessments and the issuance of "coach cards" to employees who were not in compliance with the SYSCO*Safe* Preferred Work Methods. (Tr. 139-40).

Mr. Flakes testified that Appellant violated SYSCO*Safe* Preferred Work Method number three under traveling when he extended his leg beyond the running lines of the fork lift. (Tr. 142). Mr. Flakes also testified Appellant caused his injury by extending his

leg beyond the running lines of the forklift. (Tr. 147-48). Mr. Flakes testified Appellant would not have injured his left foot if he had kept his left leg and left foot within the running lines of his forklift, and that Appellant confirmed this by signing a counseling report dated March 7, 2006 that says the February 2006 accident "could have been prevented if the following preferred work methods for safety would have been followed. Under traveling #3 keep all body parts within the running lines of the equipment." (Tr. 142, 147-48).

POINTS RELIED ON

I. The Commission erred in awarding Appellant temporary total disability benefits after April 23, 2007 because the Commission acted without or in excess of its powers, the facts determined by the Commission do not support the award, and there was not sufficient competent evidence in the record to warrant the making of the award, in that (1) §§ 287.149 and 287.170 RSMo do not allow the Commission to award Appellant temporary disability benefits after April 23, 2007, (2) the Commission determined that Appellant reached maximum medical improvement on April 23, 2007, and that fact does not support the Commission's award of temporary total disability benefits after that date, and (3) there is a lack of substantial and competent evidence to warrant an award of temporary total disability benefits to Appellant after April 23, 2007.

Allcorn v. Tap Enterprises, Inc., 277 S.W.3d 823 (Mo. App. S.D. 2009)

Cardwell v. Treasurer of State of Missouri, 294 S.W. 3d 902 (Mo. App. E.D. 2008)

§ 287.149 RSMo

§ 287.170 RSMo

II. The Commission erred in failing to reduce Appellant's benefits by 25% - 50% due to Appellant's safety violation because the Commission acted without or in excess of its powers, the facts found by the Commission do not support the award, and there was not sufficient competent evidence in the record to warrant the making of the award, in that (1) the Commission was required by § 287.120.5 RSMo to reduce Appellant's past, unpaid, and future benefits by at least 25% but no more than 50%, (2) the facts found by the Commission support a reduction of at least 25% but no more than 50% of Appellant's benefits, and (3) Employer produced overwhelming competent evidence to prove Appellant's injury was the result of Appellant's violation of Employer's reasonable safety rule.

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

Thompson v. ICI American Holding, 347 S.W.3d 624 (Mo. App. W.D. 2011)

§ 287.120.5 RSMo

III. The Commission erred in awarding Appellant future medical expense benefits because the Commission acted without or in excess of its powers, the facts found by the Commission do no support the award, and there was not sufficient competent evidence in the record to warrant the making of the

award, in that (1) the Commission failed to apply the proper standard set forth in § 287.140.1 RSMo to establish that the future medical treatment is reasonably required to cure and relieve from the effects of the work injury, (2) the facts found by the Commission do not establish a reasonable probability that Appellant was in need of future medical care, and (3) there was not sufficient competent evidence in the record to prove any future medical treatment is reasonably required to cure and relieve Appellant from the effects of his work injury.

Poole v. City of St. Louis, 328 S.W.3d 277 (Mo. App. E.D. 2010)

Smith v. Roberts Dairy Co., LLC, 08-098439, 2014 WL 2726378 (Mo. Lab. Ind. Rel. Com. June 13, 2014)

§ 287.140.1 RSMo

IV. Point I of Appellant's Brief is without merit because the Commission's denial of permanent total disability benefits is supported by the facts determined by the Commission and substantial and competent evidence presented at the hearing.

Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624 (Mo. banc 2012)

Sanders v. St. Clair Corp., 943 S.W.2d 12 (Mo. App. S.D. 1997)

ARGUMENT

Standard of Review

The Court may modify, reverse, remand for rehearing, or set aside an award of the Commission only where the Commission acted without or in excess of its powers, the award was procured by fraud, the facts found by the Commission do not support the award, or there was not sufficient competent evidence in the record to support the award. § 287.495.1 RSMo. If the Commission affirms the award of the ALJ, the Court reviews the ALJ's award and decision as incorporated and affirmed by the Commission. *Pennewell v. Hannibal Reg'l Hosp.,* 390 S.W.3d 919 (Mo. App. E.D. 2013). The Court must also consider whether there was sufficient competent and substantial evidence to support the award in the context of the record as a whole. *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 222-23 (Mo. banc 2003). An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence. *Id.* With respect to questions of law, the Court need not give the Commission's decision any deference, and the Court's review is de novo. *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612, 615 (Mo. banc 2002).

Points Relied On

I. The Commission erred in awarding Appellant temporary total disability benefits after April 23, 2007 because the Commission acted without or in excess of its powers, the facts determined by the Commission do not support the award, and there was not sufficient competent evidence in the record to warrant the making of the award, in that (1) §§ 287.149 and 287.170 RSMo

do not allow the Commission to award Appellant temporary disability benefits after April 23, 2007, (2) the Commission determined that Appellant reached maximum medical improvement on April 23, 2007, and that fact does not support the Commission's award of temporary total disability benefits after that date, and (3) there is a lack of substantial and competent evidence to warrant an award of temporary total disability benefits to Appellant after April 23, 2007.

The Commission reversed the ALJ's finding that Appellant failed to prove he was entitled to temporary total disability benefits at any time after April 23, 2007, and awarded Appellant temporary total disability benefits from June 22, 2010 through February 4, 2011. In doing so, the Commission acted in excess of its statutory authority to award temporary total disability benefits, and made an award that is both contrary to its own factual findings and wholly unsupported by any substantial or competent evidence in the record.

The Commission's authority to award benefits, including temporary total disability benefits, is limited to only that authority expressly granted by statute. *See Farmer v. Barlow Truck Lines, Inc*., 979 S.W.2d 169, 170 (Mo. 1998). But in this case, the Commission awarded Appellant temporary total disability after April 23, 2007, not because it had statutory authority to do so, but because the Commission found "nothing in the actual language of Chapter 287 that would preclude [the] award of temporary total disability benefits" after that date. (L.F. 58). This reasoning is fatally flawed. The Commission may not act simply because there is no law precluding it from doing so – the

Commission may only act pursuant to an express statutory grant of authority. *See Farmer*, 979 S.W.2d at 170. And the express statutory authority relating to temporary total disability benefits precludes the Commission from awarding Appellant such benefits after April 23, 2007.

The Commission's authority to award temporary total disability benefits is expressly granted by §§ 287.149 and 287.170, so its authority to award temporary total disability benefits is limited to the express provisions found in those sections. Appellant's injury occurred after August 28, 2005, so the Court must strictly construe both §§ 287.149 and 287.170 to determine whether the Commission had authority to award Appellant temporary total disability benefits after April 23, 2007. *See* § 287.800. Strict construction under § 287.800 means "that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. A strict construction of a statute presumes nothing that is not expressed." *Lewis v. Treasurer*, 435 S.W.3d 144, 154-55 (Mo. App. E.D. 2014) (*quoting Shaw v. Mega Industries, Corp.*, 406 S.W.3d 466, 472 (Mo. App. W.D. 2013); *see also Harness v. S. Copyroll, Inc.*, 291 S.W.3d 299, 303 (Mo. App. S.D. 2009). In order to determine the plain meaning of words used by the legislature, courts are to use the plain meaning as found in the dictionary unless the legislature provides a different definition. *See Lincoln Industrial, Inc. v. Director of Revenue*, 51 S.W.3d 462, 465 (Mo. banc 2001) (*quoting Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993) for the proposition that "[t]he plain meaning of words, as found in the dictionary, will be used

unless the legislature provides a different definition."); *see also Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008).

So the Court must apply strict construction to §§ 287.149 and 287.170 to determine the limits of the Commission's authority to award temporary total disability benefits. Section 287.149 provides "[t]emporary total disability or temporary partial disability benefits shall be paid throughout the rehabilitative process." § 287.149. Section 287.170, in turn, states: "[f]or temporary total disability the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made." § 287.170.1. The Workers' Compensation Law does not specifically define the term "temporary total disability" as used in §§ 287.149 and 287.170. However, § 287.020 states that "total disability" as used in Chapter 287 shall mean: "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." § 287.020. The plain meaning of the word "temporary," as found in the dictionary, is "lasting for only a limited period of time; not permanent." THE NEW OXFORD AMERICAN DICTIONARY 1737 (2d ed. 2005). The legislature did not provide a different definition of "temporary," so the dictionary definition applies. Likewise, the legislature did not provide a definition for the phrase "rehabilitative process" as used in § 287.149, so we must use the plain meaning of "rehabilitate" and "process" as used in the dictionary. "Rehabilitate" means "restore (someone) to health or normal life by training and therapy after imprisonment, addiction, or illness." THE NEW OXFORD AMERICAN

DICTIONARY 1427 (2d ed. 2005). "Process" means "a series of actions or steps taken in order to achieve a particular end." THE NEW OXFORD AMERICAN DICTIONARY 1351 (2d ed. 2005).

Utilizing the plain meaning of the words in §§ 287.149 and 287.170, the Commission may only award temporary total disability benefits for the limited, not permanent, period of time when an injured worker is unable to return to any employment and is taking a series of actions to restore himself/herself to a condition of health or normal life. The Commission did not find Appellant was temporarily totally disabled and in the rehabilitative process from June 22, 2010 – February 4, 2011. In fact, as demonstrated in the following discussion, the Commission's own findings and the overwhelming weight of the evidence prove Appellant was not temporarily totally disabled and was not taking any actions to restore himself to a condition of health or normal life at any time after April 23, 2007.

First, the Commission held Appellant had reached maximum medical improvement as of April 23, 2007. As a matter of fact, the Commission adopted the ALJ's finding that "[t]he evidence is overwhelming that [Appellant] achieved maximum medical improvement as of April 23, 2007 . . . ." (L.F. 57, 78). The Commission and the appellate courts throughout this state have routinely, repeatedly and consistently used the maximum medical improvement standard to determine the date on which temporary disability benefits end and permanent disability benefits begin. *See Tilley v. USF Holland, Inc.*, 325 S.W.3d 487, 492 (Mo. App. E.D. 2010); *Bruflat v. Mister Guy, Inc.*, 933 S.W.2d 829, 835 (Mo. App. W.D. 1996) (overruled on other grounds by *Hampton v.*

Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)); *Williams v. Pillsbury Co.,* 694 S.W.2d 488, 489 (Mo. App. E.D. 1985); *Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296 (Mo. App. S.D. 2012); *Cardwell v. Treasurer of State of Missouri*, 294 S.W. 3d 902 (Mo. App. E.D. 2008); *Stevens v. Citizens Memorial Healthcare Foundation*, 244 S.W.3d 234 (Mo. App. S.D. 2008); *Lane v. G&M Statuary, Inc.*, 156 S.W.3d 498 (Mo. App. S.D. 2008); *Brookman v. Henry Transp.*, 924 S.W.2d 286 (Mo. App. E.D. 1996). The Commission's finding that the evidence was overwhelming that Appellant achieved maximum medical improvement as of April 23, 2007 belies any possibility that Appellant was in a limited, not permanent, period of total disability after that date, or that he was taking any actions to restore himself to a condition of health or normal life after that date. Accordingly, the Commission did not have express statutory authority to grant temporary total disability benefits after April 23, 2007.

To reconcile its finding that Appellant had reached maximum medical improvement as of April 23, 2007 with its award of temporary total disability benefits from June 22, 2010 – February 4, 2011, the Commission declared that maximum medical improvement need not serve as an end point for temporary total disability benefits because the exact words "maximum medical improvement" do not appear verbatim in § 287.170. (L.F. 58). This reasoning completely misconstrues the principles of strict construction. As was previously stated, strict construction under § 287.800 means "that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms, and to cases which fall fairly within its letter. A

strict construction of a statute presumes nothing that is not expressed." *Lewis*, 435 S.W.3d at 154. But "[t]he rule of strict construction does not mean that the statute shall be construed in a narrow or stingy manner." *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009). Strict construction does not require that certain words appear verbatim in a statute, "it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used." *Allcorn,* 277 S.W.3d at 828 (internal citations omitted).

While the phrase "maximum medical improvement" might not appear verbatim in the statute, the maximum medical improvement standard clearly comes within the scope of the language used in §§ 287.149 and 287.170. The Commission itself stated that maximum medical improvement "permits the fact-finder to identify the point at which the question of permanent disability becomes ripe for determination." (L.F. 58). This is consistent with the plain meaning of the word "temporary," which is defined to be something that is "not permanent." The point at which disability is no longer temporary and instead becomes permanent is not only obviously within the scope of the plain meaning of "temporary" as used in §§ 287.149 and 287.170 – it is absolutely essential to the determination of when an injured worker becomes entitled to permanent benefits instead of temporary benefits.

This is among the reasons why the Eastern District Court of Appeals in *Cardwell v. Treasurer*, 249 S.W.2d 902, rejected the Appellant's argument 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 included in the statute. *Id.* at 909. "Although the term maximum medical improvement is not included in the statute," the Court of Appeals held, "the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated." *Id.* at 910.

The *Cardwell* court was not bound by strict construction because the injury in that case occurred before August 28, 2005, but the Court's rationale is perfectly sound even when strict construction is applied to §§ 287.149 and 287.170. The plain and unambiguous terms of those statutory sections dictate that temporary total disability benefits are owed only during the limited, not permanent, period when an injured worker is unable to return to any employment and is taking a series of actions to restore himself/herself to a condition of health or normal life. The concept of maximum medical improvement clearly comes within the scope of that plain and unambiguous language because it tells us both when a disability becomes permanent instead of temporary, and also when no further medical progress can be achieved; that is, the point at which the injured worker is no longer engaged in the rehabilitative process.

The continuing validity of the *Cardwell* case and all of the other precedent utilizing the maximum medical improvement standard after strict construction is supported by the fact that the legislature did not exclude the phrase "maximum medical improvement" from the temporary total disability statutes. "[T]he Legislature is presumed to have acted with a full awareness and complete knowledge of the present

state of the law, including judicial and legislative precedent." *Hogan v. Bd. of Police Comm'rs of Kansas City*, 337 S.W.3d 124, 130 (Mo. App. W.D. 2011). Had the legislature intended to abrogate the case law establishing maximum medical improvement as the end point for temporary benefits in the context of §§ 287.149 and 287.170, it would have expressly excluded consideration of maximum medical improvement from the definition of "temporary total disability." Instead, the Legislature chose to define "total disability," but not "temporary total disability" or "temporary." *See* §§287.020, 287.149, and 287.170. The Legislature is presumed to have known of the case law establishing maximum medical improvement as the point when a disability becomes permanent instead of temporary. The plain meaning of "temporary" as used in §§ 287.149 and 287.170 prohibits payments for permanent disability for the duration of a temporary disability, but the Legislature chose not to define "temporary" or "temporary total disability" to allow payments for disability that has become permanent as a result of reaching maximum medical improvement. Accordingly, the case law establishing that temporary total disability benefits are no longer owed after disability becomes permanent at the point of maximum medical improvement clearly remains valid under strict construction.

To further justify the inconsistencies between its decision to award temporary total disability benefits after April 23, 2007 with its finding that the evidence was "overwhelming" that Appellant reached maximum medical improvement on that date, the Commission said "applying a per se rule that temporary total disability benefits cannot be awarded after the date of maximum medical improvement works an absurd result." (L.F.

58). In fact, the opposite is true – it would be absurd to award temporary benefits after the disability becomes permanent and an employee becomes entitled to permanent partial or permanent total disability benefits. The courts have repeatedly supported this common sense distinction. *See, e.g. Cardwell*, 249 S.W.3d at 910 ("Permanent disability is determined and provided only after temporary disability compensation is discontinued."); *Bruflat,* 933 S.W.2d at 835 ("a temporary award is not appropriate for a disability for which further improvement is not expected."). Temporary total disability is "intended to provide a sufficiently long period of time for the payment of compensation for temporary total disability to enable the Compensation Commission to appraise justly the nature and extent of an employee's injuries before making a final award, while in the meantime paying compensation to the employee for temporary total disability." *State ex rel. Melbourne Hotel Co. v. Hostetter*, 126 S.W.2d 1189, 1191 (Mo. banc 1939). Permanent, not temporary, disability awards are intended to compensate an employee for a permanent condition and the restrictions that permanent condition imposes on employment. *See Cardwell*, 249 S.W.3d at 910; *see also Williams v. Pillsbury Co*., 694 S.W.2d 488, 489 (Mo. App. E.D. 1985). If there is no standard to determine when a temporary disability becomes permanent, the legislature's distinction between temporary benefits and permanent benefits is completely neutered. Clearly that is not consistent with the principles of strict statutory construction.

In sum, the Commission's finding that the overwhelming evidence proved Appellant reached maximum medical improvement as of April 23, 2007 precludes the award of temporary total disability benefits after that date.

Second, even if the maximum medical improvement standard is not used to determine whether Appellant was entitled to temporary total disability benefits after April 23, 2007, the overwhelming evidence in the record proves Appellant was not temporarily totally disabled after April 23, 2007, and that he was not engaged in the rehabilitative process after that date.

The sole factual basis for the Commission's award of temporary total disability benefits from June 22, 2010 – February 4, 2011 was that "Dr. Schmidt [testified] that one would be expected to lose a significant amount of time from work following the surgery performed by Drs. Johnson and MacKinnon." (L.F. 59). Whether or not a hypothetical individual would be expected to lose time from work after a particular type of surgery does not in any way establish Appellant was unable to work during a limited, not permanent, period of time while engaging in a process to restore himself to a condition of health or normal life. Dr. Schmidt did not testify as to a particular amount of time "one," much less how much time Appellant in particular, "would be expected" to miss from work. More importantly, Dr. Schmidt did not offer any testimony that ***Appellant*** was actually unable to work following the surgery as opposed to the hypothetical "one." Furthermore, Dr. Schmidt opined that the surgery was not necessary, and that it had "a predictably poor result." (Tr. 2441).

Aside from Dr. Schmidt's opinions, the balance of the evidence proves the June 22, 2010 surgery and related care made Appellant's condition worse. Appellant was released from treatment at maximum medical improvement by Dr. Blair on April 23, 2007. (Tr. 2623). Appellant subsequently sought pain management treatment on his own

with Dr. Graham. (Tr. 2710). Dr. Graham recommended against surgery or any other invasive treatment. (Tr. 2710). Dr. Graham stated he had nothing to offer Appellant from a pain management perspective due to his dramatic elevations on every scale of psychological testing, which indicated Appellant would have subjective complaints "that are often recalcitrant to treatment." (Tr. 2710). Prior to the surgery, Appellant also saw Dr. Berkin on two occasions in 2007 and 2009; and on neither occasion did Dr. Berkin recommend surgery. (Tr. 177-78, 190). Despite being advised against seeking surgical intervention by multiple providers, Appellant sought further treatment from Dr. Johnson and underwent a tarsal tunnel release, tendon lengthening removal of cutaneous neuromas, and internal neurolysis on June 22, 2010. (Tr. 466). As predicted by multiple providers, the surgery was unsuccessful. Consistent with Dr. Schmidt's opinions that the surgery was not necessary, and that Appellant had a predictably poor result based on Appellant's complaints, Dr. Berkin opined the surgery did not cure or relieve the effects of Appellant's injury, and, in fact made Appellant's condition worse. Dr. Berkin confirmed that point when he increased Appellant's permanent disability rating from 30% prior to surgery to 60% after the surgery. (Tr. 285). The overwhelming evidence demonstrates Appellant was most certainly not engaged in the rehabilitative process by choosing to undergo an unnecessary surgery that was predicted to, and in fact did, make him worse, and the evidence clearly demonstrates Appellant did nothing to restore or bring himself to a condition of health or normal life after April 23, 2007.

For the foregoing reasons, the Commission erred in awarding Appellant temporary total benefits from June 22, 2010 – February 4, 2011 because: (1) the Commission acted

without or in excess of its power in making the award; (2) the award is not supported by substantial and competent evidence in the record; and (3) the award is contrary to the Commission's findings of fact.

II. The Commission erred in failing to reduce Appellant's benefits by 25% - 50% due to Appellant's safety violation because the Commission acted without or in excess of its powers, the facts found by the Commission do not support the award, and there was not sufficient competent evidence in the record to warrant the making of the award, in that (1) the Commission was required by § 287.120.5 to reduce Appellant's past, unpaid, and future benefits by at least 25% but no more than 50%, (2) the facts found by the Commission support a reduction of at least 25% but no more than 50%, and (3) Employer produced overwhelming competent evidence to prove Appellant's injury was the result of Appellant's violation of Employer's reasonable safety rule.

Employer has the burden to prove the following four elements for a reduction of benefits under section 287.120.5: (1) employer adopted a reasonable rule for the safety of employees; (2) Appellant's injury was caused by the failure of employee to obey the safety rule; (3) Appellant had actual knowledge of the rule; and (4) prior to the injury employer made a reasonable effort to cause employees to obey the rule. *Carver v. Delta Innovative Servs.*, 379 S.W.3d 865, 869 (Mo. App. W.D. 2012). Employer proved all four of these elements. Nonetheless, the Commission incorrectly reversed the ALJ's reduction of Appellant's compensation.

Employer introduced its safety rule, specifically SYSCO*Safe* Preferred Work Methods number three under traveling, which states "[k]eep all body parts inside the running lines of the equipment." (Tr. 2568). Employer also presented the testimony of Appellant's supervisor, Mr. Flakes, who was responsible for enforcing Employer's safety rules at the time of Appellant's accident. Mr. Flakes testified Appellant violated SYSCO*Safe* Preferred Work Method number three under traveling when he extended his leg beyond the running lines of the fork lift. (Tr. 142). Mr. Flakes also testified Appellant caused his injury by extending his leg beyond the running lines of the forklift. (Tr. 147-148). Mr. Flakes' reasonable and credible opinion was Appellant would not have injured his left foot if he had kept his left leg and left foot within the running lines of his forklift. (Tr. 147-148). Mr. Flakes also testified that the safety policies were discussed at daily safety meetings, that employees were monitored daily for compliance through hazardous work assessments, and that Employer issued coaching cards to employees who violated Employer's safety policies. (Tr. 137-40). The Commission did not dispute the ALJ's findings that the Employer met its burden to prove that Employer adopted a reasonable rule for the safety of its employees, that the Appellant's injury was caused by Appellant's failure to obey the safety rule, and that the Employer made a reasonable effort to cause its employees to obey the safety rule prior to Appellant's injury. (L.F. 60-61). Nonetheless, the Commission refused to reduce Appellant's benefits as required by § 287.120.5 by stating: "[a]t best, employer has proven that employee 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 occurrence of the

work injury." (L.F. 60-61). That finding is not enough to refuse to reduce Appellant's benefits due to his violation of Employer's reasonable safety rule.

The 2005 amendments to the workers' compensation law eliminated the requirement of § 287.120.5 that an employee's violation of a safety policy be willful. *See* § 287.120.5. Accordingly, the Commission had no authority or discretion to disregard Appellant's violation of Employer's safety rule because it was a "momentary," "inadvertent," or "technical" violation. § 287.120.5. The Commission may consider the seriousness of the violation in determining whether to reduce benefits over 25% and up to 50%, but § 287.120.5 does not allow the Commission to reduce benefits by less than 25% because the violation was not willful. § 287.120.5.

The Commission's finding that Appellant was not actually aware of the application of the rule at the time of the accident is also an invalid basis for its refusal to reduce Appellant's benefits. The statute only requires that the employee had "actual knowledge of the rule," it does not require that the employee must be "actually aware" of the "application" of the rule "at the time of the occurrence of the work injury." § 287.120.5. The sole basis for the Commission's finding that Appellant did not have actual knowledge of the rule is that Appellant believed the rule only applied when the equipment was moving because the rule is located in a section titled "traveling," which implies an employee must be moving for the rule to apply. (L.F. 60). This finding does

nothing to contradict the overwhelming evidence that Appellant had actual knowledge of SYSCO*Safe* Preferred Work Method number three under traveling.

In any event, although the statute does not require this finding, the overwhelming weight of the evidence establishes that Appellant was actually aware of the application of the rule at the time of the occurrence of the work injury. Appellant admitted he received a copy of the SYSCO*Safe* Preferred Work Methods and that he was familiar with Preferred Work Method number three under traveling. (Tr. 92-4). He also admitted that Employer enforced this safety rule. (Tr. 94). Mr. Flakes testified that the rule applied whether the equipment was moving or stationary, and that this information was communicated to Appellant. (Tr. 139). Mr. Flakes' testimony is corroborated by the undisputed fact that Appellant signed a counseling report dated March 7, 2006 that says the February 2006 accident "could have been prevented if the following preferred work methods for safety would have been followed. Under traveling #3 keep all body parts within the running lines of the equipment." (Tr. 2598). As the ALJ recognized, "[A]ppellant admitted that he did not have to sign the counseling report, and he had no reasonable explanation as to why he signed the counseling report stating that he was in violation of Preferred Work Method number three under traveling at the time of the accident if he did not think he was in violation of that reasonable safety rule." (L.F. 83).

In sum, the evidence plainly demonstrates Employer met its burden of proof to justify a reduction of compensation under § 287.120.5. Once Employer has met its burden, the statute states that the benefits "shall be reduced at least twenty-five but not more than fifty percent," and the Commission is without discretion to reduce benefits in

.an amount less than twenty-five percent. §287.120.5. Given that Appellant's injury could have been prevented altogether if he followed *SYSCOSafe* Preferred Work Method number three under traveling, Appellant's benefits should have been reduced by the maximum fifty percent. In addition, the law says a reduction under § 287.120.5 must be taken against "the compensation and death benefit provided herein," not just unpaid benefits. § 287.120.5. Based on the plain language of § 287.120.5, the Commission has routinely awarded, and the appellate courts have upheld, reductions against paid and unpaid benefits, including medical benefits. *See Thompson v. ICI American Holding*, 347 S.W.3d 624 (Mo. App. W.D. 2011). Consistent with the statute and the case law interpreting § 287.120.5, the Commission should have applied a fifty percent reduction to the benefits previously paid to Appellant as well as unpaid benefits awarded by the Commission.

The Commission's award of benefits to Appellant without the required statutory reduction due to Appellant's violation of Employer's reasonable safety rule must be reversed because the Commission acted without or in excess of its powers, the facts found by the Commission do not support the award, and there is insufficient substantial and competent evidence to warrant the award. The overwhelming weight of the evidence proves that the Employer met its burden pursuant to § 287.120.5 and the Commission was required to reduce Appellant's benefits no less than 25%.

III. The Commission erred in awarding Appellant future medical expense benefits because the Commission acted without or in excess of its powers, the facts found by the Commission do no support the award, and there was not

sufficient competent evidence in the record to warrant the making of the award, in that (1) the Commission failed to apply the proper standard set forth in § 287.140.1 RSMo to establish that the future medical treatment is reasonably required to cure and relieve from the effects of the work injury, (2) the facts found by the Commission do not establish a reasonable probability that Appellant was in need of future medical care, and (3) there was not sufficient competent evidence in the record to prove any future medical treatment is reasonably required to cure and relieve Appellant from the effects of his work injury.

The Commission affirmed The ALJ's unequivocal and correct finding that Appellant failed to meet his burden to prove there is any future surgical treatment reasonably required to cure and relieve Appellant from the effects of the February 2006 accidental injury. (L.F. 61, 76). The Commission erred, however, in finding that Appellant proved that future medical treatment in the way of non-steroidal anti-inflammatory medication and analgesics is reasonably required to cure and relieve the effects of that injury.

Pursuant to § 287.140.1, an employer is required to provide medical treatment "'as may be reasonably required to cure and relieve from the effects of the injury.' This includes allowance for the cost of future medical treatment." *Pennewell,* 390 S.W.3d at 926 (*citing Poole v. City of St. Louis*, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010)). "An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related

injury." *Pennewell,* 390 S.W.3d at 926. The employee must prove he is **currently** in need of additional medical treatment at the time of the award. *Smith v. Roberts Dairy Co., LLC*, 08-098439, 2014 WL 2726378 (Mo. Lab. Ind. Rel. Com. June 13, 2014) (*citing Poole,* 328 S.W.3d at 292)(emphasis added). Prior recommendations for treatment over an indefinite period may not be sufficient to establish a current need for additional medical treatment at the time of hearing. Smith, 2014 WL 2726378 at 1 (future medical benefits denied where employee's only evidence of need for additional medical treatment was statement of provider four years prior to hearing that employee had "indefinite need" for self-directed aqua therapy on an ongoing basis).

Appellant was awarded future medical benefits on the basis that "the medical authorities in this case appear to consistently recommend 'non-steroidal anti-inflammatory medication and analgesics for control of his left foot pain and ankle pain' that does not 'require ongoing examination or observation by a physician.'" (L.F. 76). But that is simply not true. A review of the record demonstrates there is no consistent recommendation for non-steroidal anti-inflammatory medication and analgesics or any other future medical treatment at any time, there is absolutely no evidence that the non-steroidal anti-inflammatory medication and analgesics would cure and relieve Appellant from the effects of the injury, and there is no current recommendation for any future medical treatment. In fact, the only medical authority who recommended non-steroidal anti-inflammatory medication and analgesics at any time is Dr. Berkin, Appellant's IME doctor, and Dr. Berkin's opinion in that regard is far outweighed by the greater weight of the medical authority demonstrating that no future medical treatment is required.

Furthermore, that recommendation was made over two years prior to Appellant's hearing, and Appellant did not submit any medical evidence that he was still in need of any medical treatment at the time of his hearing.

As an initial matter, Dr. Berkin's opinion regarding further medical treatment is tenuous at best. While Dr. Berkin listed "[t]he use of nonsteroidal anti-inflammatory medication and analgesics for control of his left foot pain and ankle pain" as a treatment recommendation in his report dated August 1, 2011, he conceded at his deposition on October 4, 2011 that none of his treatment recommendations would improve Appellant's condition. (Tr. 157, 238-9, 286). Dr. Berkin testified on direct examination that "all my treatment recommendations were mostly supportive measures. It's not like they were going to improve his condition any. But, you know, I recommended some restrictions that I think he should abide by and things he should avoid in order to maintain himself as best he could." (Tr. 204). On cross-examination, Dr. Berkin reaffirmed his treatment recommendations were "supportive measures" that did not require ongoing examination or observation by a physician. (Tr. 238). He then he testified "I don't know right now that anything at the time that I saw him was immediately going to help this guy. If his symptoms get worse, they may do fusion on the guy in the future. I hope that doesn't happen because then he won't be able to move his foot at all, but it will help relieve some of his pain." (Tr. 239). This testimony establishes that Dr. Berkin did not opine that any future treatment was reasonably necessary to cure and relieve Appellant of the effects of his February 2006 accidental injury. At best, Dr. Berkin's opinion was that Appellant might need some "supportive measures" two years before the hearing that would not

improve his condition. Dr. Berkin subsequently testified at his deposition on October 4, 2011 that he did not know if anything would help Appellant currently. This feather weight opinion is not near enough to satisfy Appellant's burden to prove a reasonable probability that he now needs, or will ever need, additional medical treatment for his February 2006 accidental injury.

Dr. Berkin's opinion regarding future medical treatment is further debunked by the balance of the medical authority, including the testimony of Appellant's treating physician, Dr. Jeffery Johnson. Dr. Johnson did not recommend non-steroidal anti-inflammatory medication and analgesics. As a matter of fact, Dr. Johnson testified the only additional treatment he could provide Appellant was a tendon transfer, but he "was not enthusiastic that a tendon transfer would really provide Appellant "with any significant benefit." (Tr. 527-28). So even the testimony of Appellant's treating physician, Dr. Johnson, is contrary to Dr. Berkin's opinion that Appellant required non-steroidal anti-inflammatories and analgesics.

The records from Appellant's pain management consultation with Dr. John D. Graham further contradict Dr. Berkin's opinion regarding future medical treatment and cut against any award of future medical treatment. Those records show Dr. Graham gave Appellant a self-administered psychological test that showed "dramatic elevations on every scale tested, [with] all but three scales literally off the chart." (Tr. 2710). The results of this psychological test lead Dr. Graham to say "[o]ne would have to consider a strong likelihood of functional overlay being present in [Appellant]," and ultimately conclude "[f]rom a pain management standpoint, I have nothing to offer Mr. Greer." (Tr.

2710). Finally, orthopedic surgeons Dr. Blair and Dr. Schmidt both opined Appellant was at maximum medical improvement as of April 23, 2007 and did not require any medical treatment after that date. (Tr. 2623, 2438, 2441).

In sum, the only evidence in the record supporting the Commission's award of future medical treatment is Dr. Berkin's recommendation two years prior to hearing that Appellant use non-steroidal anti-inflammatories and analgesics; a recommendation Dr. Berkin concedes was a "supportive measure" that would not improve Appellant's condition in any way. Dr. Berkin subsequently testified on October 4, 2011 that he was not aware of any treatment that would help Appellant. The overwhelming weight of medical authority demonstrates Appellant was not in need of any medical treatment after he reached maximum medical improvement on April 23, 2007, and there is no evidence Appellant needs additional medical treatment. The Commission is not authorized to award future medical benefits in the absence of evidence that there is a reasonable probability that the employee is in need of additional medical treatment for the work-related injury.

For the foregoing reasons, the Commission erred in awarding Appellant future medical benefits because (1) the Commission acted without or in excess of its power in making the award, (2) the award is contrary to the Commission's findings of fact, and (3) the award is not supported by substantial and competent evidence in the record and is against the overwhelming weight of the evidence.

IV. Point I of Appellant's Brief is without merit because the Commission's denial of permanent total disability benefits is supported by the facts determined by

the Commission and substantial and competent evidence presented at the hearing.

Appellant bears the burden to prove to a reasonable certainty that he is permanently and totally disabled. *See Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo. App. S.D. 1997). There is no evidence in the record proving to a reasonable certainty Appellant is permanently and totally disabled as a result of the February 2006 injury in combination with his pre-existing disabilities, much less any evidence proving he is permanently and totally disabled as a result of the February 2006 work injury alone. The Commission held, "[a] review of the entire record of evidence plainly demonstrates [Appellant] is not permanently and totally disabled as a result of the February 2006 accidental injury alone." (L.F. 78). The Commission was right. The entire record of evidence demonstrates beyond any doubt that the Commission's view of the evidence was not in error.

The evidence in the record includes testimony from Appellant's vocational expert, Mr. J. Stephen Dolan. Mr. Dolan opined that Appellant is not permanently and totally disabled as a result of the February 2006 injury alone. (Tr. 764-70). Appellant argues that Mr. Dolan offered testimony at his deposition that the February 2006 injury alone rendered Appellant unemployable in the open labor market. However, Mr. Dolan testified that "[i]t sounds like [Dr. Berkin] said in the deposition that he was not basing these restrictions solely on the foot injury. If that's true, then, then Mr. Greer is not totally disabled solely based on the foot injury." (Tr. 770). The ALJ's findings, adopted

by the Commission, are consistent with this testimony, as demonstrated by the following excerpt from the award:

> Mr. Dolan opined that the Appellant is unable to perform any employment for which a reasonably stable market exists, his opinion in that regard is based entirely on Dr. Berkin's restrictions. Dr. Berkin's restrictions, in turn, are based on the February 2006 accidental injury in addition to the Appellant's prior neck, back, shoulder, and toe injuries. Therefore, Mr. Dolan's testimony does not prove the Appellant is permanently and totally disabled as a result of the February 2006 injury alone. Dr. Berkin also testified that the Appellant is permanently and totally disabled based on all of his injuries, not just the February 2006 foot injury. (L.F. 78).

Dr. Berkin's opinion that Appellant was not permanently and totally disabled was echoed by Mr. Terry Cordray, the Second Injury Fund's vocational expert. He unequivocally testified Appellant is not permanently and totally disabled because of the February 2006 foot injury or his prior injuries. (Tr. 2763).

In the face of this overwhelming evidence proving Appellant is not permanently and totally disabled, and certainly not permanently and totally disabled as a result of the February 2006 foot injury alone, Appellant clings to two pieces of "evidence" to argue the Commission's denial of permanent total disability benefits was in error. First, Appellant argues that Mr. Dolan offered testimony at his deposition that the February 2006 injury alone rendered Appellant unemployable in the open labor market given Appellant's subjective limitation of having to raise his foot in the air. Second, Appellant

argues his own self-serving testimony that his pain and this self-imposed and subjective limitation prevent him from working proves he is permanently and totally disabled. Appellant argues, to the exclusion of all other arguments, that the Commission erred in not finding his testimony regarding his subjective limitations and Mr. Dolan's opinions based on that testimony to be more credible than the balance of Mr. Dolan's other opinions and the opinions of Mr. Cordray. Appellant's argument has no merit.

At the heart of Appellant's argument is the credibility of Appellant, Mr. Dolan and Mr. Cordray. The Commission credited the testimony of Mr. Dolan and Mr. Cordray that Appellant was not permanently and totally disabled as a result of the February 2006 foot injury, and discredited Appellant's testimony with respect to his self-imposed subjective restrictions and Mr. Dolan's opinion (which was contrary to the opinions in his report) that if that those self-imposed subjective restrictions were true, Appellant was permanently and totally disabled as a result of that foot injury. The ALJ and the Commission viewed with skepticism Appellant's testimony regarding his self-imposed subjective restrictions in light of surveillance video and other evidence in the record. Surveillance showed that Appellant "demonstrated capabilities beyond his reported limitations and subjective complaints…. Consequently, [Appellant's] subjective complaints should be viewed as suspect, reflecting poorly on [Appellant's] credibility." (L.F. 81-82). Having chosen to discredit Appellant's testimony regarding his subjective restrictions and complaints, both the ALJ and the Commission discounted Mr. Dolan's opinion that Appellant was permanently and totally disabled based on those restrictions and complaints. The ALJ and the Commission also found Mr. Dolan's opinions based on

that testimony to be unpersuasive and against the great weight of the evidence. The Award reads, in pertinent part:

> Mr. Dolan also assumed that the Appellant had a restriction to 'rest', meaning the Appellant should be allowed to lie down. However, Dr. Berkin never placed such a restriction for the Appellant to be able to 'rest' and only restricts the Appellant to take frequent breaks if required to perform exertional activities for an extended period of time. These assumptions are against the great weight of the credible evidence and the objective medical evidence in this case. (L.F. 82).

Appellant wants this Court to overturn the Commission's determination that he was not permanently and totally disabled as a result of the February 2006 foot injury. But that would require the Court to reassess the credibility of the evidence, including the credibility of Appellant, Mr. Dolan, and Mr. Cordray, as well as the credibility of the surveillance video and other evidence in the record. That the Court cannot do. The Court is required to give deference to the Commission's findings with respect to witness credibility and the weight to be given to conflicting evidence. *See Hornbeck v. Spectra Painting, Inc.*, 370 S.W.3d 624, 631-32 (Mo. banc 2012). As the Court said in *Hornbeck*, "[w]hether to accept conflicting medical opinions is a fact issue for the Commission, and this Court defers to the Commission's decisions relating to the credibility of witnesses and the weight given to testimony." *Id.* at 632 (*citing Johnson v. Denton constr. Co.*, 911 S.W.2d 286, 288 (Mo. banc 1995)). And the Court cannot disturb those decisions "unless they are unsupported by the competent and substantial evidence on the whole record."

Id. (*citing* MO. CONST. art. V, sec. 18). The Commission's decision to discredit Appellant's testimony regarding his subjective complaints and limitations and Mr. Dolan's opinions based on that testimony was supported by the competent and substantial evidence on the whole record, so the Court must give deference to and cannot disturb that decision.

For the foregoing reasons, the Commission's decision to deny Appellant permanent total disability benefits based on its decisions relating to the credibility of the witnesses and the weight given to the testimony must be affirmed.

CONCLUSION

The Commission erred in awarding Appellant temporary total disability benefits after April 23, 2007, awarding future medical benefits, and refusing to reduce Appellant's benefits due to his violation of Employer's reasonable safety rule. In making each of these awards, the Commission acted without or in excess of its power, made findings that do not support the award, and issued each of the awards against the overwhelming weight of the evidence and without substantial and competent evidence to support the awards. Finally, the Commission's denial of permanent total disability benefits was properly supported by substantial and competent evidence in the record.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitations contained in Rule 84.06(b) because the brief contains 12,010 words. This count does not include portions of the brief subject to exemption under Rule 84.06(b).
2. This brief has been prepared in a proportionally spaced typeface (13-point Times New Roman) using Microsoft Word 2013.

Respectfully Submitted,

RESTOVICHALLEN, LLC

By: /s/John M. Allen

John M. Allen, #49642
Cynthia L. Parnell, #61280
214 North Clay Avenue, Suite 210
Kirkwood, MO 63122
Telephone: (314) 434-7700
Facsimile: (314) 480-3355
john@restovichallen.com
cynthia@restovichallen.com
Attorneys for Respondent/Cross-Appellant Sysco Food Services of St. Louis, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief and appendix were served via operation of this Court's electronic filing system this 30th day of March, 2015 upon:

Ray B. Marglous
Robert S. Merlin
Sarah H. Hale
101 South Hanley Road, Suite 1075
Clayton, MO 63105
rob@marglouslaw.com
Attorneys for Appellant

Jonathan Sternberg
2323 Grand Boulevard, Suite 1100
Kansas City, MO 64108
jonathan@sternberg-law.com
Co-counsel for Appellant

Tracey Cordia
Assistant Attorney General
815 Olive St., Suite 200
St. Louis, MO 63101
Tracey.cordia@ago.mo.gov
Attorney for the Treasurer of Missouri as Custodian of Second Injury Fund

/s/John M. Allen