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 REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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## Introduction

The record is clear that: (1) the Commission erred in awarding Appellant temporary total disability benefits between June 22, 2010 and February 4, 2011; (2) the Commission erred in failing to assess a reduction against Appellant's benefits as required by § 287.120.5 because Appellant's injury was the result of Appellant's violation of a reasonable safety rule, of which Appellant was aware, and which was adopted and enforced by Employer for the safety of its employees; and (3) that the Commission erred in awarding future medical treatment benefits to Appellant because Appellant failed to present evidence that he reasonably required future medical treatment to cure and relieve the effects of his injury. Appellant's arguments in opposition to these points are based upon misstatements of the record and incorrect interpretations of the law, and those arguments fall woefully short of demonstrating that the Commission acted within its authority to award Appellant temporary total disability benefits at any time between June 22, 2010 and February 4, 2011, to refuse to assess a reduction in Appellant's benefits due to his safety violation, and to award Appellant future medical benefits.

First, Appellant failed to point to any evidence whatsoever proving he was in the rehabilitative process between June 22, 2010 and February 2011, so the Commission's award of temporary total disability benefits for that period of time was in error. Second, Appellant did not refute the overwhelming evidence that his violation of Employer's reasonable safety rule caused his injury. Finally, Appellant did not come forward with any evidence to prove that he reasonably required additional medical treatment to cure

and relieve the effects of his work injury at the time of his hearing. For the foregoing reasons, and as demonstrated in more detail below, this Honorable Court should modify the award of the Commission's award and find that (1) Appellant is not entitled to any temporary total disability benefits during the period from June 22, 2010 through February 4, 2011; (2) Appellant is not entitled to an award providing for future medical treatment; and (3) all of Appellant's past and future benefits are subject to a 50% reduction pursuant to § 287.120.5.

## I. Appellant has failed to refute that the Commission erred in awarding Appellant temporary and total disability benefits from June 22, 2010 through February 4, 2011.

Appellant and Employer agree that the Commission is required to interpret the plain language of §§ 287.149 and 287.170 using the principles of strict construction in determining whether Appellant met his burden of proof to establish he is entitled to temporary total disability benefits from June 22, 2010 through February 4, 2011. But Appellant and Employer disagree as to what strict construction requires in the context of an injured worker's entitlement to temporary total disability benefits.

Appellant argues that under strict construction, the Workers' Compensation Law (the "Law") poses only two questions that must be answered to determine his entitlement to temporary total disability benefits: (1) whether he was unable to work during the rehabilitative process; and (2) what the period of that rehabilitative process is. Appellant's application of strict construction to §§ 287.149 and 287.170 oversimplifies the matter. Not only must Appellant prove he was unable to work and engaged in the

rehabilitative process, he has to prove his disability during that period of time was temporary, rather than permanent. Strictly construed, the Law requires Appellant to prove the following, by substantial and competent evidence, in order to meet his burden of establishing he is entitled to temporary total disability benefits from June 22, 2010 through February 4, 2011: (1) that his alleged disability from June 22, 2010 – February 4, 2011 was temporary; (2) that from June 22, 2010 – February 4, 2011, he was unable to return to any employment, and not merely unable to return to the employment in which he was engaged at the time of the accident; and (3) that he was engaged in the rehabilitative process from June 22, 2010 – February 4, 2011.

Appellant failed to proffer substantial and competent evidence demonstrating he met these requirements. In fact, Appellant altogether failed to submit any evidence demonstrating that he met a single one of these requirements. Accordingly, the Commission erred in awarding Appellant temporary total disability benefits from June 22, 2010 through February 4, 2011.

**A. There is no substantial and competent evidence in the record proving Appellant's alleged disability from June 22, 2010 through February 4, 2011 was temporary.**

There can be no dispute that temporary total disability benefits are owed under §§ 287.149 and 287.170 only during the period of time that the disability, be it a total or partial disability, is temporary. As soon as the disability becomes permanent, permanent total or permanent partial disability benefits are owed under § 287.200 or § 287.190, respectively. So Appellant bears the burden to prove that his alleged disability from

June 22, 2010 – February 4, 2011 was temporary. Appellant does not point to any evidence in the record proving his disability during that period of time was temporary rather than permanent. Appellant dances around the issue altogether, arguing Employer failed to prove that Appellant's disability was indeed temporary from June 22, 2010 through February 4, 2011 by erroneously relying on the point of maximum medical improvement as the date upon which Appellant's disability was no longer temporary. Appellant's argument fails for a number of reason.

First of all, it is Appellant's burden, and not Employer's, to prove all elements necessary for an award of benefits. *Davidson v. Missouri State Treasurer as Custodian of Second Injury Fund*, 327 S.W.3d 583, 588 (Mo. App. S.D. 2010). It is not Employer's burden to prove that Appellant is not entitled to benefits. *Id*. This means that Appellant had to produce substantial and competent evidence that any disability he had from June 22, 2010 through February 4, 2011 was temporary, rather than permanent. There is no such evidence, so Appellant is not entitled to an award of temporary total disability benefits for that period of time.

Second, and more importantly, by proving that Appellant reached maximum medical improvement on April 23, 2007, a finding that was unequivocally adopted by the Commission, Employer did prove that Appellant was not temporarily disabled at any time after that date. (L.F. 57, 78). Appellant concedes that over the course of the last 25 years, the law has clearly and consistently been that the point of maximum medical improvement is, in Appellant's own words, "the standard for calculating the term of temporary total disability benefits, even after the enactment of the 'strict construction'

mandate in 2005." (Appellant's Substitute Reply Brief and Brief of the Cross-Respondent ("Response") 10.) But Appellant wants this Court to overturn all of this precedent and ignore the concept of maximum medical improvement altogether because those three words do not appear in the statute. This argument is without merit and completely misconstrues the primary purpose of strict construction, which is to prevent broader application of a statute than its terms allow. *Lewis v. Treasurer of State*, 435 S.W.3d 144, 154 (Mo. App. E.D. 2014).

Under strict construction, statutes are not to be "construed in a narrow or stingy manner." *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 828 (Mo. App. S.D. 2009). If a concept clearly falls within the scope of the language of a statute, it remains valid when subject to the principles of strict construction. *Id*. Where a statute dictates payment of temporary and permanent disability benefits, as the Law does, there could not be any concept that fits more squarely within the scope of its plain language than a concept that establishes when a disability ceases to be temporary and becomes permanent. Furthermore, "[t]he articulated legislative purpose of the 2005 amendments was to raise the threshold for obtaining worker's compensation." *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863, 867 (Mo. App. E.D. 2012). Seeking to lower the threshold for obtaining benefits by eliminating the concept of maximum medical improvement from the determination of when temporary total disability benefits end, under the guise of strict construction, directly contradicts the stated purpose of the 2005 amendments to the Law. For all of these reasons, courts have continued to hold that maximum medical improvement establishes the point at which disability becomes permanent, and ceases

being temporary, when determining benefits due to employees injured, even after the 2005 amendments. *See, e.g., Hoven v. Treasurer of State of Missouri*, 414 S.W.3d 676, 678 (Mo. App. E.D. 2013); *Miller v. Treasurer of State of Missouri*, 425 S.W.3d 218, 220 (Mo. App. E.D. 2014); *Lewis*, 435 S.W.3d at 154; *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 910 (Mo. App. E.D. 2008) (holding that liability for permanent disability begins at the point of maximum medical improvement, and that liability for temporary total disability ends when liability for permanent disability begins, thus, liability for temporary disability ends at the point of maximum medical improvement).

Appellant further argues that if the legislature intended to designate a cut-off date for the payment of temporary benefits, it would have done so, because the legislature did designate a cut-off date for benefits in another section of the Law, § 287.220.13. This argument doesn't support Appellant's cause. First of all, § 287.220.13 pertains to circumstances that are completely irrelevant to this case – cessation of permanent total disability benefit payments by the Second Injury Fund when an injured worker is able to obtain employment. Furthermore, by enacting one provision for payment of temporary disability benefits and another provision for payment of permanent disability benefits, the legislature *did* designate a cut-off date for temporary benefits, and that cut-off date is the date disability becomes permanent and permanent disability benefits become payable. *See* §§ 287.170, 287.190, and 287.200.

There is no question that Appellant reached maximum medical improvement on April 23, 2007. The law is clear that a disability is no longer temporary after an injured

worker reaches the point of maximum medical improvement. Accordingly, Appellant did not, and could not, establish that his alleged disability from June 22, 2010 – February 4, 2011 was temporary, which is an absolute prerequisite to demonstrating he is entitled to temporary total disability benefits.

**B. There is no substantial and competent evidence in the record proving Appellant was unable to return to any employment between June 22, 2010 and February 4, 2011.**

Although Appellant argues that there is evidence in the record that he was unable to work from June 22, 2010 – February 4, 2011, Appellant did not offer a single medical opinion demonstrating that he was unable to work during that period, much less prove by substantial and competent evidence that he was unable to return to any employment during that time. In the absence of substantial and competent evidence proving he was unable to return to any employment, not just the employment he was engaged in at the time of his injury, from June 22, 2010 through February 4, 2011, Appellant is not entitled to an award of temporary total disability for that period of time. *See* §§ 287.020 and 287.170.

Appellant relies on the testimony of Dr. Johnson to establish he was unable to work from June 22, 2010 through February 4, 2011. Appellant asserts that Dr. Johnson testified Appellant was unable to work from June 22, 2010 through February 4, 2011. That is an absolute fabrication. Dr. Johnson at no time testified that Appellant was unable to work at any time between June 22, 2010 and February 4, 2011. Dr. Johnson testified on April 25, 2012 that Appellant's condition was essentially the same as it had

been since June 2010, that "really there are no restrictions," and that he would advise Appellant to "do whatever you feel you can." (Tr. 338-339). Dr. Johnson's testimony does not prove Appellant was unable to work from June 22, 2010 through February 4, 2011. Dr. Johnson's testimony actually proves the contrary – that Appellant was able to able to return to some employment – given that he had no restrictions for Appellant and he thought Appellant could do whatever he felt he could do.

The sole piece of evidence the Commission relied upon to establish Appellant was unable to work from June 22, 2010 – February 4, 2011 was "…testimony from Dr. Schmidt 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). But this evidence, just like Dr. Johnson's testimony, falls far short of proving Appellant was actually unable to work from June 22, 2010 through February 4, 2011. In fact, it does not even prove that Appellant himself would be *expected*, much less that that he actually *did*, lose any time from work between June 22, 2010 and February 4, 2011. Dr. Schmidt's speculative testimony does nothing more than establish that the amorphous "one" would usually be expected to miss work for some undefined period of time following the type of surgery Appellant underwent on June 22, 2010. The Commission disregarded Appellant's utter failure of evidence on this point and concluded that because Dr. Schmidt testified that "one would be expected" to lose time from work after this type of

surgery, that Appellant was "temporarily and totally disabled from the date of surgery on June 22, 2010, to the date Dr. Johnson released him on February 4, 2011." (L.F. 59).

The Commission is without power to award temporary total disability benefits during any time period for which an injured worker fails to prove by substantial and competent evidence that he was unable to work. *See* §§ 287.120 and 287.170, *see also Farmer v. Barlow Truck Lines, Inc*., 979 S.W.2d 169, 170 (Mo. 1998). Other than his own testimony, which the ALJ determined lacked credibility, Appellant failed to submit any evidence, much less substantial and competent evidence, proving he was unable to work at any time between June 22, 2010 and February 4, 2011. (L.F. 78). Accordingly, the Commission erred in awarding Appellant temporary total disability benefits from June 22, 2010 through February 4, 2011.

**C. There is no substantial and competent evidence in the record proving Appellant was in the rehabilitative process from June 22, 2010 through February 4, 2011.**

Appellant similarly erroneously applies the law and misstates facts in the record when arguing he proved that he was in the rehabilitative process from June 22, 2010 through February 4, 2011. In making his erroneous argument, Appellant again strays from the mandates of strict construction. Appellant argues the Commission is authorized to determine what the term "rehabilitative process" means because § 287.149 does not specifically define that term. Quite the opposite, and as Appellant repeatedly argues, strict construction does not permit arbitrary decisions regarding the meaning of terms used in a statute. Strict construction dictates that "[t]he plain meaning of words, as found

in the dictionary, will be used unless the legislature provides a different definition." *Asbury v. Lombardi*, 846 S.W.2d 196, 201 (Mo. banc 1993); *see also Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 25 (Mo. banc 2008).

So the Commission, and this Court, are bound by the plain meaning of the words "rehabilitate" and "process", as those terms are found 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). Taking the plain meaning of the words "rehabilitate" and "process" together, then, the "rehabilitative process" is a series of actions or steps taken by an injured worker to restore himself to health or normal life by training and therapy.

Appellant has adduced no evidence whatsoever that he was taking any actions or steps from June 22, 2010 through February 4, 2011 to achieve the goal of restoring himself to health or normal life by training or therapy. Appellant simply contends that he must have been in the rehabilitative process during that time simply because he was recovering from a surgery that flowed from his work-related injury, an injury that occurred more than four years prior to the surgery. He apparently makes this contention based solely on the fact that he did not work after undergoing a treatment that Appellant argues was necessary. This is not enough to prove that Appellant was in the rehabilitative process from June 22, 2010 through February 4, 2011.

First of all, there is no legal basis to say that an injured worker is automatically deemed to be in the rehabilitative process following a medical procedure solely because that treatment was "necessary." Second, and assuming the "necessity" of Appellant's June 22, 2010 surgery is relevant, the overwhelming weight of the evidence is that the surgery was not necessary. The overwhelming evidence in the record proves that Appellant's surgery was totally unnecessary, that providers selected by both Appellant and Employer recommended against the surgery because it was not expected to improve Appellant's condition, and, as predicted, the surgery did not improve Appellant's condition. (Tr. 232, 2458, 2710). In fact, the surgery made him worse. (Tr. 285, 293). Appellant argues that the fact that Employer was required to pay Appellant's medical expenses for the surgery proves that the surgery was necessary, but that is simply not the case. The standard, according to current case law, to establish liability for payment of medical expenses is a far cry from requiring that the treatment is necessary. An employee must only demonstrate that the medical expenses are for treatment "flows from" the injury. *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519-521 (Mo. App. W.D. 2011). The mere fact that Appellant's June 22, 2010 surgery may have flowed from his work injury four years before the surgery does not prove he was in the rehabilitative process following that surgery. Simply put, there is no substantial and competent evidence that Appellant was in the rehabilitative process from June 22, 2010 through February 4, 2011.

Appellant's argument, in a nutshell, is that he must have been in the rehabilitative process from June 22, 2010 through February 4, 2011 for the sole reason that he had a

surgery on June 22, 2010 that may have flowed from his work injury four years prior to the surgery. If this Court were to accept this argument, an argument that misconstrues the Law and undermines its legislative purposes of the Law, the result would be that employers are perpetually liable to injured workers for temporary total disability benefits anytime an injured worker chooses to seek out and undergo any conceivable treatment, including treatment that providers of his own choosing recommend against, and then does not work after that surgery, regardless of whether the injured worker was already deemed to have reached the point of maximum medical improvement, regardless of whether the treatment renders the injured worker unable to work, and regardless of whether the injured worker is actually working towards restoring himself to a condition of health or normal life.

This is an absurd result and totally contrary to the stated purpose of the 2005 amendments – to increase the requirements for obtaining workers' compensation. *Duever*, 371 S.W.3d at 867. This result is also totally contrary to the purpose of the Law as stated by Appellant – to return employees to their employment as soon as possible while ensuring they receive the maximum benefits to which they are entitled. Appellant's position is that the Law requires employers to pay total disability benefits to employees so they can pursue treatment that does not work, after being advised by multiple medical providers that said treatment would not work, for years after not only the injury, but also years after employers have provided those employees with all treatment necessary to achieve maximum improvement. This cannot conceivably be

interpreted to serve the purpose of returning employees to their employment as soon as possible, and would frequently only serve to prolong return to work.

The plain words of the statutes governing temporary total disability, §§ 287.149 and 287.170, make clear that injured workers are entitled to temporary total disability benefits only if all of the following conditions are met: (1) the injured worker's disability is temporary; (2) the injured worker is unable to return to any employment, and not merely unable to return to the employment in which he was engaged at the time of the accident; and (3) the injured worker is engaged in the rehabilitative process. Appellant failed to submit any evidence, much less substantial and competent evidence, that he met any of these requirements between June 22, 2010 and February 4, 2011. Accordingly, the Commission erred in awarding Appellant temporary total disability benefits from June 22, 2010 through 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. Appellant failed to prove that the Commission was correct in failing to reduce Appellant's benefits pursuant to § 287.120.5, even though Employer proved, by overwhelming evidence, that Appellant's injury was the result of Appellant's violation of Employer's reasonable safety rule, of which Appellant was aware, that was adopted and enforced by Employer for the safety of its employees.

In response to Employer's second point on appeal, that the Commission erred in failing to reduce Appellant's benefits pursuant § 287.120.5 because Appellant's injury was the result of Appellant's violation of a reasonable rule adopted by Employer for the safety of its employees, Appellant concedes that Employer met its burden of proving that Employer adopted a reasonable safety rule for the safety of its employees. But Appellant fails to acknowledge that Employer presented overwhelming evidence that it also met its burden with respect to the other requirements of § 287.120.5: that Appellant's injury was caused by the failure of employee to obey the safety rule; that Appellant had actual knowledge of the rule; and that prior to the injury Employer made a reasonable effort to cause employees to obey the rule. *See Carver v. Delta Innovative Servs.*, 379 S.W.3d 865, 869 (Mo. App. W.D. 2012).

Appellant argues Employer failed to present evidence that there was a causal connection between Appellant's safety violation and his injury, but Barry Flakes unmistakably testified that Appellant's injuries were caused by his failure to obey Employer's reasonable safety rule, which states that employees must "[k]eep all body parts inside the running lines of the equipment." (Tr. 147-48, 2568). Appellant argues

that this is irrelevant because Mr. Flakes also testified that another employee's safety violation contributed to the accident that led to Appellant's injury. However, the testimony clearly establishes that even though the actions of another employee may have contributed to the *accident*, Appellant's safety violation was the sole cause of the *injury* he sustained in the accident. (Tr. 146-147). Appellant apparently believes that no safety penalty should be assessed against him because another employee also committed safety policy violations that led to a collision. This argument has no support in the law. The plain language of § 287.120.5 is clear that Employer must only establish that "employee's *injury* was caused by the failure of employee to obey the safety rule." § 287.120.5 (emphasis added). Employer presented overwhelming evidence that Appellant's injury was caused by his failure to obey Employer's safety rule.

By next arguing that he did not have actual knowledge of the meaning of the rule, Appellant again disregards contrary evidence in the record that Appellant did in fact have actual knowledge of the meaning of Employer's safety policy. Both Appellant and the Commission mistakenly argue that in finding Appellant had actual knowledge of the safety rule, the ALJ relied solely upon "the premise that receipt of a written policy necessarily confers actual knowledge of the application or meaning of such policy." (L.F. 60). To the contrary, the ALJ's finding that Appellant had actual knowledge of the meaning of Employer's safety policy was based not only upon Appellant's receipt of the written policy, but also upon Appellant's written acknowledgement that "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.'" (L.F. 45). Appellant argues that that this does not constitute any specific admission by Appellant that he knew the rule applied when his forklift was stationary. But as the ALJ pointed out, Appellant "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." *Id.* Appellant attempts to explain this deficiency by arguing that he was not thinking about ambiguities in the safety rule when he signed the form. That is because there were no ambiguities in the rule and Appellant was well aware that the rule applied while his forklift was stationary. Mr. Flakes testified that he met with Appellant to discuss the counseling report, Appellant never said he thought the rule only applied when the forklift was in motion, and never said he did not believe he was in violation of that safety rule. Instead, he signed the form acknowledging that his injuries were caused by his failure to obey Employer's reasonable safety rule requiring employees to keep all body parts within the running lines of the equipment. (Tr. 146).

With respect to the final element of § 287.120.5, that Employer enforced the rule, Appellant continues his pattern of misstating testimony in the record by arguing that Mr. Flakes acknowledged he had not given counseling reports to other employees who leaned forward in the same manner as Appellant to use their scanners. To the contrary, Mr. Flakes did not testify that he had ever seen Appellant, or anyone else, lean forward to scan a pallet. (Tr. 152-53). Mr. Flakes also did not testify that "he had never given any counseling reports to any employees for violating the Rule," as Appellant claims. He

testified that he could not recall offhand any episodes where Appellant was coached on violating the rule prior to his injury, and does not offer any testimony regarding other employees who may or may not have been coached on the rule. *Id*. Furthermore, Appellant's safety policy violation was not leaning forward to use his scanner. His safety policy violation, and the cause of his injury, occurred when he extended his left foot outside the running lines of the forklift.

Appellant's erroneous and irrelevant arguments do nothing to contradict the overwhelming evidence that Employer met its burden of proof pursuant to § 287.120.5, which requires that ***all*** of Appellant's benefits, including all paid and unpaid medical and disability benefits, be reduced by up to 50%, but no less than 25%. *See, e.g., Thompson v. ICI American Holding*, 347 S.W.3d 624 (Mo. App. W.D. 2011). There is no provision of § 287.120.5 that allows the Commission to reduce benefits by less than 25% if an employee's injury was caused by his own safety violation, even if other circumstances contributed to the injury. *See* § 287.120.5. The only discretion granted to the Commission once Employer meets its burden of proof regarding the safety violation is in allowing the Commission to assess a reduction between 25% and 50%. *Id.*

Appellant argues that if this Court does apply a penalty to his benefits, it should only apply the minimum penalty because his conduct was not "willful or negligent." Appellant's conduct was the definition of negligent, if not willful. Appellant was aware of the safety rule and either consciously chose to ignore the rule or was not exercising reasonable care in following Employer's rule designed to for his safety. Given that Appellant's injury could have been prevented altogether if he followed employer's

reasonable safety rule, all of Appellant's benefits, paid and unpaid, should be reduced by the maximum fifty percent.

## III. Appellant failed to refute that the Commission erred in awarding Appellant future medical expense benefits because Appellant failed to prove by substantial and competent evidence that there is a reasonable probability that Appellant requires future medical treatment for his injury.

Despite Appellant's argument that he established through substantial and competent evidence that there is a reasonable probability he requires future medical treatment for his injury, Appellant demonstrated nothing more than that some of his providers had suggested additional non-specific treatments at some point well in the past. This evidence falls far short of meeting Appellant's burden to prove that he reasonably required additional medical treatment to cure and relieve the effects of his work injury at the time of his hearing. *See Smith v. Roberts Dairy Co., LLC*, 08-098439, 2014 WL 2726378 (Mo. Lab. Ind. Rel. Com. June 13, 2014) (citing *Poole v. City of St. Louis*, 328 S.W.3d 277, 292 (Mo. App. E.D. 2010)).

In support of his position, Appellant draws a plethora of misleading conclusions from testimony in the record. First, he argues that the medical records demonstrate that future treatment, including possible surgery, has been recommended. To the contrary, 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).

Appellant next argues that Employer's expert, Dr. Schmidt, "concurred that treatment [Appellant's] doctors recommended would be the next step in treatment." (*Response* 25). Not only is this a complete misstatement of Dr. Schmidt's testimony, the testimony cited by Appellant was given by Dr. Schmidt prior to Appellant's June 22, 2010 surgery, and, in fact, concerned his opinions regarding whether he would recommend the surgery that Appellant ultimately decided to undergo on June 22, 2010, not any future medical treatment. (Tr. 2364-66).

Appellant's next distortion of the record pertains to the alleged recommendations for future medical treatment by Dr. Johnson and Dr. Berkin. Appellant would have this Court believe the Transcript at Page 330-332 reflects that: "Dr. Johnson testified [Appellant] requires future treatment, including pain management and a tendon transfer." (Response 25). However, Dr. Johnson made no such statement. The Transcript at Page 330-332 reflects that on April 25, 2012, Dr. Johnson offered the following testimony regarding his February 4, 2011 evaluation of Appellant:

> A And I really didn't have a lot more to offer him from a musculoskeletal perspective. Unless he were to do some type of tendon transfer that would pull his foot in another direction, but he really didn't want to do that. And frankly, I think most of his problem was pain related, not so much the deformity.
>
> Q So in terms of future treatment he is a candidate for the tendon transfer, but he didn't want to do it so you didn't go any further at that point?
>
> A Yes.

Q But you do recommend future treatment with Dr. Mackinnon and possibly pain management?

A I did at that time, yes.

(Tr. 332).

Dr. Johnson clearly did not testify that Appellant "required" a tendon transfer. At best, Dr. Johnson felt that Appellant may have been a candidate for tendon transfer, but that he believed Appellant's issues were primarily pain-related, not due to any deformity a tendon transfer could potentially correct. (Tr. 332). This testimony also reflects that Dr. Johnson had recommended future treatment with Dr. Mackinnon and possibly pain management on February 4, 2011, but does not demonstrate that Dr. Johnson had future treatment recommendations at the time of his deposition on April 25, 2012. Furthermore, Appellant did seek additional treatment from Dr. MacKinnon per Dr. Johnson's recommendation, and she had no additional treatment recommendations. (Tr. 535-36). There is no indication Appellant sought a pain management consultation at any time during the two years between his visit with Dr. Johnson and his hearing, much less that he continued to require pain management consultation or treatment at the time of the hearing two years later.

Appellant also argues that "Dr. Berkin prescribed treatment recommendations in his report including nonsteroidal anti-inflammatory medication and a possible fusion in the future." (Response 25 (*citing* Tr. 180, 230-240)). The report identified in the Transcript at Page 180 with Dr. Berkin's recommendations is dated January 12, 2008, more than two years prior to Appellant's 2010 surgery, and more than five years prior to

hearing. With respect to the fusion, Dr. Berkin testified at his deposition on October 4, 2011 as follows:

> Q …I wrote down that you stated, "Treatment recommendations won't improve his condition."
>
> Did I write that down accurately?
>
> A I said I gave some – and that was when I was talking about my first report. I gave some supportive measures and that's essentially what I've done this last time.
>
> 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.
>
> Q And you're not recommending that here today, are you?
>
> A No, I don't recommend it today.

(Tr. 238-239).

Again, Dr. Berkin's testimony is the exact opposite of Appellant's characterization of his testimony. Dr. Berkin's testimony actual testimony is indisputable – he did *not* recommend fusion surgery for Appellant.

Appellant's Response is riddled with inaccurate references to physician testimony regarding future medical treatment recommendations and ultimately fails to point to any evidence that any future medical treatment was reasonably required to cure and relieve

the effects of Appellant's work injury at the time of his hearing on May 7, 2013. Accordingly, Appellant failed to meet his burden pursuant to § 287.140.1 and the Commission erred in awarding future medical benefits in the face of this failure.

## CONCLUSION

Employer has proved by overwhelming evidence that Appellant was not temporarily totally disabled at any time between June 22, 2010 and February 4, 2011; that Appellant's injury was the result of Appellant's violation of a reasonable safety rule, of which Appellant was aware, and which was adopted and enforced by Employer for the safety of its employees; and that Appellant failed to present evidence that he reasonably required future medical treatment to cure and relieve the effects of his injury. Appellant's arguments in opposition to these points are based upon erroneous citations to the record and/or erroneous interpretations of law. And none of those arguments come close to defeating any of Employer's points on appeal. Accordingly, this Honorable Court should modify the Commission's award and find:

1. Appellant is not entitled to any temporary total disability benefits during the period from June 22, 2010 through February 4, 2011; and
2. Appellant is not entitled to an award providing for future medical treatment; and
3. all of Appellant's past and future benefits are subject to a 50% reduction pursuant to § 287.120.5.

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the limitations contained in Rule 84.06(b) because the brief contains 6,084 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,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing brief was served via operation of this Court's electronic filing system, this 22nd day of May, 2015 upon:

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