

**TWENTY-SECOND ANNUAL WORKERS COMPENSATION CONFERENCE**

**JUNE 6th & 7th, 2016 TAN-TAR-A RESORT**

**OSAGE BEACH, MISSOURI**

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**PREVAILING FACTOR AND PRE-EXISTING INJURY**

**Focus of the Discussion**

The 2005 Worker's Compensation legislative amendments have now been in effect for almost 11 years. Among other changes, "injury" and "accident" were redefined. The causation standard was changed from a "substantial factor" to the "prevailing factor". Since August 28, 2005, "prevailing factor" has been the standard governing compensability and causation in Missouri Workers Compensation Cases.

"Pre-existing injury" as used in this discussion is intended to include the injuries, illnesses and medical conditions referred to in the cases hereinafter cited, that are being compared to the job-related accident in question to determine whether those pre-existing injuries, illnesses, or medical conditions are the primary factor, in relation to any other factor, in causing the resulting medical condition and disability.

In a large number of Missouri workers' compensation cases, a pre-existing injury, illness, or medical condition potentially becomes involved when determining compensability and when applying the prevailing factor causation standard, or is perceived to come into play when determining the need for past, current, or future medical treatment. This discussion's focus is: (1) sections of the Missouri Workers Compensation Law that cases have cited as relevant to determining compensability and application of the prevailing factor causation standard in the context of pre-existing injury; (2) post-2005 amendment cases that discuss the application of the prevailing factor causation standard in the context of cases involving a pre-existing injury, illness, or medical condition; (3) the material distinction between determining whether a compensable injury has occurred and determining the medical treatment required to be provided to treat a compensable injury; and (4) issues and arguments related to prevailing factor and pre-existing injury that have developed in the post-amendment cases cited.

Because of time limitations, this discussion is not intended to focus on pre-existing injury in the context of occupational disease cases as defined in R.S. Mo. 287.067 (2012), but is limited to the sections of the Missouri Workers Compensation Law and cases referenced in these materials.

### **Applicable Sections of the Missouri Workers Compensation Law**

A number of post 2005 amendment cases involving the issues of compensability, prevailing factor, and pre-existing injury, have now made their way through The Missouri Appellate Courts and The Missouri Supreme Court. Those cases repeatedly cite and discuss the following sections of The Missouri Workers Compensation Law:

#### **I. R.S. Mo. 287.120-Employer's Liability For Injury or Death by Accident (or Occupational Disease) Arising Out of and in the Course of the Employee's Employment**

**287.120. Liability of employer set out--employee not liable, exception--exclusive remedy--compensation increased or reduced, when--use of alcohol or controlled substances or voluntary recreational activities, injury from--effect on compensation--mental injuries, requirements, firefighter stress not affected**

**1. Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident or occupational disease arising out of and in the course of the employee's employment.** Any employee of such employer shall not be liable for any injury or death for which compensation is recoverable under this chapter and every employer and employees of such employer shall be released from all other liability whatsoever, whether to the employee or any other person, except that an employee shall not be released from liability for injury or death if the employee engaged in an affirmative negligent act that purposefully and dangerously caused or increased the risk of injury. The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the unprovoked violence or assault against the employee by any person.

#### **II. R.S. Mo. 287.020.2-Definition of Accident**

2. The word "**accident**" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of **an injury** caused by a specific event during a single work shift. An injury is **not compensable** because work was a triggering or precipitating factor.

#### **III. R.S. Mo. 287.020.3-Definition of Injury, Compensability, and Prevailing Factor**

3. (1) In this chapter the term "**injury**" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "**The prevailing factor**" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.
- (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.
- (4) A **cardiovascular**, pulmonary, respiratory, or other disease, or cerebrovascular **accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.**
- (5) The terms “**injury**” and “**personal injuries**” shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

### **POST- 2005 AMENDMENT CASES**

The following list of cases is not intended to be an exhaustive list of every Missouri appellate or supreme court decision that has discussed prevailing factor in the context of a pre-existing injury, illness or medical condition, but it is a representative sample. Another good source to consult to see how the LIRC is dealing with this subject are the LIRC Decisions at [http://labor.mo.gov/LIRC/Forms/WC\\_Decisions](http://labor.mo.gov/LIRC/Forms/WC_Decisions).

The cases cited are organized in chronological order with the earliest-decided cases listed first. The entire opinions have not been copied, but rather background factual information from each case is included to provide context, along with selected sections of The Court’s prevailing factor and pre-existing injury discussion. Sections of the cases that are particularly pertinent to the topic being discussed are in ***bold print and italics***. In parentheses below each case caption are the primary points the case

### **GORDON V. CITY OF ELLISVILLE, 268 S.W.3d 454, (MO. APP. E.D. 10-28-2008)**

#### **(AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION; CHANGES IN ACTIVITY LEVEL)**

[P. 456]On October 21, 2005, (author’s note: slightly less than 2 months after the effective date of the August 28, 2005 legislative amendments) ***Claimant was in the process of climbing out of a tub grinder at work when he slipped and fell on his right arm with his arm extended.***

[P.456-457]***At the hearing, Claimant testified about the circumstances of his work accident and the difficulties he continued to experience using his arm. He also spoke about a shoulder injury he sustained in 1993. In March of that year, Claimant underwent an open right rotator cuff repair. According to Claimant, after the 1993 surgery he was 99.5% back to normal and had no difficulties performing the labor required \*457 for his job. He could also play softball, bowl and golf without problems with respect to his right arm. However, Claimant stated that since his 2005 injury, he can no longer play sports and needs assistance to***

*compensate for pain in his arm when performing work duties.*

[P.457]Dr. Poetz (claimant's examining physician) opined that Claimant suffered a 55% permanent partial disability to the upper right extremity as measured at the right shoulder directly resulting from the October 2005 injury. In addition, he **testified that the October 2005 accident was a substantial and prevailing factor** in causing the 55% permanent partial disability to Claimant's right shoulder.

[P.457]Employer presented the deposition testimony of Dr. Lehman. **Dr. Lehman stated that although he believed Claimant's rotator cuff tear was a result of the October 2005 work accident prior to performing surgery, he came to a different conclusion after observing Claimant's shoulder during surgery. According to Dr. Lehman, when he operated on Claimant's shoulder, he expected to see a re-tear of Claimant's previous rotator cuff repair, but instead found no evidence of any good rotator cuff tissue. Dr. Lehman also noticed chronic changes in Claimant's joint that appeared to be long-term in nature. Because Dr. Lehman found no evidence of any good rotator cuff tissue and no acute changes, he concluded that Claimant's October 2005 work accident was not the prevailing factor in causing his need for surgery. He diagnosed Claimant's 2005 work accident as a strain of the right shoulder causing inflammation and found that the strain had no effect on Claimant's rotator cuff. Dr. Lehman concluded that Claimant did not have a disability as a result of the October 2005 work accident.**

[P.457]The ALJ specifically found Dr. Lehman's testimony to be **"more persuasive" than that of Dr. Poetz** because: (1) Dr. Poetz is a family doctor who does not perform shoulder surgeries, while Dr. Lehman is a boardcertified orthopedic surgeon who devotes 40% of his practice to shoulder surgery; (2) Dr. Lehman actually performed the surgery on Claimant and viewed the damage to Claimant's shoulder; and (3) while Dr. Lehman gave clear and cogent explanations as to how he arrived at his expert opinion, Dr. Poetz did not reconcile his conclusion that Claimant's injury was the prevailing factor in causing his rotator cuff tear with the arthroscopic findings and did not show any acute injury. **Based on Dr. Lehman's testimony, the ALJ found that the injury Claimant suffered from his work accident \*[458] was not the prevailing factor in causing his rotator cuff tear.**

[P.458-459]\*\*\*\*\***In particular, Claimant argues that the Commission's finding supports an award of compensation since he sufficiently proved that the 2005 work accident aggravated his pre-existing shoulder injury.** Section 287.120 RSMo Supp.2006 3 requires employers to furnish compensation according to the provisions of the Worker's Compensation Law for personal injuries of \*459 employees caused by accidents arising out of and in the course of the employee's employment. Section 287.120.1. An "accident" is an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by the specific event during a single work shift. Section 287.020.2 RSMo Supp.2006. 4 **When the Worker's Compensation Law refers to an "injury," it means an injury arising out of and in the course of employment. Section 287.020.3(1). Section 287.020.3(1) further states that "[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." Finally, Section 287.020.3(1) defines "prevailing factor" as "the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."**

[P.459]\*\*\*\*\***Claimant argues that because the Commission found that he suffered some trauma to his right shoulder when his work accident occurred, the Commission was required to award compensation. He refers to evidence in the record indicating that,**

***notwithstanding the injury he sustained to the same shoulder in 1993, he had no problems working and playing sports before the 2005 accident, but afterward was injured and unable to work. \*\*\*\*\*Based on this evidence, Claimant contends it is clear that the work accident aggravated his previous condition, rendering the injury compensable.***

[P.459] Case law preceding the 2005 amendments to the Worker's Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an "aggravated condition." See *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. E.D.2002) . However, since *Rono* was decided, the legislature amended Section 287.020 , changing the criteria for when an injury is compensable. In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the "employment" is a "substantial" factor in causing the injury, "can be seen to have followed as a natural incident of the work" and "can be fairly traced to the employment as a proximate cause." See S.B. Nos. 1 & 130, section A 93<sup>rd</sup> Gen. Assem., 1st Reg. Sess. (Mo.2005). ***Thus, while Rono's approval of compensation where the claimant establishes a causal link between his aggravated condition and his job duties fits within the former version of section 287.020 , we review causation in light of a new statutory standard.***

[P.459]***Under the current statute, a work injury "is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability."*** Section 287.020.3 (emphasis added). Further, Section 287.800 RSMo Supp.2006 requires this Court to strictly construe the provisions of the Worker's Compensation Law. Thus, we must limit our consideration of Claimant's claim for benefits to the standard contained in the current version of section 287.020.3. Specifically, we are to review whether Claimant established that his 2005 work accident was the prevailing factor in causing his need for rotator cuff surgery and postsurgery recovery. ***Therefore, because Claimant's argument that he is entitled to compensation is based on analysis under the former version of section 287.020 , it has no merit.*** [4]

[P.460] Based on the standard contained in the current version of section 287.020 , we find that the Commission's decision that Claimant's 2005 work accident was not the prevailing factor in causing his need for \*460 rotator cuff surgery and post-surgery recovery was supported by competent and substantial evidence. ***Dr. Lehman, Claimant's orthopedic surgeon, testified that after he observed first-hand the damage to Claimant's shoulder, he found no evidence of acute injury.***

[P.460]***He also concluded that the damage was long-term in nature. Dr. Lehman then specifically testified that the strain and inflammation Claimant experienced when he fell was not the prevailing factor in his need for surgery.***

[P.460]According to Claimant, Dr. Lehman's opinion was not based on substantial or competent evidence because Dr. Lehman did not evaluate Claimant's history or utilize Claimant's history in his opinion. We disagree. First, the record indicates that Dr. Lehman did discuss Claimant's patient history at least to the extent it revealed his prior right shoulder injury. ***\*\*\*\*\*Second, Claimant cites no authority to support his argument that where a claimant's activity level changes after a work accident, the treating doctor must base his opinion of whether a claimant's work accident is the prevailing factor in causing the claimant's medical condition on such changes in his activity level.*** [7]

[P.461]***Here, Dr. Lehman explained that although he initially believed that Claimant's need for rotator cuff surgery was based on Claimant's work accident, when he actually***

*observed Claimant's rotator cuff tissue he discovered that it could not have been caused by an acute injury.* \*461 Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause. *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. W.D.1991) . *Claimant's only counter to Dr. Lehman's explanation of his condition is that his opinion "makes no sense" since he was able to perform labor intensive activities before his work accident and subsequent surgery. His theory that Dr. Lehman's opinion "makes no sense" is not, however, based on any scientific or medical evidence.* Thus, Claimant's argument that Dr. Lehman's opinion was not based on substantial and competent evidence fails.

[P.461]To the extent Claimant asserts that the Commission should have relied instead on Dr. Poetz, it was free to believe whichever expert it chose to believe. See *Hulsey*, 239 S.W.3d at 162. Even though Dr. Poetz concluded that Claimant's medical condition was caused by his work accident, the Commission noted that Dr. Poetz failed to explain how Dr. Lehman's arthroscopic finding of no acute injury could be reconciled with his conclusions. Dr. Poetz also acknowledged that he is not an orthopedic surgeon nor has he performed any surgery of the type Claimant underwent. For these reasons, the Commission's decision to accept Dr. Lehman's opinion over that of Dr. Poetz is supported by competent and substantial evidence. . .

**JOHNSON V. INDIANA WESTERN EXPRESS, INC., 281 S.W.3d 885 (MO. APP. S.D. 5-26-2009)**

**(OBJECTIVE SIGNS OF AN INJURY RESULTING IN FURTHER DISABILITY; AGGRAVATION OF PRE-EXISTING INJURY OR CONDITION IS NOT SUFFICIENT; WHERE INCONSISTENT OR CONFLICTING MEDICAL OPINIONS EXIST, OBJECTIVE MEDICAL FINDINGS SHALL PREVAIL OVER SUBJECTIVE MEDICAL FINDINGS )**

[P.886]Jack Johnson (claimant) filed claims for workers' compensation benefits against Indiana Western Express, Inc. (IWX) and the Second Injury Fund. *The Labor and Industrial Relations Commission (the commission) denied the claims. This court affirms. Claimant's Claim for Compensation was directed to an alleged injury sustained February 9, 2006. He asserted that during the course of his employment as an over-the-road truck driver, he was "suddenly, violently and unexpectedly jerked forward when a gust of wind caught a door" he was opening on his trailer; that this resulted in injury to his "[b]ack and body as a whole."* *The commission found that claimant's injury and disability existed prior to the February 9, 2006, incident; that claimant did not sustain a new injury on that date that arose out of and in the course and scope of his employment.*

[P.887]*In August 2004, he sustained a low back injury while removing chains from a generator he had delivered to a location in Florida.* He was asked what he did at that time. He answered, "It was like I twisted around. I think I was jerking the chain off or something. I twisted around and I heard a pop in my back. And that was pretty much it from—you know, pretty much by the end of that deal." *Claimant did not work following the August 2004 injury until he began working for IWX in November 2005.*

[P.887] *Claimant was treated for his 2004 injury by Dr. Richard Marks in Ft. Worth, Texas.* He received epidural injections for pain. He also underwent a "two-level TDR," a transcutaneous disc resection, in April 2005 at the L4–5 and L5–S1 levels. *Claimant was last seen by Dr. Marks on June 30, 2005. An MRI had been performed on June 29, 2005.*

*Claimant reported that although the pain and numbness in his lower left extremity had abated post-surgery, pain and spasm tightness in his back continued.*

[P.887]*Dr. Marks' report stated that the back pain could be quite debilitating; that it could "leav[e] him down for as long as 2 days at a time." He observed, "[T]he back pain itself as well as muscle spasm tightness is significant, virtually disabling [claimant] from doing his normal work activities."* Dr. Marks recommended physical therapy. He requested a follow-up visit. He discussed a need to undergo future surgery, a discectomy and fusion, in order "for any definitive care to be rendered." Claimant did not follow-up with Dr. Marks with respect to the 2004 injury.

[P.887]*Claimant said he started feeling better after his last visit with Dr. Marks; that he was walking for physical therapy. He decided on his own that he was able to work as an over-the road truck driver and applied for a position with IWX.*

[P.887] *The commission based its denial of benefits, in large part, on the testimony of Dr. Jeffrey MacMillan.* Dr. MacMillan examined claimant prior to the evidentiary hearing in this case. *Dr. MacMillan's*

*[P.888] opinion was that claimant's medical condition and claimant's need for ongoing treatment was not related to the February 9, 2006, incident. He found no evidence that claimant ever recovered from the August 2004 injury, or that claimant suffered a new injury.* Dr. MacMillan found that the MRI test performed after the 2004 injury and an MRI performed after the 2006 event did not support that a further injury had occurred. *Dr. MacMillan explained, "So you have MRIs bracketing the alleged injury but there is really no significant change between those two studies. So, on the second study there is no evidence of a new injury and, typically, there has to be some objective evidence that something happened or something changed."* Dr. MacMillan concluded that claimant's pain was caused by two degenerative discs; that the discs were abnormal prior to February 2006.

[P.889]Dr. MacMillan acknowledged that this was different than cases in which you only have an MRI performed after the event from which an injury is claimed; that in those instances, it is necessary to surmise if there has been a change in a patient's condition. He continued, "But in this case you have a different scenario. You have somebody who has clearly documented severe symptoms before the alleged injury. You have very similar symptoms after the alleged injury, and you have an MRI before the alleged injury that shows degenerative changes, and you have a virtually indistinguishable MRI after the alleged injury. So there is no objective evidence that anything changed."

[P.889]*Dr. MacMillan was asked, "[I]n looking at these films that you reviewed of this patient, do you see anything on the subsequent studies to indicate to you that there was a change in the pathology of his spine after February 9th, 2006, that did not exist prior to that date?" Dr. MacMillan answered, "No."* Dr. MacMillan's opinion was that the event of February 9, 2006, was not the primary or prevailing factor in causing claimant's need for additional medical treatment.

[P.889]Indeed, there is no evidence to dispute that an incident occurred on February 9, 2006, as claimant describes, when a gust of wind caught the door he was trying to open and jerked him forward. Claimant alleges that that incident caused his current complaints. *Thus, the issue of accident rises or falls with the determination of causation. Indeed, § 287.020, in effect at the time of this injury, states that: "[a]n injury by accident is compensable only if the*

*accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor[’] is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.[’] 287.020.3(1), RSMo . Additionally, an accident must produce “at the time objective symptoms of an injury.” § 287.020.2. Moreover, “[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate test or diagnostic procedures.” § 287.190.6(2).*

[P. 890] *\*\*\*\*\*The commission found “from the evidence” that claimant had a significant back injury that preexisted the accident that occurred February 9, 2006; that the ultimate decision regarding compensability depends on the determination of which doctor was correct with respect to whether claimant's current condition was caused by the February 9, 2006, incident..*

[P. 890] Claimant contends that “the accident sustained by [him] on February 9, 2006[,] was the prevailing factor in causing both the resulting medical condition and disability to the low back and body as a whole.” *Claimant refers to four aspects of the evidence he presented as support for his claim of error. He contends that (A) he had recovered sufficiently from his prior back injury to enable him to return to work as a truck driver in the same capacity as before the prior injury; (B) he was not disabled at the time of the incident on February 9, 2006; (C) he had passed a DOT physical examination taken at the request of IWX and had been found not to be disabled, and that he met all requirements of the DOT to drive an over-the-road truck without restrictions; and (D) where there exists a preexisting but non-disabling condition, a subsequent accident that results in a disability to the injured employee is the prevailing factor in causing any resulting medical condition and additional disability.*

[P. 890] Further, as explained in *Gordon*, since the effective date of the 2005 changes to The Workers' Compensation Law, new and significantly different standards must be applied in determining the compensability of a claim. \*891

[P. 891] *Case law preceding the 2005 amendments to the Worker's [sic] Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an “aggravated condition.” See Rono v. Famous Barr, 91 S.W.3d 688, 691 (Mo.App. E.D.2002) . However, since Rono was decided, the legislature amended Section 287.020 , changing the criteria for when an injury is compensable.* In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the “employment” is a “substantial” factor in causing the injury, “can be seen to have followed as a natural incident of the work” and “can be fairly traced to the employment as a proximate cause.” See S.B. Nos. 1 & 130, section A 93rd Gen. Assem., 1<sup>st</sup> Reg. Sess. (Mo.2005)....

[P. 891] Under the current statute, a work injury “is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.020.3 (emphasis added). Further, Section 287.800 RSMo Supp.2006 requires this Court to strictly construe the provisions of the Worker's [sic] Compensation Law. *Thus, we must limit our consideration of Claimant's claim for benefits to the standard contained in the current version of section 287.020.3.... Id. at 459.*

[P. 891] *The commission recognized this, pointing out that § 287.190.6(2) requires that “where inconsistent or conflicting medical opinions exist, objective medical findings shall*

*prevail over subjective medical findings.”*

[P. 891] *Dr. MacMillan's assessment was consistent with the earlier observations of Dr. Marks, the surgeon who performed surgery on claimant after the 2004 injury. After the surgery, Dr. Marks found abnormalities at claimant's L4–5 disc and L5–S1 disc of the lumbar spine. Dr.*

*[\*892] Marks concluded at that time that claimant was virtually disabled from his normal work activities; that claimant would need a discectomy and fusion for definitive care.*

[P. 892] Finally, claimant contends in argument (D) that the facts found by the commission do not support an award of no compensation because claimant's prior injury was nondisabling; that, therefore, the February 9, 2006, incident disabled claimant so that its consequences were the prevailing factor that caused his subsequent physical disability. There was sufficient medical evidence, as previously discussed, from which the commission could find that the February 9, 2006, incident was not the prevailing factor in the disability claimant experienced after that date. *As noted, supra, under current law, in order for an event that arises out of and in the course of one's employment to entitle an employee who has a prior disability to additional benefits, the event must be a prevailing factor that results in further disability.*

*[P. 893] It is not sufficient that the event simply aggravates a preexisting condition. § 287.020 ; Gordon v. City of Ellisville, 268 S.W.3d at 459 .*

#### **LEAKE V. CITY OF FULTON, 316 S.W.3d 528, (MO. APP. W.D. 8-31-2010)**

#### **[COMPARATIVE RELATIONSHIP BETWEEN CONTRIBUTING FACTORS-- WHICH OF THE CONTRIBUTING FACTORS IS THE PREVAILING FACTOR?]**

*[P.529]Leake was a captain with the Fulton fire department and had been with the department for twenty years. On April 30, 2006, Leake was called to the scene of a three-car automobile accident. While no one in the accident was badly injured, one of the automobiles involved had to be removed from the roadway, and Leake and two others pushed the vehicle to the side of the road. During the time that Leake was assisting at the scene of the accident, the light rain that had been falling became very heavy, and hail started to fall. The rain was so heavy that it ran into the raincoat of police officer Mark Moses, who was also assisting with the accident, and it shorted out his radio. Shortly after the vehicle had been removed from the roadway, Officer Moses and Leake were dispatched to a more serious accident nearby.*

*[P.529]The second accident was a single truck that had skidded off of a highway, gone over a guardrail, and tumbled to the bottom of a steep embankment. The driver of the truck had been ejected on the way down the embankment and had come to rest in an algae-covered concrete drainage ditch, right next to his truck. **By this time the rain had ended and the sun had come out, making the air hot and humid.***

*[P.529]Leake scrambled down the steep embankment through shindeep thick wet grass to get to the ejected driver. Leake, Officer Moses, and others began performing CPR on the*

*man, with Leake using the rescue breathing bag. The rescue efforts were especially difficult because of the large size of the driver, the fact that the driver's airway and the breathing device were obstructed with the man's vomit, the fact that the driver was wedged against his vehicle, the wet and slippery condition of the concrete drainage ditch, and the hot, humid weather. The rescuers worked frantically for some time until the ejected driver was able to be put on a backboard. Then Leake and the other rescuers carried the man up the other side of the embankment to a waiting ambulance. This side of the embankment was less steep, but longer in distance. The trip up the embankment was difficult, and Leake slipped once on the way. When the man had been placed into the ambulance, Leake returned to the bottom of the culvert to retrieve his tools and then climbed back up the steep side of the embankment to get back to his vehicle.*

*[P.530] When Leake reached the road, he climbed back over the guardrail and asked for some alcohol to clean his hands.*

*[P.530]Then, suddenly, he said that he felt dizzy, the color left his face, and he collapsed. Officer Moses believed that Leake was possibly having a heat stroke because of the weather, their exertion, and the fact that Leake was wearing his firefighting gear, which consisted of large rubber boots, heavy insulated pants, a heavy insulated coat, a shirt, and a helmet. The other rescuers on the scene removed Leake's firefighting gear and began trying to resuscitate him. Although he briefly began breathing again, the attempts to save his life were ultimately unsuccessful, and Leake died at the scene.*

*[P.530]Widow applied to the Division of Workers' Compensation for death benefits following Leake's death. At the hearing, Widow testified that Leake had not been diagnosed with or treated for any heart disease before his death. Widow also testified that Leake had been able to perform his job without any difficulties and that he had been fairly active outside of his employment, doing work around the house and boating.*

*[P.530]Leake's medical records were also admitted into evidence and showed that Leake had not been diagnosed with or treated for heart disease . They indicated that Leake had been recommended to follow a healthy diet and to stop smoking, but he had not been placed on any medications for cholesterol reduction or blood pressure control.*

*[P.530]Officer Moses testified at the hearing. He relayed the events as set forth above and offered that in his twelve years as a police officer, the April 30, 2006 vehicle rescue that he and Leake worked was the most physically demanding and emotionally challenging that he had ever experienced. Moses also testified that, as a member of the SWAT team and a former bicycle patrol officer, he had been in good physical shape but that he had never before felt fatigue at the level he experienced following the April 30 rescues.*

*[P.530]\*\*\*\*Dr. Jerry Kennett, an expert for Fulton, reviewed Leake's medical records and his autopsy report and concluded that Leake's death was primarily caused by his underlying cardiovascular disease . \*\*\*\*Dr. Kennett opined that while the work Leake was doing on the day of his death may have been a contributing factor, it was not the major factor that led to his death. Dr. Kennett testified that Leake had a thickened heart muscle with blockage in the three main coronary arteries and that Leake had suffered a prior heart attack , although Leake was apparently not aware of the prior heart attack .*

*[P.530]Dr. Stephen Schuman, Widow's expert, also reviewed Leake's medical records*

*and his autopsy report, as well as the statements of Leake's co-workers, and concluded that, although not in optimal health, Leake was medically stable during the time leading up to his death because he had been able to go about his business and work activities without any symptoms. Dr. Schuman opined that Leake would have been able to continue his activity level had it not been for the events of April 30, 2006. Dr. Schuman opined that there were significant, unusual physical exertions on the day in question, emotional stress associated with responding to a severe car accident, and hot and humid weather in which the body cannot dissipate heat, and that all of those factors combined to increase demand on the cardiovascular system for enhanced cardiac output.*

*[P.531]Dr. Schuman explained that the heart muscle \*531 requires more blood flow to sustain the extra work, and if there is any restriction of blood flow because of coronary artery blockage, that blood flow cannot increase to the level that the demand increases, causing a supply-demand imbalance. This creates an electrical instability, which in turn causes a serious arrhythmia , or irregular beating, the most severe type of rhythm abnormality. It was Dr. Schuman's opinion that this electrical instability was the cause of Leake's death. **Dr. Schuman concluded that if the demand had not been there, in the form of the physical exertion, emotional stress, and environmental factors, the electrical event would not have occurred and, thus, that Mr. Leake's work was the prevailing factor causing his death.***

*[P.531Both experts seemed to agree that Leake's death was not caused by a heart attack but was the result of an episode of ventricular fibrillation —the rhythm abnormality. Both experts also agreed that both Leake's underlying, although previously undetected, cardiovascular condition and the conditions of Leake's work combined to cause the cardiac episode leading to Leake's death. \*\*\*\*The experts just disagreed about which factor was the prevailing cause.*

*[P.531The Administrative Law Judge (“ALJ”) denied benefits, finding that the events and conditions of Leake's employment on April 30, 2006, were not the “prevailing factor” causing Leake's death, but that Leake's death was primarily attributable to his underlying heart disease . Widow filed a timely application for review with the Commission, and the Commission overturned the decision of the ALJ and awarded Widow benefits. City now appeals to this court.*

*[P.531Fulton appeals the order of the Commission, claiming that the Commission's award of benefits was not supported by competent and substantial evidence and was against the overwhelming weight of the evidence because there was evidence that, absent Leake's pre-existing coronary artery disease, he would not have died on April 30, 2006.*

*[P.531For an award of benefits to be appropriate, the 2005 amendments require that the workplace “accident” was the “prevailing factor” or primary factor in causing the injury and the disability (in this case, the ventricular fibrillation that caused Leake's death). § 287.020.3(1). \*\*\*\*In other words, Leake's death must not have “come from a hazard or risk unrelated to the employment to which [Leake] would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.” § 287.020.3(2)(b). \*\*\*\*Specifically, “cardiovascular ... disease ... suffered by a worker is an injury only if the accident \*532 is the prevailing factor in causing the [death].” § 287.020.3(4)*

*[P.531Prior to the 2005 changes in the Workers' Compensation Law, an employee's work only had to be a “substantial factor” and not the “prevailing factor.” § 287.020.3(2)(a). The 2005 changes also required the Commission and the courts to construe the law “strictly” rather than*

liberally in favor of coverage the way it had been before the revisions. § 287.800. *Therefore, the employee's burden in establishing that his injury is compensable is now higher than it was before the changes in the law. \*\*\*\*In briefing to this court, Fulton urges that we find Leake's underlying health conditions prevent a finding that any employment-related accident could possibly have been the prevailing factor causing his death. \*\*\*\*Similarly, at oral argument, Fulton initially suggested that pre-existing cardiovascular disease that contributed to a workplace injury or death would always be the prevailing factor. Thus the existence of cardiovascular disease would bar recovery under section 287.020. We disagree. That underlying cardiovascular disease does not always preclude recovery is inherent in section 287.020.3(4)'s recognition that a "cardiovascular disease" can constitute an "injury," "if the accident is the prevailing factor in causing the resulting medical condition." \*\*\*\*Where, as here, both a preexisting cardiovascular condition and a work-related activity contribute to cause an employee's injury or death, the question is which of the contributing factors was "the primary factor, in relation to [the] other factor, causing ... the resulting" injury or death. § 287.020.3(1). The determination of whether a particular accident is the "prevailing factor" causing an employee's condition (in this case, death) is inherently a factual one (a proposition with which Fulton's counsel agreed at oral argument). 3 We see no reason not to defer to the Commission's factual finding in this case. See Endicott v. Display Techs., 77 S.W.3d 612, 615 (Mo. banc 2002).*

*[P.532]Two different expert opinions served as evidence in Leake's case. Both experts testified that Leake's pre-existing, although previously unknown, cardiovascular condition combined with circumstances surrounding his job duties on April 30, 2006, to cause Leake's death. Leake's expert, Dr. Schuman, testified, by deposition, that the events and conditions of the rescues on April 30, 2006, taken together, was the prevailing factor leading to Leake's death. Fulton's expert, Dr. Kennett, testified that Leake's pre-existing cardiovascular disease was the prevailing factor in Leake's death. The Commission fully considered both expert opinions, along with the evidence supporting them, and concluded that Dr. Schuman's opinion was more credible and better supported. Fulton has not established that the Commission's conclusion was against the overwhelming weight of the evidence, and therefore, even under the more stringent standards, it is supported by competent and substantial evidence on the record as a whole. \**

*[P.533] First, as Dr. Schuman pointed out, Leake had never even been diagnosed with any cardiovascular disease . He had never presented with any symptoms of his condition. In fact, Leake had apparently suffered a heart attack at some time in the past without ever having realized it. Leake had not been treated for high blood pressure or high cholesterol. Although Leake's physician had advised him to quit smoking and follow a healthy diet, the advice was no different than that which any physician would offer to a moderately overweight patient who smoked and did not appear to be in response to any particular complaints that Leake was presenting at the time.*

*[P.533]All of the above evidence would support Dr. Schuman's conclusion, accepted by the Commission, that he could "[a]bsolutely" say, to a reasonable degree of medical certainty, that Leake would not have had the cardiac event if he had not been exposed to the extraordinary physical and mental stress related to performing his work duties on April 30, 2006.*

**TILLOTSON V. ST. JOSEPH MEDICAL CENTER, 347 S.W.3d 511 (MO. APP. W.D. 10-4-2011)**

**(THE MATERIAL DISTINCTION BETWEEN DETERMINING WHETHER A COMPENSABLE INJURY HAS OCCURRED AND DETERMINING THE MEDICAL TREATMENT REQUIRED TO BE PROVIDED TO TREAT A COMPENSABLE INJURY)**

*[P.513]Tillotson is a registered nurse. In January 2006, she was employed by St. Joseph's*

*[P.514] Medical Center("Employer"). On January 7, 2006, Tillotson was helping another nurse move a patient who was lying in bed when the bed began to roll causing Tillotson to lose her balance. Tillotson bounced off the wall, striking her right knee against a chair. Tillotson may also have twisted her knee.*

*[P.514] Following the accident, Tillotson continued working for a few weeks, but experienced significant and increasing pain. Employer authorized an evaluation by Dr. Michael Perll ("Dr. Perll") who determined via an MRI that Tillotson had torn her lateral meniscus . Dr. Perll also determined that Tillotson had some degenerative changes involving the medial meniscus related to arthritis .*

*[P.514] Employer authorized Tillotson to be seen by an orthopedic surgeon, Dr. Gregory Van den Berghe ("Dr. Van den Berghe"). Dr. Van den Berghe confirmed Dr. Perll's diagnosis. Dr. Van den Berghe determined that an arthroscopy could benefit the torn lateral meniscus , but would not alleviate Tillotson's pain. **Dr. Van den Berghe believed that both Tillotson's torn lateral meniscus and her pre -existing degenerative condition were contributing to her pain and symptoms, and that a total knee replacement would provide her with more lasting pain relief.***

*[P.514] Employer referred Tillotson to Dr. Daniel Stechschulte ("Dr. Stechschulte") for a second opinion. **Dr. Stechschulte agreed that Tillotson had suffered a torn lateral meniscus in her right knee, and that she also suffered from a degenerative arthritic condition . He noted that a tear of the lateral meniscus would normally be repaired by arthroscopic surgery . However, arthroscopic surgery is not recommended for patients with severe arthritis . Arthroscopy to remove a torn lateral meniscus can worsen a degenerative arthritic condition . Dr. Stechschulte agreed that Tillotson's torn lateral meniscus should be repaired by a total knee replacement, but he opined that "her pre-existing arthritis is the major prevailing factor for the need for this surgery. "** (Emphasis added.)*

*[P.514] Employer does not contest that Tillotson sustained an acute lateral meniscus injury as a result of the January 7, 2006 accident. Employer paid for Tillotson's medical care following the accident in the total amount of \$4,593.80. **However, based on Dr. Stechschulte's evaluation, Employer refused to authorize any further medical treatment for Tillotson's torn lateral meniscus including the total knee replacement . Tillotson proceeded with the total knee replacement with Dr. Van den Berghe at a cost of \$4,646.21.** While recuperating from the total knee replacement , Tillotson was temporarily and totally disabled from June 16, 2006 through December 11, 2006. Tillotson returned to her job, full time, and without restrictions or accommodations, on December 11, 2006, and continued working until her planned retirement on October 1, 2007. **In November 2007, Tillotson filed a claim for workers' compensation. She sought recovery for the cost of the total knee replacement , for future medical treatment, for temporary total disability for the recuperative period following surgery, and for residual permanent partial disability of the right leg.***

*[P.514] In addition to the testimony of Employer's experts, Drs. Van den Berghe and Stechschulte, outlined above, the Division*

*[P.515] heard the testimony of Tillotson's expert, Dr. P. Brent Koprivica ("Dr. Koprivica"). Dr. Koprivica agreed that Tillotson sustained a torn lateral meniscus as a result of the January 7, 2006 accident. He also agreed that Tillotson's pre-existing arthritis coupled with the torn lateral meniscus warranted a total knee replacement, and that the combination of the conditions rendered arthroscopy an ineffective means to address Tillotson's torn lateral meniscus. Dr. Koprivica further opined that the January 7, 2006 accident destabilized Tillotson's right knee causing an aggravation and a progression of the pre-existing degenerative arthritis. Dr. Koprivica opined that Tillotson's work injury was, therefore, the prevailing factor in causing the need for a total knee replacement. Dr. Koprivica rated Tillotson's resultant permanent partial disability of the leg at 50%. Dr. Koprivica also testified that Tillotson would require future medical care.*

*[P.515] The Division found that "Ms. Tillotson's January 7, 2006 accident was the prevailing factor in causing her acute lateral meniscus injury." (Finding number 11.) This determination has not been appealed by the Employer and, thus, is not at issue in this case. The Division found that "Ms. Tillotson's January 7, 2006 accident was not the prevailing factor causing her medial meniscus injury; this was a chronic condition unrelated to the accident." (Finding number 12.) The Division found that "Ms. Tillotson's July 17, 2006 right total knee replacement ... would not have been performed absent symptoms (pain)." (Finding number 13.) The Division found that "Ms. Tillotson's arthritis present at the time of her accident was the prevailing factor in causing her need for her [total knee replacement]." (Finding number 14.) On this latter subject, the Division expressly found as follows with respect to the testimony of Dr. Koprivica:*

*While Dr. Koprivica is a well qualified rating doctor, I find that he does not possess the expertise necessary to offer credible conclusive opinions regarding the cause of precise orthopedic conditions. When presented with the opinions of board certified and board eligible orthopedic surgeons whose practices are predominantly centered on treating patients, such as Drs. Van den Berghe and Stechschulte, I will defer—and give greater weight—to their medical causation opinions instead of Dr. Koprivica's opinions. I do not find Dr. Koprivica's opinion that Ms. Tillotson's January 7, 2006 accident was the prevailing factor in causing her need for a [total knee replacement] credible and I disbelieve this opinion. (Finding number 17.)*

*[P.514] The Division found that "[h]ad Ms. Tillotson suffered only a meniscal tear, a [total knee replacement] would not have been required.... Ms. Tillotson required a [total knee replacement] because of her arthritis alone that existed at the time of her accident." (Finding number 18.)*

*[P.516] Based on these findings, the Division denied Tillotson's claim for recovery of the medical costs for the total knee replacement, for temporary total disability during the post-surgical recuperative period, and for future medical expenses, finding that these claims were not "due to her accident." (Finding numbers 20, 21, and 23.) The Division also denied Tillotson's claim for permanent partial disability. (Finding number 19.)*

*[P.516] Tillotson asserts four points on appeal. First, Tillotson asserts that the Commission erroneously employed a prevailing factor analysis to conclude that Tillotson was not entitled to compensation associated with her total knee replacement. Second, Tillotson*

asserts in the alternative that the Commission's finding that her accident was not the “prevailing factor ” requiring a total knee replacement was not supported by substantial and competent evidence. Third, Tillotson contends the Commission erroneously disregarded uncontradicted medical evidence that Tillotson's accident was the prevailing factor in causing her torn lateral meniscus , and thus her medical condition and disability. Finally, Tillotson argues that the 2005 amendments to the worker's compensation act are unconstitutional. \*517 Because Point Relied On one is dispositive of this appeal, we need not address Tillotson's Points Relied On two through four. Point

### ***Point I***

***[P.517] [3] The Commission denied Tillotson workers' compensation benefits because it found that Tillotson's accident was not the prevailing factor in requiring Tillotson to undergo a total knee replacement. Since all of the compensation sought by Tillotson was related to, or flowed from, the total knee replacement, the Commission concluded no compensation was due. Tillotson argues the Commission committed error because section 287.140.1 guarantees an injured worker the right to medical treatment reasonably necessary to cure and relieve the effects of a compensable injury and does not require a finding that a work place accident was the prevailing factor in causing the need for particular medical treatment. The Employer argues that we must read section 287.140.1 to include the requirement that a compensable injury is the prevailing factor in requiring particular medical treatment. We agree with Tillotson and disagree with the Employer.***

***[P.517]\*\*\*\*This case highlights the material distinction between determining whether a compensable injury has occurred and determining the medical treatment required to be provided to treat a compensable injury. \*\*\*\*That distinction is framed by section 287.120.1 which provides, in pertinent part, that “[e]very employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of employee's employment. ” (Emphasis added.) Section 287.120.1 thus requires two independent inquiries. \*\*\*\*First, it must be determined whether an employee has suffered a compensable injury “by accident arising out of and in the course of employee's employment.” Section 287.120.1. Second, if a compensable injury has been sustained by an employee, the appropriate compensation to be furnished must be determined. Id.***

***[P.517]The determination of whether an employee has sustained a compensable injury as a result of a workplace accident is controlled by section 287.020. An “accident” is statutorily defined as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” Section 287.020.2. “Injury” is statutorily defined as: [A]n injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor ” is defined to be the primary factor , causing both the resulting medical condition and disability. Section 287.020.3(1) (emphasis added).***

***[P.517]Here, the Commission found that Tillotson “sustained a compensable accident that arose out of the scope of her employment. ” \*\*\*\*Specifically, the Commission found that the “January 7, 2006 accident was the prevailing factor in causing [Tillotson's] acute lateral meniscus injury.” Thus, the first determination required by section 287.120.1—whether a compensable injury has occurred—is not at issue in this case.***

***[P.517]Once a compensable injury is found, the inquiry turns to the calculation of compensation or benefits to be awarded. The compensation or benefits which can be awarded an injured employee include medical treatment (section 287.140 ), temporary total disability (section 287.170), and permanent \*518 partial or permanent total disability (section 287.190 and section 287.200). Each of these statutes presumes, by express reference, that an “injury” has occurred; i.e., that the initial determination required under section 287.120.1 has already been made. Stated differently, each of these statutes presumes that the “prevailing factor ” test described in section 287.020.3(1) has already been applied to permit the conclusion that a compensable injury has occurred.***

***[P.518]\*\*\*\*The Commission denied Tillotson compensation because it concluded that although Tillotson suffered a compensable accident, that accident was not the “prevailing factor ” in requiring the total knee replacement . A total knee replacement is not, however, a medical condition or disability. It is a form of medical treatment employed to address a medical condition or disability. \*\*\*\*The central question in this case is, therefore, whether the Commission erroneously interpreted and applied the law when it denied Tillotson compensation because her conceded compensable injury was not the “prevailing factor ” in requiring a total knee replacement .***

***[P.518]To answer this question, we must construe section 287.140.1 which describes an employer's obligation to afford medical care and treatment following a compensable injury. Section 287.140.1 provides that “in addition to all other compensation paid to the employee, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve the effects of the injury. ” (Emphasis added.) \*\*\*\*Section 287.140.1 makes no reference to a “prevailing factor ” test and, as previously noted, presumes of necessity that the presence of a compensable injury under section 287.020.3(1) (which does require application of the prevailing factor test) has already been demonstrated. The legal standard for determining an employer's obligation to afford medical care is clearly and plainly articulated in section 287.140.1 as whether the treatment is reasonably required to cure and relieve the effects of the injury. \*\*\*\*This was not the legal standard employed by the Commission. Instead of determining whether Tillotson established that a total knee replacement was reasonably required to cure and relieve the effects of her torn lateral meniscus , the Commission required Tillotson to prove that her torn lateral meniscus was the “prevailing factor ” in requiring a total knee replacement . The Commission thus imposed a heightened burden on Tillotson beyond that described in section 287.140.1.***

***[P.518]The Commission has confused the determination of a whether a compensable injury has been established with the determination of what medical care and treatment an employer is obligated to provide to care for and relieve an established compensable injury. The Commission's confusion apparently generates from the Missouri General Assembly's sweeping changes to The Workers' Compensation Law in 2005. Among other things, the 2005 amendments added the “prevailing factor ” test to section 287.020.3(1)'s definition of “injury,” \*519 thus increasing the burden on an employee to establish the presence of a compensable injury.***

***[P.519][4] [5] The 2005 amendments to The Workers' Compensation Law did not, however, incorporate a “prevailing factor” test into the determination of medical care and treatment required to be afforded for a compensable injury by section 287.140.1. In fact, the 2005 amendments left section 287.140.1 virtually unchanged, adding only inconsequential language unrelated to the standard to be applied to determine whether medical treatment must***

*be afforded an injured employee.* . . . In adopting the 2005 amendments to The Workers' Compensation Law, the legislature “clearly expressed its intent to negate the effects of various cases and their progeny relevant to some of the sections and terms of the workers' compensation chapter.” 4 Id. “No such actions were directed toward” section 287.140.1. Id. “Such an omission signals an intentional acceptance of existing case law governing the unchanged portion of” section 287.140.1. Id.

[P.519] [6] *The existing case law at the time of the 2005 amendments to The Workers' Compensation Law instructs that in determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Bowers v. Hiland Dairy Co., 188 S.W.3d 79, 83 (Mo.App. S.D.2006). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. In Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 236 (Mo.App. S.D.2008), claimant, while working, heard a loud snap in the back of her left knee before it gave way. 5 Claimant was found to have sustained torn cartilage . Id. During the course of her treatment, it was determined that claimant also suffered from the pre -existing condition of chondromalacia , a condition which was aggravated by the work-place injury. Id. Claimant required arthroscopic surgery and then a subsequent total knee replacement to treat the torn cartilage . Id. Employer refused coverage for both procedures. Id. The Commission awarded claimant temporary total disability, permanent partial disability, and future medical treatment, an award which was affirmed on appeal. Id. at 236–39. Though Employer argued that the claimant would likely have required a total knee replacement at some point in her life anyway due to her pre -existing condition ,*

[P.520] the Southern District held that under section 287.140.1, an employer is responsible for medical treatment, including future medical treatment, if the care “ ‘flow[s] from the accident, via evidence of a medical causal relationship between the condition and the compensable injury.’ ” Id. at 238 (quoting *Bowers*, 132 S.W.3d at 270). Critical to the instant case, the Southern District held:

[W]hether or not [claimant] may have needed future treatment even if the injury did not occur is irrelevant to the analysis of whether the future medical care flows from the injury that actually occurred. Simply put, the injury arose out of [claimant's] employment, the knee replacement surgery was a necessary treatment of the injury and because of the limited life span of knee prosthetics, future medical treatment is likely to be needed. Id.

**Bowers and Stevens highlight the distinction between determining whether a compensable injury has occurred under section 287.020.3(1), and determining what medical care and treatment is reasonably required to treat the compensable injury under section 287.140.1.**

[P.520] *In reaching our conclusion, we are mindful of the Eastern District's decision in Gordon v. City of Ellisville, 268 S.W.3d 454 (Mo.App. E.D.2008) , a decision relied on by the Employer to argue that the issue presented by the instant case has already been determined in favor of the construction of section 287.140.1 advanced by the Employer. We disagree with the Employer's interpretation of Gordon.* In *Gordon*, a claimant was preliminarily believed to have sustained a rotator cuff tear as a result of a work-place accident. However, during surgery to correct the rotator cuff tear , the surgeon found no evidence of acute injury, and found only

evidence of a pre-existing degenerative condition . Id. at 460. As a result, the Commission found (and the Eastern District affirmed) that the claimant had not sustained a compensable injury-that is to say an injury as a result of a work-place accident.

*[P.520]Unfortunately, despite the relatively routine nature of the issue actually in dispute in*

*[P.521] Gordon, the Eastern District framed the issue before it as “whether Claimant established that his 2005 work accident was the prevailing factor in causing his need for rotator cuff surgery and post-surgery recovery. ” Id. at 459 (emphasis added). The Employer has latched on to this language, out of context, to argue that the Eastern District has ruled that the “prevailing factor ” test modifies the otherwise clear and unambiguous standard set forth in section 287.140.1. A full and fair reading of Gordon suggests otherwise. The Eastern District was not endorsing the imposition of a “prevailing factor ” test in determining whether medical treatment is reasonably required under section 287.140.1 once a compensable injury has been found. In fact, construction of section 287.140.1 was not at issue, nor discussed, in Gordon . Gordon cannot and should not be read, therefore, to stand for the proposition that the “prevailing factor ” test applies to determine whether an employer is obligated to provide certain medical care and treatment under section 287.140.1 once a compensable injury has been established under section 287.020.3(1).*

*[P.521]We conclude that the Commission committed error as a matter of law by applying the prevailing factor test to determine whether particular medical treatment was required to treat Tillotson's compensable injury.*

*[P.521]Had the Commission applied the proper standard described in section 287.140.1 to this case, the Commission would have been required to find as a matter of law that the total knee replacement was reasonably required to cure and relieve Tillotson's compensable injury (her torn lateral meniscus ). The opinions of Drs. Stechschulte, Koprivica and Van den Berghe were aligned. Each agreed that Tillotson suffered an acute injury following her work-place accident-a torn lateral meniscus in her right knee. Each agreed that a torn lateral meniscus would normally be remediated by arthroscopic surgery . Each agreed that Tillotson also suffered from a pre-existing degenerative arthritic condition that made her an ineligible candidate for arthroscopic surgery to remediate her torn lateral meniscus . Each agreed that as a result, Tillotson's torn lateral meniscus should be remediated by a total knee replacement . *The only source of disagreement amongst the experts with respect to the causal relationship between Tillotson's torn lateral meniscus and the need for a total knee replacement related to whether the torn lateral meniscus was the “prevailing factor ” requiring the total knee replacement . As we have noted, this dispute is immaterial to determining whether an employer is obligated by section 287.140.1 to provide an employee with particular medical treatment (in this case, a total knee replacement ) because the treatment is reasonably required to cure and relieve the effects of a compensable injury. No medical expert in this case contested that a total knee replacement was reasonably required to cure and relieve the effects of Tillotson's torn lateral meniscus . In fact, the medical experts agreed a total knee replacement was the only effective means available to cure and relieve the effects of Tillotson's torn lateral meniscus .**

*[P.522]Here, the uncontested medical evidence was that there was a causal connection between Tillotson's torn lateral meniscus and medical necessity of treating that injury by a total knee replacement . In fact, counsel for the Employer has agreed that the reasonableness of the total knee replacement is not at issue. 7 Notwithstanding the uncontested medical*

*causation evidence in this case, the Commission found that “Ms. Tillotson required a [total knee replacement ] because of her arthritis alone that existed at the time of her accident.”* (Emphasis added.) The Commission thus improperly substituted its “personal opinion” with respect to the causal relationship between Tillotson's torn lateral meniscus and the need for a total knee replacement in total disregard for the contrary and uncontested medical causation evidence that the torn lateral meniscus could only be treated in Tillotson's case by a total knee replacement .

*[P.522]*We conclude that the Employer was obligated by section 287.140.1 to provide Tillotson with a total knee replacement because a total knee replacement was reasonably required to cure and relieve her compensable injury (the torn lateral meniscus ) given the uncontested medical causation evidence in this case. 8 It necessarily follows that the Commission's rejection of Tillotson's compensation claim (all of which was directly related to, or flowed from, the total knee replacement ) was legally erroneous. We turn, therefore, to consideration of Tillotson's claims for compensation.

*[P.523]*Though the Commission expressly rejected as not credible Dr. Koprivica's causation opinion about whether Tillotson's compensable accident was the “prevailing factor ” in requiring the total knee replacement , the Commission made no such credibility finding with respect to Dr. Koprivica's causation opinion that Tillotson was permanently disabled to some degree due to the torn lateral meniscus and total knee replacement . In fact, the Commission did not question that Tillotson suffered a permanent partial disability. Rather, the Commission was only concerned by the fact that Dr. Koprivica “did not apportion the disability that resulted from [Tillotson's] torn lateral meniscus and the [total knee replacement ].” The Commission found that because a total knee replacement results in the removal of all menisci (and not just the lateral meniscus), “it would be very difficult for a doctor to apportion the disability from a torn lateral meniscus when a [total knee replacement ] is performed,” suggesting it was the Commission's opinion that Tillotson's permanent partial disability was entirely attributable to the total knee replacement . As we have discussed, it is immaterial the manner in which Tillotson's permanent partial disability should or could be allocated between her torn lateral meniscus and the total knee replacement , as Tillotson is entitled to compensation for disability arising out of medical treatment reasonably required by section 287.140.1 to treat a compensable injury. See *Martin*, 220 S.W.3d at 845; *Jennings*, 196 S.W.3d at 560; *Wilson*, 403 S.W.2d at 957. We conclude that Tillotson was entitled to an award for permanent partial disability

*[P.524]*The Commission denied Tillotson compensation for permanent partial disability at the percentage of disability opined by Dr. Koprivica (or at a percentage it might independently have found) because of its erroneous belief that the disability Tillotson suffered from the torn lateral meniscus and from the total knee replacement had to be allocated. As we have discussed, these disabilities coalesce, and were not required to be allocated in this case. Tillotson is entitled to an award for permanent partial disability. However, “[t]he determination of the specific percentage of disability is a finding of fact within the special province of the commission.” *Shipp v. Treasurer of the State*, 99 S.W.3d 44, 53 (Mo.App. E.D.2003) (overruled on other grounds by *Hampton*, 121 S.W.3d at 220).

*[P.524]*Thus Dr. Koprivica testified that Tillotson should be provided with appropriate monitoring, and that if necessary, her total knee replacement should be revised. 10 Dr. Koprivica's testimony that Tillotson's compensable injury (and related required medical care) will require the need for future medical care was an uncontroverted medical causation opinion. The Commission was not free to substitute its personal opinion on the subject of future

medical care. Angus, 328 S.W.3d at 300. *The Commission did not reject Dr. Koprivica's opinion that Tillotson would require future medical care as not credible. 11 Rather, the Commission denied Tillotson compensation for future medical care “[because] ... Ms. Tillotson's accident was not the prevailing factor in causing her [total knee replacement].” As we have discussed, the legal foundation for the Commission's determination was erroneous.*

[P.524] [16] *“To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” Stevens, 244 S.W.3d at 237 (quoting ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that,*

*[P.524] because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required.” Id. Tillotson met her burden to establish that future medical care would be necessary based on our review of the record as a whole.*

[P.524] Dr. Koprivica's testimony that Tillotson's compensable injury (and related required medical care) will require the need for future medical care was an uncontroverted medical causation opinion. The Commission was not free to substitute its personal opinion on the subject of future medical care. Angus, 328 S.W.3d at 300. *The Commission did not reject Dr. Koprivica's opinion that Tillotson would require future medical care as not credible. 11 Rather, the Commission denied Tillotson compensation for future medical care “[because] ... Ms. Tillotson's accident was not the prevailing factor in causing her [total knee replacement].” As we have discussed, the legal foundation for the Commission's determination was erroneous.*

[P.525]*In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.* Because the uncontested medical evidence established that a total knee replacement was reasonably required to treat Tillotson's torn lateral meniscus, Tillotson is entitled to recover the cost of the total knee replacement surgery, for total disability during the recuperative period following the total knee replacement, for permanent partial disability resulting from the total knee replacement, and for future medical expenses necessitated by the total knee replacement.

#### **WHITELEY V. CITY OF POPLAR BLUFF, 350 S.W.3d 70 (MO. APP. S.D. 10-11-2011)**

**(INJURY BY ACCIDENT OR BY A HAZARD OR RISK UNRELATED TO THE EMPLOYMENT TO WHICH WORKERS WOULD HAVE BEEN EQUALLY EXPOSED OUTSIDE OF AND UNRELATED TO THE EMPLOYMENT IN NORMAL NONEMPLOYMENT LIFE; PRE-EXISTING PERMANENT PARTIAL DISABILITY)**

#### **Facts and Procedural Background**

[P.72]*Whiteley started as the chief of police with the Poplar Bluff Police Department (“PBPD”) in June 2000, and has continued to work for City. Whiteley's job duties required him to oversee all operations of the PBPD. Prior to his employment with City, Whiteley spent*

*several years as a professional bull rider. Whiteley was sixty-three years old at the time of the hearing.*

*[P.72]On October 29, 2006 (the “2006 accident”), after Whiteley finished patrolling a designated high-crime-rate area, he went to a car wash to clean his patrol car. Whiteley was attempting to wash the inside of the windshield when he injured his neck. He was standing outside of the patrol car on the driver's side with the front door open, and leaned inside the car reaching with a rag to clean the windshield behind the steering wheel. As Whiteley extended his arm to clean the windshield, he felt a tearing sensation in his neck. Whiteley had an immediate onset of pain on the right side of his neck, and later developed a muscle spasm that caused a visible knot on the right side of his neck.*

*[P72-73]Whiteley testified that having clean patrol cars was important for the City's image, and for safety reasons. If the windshield was dirty or had a film on the \*73 inside, it could create impaired visibility, especially at night. Whiteley also noted that it was critical for police officers to be able to see and observe things clearly when driving their patrol cars. It was an integral part of the job. Police officers with the PBPD were responsible for keeping their patrol cars “as clean and uncluttered as possible.” This job related duty was documented in paragraph “I. Vehicle Use,” subparagraph B.3. of the “MOTOR EQUIPMENT” policy.*

*[P.73]Additionally, the officers used a “VEHICLE EQUIPMENT SAFETY CHECKLIST” that required them to periodically check the equipment and other listed items on their patrol cars. One of the categories on the checklist was “WINDSHIELD (CLEAN).” To assist the police officers with this responsibility, City had a designated area at the PBPD where the officers washed their patrol cars and cleaned the windows, with City furnishing water, a commercial vacuum cleaner, and other supplies.*

*[P.73]Higher ranking officers with the PBPD, including Whiteley, were assigned their own patrol cars. The officers, as part of their assigned duties, were generally expected to wash their patrol cars and clean the windows at the end of each shift. Whiteley testified that depending on the weather, he normally washed his patrol car and cleaned the windows one or more times each week. As chief of police it was important for Whiteley to set a good example and keep his patrol car clean.*

*[P.73]On October 30, 2006, City authorized Whiteley to get medical treatment at Ozark Foothills Industrial Medicine Clinic with Dr. Austin R. Tinsley. 1 Whiteley initially saw Nurse Practitioner Amy Robertson. Her assessment was an acute right cervical spasm . She prescribed Skelaxin , Flexeril and therapy. Later that same day, Whiteley went to see Dr. Tinsley at the Tinsley Medical Clinic where he received a Torodol injection.*

*[P.73]Whiteley returned to Dr. Tinsley on November 1, 2006. Dr. Tinsley noted Whiteley could only rotate his head approximately 45 degrees either way. Dr. Tinsley diagnosed Whiteley with “[a]cute cervical strain ” and “suspect[ed] some preexisting cervical DJD [degenerative joint disease ] noting multiple trauma [Whiteley] sustained when riding bulls.”*

*[P.73]On November 9, 2006, City notified Whiteley it was denying Whiteley's claim and advised him that he would have to use his personal insurance to obtain treatment.*

*[P.73]On November 10, 2006, Dr. Tinsley ordered an MRI of Whiteley's cervical spine.*

***The MRI findings included degenerative disc disease and some disc bulging in the cervical spine.***

***[P.73]On November 13, 2006, Whiteley returned to see Dr. Tinsley and his impression was, “Acute cervical strain , superimposed on severe cervical disc disease , post traumatic from multiple injuries in the past.” When questioned about what Dr. Tinsley meant by “multiple injuries in the past,” Whiteley explained***

***[P.73]Dr. Tinsley had treated him for several injuries he suffered from bull riding, but that he had no prior injuries or treatment for his neck.***

***[P.73-74]On November 20, 2006, Whiteley saw Dr. Tinsley again and reported persistent, worsening neck pain. Dr. Tinsley referred Whiteley to Dr. Yuli Soeter, a pain management specialist. Dr. Soeter noted that Whiteley had “lost the range of motion of his cervical spine completely.” Dr. Soeter's diagnosis was: (1) cervical disc displacement, without myelopathy ; (2) right occipital nerve neuralgia; and (3) spinal enthesopathy , right paracervical region. Dr. Soeter's plan and treatment included \*74 cervical epidural injections , trigger point injections, a right occipital nerve block and physical therapy. Whiteley received the injections, nerve block and therapy. Whiteley's final visit with Dr. Tinsley occurred on December 4, 2006. Dr. Tinsley's exam revealed “much less spasm, no dysesthesias, otherwise normal except for some pain at extremes.” *Whiteley concluded his treatment with three physical therapy sessions at Ozark Physical Therapy on December 12, 14 and 15, 2006. 2****

***[P.74]On December 6, 2006, Whiteley filed his “Claim for Compensation” against City, including therein a claim against the Second Injury Fund (“SIF”) for injuries to his left upper/lower extremity and right lower extremity. 3 Whiteley did not miss work and did not make any claim for temporary total disability.***

***[P.74]Whiteley testified he still had constant right neck pain in the area where the knot or spasm was located and described problems he had in doing his job. Whiteley rated his pain at a six or seven out of ten at its worst when doing these activities. On a normal day, Whiteley rated his neck pain in the range of two to four out of ten. Whiteley relieved the pain in his neck by taking Motrin daily and hydrocodone occasionally. He also did pressure point treatments that were suggested by Dr. Soeter.***

***[P.74]During the three years preceding his 2006 accident, Whiteley indicated that with the exception of occasional stiffness, he did not have any symptoms in his neck and his neck did not bother him or affect his ability to do his job. Whiteley explained he had an immediate onset of symptoms after his 2006 accident. He also agreed that while he may have had pre-existing degenerative conditions in his cervical spine, he was unaware of those conditions.***

***[P.74]During his bull riding career, Whiteley had several significant injuries including fractured ribs, fractures to his right tibia/ fibia, an injury to his right arm, and an injury to his left shoulder. Both Whiteley's testimony and the medical records confirmed he did not have any injuries or significant treatment for his cervical spine or neck before his 2006 accident.***

***[P.74]On July 15, 2002 (“2002 accident”), Whiteley also had a claim resulting from a suspect intentionally rear-ending his patrol car. Both the claim and the compromise settlement agreement, listed “back, neck and shoulders” as the parts of the body injured in the 2002 accident. The compromise settlement agreement for this injury was based on approximately***

**6% of the body as a whole related to the neck, back and shoulders. Whiteley recalled signing that agreement, but did not agree he suffered any injury to his neck as a result of the 2002 accident. Whiteley stated that his neck may have been a little sore, but his injury and all of his treatment, was to the mid-back or thoracic spine.**

**[P.74-75]Dr. Tinsley noted on June 23, 2003, that Whiteley had an “[o]ld workmen's comp injury ... had a whiplash type injury[ ]”; \*75 however, Dr. Tinsley never mentioned Whiteley's neck in this record. Earlier records established that all of Whiteley's treatment after the 2002 accident was for pain in the thoracic area. An MRI ordered by Dr. Tinsley on September 13, 2002, showed “CONSISTENT BACK PAIN FOLLOWING MVA.” The MRI was a scan of the thoracic spine to L3, and did not include the cervical spine. There were no records of any x-rays or MRIs of the cervical spine after the 2002 accident. The extensive medical records of Dr. Tinsley go back to 1979, and there are no references to Whiteley's neck or cervical spine before his 2006 accident.**

**[P.75]On January 20, 2005, Whiteley obtained an independent medical evaluation (“IME”) and report from Dr. Raymond Cohen for his 2002 accident. Dr. Cohen diagnosed Whiteley with “[m]oderately severe thoracic myofascial pain disorder.” Dr. Cohen gave a rating of “20% whole person disability at the level of the thoracic spine.” He did not diagnose any injury or assign any disability to Whiteley's cervical spine or neck.**

[P.75]The records of Whiteley's chiropractor, Dr. Jack Rushin, indicate Whiteley made regular visits for adjustments from 2001 through the date of Whiteley's 2006 accident. Whiteley's primary complaint was discomfort in his low back. Although Whiteley had periodic adjustments to his lumbar, thoracic, and cervical spine, Whiteley emphasized that these adjustments were done to his whole spine regardless of his complaints and were merely a part of the “chiropractic theory of treatment.” Out of approximately 51 treatment records of Dr. Rushin, there were only two records indicating Whiteley had any specific complaints or symptoms to his cervical spine.

[P.75-76]On August 29, 2008, Dr. Thomas F. Musich performed an evaluation of Whiteley, at Whiteley's request. Dr. Musich's IME report of the same date was admitted into evidence. Other than one medical record of Dr. Rushin in September 2003, Dr. Musich found no history of any preexisting problems with Whiteley's neck or cervical spine. Dr. Musich's physical examination revealed “straightening of the normal cervical lordosis [;] ... focal subjective pain to deep palpation over the right paracervical musculature with spasm palpable[;] ... a loss of 20% cervical extension[;] and a loss of 25% right cervical rotation and right cervical lateral flexion due to end range pain.” Dr. Musich reached the following conclusions regarding the primary injury:

**It is my opinion, based upon a reasonable degree of medical certainty that Danny Whiteley suffered significant work related neck trauma on or about October 29, 2006 during the course and scope of his employment by The City of Poplar Bluff Police Department. It is my medical opinion that the work trauma of October 29, 2006 is the prevailing factor in the development of acute and severe right neck pain which required extensive evaluation and aggressive conservative treatment. It is my medical opinion that the work trauma of October 29, 2006 is causally related to this patient's persistent post traumatic neck symptoms due to symptomatic cervical disc displacement, right occipital nerve neuralgia and symptomatic spinal enthesopathy \*76 of the right paracervical region.**

[P.76]On January 14, 2009, at City's request, Dr. Russell C. Cantrell evaluated Whiteley and detailed his findings in a report of the same date. Dr. Cantrell's deposition was also taken. Dr. Cantrell reviewed Whiteley's medical records and other documents related to medical treatment both before and after the 2006 accident. ***Dr. Cantrell mentioned Dr. Tinsley's June 23, 2003 record in which he referenced an “[o]ld workmen's comp injury” in which Whiteley had a “whiplash type injury.” Dr. Cantrell acknowledged, however, that the trigger point injection for that injury was in the inferior medial scapular area to T-11, and not to Whiteley's neck.*** During Dr. Cantrell's discussion of the 2002 accident, he focused on the fact that both the claim for compensation and the compromise settlement agreement listed injury to Whiteley's neck, back and shoulders. ***Dr. Cantrell agreed, however, that the treatment after the 2002 accident was for the thoracic spine and there was no record of any treatment for Whiteley's neck. Dr. Cantrell also acknowledged that in Dr. Cohen's IME report for the 2002 accident, Whiteley's current complaints did not include any reference to his neck. Dr. Cohen's report also indicated that he did not perform an examination of Whiteley's cervical spine. Dr. Cantrell also agreed that Dr. Cohen's diagnosis and disability rating for the 2002 accident were for an injury to the thoracic spine and did not include Whiteley's neck.***

[P.76]Dr. Cantrell also reviewed the chiropractic records of Dr. Rushin. Dr. Cantrell emphasized that these records indicated Whiteley had limited range of motion in his cervical spine and received regular adjustments that included his cervical spine. ***Dr. Cantrell then agreed that the chiropractic records did not support a conclusion that Whiteley had a pattern of neck pain before his 2006 accident.***

[P.76]***In his report, Dr. Cantrell concluded “within a reasonable degree of medical certainty, that the events of October 29, 2006, [were] not the prevailing factor in the cause of [Whiteley's] medical condition for which he received extensive treatment....” He noted that the activities Whiteley described in cleaning the windshield “may have served as a contributing factor to a diagnosis of a cervical strain superimposed on preexisting degenerative disk disease within [Whiteley's] cervical spine....” Dr. Cantrell went on to explain the findings on the MRI represented a “progressive degenerative process, not uncommonly seen in an individual of Whiteley's age” and that his opinion was further supported by the chiropractic findings. Dr. Cantrell gave Whiteley a 5% permanent partial disability of the person as a whole referable to Whiteley's cervical spine pain complaints, 4% to pre-existing degenerative pathology, and 1% to a diagnosis of cervical strain referable to the 2006 accident. Dr. Cantrell also stated, “It is lastly my opinion that it is equally likely that Mr. Whiteley may have experienced similar onset of pain complaints if he were engaged in similar activities of washing a vehicle outside the scope of his employment.”***

[P.76-77]During cross-examination, Dr. Cantrell agreed that Whiteley's neck was basically asymptomatic and he was not having any neck pain before his 2006 accident. Dr. Cantrell also agreed that both he and Dr. Tinsley diagnosed Whiteley with an acute cervical strain superimposed on cervical degenerative disc disease, and that there was no medical evidence Whiteley received any treatment for neck pain before his 2006 accident. Dr. Cantrell acknowledged Whiteley received extensive conservative treatment and it was close in time to the \*77 2006 accident. ***Dr. Cantrell admitted Whiteley's cervical sprain /strain was “a new injury” and he assigned permanent partial disability because of that new injury. Dr. Cantrell also agreed that if Whiteley had not had the 2006 accident, Whiteley would not have needed medical treatment at that time.***

[P.77]***On March 30, 2010, Whiteley's worker's compensation claim against City was heard. On July 1, 2010, the ALJ issued her award finding: (1) that “based on all of the***

*evidence presented ... the causation opinion of Dr. Cantrell [was] more credible than the causation opinion of Dr. Musich”; (2) that “[Whiteley's] cervical injuries sustained on October 29, 2006[,] [were] not medically causally related to [Whiteley's] alleged work accident[ ]”; (3) that “[Whiteley's] alleged work accident ... [was] not the prevailing factor in causing [Whiteley's] medical condition[ ]”; and (4) that “[b]ased on the denial of medical causation, all other issues [were] moot[,] ... will not be ruled upon[,] ... [and] the primary claim has been denied.”*

[P.77]Subsequently, Whiteley filed his “Application for Review” with the Commission. On March 22, 2011, the Commission issued its Final Award reversing the ALJ's award finding that the 2006 accident “was the prevailing factor in causing [Whiteley's] cervical spine condition ... [and] that [Whiteley] shall be awarded past medical expenses and permanent partial disability benefits.” The Commission also awarded: (1) \$5,740.67 in past medical expenses; (2) 7.5% permanent partial disability to the body as a whole rated at the cervical spine or \$11,296.50; (3) credit to City in the amount of \$123.26 for overpayment of mileage expense; and (4) attorney fees. This appeal followed.

[P.77-78] [1] *City contends the Commission erroneously interpreted and applied section 287.020.3 as to the definition of “accident” 4 because undisputed facts show Whiteley was not engaged in work activity integral to his employment*, and that the Commission's decision was not supported by competent and substantial evidence in that it disregarded evidence of Whiteley's pre-existing injuries. City further contends the Commission erred in awarding Whiteley past medical expense. The issues for our determination are:

- 1. Did the Commission err in concluding Whiteley sustained an injury by accident because the facts showed Whiteley was not engaged in work integral to his employment?*
- 2. Did the Commission ignore evidence that Whiteley had a pre-existing neck condition severe enough to defeat the award which concluded his neck injury was caused by his work?*
- 3. Was the award of past medical expenses of \$5,740.67, proven to be \*78 medically necessary and causally related to Whiteley's work injury?*

#### **[P.78]Point I: Whiteley Sustained an Injury by Accident**

[P.78]*City first contends the Commission erroneously interpreted and applied section 287.020.3 in ruling Whiteley sustained an injury by accident because the undisputed facts show Whiteley was not engaged in any work activity integral to his employment, and was equally likely to experience similar onset of neck injury while performing similar movements outside his employment. We disagree.*

[P.78]Section 287.020.3(2) provides:

[P.78]An injury shall be deemed to arise out of and in the course of employment only if:  
(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and  
(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

[P.78]Here, City specifically contests the Commission's finding as to section

287.020.3(2)(b). *In Pile v. Lake Regional Health System*, 321 S.W.3d 463 (Mo.App.S.D.2010) this Court explained that the application of this subsection involves a two-step analysis:

*The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such case, there is a clear nexus between the work and the injury.*

[P.79]Id. at 467. *Significantly, this Court determined that*

*[w]here the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal nonemployment life. Only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life.*

[P.79][6]Here, Whiteley offered extensive evidence to establish that the activity of keeping the windshield of his patrol car clean was an integral part of his job as a police officer for City, and thus there is a clear nexus between the job of being a police officer and keeping patrol cars clean. Whiteley testified regarding the importance of keeping patrol cars clean and the windows washed for both City's image and for safety reasons. 6 Furthermore, this job-related duty was documented in the "MOTOR EQUIPMENT" policy and the "VEHICLE EQUIPMENT SAFETY CHECKLIST." City also designated an area at the police station with equipment and supplies to assist police officers with this responsibility. It is significant to note that the ALJ included almost all of this evidence in her "Findings of Fact" under "Cleaning of patrol cars." Thus competent and substantial evidence supported a finding that the activity of keeping patrol cars clean was an integral part of the job of the PBPB officers. City has offered no evidence to refute Whiteley's testimony regarding the nexus between his job, and the activity of cleaning his patrol car that led to his injury. Because the work nexus is clear in this case, we neednot consider whether the worker would have been equally exposed to the risk in normal non-employment life. See *Pile*, 321 S.W.3d at 467. Accordingly, the Commission did not err in concluding Whiteley sustained an injury by accident because the facts demonstrated Whiteley was engaged in work integral to his employment. Point I is denied.

#### [P.79](A)Evidence of "Whiplash Injury ."

[7] City, and its medical expert, repeatedly rely on the fact that Whiteley had a "whiplash type injury" as a result of the 2002 accident. While the phrase "whiplash type injury" typically denotes an injury to the neck, the medical records make it clear that Whiteley injured his thoracic spine rather than his cervical spine in this accident.

[P.80]During a discussion of the 2002 accident, the Commission stated, "There was an MRI scan taken of [Whiteley's] thoracic spine down to L3 and [Whiteley]was given a 20% permanent partial disability rating of the body as a whole at the level of the thoracic spine, but no medical evidence suggested that [Whiteley] suffered a cervical spine injury ." As such, there is no evidence to support a finding that the Commission improperly and arbitrarily disregarded any alleged uncontroverted evidence of Whiteley's prior whiplash injury to the cervical spine; a whiplash injury to the thoracic spine is not relevant here.

[P.80] (B) Pre-existing Symptomatic Cervical Degenerative Disc Disease .

[8] *City also contends there was uncontroverted evidence of Whiteley's "pre-existing symptomatic cervical degenerative disc disease." This is also incorrect.* While Whiteley did have pre-existing degenerative disc disease, there is no credible evidence to support City's claim that this pre-existing condition was symptomatic. A careful review of the evidence led both the ALJ and the Commission to conclude that Whiteley did not have any significant symptoms or treatment for his neck or cervical spine prior to his 2006 accident; we agree that this conclusion is supported by the evidence. *In regard to his career as a professional bull rider, Whiteley admitted he had significant injuries, however, Whiteley denied any prior injuries or medical treatment for his cervical spine or neck. Although Whiteley frequently visited the doctor, and had a number of injuries and health problems over the years, none of the participants in this case (attorneys, doctors, ALJ or Commission) have found any entries in the records to support City's argument that Whiteley had a preexisting symptomatic degenerative disc disease in his cervical spine.*

[P.80] Absent medical records to support its position, City relied on the 2002 compromise settlement records. The 2002 compromise settlement described Whiteley's 2002 accident and the resulting whiplash injury to his thoracic spine. There is only a superficial conclusion that Whiteley injured his neck, back and shoulders as a result of the 2002 accident. The compromise settlement agreement indicates the settlement was based on "an approximate disability of 6% of the body as a whole related to the neck, back and shoulders." Whiteley testified his neck may have been a little sore after the 2002 accident, but his injury and all of his treatment was to the midback or thoracic spine.

[P.81] In support of its position that Whiteley had a symptomatic degenerative condition in his cervical spine, City also relies on the chiropractic records of Dr. Rushin. According to City's count, Whiteley received adjustments to his cervical spine in 43 of the 51 chiropractic visits. As noted by both the ALJ and the Commission in their findings, however, out of all the chiropractic visits, there were only two records that indicated Whiteley had any specific complaints or symptoms in his cervical spine. Whiteley acknowledged the regular adjustments to his cervical, thoracic and lumbar spine, but emphasized that this was done to his whole spine regardless of his complaints, and was part of the "chiropractic theory of treatment." *A complete review of those records does not support City's suggestion that Whiteley's cervical spine was symptomatic before his 2006 accident.*

[P.81] The final flaw in City's position was the admissions of Dr. Cantrell. *Although Dr. Cantrell emphasized Whiteley's cervical degenerative disc problems, he admitted during cross-examination that prior to the 2006 accident, Whiteley was "basically asymptomatic," not having any neck pain and other than chiropractic adjustments, Whiteley was not getting any real treatment. Dr. Cantrell also acknowledged that there was no documentation Whiteley had pain in his neck prior to his 2006 accident because he had no treatment for neck pain prior to that date.* Accordingly, the evidence does not support a finding that Whiteley had pre-existing symptomatic degenerative disease in his cervical spine or any significant treatment for that condition prior to his 2006 accident; the Commission's findings did not ignore evidence and are supported by competent and substantial evidence.

[P.81-82] (C) *Pre-existing Permanent Partial Disability Presumed Under Section 287.190.6.*

[9] City also alleges the Commission "improperly and arbitrarily disregarded" the evidence of pre-existing permanent partial disability to the neck that must be presumed to continue under section 287.190.6(1), which provides: 'Permanent partial disability' means a disability that is permanent in nature and partial in degree, and when payment therefor has been made in

accordance with a settlement approved either by an administrative law judge or by the labor and industrial relations commission, a rating established by medical finding, certified by a physician, and approved by an administrative law judge or legal advisor, or an award by an administrative law judge or the commission, the percentage of disability shall be conclusively presumed to continue undiminished whenever a subsequent injury to the same member or same part of the body also results in permanent partial disability for which compensation under this chapter may be due.... § 287.190.6(1) (emphasis added). A full reading of section 287.190.6(1) makes it clear that it does not apply here. 8 As previously noted, the evidence does not \*82 support a finding that Whiteley suffered any injury or permanent partial disability to his neck or cervical spine as a result of the 2002 accident. Section 287.190.6(1) initially defines permanent partial disability as “a disability that is permanent in nature and partial in degree.” The evidence reviewed previously, and the findings of the Commission, confirm Whiteley did not suffer any disability to his neck or cervical spine as a result of the 2002 accident that was “permanent in nature and partial in degree.” The “payment therefor” that is required by this section was based on Dr. Cohen's diagnosis and rating of an injury to the thoracic spine. No payment was made for a cervical injury. Thus, the provisions of section 287.190.6(1) are not applicable.

**HORNBECK V. SPECTRA PAINTING, INC., 370 S.W.3d 624 (MO. BANC. 7-31-2012)**

**[I KNOW--THIS IS NOT A PRE-EXISTING INJURY CASE !!]**

**(DISTINCTION BETWEEN COMPENSABILITY AND MEDICAL TREATMENT;  
FOCUS ON WHETHER THE ACCIDENT IS THE PREVAILING FACTOR IN  
CAUSING THE RESULTING MEDICAL CONDITION AND DISABILITY; INJURIES  
VS. TREATMENT)**

**[P.626]I. Background**

**[P.626-627]***Terry Hornbeck was employed by Spectra Painting, Inc., as a painter and drywall taper. He suffered a work-related accident in November 2006 when he fell 10 feet from a ladder onto a concrete surface. The ladder from which he fell was on a makeshift scaffolding platform. After his fall, Hornbeck was taken to the emergency room with complaints of pain in his feet, legs, back, and left shoulder. No structural abnormalities were diagnosed, and he was released from the hospital the same afternoon as his fall. In the coming months, he visited three physicians provided by Spectra. Because none of those \*627 physicians diagnosed a physical cause for his continued discomfort and pain, he was released in April 2007 to return to work.*

**[P.627]***In October 2007, still complaining of pain, Hornbeck utilized his own insurance to obtain additional medical care.*

**[P.627]***Seeking additional compensation for his ongoing medical treatments, Hornbeck moved in January 2008 for a hearing before an administrative law judge (ALJ) pursuant to section 287.203. 3*

**[P.627]***The ALJ's findings included that, from November 2006 to April 2007, Spectra had paid Hornbeck \$32,801.15 in medical expenses and \$16,754.88 in TTD benefits. Spectra also had paid him a \$7,000 indemnity credit against any further liability in the case. The ALJ determined that Hornbeck was not entitled to further payments for his unpaid medical*

*expenses or future medical treatments. He found that Hornbeck had reached maximum medical improvement (MMI) for his work-related injury on April 24, 2007. \*\*\*\*The ALJ refused to award Hornbeck the additional benefits he sought in his petition because he found that Hornbeck's "treatment undertaken and medical expenses incurred [after his April 2007 MMI date] [were] unrelated to [his workrelated] injury ."*

[P.627]*The ALJ concluded that Hornbeck's 2006 work injury caused him to suffer permanent partial disability (PPD) of 20 percent of his left bicep, 5 percent for each of his feet, and 2.5 percent of his total body as a whole for lower back pain.* He found that Hornbeck's injuries warranted application of a 5–percent multiplicity factor . He also indicated that Hornbeck was entitled to 42.4 weeks of PPD compensation from the SIF.

## [P.627-628]II. The Commission's Findings

[P.627-628]*As he had in his case presented to the ALJ, Hornbeck largely premised his case before the Commission on testimony by his osteopathic physician, Dr. Volarich, who had started treating him in March 2008.* 5 \*628 The Commission also examined Hornbeck's treatment records from three physicians who had treated him beginning in October 2007, 6 as well as the treatment records from Hornbeck's Spectra-provided physicians who had treated him after his initial complaints of pain and discomfort. 7 *In deciding Hornbeck's case, the Commission expressly found that the medical opinions of the Spectra-provided physicians were more credible than the opinions offered by Dr. Volarich. The Commission affirmed the ALJ's decision to deny Hornbeck's requests for additional medical benefits after concluding that Hornbeck had "failed to demonstrate that [his work-related injury in November 2006] was the prevailing factor resulting in a medical condition that warranted treatment after [he had reached MMI in] April 2007."* 8

[P.628]*The Commission's decision highlighted its disagreement with the standards of proof that it believed that the ALJ had applied, and it sought to clarify the appropriate standards for determining the issue of medical causation.* The Commission also expressly found that TTD benefits had not been underpaid to Hornbeck, which was an issue that the ALJ had not reached. The Commission approved and affirmed the attorneys' fees and costs that had been awarded by the ALJ.

[P.628]Contrary to the ALJ, however, the Commission found in favor of Hornbeck that Spectra had violated the scaffolding act and was required to pay the 15–percent penalty under section 287.120.4. The Commission indicated that the 15–percent penalty applied to the compensation awards entered by the ALJ. *Hornbeck and Spectra both appeal the Commission's decision.* 9

[P.629]This Court defers to the Commission's factual findings and recognizes that it is the Commission's function to determine credibility of witnesses. *CNW Foods, Inc. v. Davidson*, 141 S.W.3d 100, 102 (Mo.App.2004) . This Court “may not substitute its judgment on the evidence,” and when the “evidence before an administrative body would warrant either of two opposed findings, the reviewing court is bound by the administrative determination, and it is irrelevant that there is supportive evidence for the contrary finding.” *Pulitzer Pub. Co. v. Labor & Indus. Relations Comm'n*, 596 S.W.2d 413, 417 (Mo. banc 1980) .

[P.629]\*\*\*\*\**Hornbeck further argues that the Commission erred in entering a final PPD award because it misapplied the law and made findings contrary to the overwhelming*

*weight of the evidence when it agreed with the ALJ's determinations that he had reached MMI in April 2007. He asserts that the Commission wrongly determined that he had failed to prove that his medical treatments and claimed disabilities after April 2007 were related to his compensable November 2006 work injury .*

*[P.631]Essentially, he contends that the overwhelming weight of the evidence shows that he required medical treatment after April 2007 that related to his November 2006 work injury . He asserts that the Commission applied the wrong standards for assessing his claims, and heurges that he is entitled to attorneys' fees and costs beyond the amounts awarded by the ALJ.*

#### **[P.631]1. Witness Credibility Determinations**

*[P.631-632] [8] Hornbeck asserts throughout his brief that the Commission erred in not finding credible his medical expert, Dr. Volarich. **He argues that, when assessing the necessity for medical treatments after the April 2007 MMI date entered by the \*632 ALJ, the Commission wrongly credited the evidence from the Spectra-provided physicians over the evidence provided by Dr. Volarich.** [9] [10] Despite Hornbeck's numerous arguments advancing the reliability of Dr. Volarich's testimony, this Court refuses to engage in reassessing the credibility of the evidence presented in this case. Whether 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. *Johnson v. Denton Constr. Co., 911 S.W.2d 286, 288 (Mo.banc 1995).**

#### **[P.632]2. Acceptance of the MMI Date Entered by the ALJ**

*[P.632]At the heart of Hornbeck's complaints about the Commission's failure to accept Dr. Volarich's testimony is his belief that the Commission wrongly refused to rely on Dr. Volarich's opinion that Hornbeck had not yet reached MMI as of the April 2007 date decided by the ALJ. This argument, however, is not persuasive because it was the Commission's prerogative to discount Dr. Volarich's MMI testimony in favor of the three physicians whose medical opinions supported that Hornbeck reached MMI in April 2007. This issue presents a matter of witness credibility and the weight to be given to conflicting evidence, and this Court must give deference to the Commission's findings. See *Johnson, 911 S.W.2d at 288.**

#### **[P.632]3. Medical Causation Determinations**

*[P.632] [11] Hornbeck argues that this Court should reverse the Commission's decision that he was not entitled to additional benefits for his treatments after April 2007 because he had not demonstrated that his November 2006 work injury was the “prevailing factor” in causing his medical condition requiring those treatments.*

*[P.632]\*\*\*\*The Commission's decision incorporated the following statements concerning a “prevailing factor” assessment:*

*[P.632]The appropriate standard of proof for medical causation is found at [section] 287.020.3(1)[, RSMo Supp.2005]: “An injury by accident is compensable only if the accident was the prevailing factor [ 13 ] in causing both the resulting medical condition and disability.” We agree [with Hornbeck] that the [ALJ's] failure to identify or cite appropriate standard of proof raises the question of whether the appropriate standard was applied.*

*[P.632-633]Our supplemental opinion on the issue of medical causation ... is intended*

***to clarify the issue and to make clear that the appropriate standard of proof has been applied to [Hornbeck's] claim. We affirm the [ALJ's award] because we conclude that [Hornbeck] failed to demonstrate \*633 that the work injury was the prevailing factor resulting in a medical condition that warranted treatment after April 2007.***

[P.633]In discussing the medical causation standards for Hornbeck's case, the Commission also incorporated additional “prevailing factor” language:

[P.633]Employer's termination of treatment and [TTD] benefits are vigorously disputed in this case. ***The parties agree that employee sustained compensable injuries when he fell from a scaffold in the course of his duties.... The key issue is the nature and extent of the medical condition and disability resulting from that accident. “Injury” and “accident” are defined by [section 287.020 RSMo . Section 287.020.3(1) RSMo defines “injury” as an injury that arises out of and in the course of employment:***

In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

[P.633]If an injury by accident is compensable under the Workers' Compensation Law, we look to [section] 287.140.1 RSMo [ 14 ] to determine employer's liability to provide treatment for the injury :

[P.633]In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical ... treatment ... as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

[P.633]\*\*\*\****Given the language of the foregoing sections, [Hornbeck's] burden is to show that [his work-related fall in November 2006] was the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 24, 2007 (the date on which [Spectra's] treating doctors found [Hornbeck] to have reached [MMI] ). In support of his claim, [Hornbeck] offers the testimony of Dr. David Volarich, who performed an independent medical examination....***

....

[P.633]Although we disagree with the comments and rationale of the administrative law judge for discounting the opinion of Dr. Volarich, we do agree that the opinion of Dr. Volarich does not provide a convincing basis for the award sought by [Hornbeck].

....

[P.633]\*\*\*\****We find Drs. Chabot, Paletta, and Aubuchon more credible than Dr. Volarich. We conclude that the work injury of November 9, 2006, was not the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 24, 2007.***

[P.633-634]\*\*\*\*Citing *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511 (Mo.App.2011), ***Hornbeck argues that the Commission's application of a “prevailing factor” standard in his case was improper. He argues that Tillotson provides that his claims for additional treatments after April 2007 were supported so long as he could prove that the treatments flowed from his compensable work injury . See \*634 Tillotson, 347 S.W.3d at 519***

(explaining that “in determining whether medical treatment is ‘reasonably required’ to cure or relieve a compensable injury , it is immaterial that the treatment may have been required because of the complication of pre -existing conditions, or that the treatment will benefit both the compensable injury and a pre -existing condition;” and stating that “once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury ” and “[t]he fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant”).

**[P.634]***Tillotson* reversed a Commission decision denying workers' compensation benefits to a claimant who had a total knee replacement surgery for which her employer refused to pay because it contended the surgery was most related to a preexisting arthritis condition and not to the employee's compensable work-related injury. 347 S.W.3d at 517. *The claimant there argued to the Commission that “section 287.140.1 guarantees an injured worker the right to medical treatment reasonably necessary to cure and relieve the effects of a compensable injury and does not require a finding that a work place accident was the prevailing factor in causing the need for particular medical treatment.” Id. Her employer, however, argued that “section 287.140.1 [includes] the requirement that a compensable injury is the prevailing factor in requiring particular medical treatment” before the treatment is compensable in workers' compensation. Id. The court agreed with the claimant. Id.*

**[P.634]***\*\*\*\*Tillotson articulated that there is a “material distinction between determining whether a compensable injury has occurred and determining the medical treatment required to be provided to treat a compensable injury.” Id. It stated: That distinction is framed by section 287.120.1 which ... requires two independent inquiries. First, it must be determined whether an employee has suffered a compensable injury ‘by accident arising out of and in the course of employee's employment.’ Section 287.120.1.*

**[P.634]***Second, if a compensable injury has been sustained by an employee, the appropriate compensation to be furnished must be determined. [Section 287.120.1].*

**[P.634]**The court found that when the “prevailing factor ” test was met for determining that there was a compensable injury at issue in the case , there was no need for the Commission to additionally apply a “prevailing factor ” assessment in determining the compensability of the medical treatments for which the claimant sought compensation. See *id.* at 517–18.

It opined:

*Section 287.140.1 makes no reference to a “prevailing factor ” test and, as previously noted, presumes of necessity that the presence of a compensable injury under section 287.020.3(1) (which does require application of the prevailing factor test) has already been demonstrated. The legal standard for determining an employer's obligation to afford medical care is clearly and plainly articulated in section 287.140.1 as whether the treatment is reasonably required to cure and relieve the effects of the injury.*

**[P.634-635]***Tillotson went on to declare that “once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury.” Id. at 519. \*\*\*\*Tillotson did not make new law but, rather, articulated the statutory requirements that were already in place \*635 for determining the compensation due to the claimant pursuant to section 287.140.1, which provides that an employer shall provide the claimant the treatment that “may reasonably be required ... to cure and relieve from the effects” of the work-related injury. See *Tillotson*, 347 S.W.3d at 518–19.*

[P.635]\*\*\*\**Hornbeck is correct that the Commission in his case , as in Tillotson, refused to compensate treatment that was claimed to relate to a compensable work injury but that the employer believed was not caused by the work injury as a “prevailing factor .” 15* \*\*\*\* *In Tillotson, the Commission had found that the “conceded compensable injury was not the ‘prevailing factor’ in requiring a total knee replacement.”* Id. at 518. \*\*\*\**In Hornbeck's case, the Commission found that his compensable work injury in November 2006 was not the “prevailing factor” for the medical treatments and disabilities for which he sought compensation after April 2007. \*\*\*It is not clear from the Commission's decision in Hornbeck's case, however, whether it was declaring that his compensable work injury was not the “prevailing factor” for the injuries for which he sought treatment after April 2007 or whether it was declaring that his compensable work injury was not the “prevailing factor” for the treatments for which he sought compensation after April 2007.*

[P.635-636]Considering *Tillotson*, the Commission's reasoning in *Hornbeck's* case does appear to confuse that section 287.140.1 does not have a “prevailing factor ” component but, rather, tests whether a treatment for which workers' compensation is sought is a treatment that “may reasonably be required ... to cure and relieve” the effects of a compensable work-related injury . The Commission did not contemplate the “flow from the work injury ” reasoning employed in *Tillotson* when deciding *Hornbeck's* case because *Tillotson* came after the Commission's decision. But *Tillotson* 's reasoning echoed the reasoning in *Bowers v. Hiland Dairy Co.*, in which the court opined:

[A] workers' compensation claimant is not required, for purposes of reimbursement for past treatment and medications, to prove that medical treatment rendered following the date of the work-related accident benefited only the conditions resulting from the work-related injury. Rather, a claimant need only prove that the need for the treatment and medication flow from the work injury, and the fact the medication or treatment may also benefit a noncompensable or earlier injury or condition is irrelevant; [and] likewise, a workers' compensation claimant cannot be denied an award for future medication and treatment because he could not prove they would only benefit the work injury .

We find unpersuasive that portion of Dr. Aubuchon's testimony tying a future need for orthotics to the work injury . \*636 [He] did not identify the objective findings, diagnosis, or medical condition resulting from the work injury that would reasonably require future treatment in the form of orthotics. As a result, we find that [his] testimony does not establish the requisite showing that [Hornbeck] has a need for orthotics that ‘flows’ from the work injury .

[P.636]*In its conclusion to that section, however, the Commission again stated its finding that Hornbeck had not shown that his work-related injury was the “prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 24, 2007.”*

[P.636]It is not clear why the Commission emphasized the “prevailing factor ” rationale as the main component of its “medical causation” analysis and only briefly contemplated a “flows from” analysis in regard to Dr. Aubuchon's testimony. *However, the context of the Commission's decision taken as a whole reflects that its conclusions would have been the same even if it had not emphasized “prevailing factor ” reasoning in affirming the ALJ's denial of Hornbeck's request for compensation after April 2007. The Commission found: “We*

*conclude that [the medical records generated in connection with Hornbeck's post-April 2007 treatment] provide no support for [his] claim that he remained in need of treatment after April 2007 as a result of the work injury .” Given the Commission's credibility assessments of the evidence in Hornbeck's case , it does not appear that there would have been sufficient evidence on which the Commission would have concluded that, pursuant to section 287.140.1, Hornbeck showed that his post-April 2007 treatments were reasonably necessary to cure and relieve the effects of his compensable November 2006 work injury . Cf. Tillotson, 347 S.W.3d at 521 (finding that, if the Commission in that case had “applied the proper standard described in section 287.140.1 [,] ... [it] would have been required to find as a matter of law that the claimant's total knee replacement was reasonably required to cure and relieve [her] compensable injury ;” noting that the medical evidence in that case was aligned and no expert contested that the claimed surgery was not reasonably required to cure and relieve the effects of the work-related injury ). Given the facts in this case , this Court is not persuaded by Hornbeck's assertions that his case should be remanded to the Commission for consideration in light of Tillotson’s standards.*

**ARMSTRONG V. TETRA PAK, INC., 391 S.W. 3d 466 (MO. APP. S.D. 12-26-2012)**

**(INJURY VS. COMPENSABLE INJURY; SUFFERING AN INJURY THAT IS NOT COMPENSABLE; PRECIPITATING EVENT THAT DOES NOT CAUSE THE RESULTING MEDICAL CONDITION OR DISABILITY; TILLOTSON DOES NOT HOLD THAT ONCE AN ACCIDENT HAS BEEN SUSTAINED THE EMPLOYER IS NECESSARILY RESPONSIBLE AS A MATTER OF LAW FOR ALL INJURIES AND DISABILITIES THAT FLOW FROM THE ACCIDENT)**

*[P.467]Ronald Armstrong (Claimant) appeals from a final award entered by the Labor and Industrial Relations Commission (Commission) denying compensation on his claims against his employer, Tetra Pak, Inc. (Employer), and the Second Injury Fund (the Fund). See § 287.220 RSMo (2000) . 1 The Commission found that: (1) Claimant had suffered an injury to his shoulder due to an accident at work; but (2) he failed to prove that he had a compensable injury, in that the work accident was not the prevailing factor in causing his resulting medical condition and disability.*

**[P.468]I. Factual and Procedural Background**

*[P.468]Employer produces cardboard “juice boards” used to make milk and juice cartons. Claimant began working for Employer in April 2005. Claimant worked initially as a “stacker,” and his job was to stack materials on pallets. Later, he worked as a “feeder checker.” This job required him to feed cardboard into a machine for processing and then perform quality control checks. Prior to Claimant's employment with Employer, he had worked for several employers, including Town & Country Grocery and Triangle Wire. Claimant also worked at his own business, Armstrong Tae Kwon Do, from 1995 to 2007. Claimant was the instructor, training students in martial arts self-defense, boxing and weight training. **Claimant had several injuries before he began working for Employer. These injuries included a 1996 “ulnar nerve transposition which required surgery to treat. In 2001, Claimant suffered a neck injury. Claimant's symptoms from the neck injury included “pins and needles” radiating down both arms and pain in the base of the neck. The treatment for his neck injury included a surgery, which consisted of a surgical fusion and implanting a “cage.” In 2003, Claimant injured his***

*left hip and underwent a total left hip replacement. In 2006, Claimant began having pain symptoms in his neck and arms again for reasons unrelated to his work for Employer. Claimant underwent a second surgery by a different surgeon to remove the cage and repeat the fusion. After this second surgery, Claimant was given a 15-pound permanent weight restriction with regard to overhead lifting. In 2009, Claimant developed problems in his right hip and underwent a total right hip replacement. After Claimant's second neck surgery in 2006, he resumed his employment with Employer, subject to the above-mentioned lifting restriction. He continued to work as a "feeder checker." Claimant was off work again for his total right hip replacement in 2009 and again resumed his employment with Employer in the same position.*

**[P.468]***On May 12, 2010, Claimant was at work feeding cardboard into the processing machine. He was not suffering any pain in his shoulder or any part of his right upper extremity. Claimant began working a "rush order" involving a particular stack of cardboard that was higher than normal. Claimant described the stack as being "above the head in height, above the shoulder." As he reached for the cardboard, he felt a sharp, deep pain in his right shoulder. Claimant did not report this pain right away because he thought it would go away. The pain had not gone away by the following day. Claimant reported the incident to his supervisor, who confirmed that Claimant made the report the day after the incident occurred.*

**[P.468-469]***Claimant was referred to Dr. Glen Cooper for evaluation and treatment. Dr. Cooper initially saw Claimant on May 14, 2010. Dr. Cooper performed an evaluation and diagnosed subacromial bursitis and mild rotator cuff tendinitis. Dr. Cooper obtained x-rays, which were reported as negative for pathology, and prescribed medication. The doctor also imposed lifting restrictions and stated that "[t]his patient had a benign onset of shoulder pain, which should have a relatively short course of treatment. His physical examination is remarkably benign." Claimant continued to see Dr. Cooper for his right shoulder complaint. \*\*\*\*On May 19, 2010, Dr. Cooper opined that Claimant was not actually injured on May 12, 2010, but probably perceived some limitation in \*469 his shoulder motion while performing a new task. On June 9, 2010, Claimant reported left shoulder pain, neck discomfort and right shoulder pain to Dr. Cooper. \*\*\*\*The doctor stated that the "precipitating event" was the lifting episode on May 12, 2010, which may have aggravated the bursitis and created mild tendinitis. Dr. Cooper opined that it was not really possible for this lifting incident to create clinical damage.*

**[P.469]***Claimant was discharged by Dr. Cooper on July 19, 2010 with lifting restrictions for the right arm and work above the right shoulder. Thereafter, Claimant was referred to an orthopedist, Dr. Richard Lehman. Dr. Lehman saw Claimant September 2, 2010 and took a patient history in addition to performing a clinical evaluation. X-rays revealed degenerative arthritis of the right shoulder and degenerative changes in the AC joint. \*\*\*\*Dr. Lehman believed that Claimant had a preexisting impingement and arthritis, rather than an acute injury to the right shoulder. Dr. Lehman ordered an MRI, which was done on October 4, 2010. The MRI revealed no acute tears, but revealed tendinosis, osteoarthritis and subcortical cysts, along with fraying of the glenoid labrum. \*\*\*\*Dr. Lehman opined the Claimant had severe degenerative arthritis and fraying of the rotator cuff, and that the prevailing factor for this pathology was preexisting subcortical cysts and arthritis. \*\*\*\*He stated that the MRI supported this to be a chronic, long-term and preexisting condition. Dr. Lehman stated that, "[b]ased on the MRI this appears to be chronic and long-term in nature as well as pre-existing. I do not believe his work related injury was the prevailing factor."*

**[P.469]***Claimant then consulted Dr. Dennis Straubinger for a right shoulder*

*evaluation. \*\*\*\*Dr. Straubinger concurred with Dr. Lehman that “[Claimant’s] shoulder complaints are not work related, but rather are degenerative in nature.”*

**[P.469]***In October 2010, Claimant filed a claim for compensation. He sought compensation from Employer and permanent partial disability from the Fund. Claimant alleged that he suffered a right shoulder injury due to an accident that occurred on May 12, 2010. Thereafter, Claimant stopped working for Employer and resumed working at his martial arts business.*

**[P.469]***In November 2010, Claimant was sent by his attorney to see Dr. Dwight Woiteshek. After taking a history and performing a clinical evaluation, Dr. Woiteshek diagnosed Claimant as having tendinosis and osteoarthritis with impingement. \*\*\*\*Dr. Woiteshek opined that the prevailing factor in causing these medical conditions was the May 12, 2010 work incident.*

**[P.469-470]***In March 2011, a hearing was held before an Administrative Law Judge (ALJ), who denied benefits to Claimant. The ALJ found that Claimant failed to satisfy his burden of proof on the issues of accident and medical causation, explaining:*

*Based on a thorough review of the evidence including the testimony of the witnesses and the medical records, I find that the opinions of Dr. Cooper, Dr. Straubinger, and Dr. Lehman are credible and very persuasive and are more credible than the opinion of Dr. Woiteshek. I find that the alleged work accident was not the prevailing factor in causing the resulting right shoulder medical conditions and disability. I find that the employee failed to satisfy his burden of proof on the issues . . . I further find \*470 that the employee did not sustain a compensable work related accident or injury that arose out of and in the course of his employment and the employee’s right shoulder condition is not medically causally related to the alleged accident.*

**[P.470]***Thereafter, Claimant filed an application for review with the Commission. The Commission unanimously affirmed the denial of benefits, but it modified the award. \*\*\*\*After reviewing the statutory definitions of “accident” and “injury” in § 287.020, the Commission decided Claimant had proved that he suffered an injury to his right shoulder in an accident at work. \*\*\*\*The Commission agreed with the ALJ, however, that “the more credible evidence shows that employee’s shoulder complaints are predominately degenerative in nature and not primarily due to the May 12, 2010, accident.” The Commission concluded that, “since employee has not proved that his May 12, 2010, accident was the prevailing factor in causing both his medical condition or any disability, the [ALJ’s] decision to deny him benefits from employer and the Second Injury Fund should be affirmed.” This appeal followed.*

**[P.471]***\*\*\*\*Claimant argues that this finding was erroneous because, once an accident has been sustained, the employer is responsible as a matter of law for all injuries and disabilities that flow from the accident. We find no merit in this argument. 4*

**[P.471]***\*\*\*\*Claimant claims Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511 (Mo.App.2011), stands for the proposition that, once an accident has been sustained, the employer is responsible as a matter of law for all injuries and disabilities that flow from the accident. For the reasons set forth below, we do not believe Tillotson supports Claimant’s argument.*

**[P.471]Nurse Tillotson tore the lateral meniscus in her right knee while helping another nurse move a patient. Because of preexisting degenerative changes in Tillotson's knee due to arthritis , an arthroscopic repair of the torn meniscus would not relieve her pain. Instead, she needed and received a total knee replacement to obtain lasting pain relief. Tillotson, 347 S.W.3d at 513–14. The Commission determined that Tillotson suffered a compensable workplace injury, as defined by § 287.020 , when she sustained the torn meniscus . Id. at 517. Thus, there was no issue in Tillotson about whether a compensable injury had occurred. Id.**

**[P.471-472]The western district of this Court reversed the Commission's denial of Tillotson's claim for medical expenses and other benefits relating to the total knee replacement surgery. Id. The Court explained that the requirements of § 287.020 were satisfied because the Commission found \*472 Tillotson had sustained a compensable injury. Id. The Commission erred, however, by using the “prevailing factor” requirement in § 287.020 to determine the medical treatment Tillotson was entitled to receive. Id. at 517–18. What the Commission should have determined, pursuant to § 287.140, is whether the total knee replacement surgery was reasonably required to cure and relieve the effects of the injury. Id. at 518. The upshot of Tillotson is this: “once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury.” Id. at 519; see Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 635 (Mo. banc 2012); Noel v. ABB Combustion Engineering, 383 S.W.3d 480, 484–85 (Mo.App.2012). Thus, Tillotson addresses the legal standard by which a claimant's entitlement to compensation for medical treatment is to be determined.**

**[P.472]\*\*\*\*[11] In contrast to Tillotson, the issue in the case at bar is whether Claimant sustained a compensable injury. To decide this issue, the Commission was required to use the statutory tests set out in § 287.020 . In relevant part, this statute defines “accident” and “injury” as follows: 2. The word “accident” as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor. 3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.**

**[P.472] (2) An injury shall be deemed to arise out of and in the course of the employment only if:**

**(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and**

**(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. § 287.020.2–3 (emphasis added). 5**

**[P.472-473]\*\*\*\*[Based upon the plain language of this statute, Claimant was not entitled to compensation unless he proved that: (1) he suffered an accidental work-related injury; and (2) the accident was the prevailing factor in causing both the resulting medical condition and disability. See, e.g., Bond v. Site Line Surveying, 322 S.W.3d 165, 170–71**

(Mo.App.2010) . The Commission correctly used that legal standard in determining that Claimant did not sustain a compensable injury on May 12, 2010 because the accident was not the prevailing factor in causing both his resulting medical condition and disability. *As we noted in Jordan v. USF Holland Motor Freight, Inc., 383 S.W.3d 93, 95 n. 4 (Mo.App.2012) , there is a material distinction between determining whether a compensable injury has occurred and determining what medical treatment is required to treat a compensable injury. Id. Tillotson addressed the latter, while Claimant's case involves the \*473 former. See id.* Thus, Tillotson does not support Claimant's argument. Claimant's point is therefore denied. The final award of the Commission is affirmed

**DILLON v. ARCHITECTURAL MATERIALS COMPANY, 419 S.W.3d 802 ( MO APP. S.D. 3-4-2013)**

**(IMPORTANCE OF EXPERT CREDIBILITY DETERMINATIONS)**

[P.804] *Claimant worked for Architectural Materials Company (“Employer”) as a commercial glazier, a job which involved installing glass doors and replacing windows. Between 2005 and 2007, Claimant was treated by a chiropractor for complaints that included low back pain. In 2007, an x-ray showed a “[l]oss of segmental motion integrity ... at vertebral levels L5–S1[.]”*

[P.804] *On August 13, 2009, Claimant was lifting a door out of the back of his truck and felt an immediate pain in his lower back. He did not work the next day and returned to work the following Monday. That day, Claimant was descending a ladder when he slipped. The pain in his back increased substantially, and Claimant went to the emergency room. Later, Claimant was referred to Doctor Kristi Foster to whom he reported he had been experiencing low back pain for approximately three weeks. A subsequent MRI revealed a disc protrusion at L4–5, an annular tear, and a disc herniation at L5–S1. Surgery was conducted on September 23, 2009.*

[P.804] *Claimant sought workers’ compensation benefits. At the hearing before the Administrative Law Judge (“ALJ”), Claimant presented numerous documents, including the report of Doctor Shane Bennoch (“Dr. Bennoch”). Dr. Bennoch reviewed Claimant’s medical records and examined Claimant before writing his report. Dr. Bennoch opined that the August 13, 2009 accident was the prevailing factor in Claimant’s low back injury. Claimant’s employer presented the report of Doctor Donald deGrange (“Dr. deGrange”). Dr. DeGrange reviewed Claimant’s medical records, noting a history of treatment for low back pain, a slip and fall shortly before the alleged work accident, and an incident in which a porch swing collapsed while Claimant was sitting in it. He also mentioned the positive findings on the 2007 x-ray. Based on the history of past complaints, Dr. deGrange did not believe that the accident on August 13, 2009, was the prevailing factor in causing Claimant’s herniated disc . The ALJ denied compensation, and the Commission affirmed that decision, incorporating the ALJ’s findings and conclusions.*

[P.805] *Claimant’s argument relies primarily on Whiteley v. City of Poplar Bluff, 350 S.W.3d 70 (Mo.App. S.D.2011) , and Leake v. City of Fulton, 316 S.W.3d 528 (Mo.App.*

W.D.2010) . \*\*\*\*\**These cases are not persuasive because in each of those cases, the Commission granted compensation to the claimant in the first instance. Whiteley, 350 S.W.3d at 77; Leake, 316 S.W.3d at 531. Thus, the credibility determinations to which the appellate courts in those cases were bound to defer were favorable to the claimant. Here, in contrast, those credibility determinations were favorable to Employer.*

[P.805]\*\*\*\**The records contained conflicting evidence regarding Claimant's past history, and Dr. deGrange, in his capacity as an expert, simply resolved that conflict differently than Claimant's expert. The Commission was entitled to choose Dr. deGrange's opinion over that of Claimant's expert. Gordon, 268 S.W.3d at 461.*

**SICKMILLER V. TIMBERLAND FOREST PRODUCTS, INC., 407 S.W.3d 109 (MO. APP. S.D. 7-18-2013)**

**(PRE-EXISTING PSYCHOLOGICAL DISABILITY AGGRAVATED AND DISABILITY WORSENER BY THE COMPENSABLE WORK INJURY; PRIMARY FACTOR RATHER THAN SOLE FACTOR)**

*[P.114]On the morning of September 28, 2007, Claimant was lifting an empty pallet when her back "popped" and her "lower right abdomen started hurting."*

*[P.114]At the time of her September 28, 2007 work injury ("work injury"), Claimant suffered from a preexisting psychological disability (depression) for which she received treatment in 2000. Claimant attributed her mental condition at that time to financial and marital difficulties. Claimant also had a history of suicidal ideations that began when she lost custody of her children sometime between 2000 and 2001. Claimant had also been treated for bilateral carpal tunnel syndrome as the result of a work-related injury she suffered when working in 1999 for a previous employer.*

*[P.114]Claimant remained off work through October 31, 2007, when Dr. Jordan discharged her to return to work without limitations.*

*[P.114]Although Claimant returned to work at that time, she was still experiencing lower back pain, and she had to have assistance to perform her job responsibilities. In May and June of 2008, Claimant's legs started going numb and "giving out[.]" She was also under a lot of stress and was having marital problems. Claimant began seeing Dr. Rakestraw for her continuing pain. Dr. Rakestraw told Claimant that she was not able to work any longer. . .*

*[P.114]Claimant last worked for Employer on June 25, 2008.*

*[P.114]Claimant filed her claim for compensation in July 2008*

*[P.115]Dr. Bennoch was able to opine that the work injury "was the prevailing cause of injury to the low back resulting [in] persistent low back pain and right radiculopathy " and that the work injury resulted in "an industrial impairment that would be a hindrance to employment or reemployment."*

*[P.115]Dr. Bennoch also opined that Claimant had “a 20% permanent partial impairment to the body as a whole rated at the brain due to severe depression.” He attributed 15% to “preexisting depression and 5% to worsening depression secondary to the [work] injury.” Concerning other pre-existing impairments hindering employment, he assigned 20% impairment to the right upper extremity and 10% impairment to the left upper extremity as a consequence of bilateral carpal tunnel syndrome . Dr. Bennoch opined that “[t]he combination of [Claimant's] impairments does create a substantially greater impairment than the total of each separate injury and illness, and a loading factor should be added.” He concluded that Claimant had been temporarily and totally disabled since June 2008 and would continue to be so until she received further evaluation and treatment.*

*[P.115]Dr. Olive initially indicated that Claimant's pain was unrelated to her work injury. After considering additional medical records presented during the deposition, he changed his opinion and stated that Claimant's pain was caused by her work injury. Presumably based on that change of opinion, Employer agreed on February 23, 2010 to authorize treatment of Claimant's lower back pain by Dr. Olive. Employer maintained that it was not responsible for any temporary total disability benefits going back to the work injury because “none of [Claimant's] treating doctors [had] kept her off work based on the low back condition.”*

*[P.115]After the emergency hearing, the ALJ concluded that Claimant was temporarily totally disabled on two different occasions: the one-month period during October 2007 before Dr. Jordan released her to return to work without restrictions and from June 26, 200[8] through the date of the hearing. The ALJ awarded Claimant benefits for those periods, plus future medical care. The ALJ did not find Dr. Bennoch's opinion credible and determined that Claimant's “work injury did not contribute to any need for mental health treatment.” The ALJ also denied Claimant's request for costs under section 287.560.*

*[P.115-116]Following the temporary award, Dr. Lennard evaluated Claimant. Dr. Lennard diagnosed Claimant with a lumbar strain and major depression . Dr. Lennard opined that the work injury “was the prevailing factor in the onset of [Claimant's] lumbar strain [,]” but he found that she had reached maximum medical improvement \*116 and did not require further treatment for her lower back. He assigned Claimant 10% permanent partial disability “to the body as a whole for her lumbar spine[,]” with 5% attributable to the work injury and 5% attributable to degenerative changes. He “strongly advised” Claimant to seek treatment for her depression, but he noted that given this condition and other mental health issues, it was “very unlikely any form of treatment directed at her low back including medications would alter her subjective complaints of pain.” Dr. Bennoch conducted a second evaluation of Claimant on August 18, 2010. Dr. Bennoch diagnosed an “[a]cute traumatic injury of the low back resulting in an L5–S1 disc with L5 nerve impingement[.]” He concluded that if Claimant received no further therapy, she was at maximum medical improvement. He rated Claimant as having 40% permanent partial disability to the body as a whole as a direct result of the work injury. He did not provide new ratings concerning Claimant's psychological disability and other pre-existing impairments, but instead referred back to his earlier evaluation. He opined that the “combination of her impairments create[d] a substantially greater impairment than the total of each separate injury/illness[.]” Dr. Bennoch further opined that Claimant had been temporarily, totally disabled from the time of the work injury.*

*[P.116]Dr. Franks, a licensed psychologist, examined Claimant on two occasions. In a report based on a June 5, 2009 examination of Claimant, Dr. Franks concluded that Claimant*

was “suffering from a complex psychiatric condition that derive [d] not only from her ... [work] injury, but also premorbid factors and personality issues.” He diagnosed her as having a chronic depressive condition and borderline personality disorder. He rated Claimant as having 20% permanent partial psychological impairment, with 10% attributable to the work injury and 10% attributable to her preexisting condition. He opined that Claimant would benefit from six months of psychological treatment.

[P.116]After examining Claimant again on August 19, 2010, Dr. Franks diagnosed her as having “Pain Disorder Associated with Psychological and Mental Condition” attributable to the work injury. He rated Claimant's permanent partial psychological impairment at 25%, with 15% attributable to her work injury and 10% attributable to preexisting factors.

[P.116]At the request of Employer, Dr. Halfaker issued a comprehensive psychological assessment of Claimant on January 25, 2011.

[P.117]\*\*\*\*He continued: In this case, it is thought to be obvious that there is significant preexisting psychological disability associated with her history of depression, anxiety, and personality disorder. Most if not all of that psychological disability appears to carry forward into the post [work] injury period and interferes with her ability to recover from that injury. As such, I would apportion very little to no permanent, partial psychological disability of the person as a whole as arising from the [work] injury in isolation. It continues to be my opinion that whatever degree of psychological disability is determined to be present it would be 95% to 99% pre-existent to the work-related injury at question in this case.

[P.117]He opined that the work injury could serve as a contributing factor to Claimant's psychological disability, but he again attributed it as being 5% or less related, and he concluded that any need for ongoing psychological treatment was related to Claimant's preexisting condition and not the work injury.

[P.117]In comparing his opinion with that of Dr. Franks, Dr. Halfaker stated, “I think probably the area of disagreement with Dr. Franks' opinions probably relates to the influence of the ... work injury on her psychological condition.” Specifically, Dr. Halfaker reiterated that while Dr. Franks believed the work injury worsened Claimant's depression, Dr. Halfaker believed Claimant's pre-existing psychological condition worsened her ability to recover from the work injury. While Dr. Halfaker stated that Claimant needed psychotherapy before the work injury occurred and he did not view the work injury as the “prevailing need” for therapy, he agreed that “the work injury is a contributing factor in [Claimant's] need for psychotherapy[.]” He also agreed that the hospitalizations Claimant underwent were “necessary,” “reasonable,” and “appropriate[.]”

[P.117]Mr. England concluded that Claimant was permanently and totally disabled from the psychological impairment alone.

[P.118]The ALJ concluded that Claimant sustained a 12.5% permanent partial disability to her low back as a result of the work injury, for which Employer was liable, but found “Claimant's psychological problems are unrelated to and preexist the work injury.” The ALJ also determined that Employer was not liable for past or future medical treatment and denied costs associated with the emergency hearing.

[P.118]The ALJ determined that Claimant had a preexisting 15% permanent partial disability to the body as a whole attributable to the psychological condition and a 20%

*disability to her right arm from the carpal tunnel syndrome.* She employed a 15% loading factor and found that Claimant was entitled to an award of \$13,505.50 from Employer and \$5,874.89 from the Fund.

***[P.118]The Commission modified the ALJ's award, concluding that Claimant was permanently and totally disabled “due to the combination of the disability from [the] ... work injury with her preexisting disabilities.”***

***[P.118]The Commission disagreed with the ALJ as to the causation of Claimant's disability. It found that the ALJ's finding that the work injury did not cause Claimant any further psychological disability was not supported by substantial and competent evidence. In its review of the expert opinions, the Commission noted that all except Mr. England agreed that the work injury contributed to Claimant's psychological disability in some manner. Claimant's own testimony at the final hearing “undoubtedly illustrate[d] that the primary injury caused a significant amount of additional psychological disability.” The Commission concluded that Claimant sustained 12.5% permanent partial disability referable to the lower back and 10% permanent partial disability referable to her increased psychological disability. Upon concluding that the combination of the disability from the work injury and the preexisting disabilities rendered Claimant permanently and totally disabled, it also found the Fund liable for the portion of those benefits not assessed against Employer.***

***[P.118]The Commission awarded Claimant past medical expenses, finding that she had provided credible testimony that the expenses were related to the work injury. The Commission also awarded Claimant future medical expenses, finding she had shown that she would require ongoing psychological care to relieve her from the effects of the work injury.*** The Commission denied Claimant's request for costs associated with the emergency hearing.

***[P.119-120]Employer's first point argues that no substantial, competent evidence supports the Commission's finding that Claimant was permanently and totally disabled because the overwhelming weight of the evidence established that her inability to work was attributable to her preexisting psychological disability. Employer's reply brief clarifies that Employer does not dispute that Claimant is permanently and totally disabled; it disagrees only with the Commission's determination that the work injury was the prevailing factor in causing the disability.*** 6 “An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.020.3(1), RSMo Cum.Supp.2005. “The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” Id. Claimant had the burden to establish that the September 28, 2007 accident she suffered at work was the primary factor that \*120 caused her injury. See *Rader v. Werner Enters., Inc.*, 360 S.W.3d 285, 298 (Mo.App. E.D.2012) .

***[P.120]Employer argues that the medical evidence does not support the Commission's finding that the work injury “caused permanent additional psychological impairment that resulted in [Claimant's] total disability.”*** 7 There is no question that Claimant had a preexisting psychological disability. 8 Substantial and competent evidence supported the Commission's finding that the work injury contributed to Claimant's psychological disability. The Commission credited Claimant's testimony that the work injury caused stress on her marriage and led to her significant weight gain, which prevented her from participating in everyday activities. In turn, her back pain and lack of physical activity contributed to her crying spells and depressed state. [11] [12] More importantly, the Commission correctly noted that “nearly every expert opined that the work injury caused at least some additional

*psychological disability.” Dr. Bennoch attributed 5% of Claimant's 20% permanentpartial psychological disability to the work injury. Dr. Franks initially attributed 10%, then later 15%, of Claimant's psychological disability to the work injury. Dr. Halfaker, who placed much more emphasis on Claimant's pre-existing mental condition, still opined that the work injury could have attributed up to 5% of Claimant's psychological impairment. 9 “The Commission is not bound by the experts' exact percentages of disability and is free to find a disability rating higher or lower than that expressed in medical testimony.” Hawthorne v. Lester E. Cox Med. Ctrs., 165 S.W.3d 587, 594 (Mo.App. S.D.2005) . The Commission is free to reject all or part of an expert's testimony, and we defer to its credibility determinations and to the weight it accords evidence. Pace v. City of St. Joseph, 367 S.W.3d 137, 150 (Mo.App. W.D.2012) .*

*[P.120-121]Employer argues that the Commission's award should be reversed “because it is agreed by the health care experts (and \*121 vocational rehabilitation expert) that the back injury alone does not render [Claimant] unable to work, the award of permanent total disability benefits should be overturned.” This is a non sequitur. Section 287.020.3(1) requires that the work-related injury be the “primary factor” in causing the disability at issue, not the sole factor. Cf. Leake v. City of Fulton, 316 S.W.3d 528, 532 (Mo.App. W.D.2010) (it is the comparative relationship between a pre-existing condition and a work-related activity which determines whether the work-related activity was the primary factor in the injury or death and this is an “inherently” factual issue for the Commission).*

*[P.121]the experts' evidence and Claimant's testimony supported the Commission's finding that the work injury contributed to Claimant's psychological impairment. That evidence, coupled with the Commission's findings of a 12.5% permanent partial disability to the lower back and 10% permanent partial disability to increased psychological disability, constituted substantial, competent evidence supporting the Commission's implicit determinationthat the work injury was the prevailing factor in causing Claimant's total and permanent disability. Point I is denied.*

*[P.121] [13] Employer next argues that the Commission erred in awarding Claimant past medical expenses because the Commission's finding that her past medical treatment was made necessary by the work injury was not supported by substantial and competent evidence. Again, we disagree.*

*[P.121]To establish an entitlement to reimbursement of her past medical expenses, Claimant had to show that the expenses were reasonably required to treat the effects of work injury. Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 266 (Mo.App. S.D.2004) . “Meeting that burden requires that the past bills be causally related to the work injury.” Id. [14] “Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a sufficient factual basis for the Commission to award compensation.” Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo.App. W.D.2010) . In Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 517 (Mo.App. W.D.2011) , the Western District held that section 287.140.1 “does not require a finding that a work place accident was the prevailing factor in causing the need for particular medical treatment.” Here, Claimant provided medical records and bills documenting her epidural treatments and psychiatric hospitalizations, which totaled \$33,653.10. **Claimant also testified that the charges were for treatment received as a result of her work injury. Dr. Franks supported Claimant's testimony, opining that Claimant's psychiatric hospitalizations were necessary to treat the effects of her work injury.***

*[P.121-122][15] Despite Dr. Halfaker's view that the work injury was not the*

*prevailing factor in the need for psychotherapy, the Workers' Compensation law does not "incorporate a 'prevailing factor' test into the \*122 determination of medical care and treatment required to be afforded for a compensable injury by section 287.140.1." Id. at 519. This section "require[s] nothing more than a demonstration that certain medical care and treatment is reasonably required to cure and relieve the effects of an injury." Id. at 520. Dr. Halfaker did agree that Claimant's hospitalizations had been "necessary" and "reasonable," and that the work injury was a contributing factor in Claimant's need for psychotherapy. As a result, the Commission did not err in ordering Employer to reimburse Claimant for her past medical expenses. Point II is denied.*

[P.122] [16] In a similar vein, Employer's third point claims the Commission's award of future medical costs was not supported by substantial and competent evidence that the future psychological medical treatment was made necessary by the work injury. Like past medical expenses, future medical expenses are covered under section 287.140.1. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51 (Mo.App. W.D.2008). [17] [18] "To receive an award of future medical benefits, a claimant must show a reasonable probability that he or she requires further medical treatment because of an injury suffered at work." *Rader*, 360 S.W.3d at 300. "An employer will be responsible for future medical benefits only if the evidence establishes to a reasonable degree of medical certainty that 'the need for future medical care flows from the accident.'" *Id.* (quoting *Lawson v. Ford Motor Co.*, 217 S.W.3d 345, 351 (Mo.App. E.D.2007)). "And, a claimant can receive an award of future medical benefits if a work injury aggravates a pre-existing condition to the point that the claimant is likely to need future care." *Conrad*, 273 S.W.3d at 54 (reversing the denial of future medical expenses even though the preexisting condition was the "primary reason" for the future care).

[P.122] *The Fund's Appeal (Case # 32277)*

[P.122] [19] [20] [21] *The Fund's single point claims "the substantial and competent evidence is that [Claimant]'s current psychological condition is the cause of her inability to be employed in that her current psychological condition has significantly worsened since her work injury, and [is] unrelated to her work injury and this worsening cannot be taken into account in determining the liability of [the Fund]." We disagree.*

[P.123] *Richardson v. Missouri State Treasurer*, 254 S.W.3d 242, 244 (Mo.App. E.D.2008) (internal citations omitted). "Where the statute applies, the employer is liable only for the amount of disability caused by the current injury, and the fund is liable in the amount of the increase in disability caused by the synergistic effect of the two injuries." *Pierson v. Treasurer of Missouri*, 126 S.W.3d 386, 389 (Mo. banc 2004). 10 *The Commission was not required to consider only Claimant's psychological condition as it existed at the time of the work injury in determining the Fund's liability so long as Claimant's worsening psychological condition was attributable to the work injury.*

[P.123]\*\*\*\**In Lawrence v. Joplin R–VIII Sch. Dist.*, we wrote, "*The Second Injury Fund provides compensation for previously existing disabilities, not increased disabilities caused by post-accident worsening of pre-existing diseases when that worsening was not caused by or aggravated by the last injury.*" 834 S.W.2d 789, 793 (Mo.App. S.D.1992) (emphasis added). *Similarly*, "*the Second Injury Fund is not liable for any progression of claimant's preexisting disabilities \*\*\*\*not caused by claimant's last injury.*" *Garcia v. St. Louis Cnty.*, 916 S.W.2d 263, 266 (Mo.App. E.D.1995) (emphasis added) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003) ). *And again*, "*The Second Injury Fund is not responsible for progression of preexisting conditions or new*

*conditions that develop after and \*\*\*\* unrelated to the work injury. ” Lammert v. Vess Beverages, Inc., 968 S.W.2d 720, 725 (Mo.App. E.D.1998) (emphasis added) (overruled on other grounds by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. banc 2003)*

*[P.123-124] \*\*\*\*Here, as set out in our analysis of Employer's first point, there was substantial, competent evidence that the work injury aggravated and worsened Claimant's pre-existing psychological condition. Claimant testified that the work injury caused stress and a significant weight gain, contributed to the deterioration of her marriage, and caused her recurrent depression and crying spells. Mr. England and Drs. Bennoch, Franks, and Halfaker all agreed (to varying degrees) that the work injury contributed to Claimant's worsening, depressed state. The Commission's determination that the work injury caused 10% permanent partial disability referable to Claimant's increased psychological problems was supported by their expert testimony. Claimant's increased psychological \*124 disability attributable to the work injury was appropriately considered in determining the Fund's liability.*

**MANESS V. CITY OF DE SOTO, 421 S.W.3d 532, (MO.APP. E.D. 2-25-2014)**

**(OBJECTIVE MEDICAL FINDINGS SHOW THAT THE ACCIDENT, RATHER THAN PRE-EXISTING INJURIES AND CONDITIONS, WERE THE PREVAILING FACTOR, I.E., THE PRIMARY FACTOR IN RELATION TO ANY OTHER FACTOR, IN CAUSING THE RESULTING MEDICAL CONDITION AND DISABILITY; JOHNSON IN REVERSE; MEDICAL EXPENSES AND CREDITS)**

*[P.536]Claimant worked for Employer as a working supervisor, performing maintenance for Employer's water, street, sewer,and parks departments. On June 14, 2007, Claimant gave his supervisor a written report stating that he believed he sustained an injury as a result of moving decorative concrete stones “on Tuesday, June 11th, 2007.” 3 Employer initially sent Claimant to Dr. Frank Krewet for medical care but later declined to offer further treatment. Claimant obtained treatment on his own from Dr. Philip Poepsel and Dr. Kevin Rutz. Dr. Rutz performed surgery on Claimant's neck in August 2007.*

*[P.536]The Commission found that Claimant suffered an accident in which he injured his neck while performing his job responsibilities moving stones on or about June 11 or 12, 2007. The Commission also found that the June 2007 accident was the prevailing factor causing Claimant's medical conditions and disability.*

*[P.536]The Commission ordered Employer to pay \$101,769.64 for Claimant's past medical expenses and to provide Claimant future medical care to cure and relieve him from the effects of the injury. Finally, the Commission ordered the Fund to pay Claimant permanent total disability benefits. Employer appeals.*

*[P.537]In its first point on appeal, Employer argues the Commission's finding that Claimant sustained an accident on June 11, 2007 was contrary to the overwhelming weight of the competent and substantial evidence because it was supported only by Claimant's testimony. Employer contends Claimant's testimony that he sustained an accident on June 11, 2007 was without credibility and probative value because it was refuted by his unsworn accounts to doctors about the incident and time records showing he did not work that day. We disagree.*

*[P.537]An employer is “liable, irrespective of negligence, to furnish compensation under the provisions of [the Workers' Compensation Law] for personal injury ... of the employee by accident arising out of and in the course of the employee's employment....” Mo.Rev.Stat. §*

287.120.1 . For purposes of the Workers' Compensation Law, the word “accident” means “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” Mo.Rev.Stat. § 287.020.2 .

***[P.537] [4] Based on Claimant's testimony and his reports to doctors and Employer, the Commission determined that Claimant suffered an accident in which he injured his neck while performing his job responsibilities moving stones on or about Monday, June 11 or Tuesday, June 12, 2007. At the hearing, Claimant testified on direct examination that when he arrived at work “on or about” June 11, his superintendent instructed him to clean up a site containing job materials, including “six or eight pallets of stones, decorative stones” made of concrete and weighing sixty to sixty-five pounds each. Claimant stated that some of the stones had fallen off the pallets, so he had to pick them up, restack them, and move them. Claimant testified that during that process he felt a burning sensation in his neck but continued working the rest of the day because he thought he had pulled a muscle. Claimant stated that he did not report the burning sensation that day at work and that a day and a half later he felt tingling and pain in his left arm, hand, and fingers. Claimant introduced a written report of the injury that he submitted to Employer on June 14. The report described the incident and stated that it occurred “on Tuesday, June 11th, 2007.” (emphasis added).***

***[P.539]In its second point on appeal, Employer asserts the Commission erred in finding the accident was the prevailing factor causing Claimant's neck condition and need for treatment because the finding was contrary to the overwhelming weight of the evidence. In particular, Employer claims the Commission's finding was erroneous because: (1) Claimant's medical records and diagnostic studies showed that Claimant had degenerative disc disease in the cervical spine and neck symptoms prior to the accident; (2) Drs. Krewet and deGrange found that Claimant's neck condition was preexisting and that the accident merely caused a cervical strain ; and (3) Drs. Volarich and Kennedy, whom the Commission found credible, based their opinions on an incorrect and incomplete medical history. We disagree.***

***[P.539]Under section 287.020.3(1), “[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.” Mo.Rev.Stat. § 287.020.3(1) . “The prevailing factor ’ is defined to be the primary factor , in relation to any other factor , causing both the resulting medical condition and disability.” Id. “The determination of whether a particular accident is the ‘prevailing factor ’ causing an employee's condition ... is inherently a factual one....” Leake v. City of Fulton, 316 S.W.3d 528, 532 (Mo.App.W.D.2010) .***

***[P.539]The Commission credited Claimant's testimony as well as the opinions of Drs. Kennedy and Volarich in analyzing whether Claimant sustained a compensable injury under section 287.020.3(1). Claimant testified that prior to the work accident, he had two car accidents affecting his neck and arms. Claimant stated that the first car accident occurred in 1996 and that his neck “got stiff, sore.” Claimant stated that doctors prescribed muscle relaxants and pain medication and that his neck symptoms disappeared after six months. Claimant testified that the second car accident in 2002 caused soreness in his neck and pain going up and down his arms. Claimant stated that doctors gave him pain medication and that after a year or so he was improving. Claimant also testified as follows:***

***Q. In the two or three years before June of '07, how [were] your neck and arms?***

***A. I believe I was doing pretty good.***

***Q. Were you having any complaints in your neck or arms?***

A. *I don't think so.*

Q. *Were you going to see any doctors for neck or arm complaints?*

A. *No, I don't believe so.*

[P.539-540]Dr. Kennedy testified that he examined Claimant a few months after his August 2007 neck surgery. Dr. Kennedy stated that it was his opinion within a reasonable degree of medical certainty that the work injury was “the prevailing cause in his production of pain and need for surgical treatment.” Specifically, Dr. Kennedy stated that the work injury was the prevailing factor in causing disc herniations at \*540 C4–5, 5–6, and 6–7, “but most prominently at C5– 6 and C6–7.”

[P.540]Dr. Volarich evaluated Claimant in 2011 and prepared a written report of his findings. In the report, Dr. Volarich concluded that Claimant's June 2007 work accident was “the prevailing or primary factor causing the disc herniation at C6–7 to the left as well as causing the aggravation of underlying and previously asymptomatic degenerative disc disease and degenerative joint disease at C4–5 and C5–6 all of which required surgical repairs.” (emphasis added).

[P.540]The Commission found Drs. Kennedy and Volarich more credible on this issue than Dr. deGrange, who concluded that the work accident was not the primary factor causing Claimant's need for surgery. The Commission concluded that the work accident was the prevailing factor causing the resulting medical conditions and associated disability of a disc herniation at C6–7 to the left, as well as the aggravation of underlying and previously asymptomatic degenerative disc disease and degenerative joint disease at C4–5 and C5–6.

[P.540]Employer claims the Commission's conclusion was erroneous under section 287.190.6(2) because “the undisputed medical records” and “objective diagnostic studies” (x-rays and MRIs) showed that Claimant had degenerative disc disease in the cervical spine and neck symptoms prior to the work accident. Section 287.190.6(2) provides that “[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings.” Mo.Rev.Stat. § 287.190.6(2) . “Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.” *Id.*

[P.540-541]Dr. Kennedy stated that the 2002 MRI revealed “some osteophyte formation with a mild amount of foraminal encroachment at C5–6” but that “C6–7 was basically normal.” (emphasis added). By contrast, Dr. Kennedy testified that the 2007 MRI “demonstrated a large disc herniation with significant canal foraminal encroachment at C5–6 and similar findings at C6–7.” Similarly, Dr. Volarich stated: The MRI scans of the cervical spine, when directly comparing the 10/17/02 study to the 7/2/07 study, demonstrate a clear change at the C6–7 level consistent with the left sided herniation that was removed at the time of [Claimant's] surgical repair on 8/22/07. The C4–5 and C5– 6 disc osteophyte complexes enlarged significantly from the 10/17/02 study when compared to the 7/2/07 study. (emphasis added). [7] Additionally, for an injury by accident to be compensable, “Section 287.020.3(1) requires that the work related injury be the ‘primary factor ’ in causing the disability at issue, not the sole factor .” \*541 *Sickmiller v. Timberland Forest Products, Inc.*, 407 S.W.3d 109, 121 (Mo.App.S.D.2013) . Thus, we reject Employer's contention that the mere existence of degenerative disc disease in the cervical spine and neck symptoms prior to the work accident requires a determination that Claimant's injury is not compensable.

**[P.541]**In its third point on appeal, Employer contends the Commission erred in finding Claimant was temporarily and totally disabled for approximately three months following his August 2007 neck surgery and awarding temporary total disability benefits for that period. Specifically, Employer alleges that the accident was not the prevailing factor causing Claimant's neck condition and that any need Claimant had for the surgery was the result of his preexisting degenerative condition. We disagree. [8] "Once a compensable injury is found, the inquiry turns to the calculation of compensation or benefits to be awarded." *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 517 (Mo.App.W.D.2011). "The compensation or benefits which can be awarded an injured employee include medical treatment (section 287.140), temporary total disability (section 287.170), and permanent partial or permanent total disability (section 287.190 and section 287.200)." *Id.* at 517–18. "Each of these statutes presumes, by express reference, that an 'injury' has occurred; i.e., that the initial determination required under section 287.120.1 has already been made." *Id.* at 518. "Stated differently, each of these statutes presumes that the 'prevailing factor' test described in section 287.020.3(1) has already been applied to permit the conclusion that a compensable injury has occurred." *Id.* Having determined in points one and two that the Commission did not err in concluding that a compensable injury by accident occurred, we decline to address Employer's arguments in points three, four, and six that Claimant failed to show an accident that was the prevailing factor causing his condition and need for treatment.

**[P.541]** "An employee is entitled to recover compensation for disability ... necessitated by treatment reasonably required to cure or relieve a compensable injury." *Tillotson*, 347 S.W.3d at 522–23.

**[P.542]***The record demonstrates that Dr. Rutz performed a cervical fusion on Claimant on August 22, 2007 and that Claimant was off work from that date until November 19, 2007. Dr. Kennedy testified that the June 2007 work injury was the "prevailing cause in [Claimant's] need for surgical treatment." Dr. Kennedy also stated that the medical treatment Claimant received, including the August 2007 surgery, was "reasonable and necessary to cure and relieve the effects" of Claimant's "acute cervical radiculopathy from disc abnormalities at C4–5, C5–6, and C6–7, most prominent [at] 5–6 and 6–7." Likewise, Dr. Volarich opined that the work accident caused Claimant's disc herniation at C6–7 and the aggravation of degenerative disc and joint disease at C4–5 and C5–6, "all of which required surgical repairs." The Commission credited Dr. Volarich's testimony and found that Claimant's surgery "was necessary owing to the symptoms [Claimant] experienced as a result of the work injury."*

**[P.542]**Employer asserts that the award of temporary total disability benefits was not supported by competent and substantial evidence because Dr. DeGrange determined that Claimant's surgery was necessary not because of the work accident but because of his preexisting degenerative condition. However, the Commission found Dr. Volarich credible on this matter. As previously discussed, we defer to the Commission on issues involving the credibility of witnesses and the weight to be given a medical expert's opinion. See *Sonic Drive In of High Ridge*, 388 S.W.3d at 592. Point three is denied.

**[P.543]**In its fifth point on appeal, Employer maintains the Commission erred in awarding future medical care to Claimant. Employer asserts the competent and substantial medical evidence demonstrated: (1) the accident caused only a cervical strain that healed and required no additional treatment; (2) any need Claimant has for future treatment is due to his preexisting degenerative disease; and (3) Dr. Volarich's testimony merely showed a possibility that Claimant will require additional treatment. We disagree.

[P.543] [15] [16] Under section 287.140.1, an employer must provide such care “as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” Mo.Rev.Stat. § 287.140.1 . “This includes allowance for the cost of future medical treatment.” Pennewell v. Hannibal Reg'l Hosp., 390 S.W.3d 919, 926 (Mo.App.E.D.2013) . “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.” Id. “An employer will be responsible for future medical benefits only if the evidence establishes to a reasonable degree of medical certainty that the need for future medical care flows from the accident.” Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 122 (Mo.App.S.D.2013) (quotation omitted).

[P.543]Dr. Volarich testified that it was his opinion within a reasonable degree of medical certainty that Claimant would benefit from additional medical treatment attributable to the work injury. Dr. Volarich stated: When I saw him he was just taking some over-the-counter Advil on most days every four hours as needed for pain. That's probably sufficient. But if he has a flare-up, he'll need something more. He'll need some narcotics, some muscle relaxants, probably some physical therapy type treatments to help control his pain syndrome.

[P.544]1. Employer's Liability for Past Medical Expenses [18] [19] As we noted above, section 287.140.1 requires an employer to provide such care “as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” Mo.Rev.Stat. § 287.140.1. A claimant seeking past medical expenses must prove “that the need for treatment and medication flow[s] from the work injury.” Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App.W.D.2011). ***A sufficient factual basis exists for the Commission to award compensation for past medical expenses when: (1) the claimant introduces his medical bills into evidence; (2) the claimant testifies that the bills are related to and the product of his work injury; and (3) “the bills relate to the professional services rendered as shown by the medical records in evidence.” Martin, 769 S.W.2d at 111– 12, superseded by statute on other grounds, 1990 Mo. Legis. Serv. S.B. 751, Mo.Rev.Stat. § 287.160.3. “The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question.” Martin, 769 S.W.2d at 112.***

[P.544-545]To support his request for reimbursement of medical expenses, Claimant introduced his treatment records from Des Peres Hospital, Dr. Rutz, and Dr. Poepsel. Claimant also introduced bills from those providers as Exhibit K. Claimant testified that Employer provided some medical care immediately after the accident but later declined to provide further treatment. Claimant stated that he subsequently sought treatment on his own for the work injury, including the August 2007 surgery. Claimant testified that he had seen Exhibit K and that it contained copies of the bills he received for the treatment he sought on his own for the work injury. The bills, Claimant's testimony identifying the bills, and the accompanying medical records constitute a sufficient factual basis under Martin for the Commission's award of past medical expenses. See id. at 111–12. Relying on Martin, Employer asserts that Claimant's testimony was without credibility or probative value because he stated that he did not know if he could read and understand Exhibit K and that he did not know “the specifics, the detail of what's included in Exhibit K.” However, we find nothing in Martin requiring a claimant to testify that he can read and \*545 understand the specifics of the medical bills. 6 Instead, the Martin court found sufficient the claimant's testimony identifying the bills “as being related to and the product of her injury.” Id. at 111.

**[P.545]**2. Credits Due Employer [21] Employer argues that it was entitled to a credit on the past medical expenses award for amounts that Claimant's health insurer paid to his medical providers. Section 287.270 provides: "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder...." Mo.Rev.Stat. § 287.270. "This section clearly was intended to allow the employee to benefit from any collateral source the employee might have available to him or her, independent of the employer, whether purchased or not." Farmer–Cummings, 110 S.W.3d at 822. "If the employer has not provided such a source, the employer has no right under the statute to claim benefit from it." Id. "Payments from an insurance company or from any source other than the employer or the employer's insurer for liability for Workmen's Compensation are not to be credited on Workmen's Compensation benefits." Shaffer v. St. John's Reg'l Health Ctr., 943 S.W.2d 803, 807 (Mo.App.S.D.1997) (quotation omitted). [22] The evidence shows, and Employer does not dispute, that Claimant's health insurer paid a portion of his medical bills. Employer does not assert that these payments came from Employer or its workers' compensation insurer. As a result, under section 287.270, no credit was due Employer for the amounts paid by the health insurer. The Commission did not err in awarding those amounts to Claimant. See id. at 808.

**[P.545-546]**Employer also contends it was entitled to a credit for fee reductions negotiated between Claimant's health insurer and his medical providers. When a claimant carries his burden under Martin by producing documentation detailing past medical expenses and testifying to the relationship of the expenses to the compensable injury, the employer may raise a defense. Farmer–Cummings, 110 S.W.3d at 822–23. Specifically, the employer may establish that the claimant "was not required to pay the billed amounts, that [his] liability for the disputed amounts was extinguished, and that the reason that [his] liability was extinguished does not otherwise fall within the provisions of section 287.270." Id. at 823. If a medical provider has allowed write-offs and fee reductions for its own purposes and the claimant is not legally subject to further liability, then the claimant is not entitled to a windfall recovery. Id. On the other hand, if the claimant "remains personally liable for any of the reductions, [he] is entitled to recover them as 'fees and charges' pursuant to section 287.140." Id. The employer carries the burden of proving by a preponderance of the evidence that it is entitled to a credit for write-offs and fee reductions. Id.; Proffer v. Fed. Mogul Corp., 341 S.W.3d 184, 190 (Mo.App.S.D.2011).

**[P.545]**[23] Here, Employer attempted to establish that Claimant had no liability for the fee reductions by introducing an affidavit of Des Peres Hospital employee Grace Ya. In Ms. Ya's affidavit, she stated that she is the custodian of records for medical billing at Des Peres Hospital and that she \*546 personally reviewed Claimant's account information. Ms. Ya stated that:

- 1) For services on August 13, 2007, "facility billing records indicate an initial charge of \$678.00 that was reduced to \$314.79" and paid by Claimant; and
- 2) For services on August 22, 2007, "facility billing records indicate an initial charge of \$52,178.68 7 that was reduced to \$31,033.96" and paid by Claimant's health insurance provider, AETNA.

**[P.546]**Ms. Ya's affidavit is insufficient to prove that Claimant's liability to Des Peres Hospital for the fee reductions has been extinguished. The record contains documents Claimant signed in 2007 and 2008 agreeing to be responsible "for the total charges for services rendered" by Des Peres Hospital. Ms. Ya did not purport to have any authority to fix, change, or extinguish a patient's liability for medical expenses. In addition, Ms. Ya's affidavit does not state whether Des Peres Hospital allowed the fee reductions for its own purposes, Farmer–Cummings, 110 S.W.3d at 823, or whether it would have made the reductions in the absence of Claimant's health insurance policy.

*[P.546-547]* [24] Employer's final argument in point six is that the Commission erred in ordering Employer to pay the past medical expenses directly to Claimant because the Workers' Compensation Law contemplates payment to Claimant's medical providers or health insurer. "However, in cases where the employer has initially denied liability, the courts have affirmed awards of medical costs to the employee." *Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71, 75 (Mo.App.E.D.1983). "Although making an award of such costs to the employee may result in a windfall, the insurance company may be entitled to reimbursement from the employee." *Id.* "The fact that claimant has accepted benefits from another source does not estop him for asserting his rights to compensation under the act." *Id.* [25] In addition, section 287.140.13(6) permits the administrative law judge to order direct payment to a medical provider whose services have been authorized in advance by the employer or insurer. Mo.Rev.Stat. § 287.140.13(6). Here, the Commission noted that no provider had given notice pursuant to that statute of a claim for fees for services authorized in advance by Employer. Thus, the Commission properly ordered Employer to pay Claimant directly for his past medical expenses. Point six is denied.

**BEATRICE V. CURATORS OF THE UNIVERSITY OF MISSOURI, 438 S.W.3d 426**  
**(MO. APP. W.D. 8-5-2014)**

**(ONE ON FIVE; DIFFERENT THEMES AND MEDICAL THEORIES)**

**Background**

*[P.428]Ms. Beatrice began working for Employer in 2004 as a labor and delivery nurse at Columbia Regional Hospital. In October of that year, one and a half years before the work-related injury at issue in this case, Ms. Beatrice slipped on water while walking into an operating room and fell on her right buttock. She sustained strains of her neck, back, right knee, and ankle and a gluteal contusion. The incident required minimal treatment, and no claim for compensation was filed.*

*[P.428]On March 28, 2006, while assisting with positioning a struggling patient during a difficult delivery, she experienced immediate pain in her low back. She finished her shift and applied ice to her back at home that night. The next day, on March 29, 2006, Ms. Beatrice was pushing a patient in a hospital bed and experienced worsening back pain and spasms radiating down her left leg. She reported the injury to Employer, and Employer referred her to Dr. Robert Conway.*

*[P.428-429]Dr. Conway ordered an x-ray of the lumbar spine, which showed no bony abnormalities. He diagnosed Ms. Beatrice with aggravation of lumbar spondylosis with possible left L5 radiculopathy, prescribed physical therapy and medication, and placed her on a ten pound lifting restriction at work with only occasional bending and twisting. **When Ms. Beatrice continued to complain of pain in her low back, Dr. Conway ordered an MRI, which he reported showed mild degenerative changes of the spine with possible mild stenosis at L5-S1 but no evidence of disc herniation or significant stenosis.** He continued to prescribe physical therapy. **On June 15, 2006, Ms. Beatrice reported to Dr. Conway that her back pain worsened as she increased work activities. Dr. Conway noted that she had made very limited progress in physical therapy, proclaimed her at maximum medical improvement, and released her from his care giving her permanent restrictions of lifting no more than twenty pounds and working no more than 8-hour shifts. He assigned a permanent partial disability rating of 4% of the body as a whole related to her work injury.***

***[P.429]Because of her work restrictions, Ms. Beatrice was no longer able to perform her job, and Employer terminated her on June 22, 2006. She filed a claim for compensation on July 6, 2006. In August 2006, Ms. Beatrice began working full-time for Litigation Management reviewing medical records from home.***

***[P.429]Continuing to have pain in her low back, Ms. Beatrice began seeing Dr. Thomas Highland, an orthopaedic surgeon with Columbia Orthopaedic Group, at her own expense in July 2006. Dr. Highland ordered a CT and myelogram of her lumbar spine. He prescribed epidural steroid injections in July 2006 and November 2006 for disc bulge at L4–5. Ms. Beatrice received some relief from the July injection but very little from the November injection.***

***[P.429]In January 2007, Ms. Beatrice sought a second opinion on her own from Dr. Keith Bidwell, a spine specialist in St. Louis. Dr. Bidwell examined Ms. Beatrice and reviewed her medical records. He noted that her MRI showed only mild disc degeneration. He determined that surgical treatment was not advisable and recommended physical therapy. Ms. Beatrice also saw Dr. George Carr for an independent medical evaluation at the request of her attorney. After examining Ms. Beatrice and reviewing her records, Dr. Carr opined that the work accident on March 28, 2006, caused the development of her chronic back pain syndrome. He concluded that she was at maximum medical improvement and suffered a permanent partial disability of 15% body as a whole rated at the lumbosacral spine due to chronic low back pain. Dr. Carr agreed that surgery was not indicated.***

***[P.429]Still experiencing persistent pain in her back and pain and weakness in her left leg, Ms. Beatrice saw Dr. Highland again in January 2007. She reported that she had begun to develop pain in her groin, right low back, and buttock area. She had also had several minor falls due to her left leg weakness. Dr. Highland referred Ms. Beatrice to Dr. Jennifer Clark, a physiatrist, to address the leg weakness. Dr. Clark's electrodiagnostic testing produced normal results. Believing that Ms. Beatrice's leg weakness was a result of her pain, Dr. Highland then referred her to Dr. Steven Street, a pain management specialist. Dr. Street administered an epidural steroid injection in February 2007.***

***[P.429]In March 2007, Dr. Highland ordered another CT and myelogram of Ms. Beatrice's lumbar spine. After reviewing the test results, Dr. Highland opined that Ms. Beatrice had a bulging disc at level L4–5 that was directly related to her work injury in March 2006 and that surgical treatment of the bulging disc would give her relief of her back and leg pain, recommended a two-level vertebral fusion at levels L4–5 and L5–S1, and scheduled the surgery for March 8, 2007. Employer did not authorize the surgery, and it was cancelled.***

***[P.429-430]In April 2007, Ms. Beatrice saw Dr. Dos Santos, a psychiatrist. Dr. Santos diagnosed \*430 her with major depression, chronic back and leg pain, and history of abuse and prescribed antidepressants. He continued to treat Ms. Beatrice with regular follow up visits.***

***[P.430]Employer sent Ms. Beatrice to Dr. James Coyle for an independent medical evaluation in May 2007. Dr. Coyle ordered an MRI and also reviewed the March 2007 CT and myelogram. His impression was that the work injury of March 28, 2006, caused an aggravation of degenerative disc disease and facet arthritis at levels L4–5 and L5–S1. He suggested that surgical intervention was a potential treatment but that the prognosis from surgery would be very guarded because the findings on the MRI were relatively mild with the exception of severe arthritis at L5–S1. He wanted better quality testing before considering surgery. Employer authorized no further treatment. Ms. Beatrice returned to Dr. Highland in July 2007 with continuing pain in her back and both legs. Dr. Highland examined Ms. Beatrice***

and reviewed the new MRI and Dr. Coyle's notes from May. *He maintained that Ms. Beatrice would benefit from surgical treatment but could not proceed because of the insurance issues.*

*[P.430]Employer sent Ms. Beatrice to Dr. Michael Chabot, an orthopaedic doctor in St. Louis, in December 2007 for its own second opinion regarding diagnosis and the need for further treatment. Dr. Chabot examined Ms. Beatrice and reviewed her medical records. He concluded that the etiology of the chronic back pain of which Ms. Beatrice complained was poorly defined. He noted evidence of mild disc degeneration and more advanced facet degeneration at L4–5 and L5– S1 and opined that her perceived disability far exceeded the objective physical findings suggesting psychosocial overtones. He agreed with Dr. Conway's opinion in 2006 that Ms. Beatrice reached maximum medical improvement then and his assignment of a permanent partial disability rating of 4% of the body as a whole related to her work injury. Dr. Chabot opined that no additional medical treatment was necessary and surgery was not indicated.* Dr. Chabot revised his opinion in March 2008 after reviewing the depositions of Dr. Highland and Dr. Coyle. He maintained his earlier opinion that the etiology of Ms. Beatrice's back pain complaints remained poorly defined but recommended a lumbar discogram extending from L3–S1 and post-discogram CT by Dr. Anthony Guarino for further diagnosis.

*[P.430]In the spring of 2008, Ms. Beatrice began to experience urinary incontinence , difficulty voiding, and urinary tract infections . Dr. Highland directed Ms. Beatrice to Dr. Jerrold Schermer, an urologist, in May for testing to address her bladder dysfunction . Dr. Schermer determined that Ms. Beatrice's bladder dysfunction was likely related to her back problems. His impression was that she had a neurogenic bladder or that her difficulties were the result of severe pain and the need for pain medication.* In Ms. Beatrice's medical records relating to the exam, Dr. Schermer wrote, "I am concerned that she has a neurogenic bladder and I have communicated this with Dr. Highland, surgery has already been recommended for her back." Dr. Schermer instructed Ms. Beatrice to perform self-catheterization twice daily.

*[P.430-431]Ms. Beatrice also saw Dr. Highland again in May 2008, and he ordered a new lumbar myelogram and post-myelogram CT. Dr. Highland opined that Ms. Beatrice's \*431 urinary incontinence and need for self catheterization was related to her lumbar spine problems caused by the work injury. He again recommended spinal decompression surgery as soon as possible to avoid any permanent damage to the nerve to the bladder.*

*[P.431]In August 2008, at Ms. Beatrice's request, a hardship hearing was conducted before an administrative law judge.*

*[P.431]The ALJ considered Ms. Beatrice's testimony, reports of Dr. Carr, Dr. Highland, Dr. Coyle, Dr. Chabot, and Dr. Bridwell, deposition testimony of Dr. Highland and Dr. Coyle, and medical records. It issued a temporary/partial award ordering Employer to "provide [Ms. Beatrice] with all such medical, surgical and other treatment as may reasonably be required to cure and relieve her from the effects of the work accident of March 28, 2006, including, but not limited to, the lumbar discograms extending from L3 to S1 with post-discogram CT recommended by Dr. Michael Chabot."*

*[P.431]Employer sent Ms. Beatrice to Dr. Guarino in St. Louis in October 2008 for lumbar discograms and post-discogram CT. Dr. Guarino performed the lumbar discogram injections at L2–3, L3–4, L4–5, and L5–S1. No post-discogram CT was done because Ms. Beatrice had previously experienced an allergic reaction to the dye when she had a kidney test performed in 1976. Ms. Beatrice attempted several times in the days prior to the appointment to*

advise Dr. Guarino's staff of her need for medication to prevent anaphylaxis . *According to Ms. Beatrice, when she arrived at her appointment, the preventative anaphylactic medication was not available on site. The testing assistant told her to go forward with the discogram only, which did not require the use of dye. The post-discogram CT study with dye was not performed or ever rescheduled by Employer. Immediately following the discogram , Ms. Beatrice saw Dr. Chabot to review the findings. He indicated that the discogram revealed back complaints at all levels and that no control level could be found. He opined that surgery was not warranted because the risks outweighed the benefits. He disagreed with Dr. Schermer's opinion that her bladder dysfunction was neurogenic and suggested that her complaints were the result of psychosocial issues. He recommended that she undergo a Minnesota Multiphasic Personality Inventory (MMPI) test for consideration of placement of a spinal cord stimulator .*

Ms. Beatrice was laid off by Litigation Management in February 2009 when she had completed the work for which she had been hired. She next found employment in July 2009 at Moberly Regional Hospital as a case manager.

*[P.431]In May 2009, Dr. Highland reviewed Dr. Guarino's discogram studies and noted that because the post-discogram CT with dye was not performed, the test results were inadequate to further assess Ms. Beatrice's back condition. He recommended that a more complete discogram with postdiscogram CT be performed by his colleague, Dr. Jeffrey Tiede, to assess Ms. Beatrice's need for surgery. Employer refused to authorize any treatment other than with Dr. Chabot or any doctor to whom he referred Ms. Beatrice. Meanwhile, Ms. Beatrice saw Dr. Tiede, who ordered an MRI. He treated her with epidural steroid injections at L4–5 and L5–S1 in May and June 2009.*

*[P.43-4321]Employer directed Ms. Beatrice to Dr. Wayne Stillings, a St. Louis psychiatrist, in July 2009 to perform the MMPI test recommended by Dr. Chabot. Ms. Beatrice \*432 and her attorney objected to the testing with Dr. Stillings because of his reputation as being “unreliable” in other workers' compensation matters and suggested that the parties agree on an appropriate psychiatrist or have the ALJ appoint one.*

*[P.432]In October 2009, Ms. Beatrice reported to Dr. Tiede and to her doctor at Women's Wellness Center that she was experiencing both urinary and fecal incontinence . Dr. Tiede performed, at Ms. Beatrice's expense, a lumbar discogram at levels L3– 4, L4–5, and L5–S1 and post-discogram CT with dye using medication to prevent an adverse reaction to the dye. The testing produced no pain at L3–4 and pain and annular dye leakage at L4–5 and L5–S1. Dr. Tiede concluded that that Ms. Beatrice had a mechanically sensitive disk at the L4–5 level with an annular tear and a chemically sensitive disk at the L5–S1 level with reproduction of her left lower extremity pain. The CT revealed evidence of a left asymmetric bulging of the disk at the L4–5 level into the left neuroforamen and a circumferential bulging of the disk at the L5–S1 level with facet joint arthropathy noted at both levels. Dr. Highland reviewed the results of Dr. Tiede's testing and concluded that surgery would be beneficial for Ms. Beatrice. He again recommended a two-level anterior fusion at L4–5 and L5–S1.*

*[P.432]Ms. Beatrice provided Employer with the discogram and post-discogram CT results and films to forward to Dr. Chabot or Dr. Coyle for their review and opinion regarding whether Ms. Beatrice was a surgical candidate. Per Employer's request, Ms. Beatrice also forwarded to it Dr. Highland's treatment records and her psychiatric records from Dr. Santos. In the meantime, Dr. Tiede continued to treat Ms. Beatrice with steroid injections in December 2009 and January and February 2010. He performed a chemical lesioning of the nerves at the left sacroiliac joint in April 2010. In May 2010, Employer responded that it would only authorize*

*the spinal cord simulator recommended by Dr. Chabot and would not authorize back surgery.*

***[P.432]Ms. Beatrice quit her job at Moberly Regional Hospital in June 2010 and the next day underwent back surgery by Dr. Highland. Prior to surgery, Dr. Highland noted that Ms. Beatrice complained of nearly constant dull and occasionally sharp pressure in low back on left side with nearly constant dull, throbbing pain down left leg and increased urinary incontinence since May 2008 and increased bowel incontinence since October 2009. Dr. Highland's diagnoses prior to surgery were degenerative disk disease and spondylosis L4–5 and L5–S1 levels, circumferential bulging disk with asymmetry into the left foramen L4–5 level resultant from March 2006 work injury, and circumferential bulging disk at L5–S1 resultant from March 2006 work injury. He performed an anterior lumbar discectomy and fusion of levels L4–5 and L5–S1. Dr. Highland released Ms. Beatrice from care in September 2010 at maximum medical improvement with a permanent lifting restriction of 20 pounds and a final rating of 23% of the body as a whole as related to her back injury in March 2006.***

***[P.432-433]After surgery, Ms. Beatrice's pre-surgery constant leg pain and her bladder and bowel problems resolved. Her back pain decreased to tolerable levels. She estimated that her pain level in her back had improved by approximately 50%; however, at the time of the final hearing, she continued treatment with a pain specialist. She returned to many of her normal, pre-injury patterns of movement and activities. Ms. Beatrice moved to New Jersey in January 2011 and worked fulltime as an ancillary \*433 nurse for an insurance company until September 2011.***

***[P.433]The final hearing was held in July 2012. The exhibits from the August 2008 hearing were admitted as well as new testimony from Ms. Beatrice, her medical records since 2008, and medical bills. Dr. Highland's October 2011 deposition and Dr. Chabot's August 31, 2011 and January 27, 2012 reports were also presented. In his deposition, Dr. Highland opined within a reasonable degree of medical certainty that Ms. Beatrice sustained a bulging disc at L4–5 and annular tears at L4–5 and L5–S1 as a direct consequence of the March 2006 work injury, which necessitated the two-level fusion. He testified that Ms. Beatrice's constant pain, difficulty walking, and urinary and bowel incontinence were consistent with the lumbar injury she had sustained. He further testified that Dr. Schermer's impression that Ms. Beatrice had a neurogenic bladder helped confirm his opinion. He discussed the importance of the discogram and post-discogram CT with dye stating, “So the discogram , when you inject the dye, it just gives you a picture that you can't see on a regular MRI scan or on an (sic) myelogram CAT scan . So change is really found primarily on the discogram ... It was the chemical process and the internal disruption—internal derangement of the [L5–S1] disc that you could really only see with the dye from the discogram .”***

***[P.433]In his two reports, Dr. Chabot diagnosed Ms. Beatrice with a history of disc bulging, disc degeneration, facet DJD, chronic back pain, sciatica and complaints of urinary and fecal incontinence with no evidence of nerve root compression . He maintained his earlier opinion that the origins of Ms. Beatrice's subjective complaints were elusive and that strong psychosocial issues played a role in her complaints. He opined that Ms. Beatrice may have sustained a strain injury as a result of the March 2006 accident, the March 2006 accident was not the prevailing factor in causing her condition, and surgical intervention was not supported by medical records and diagnostic studies. He explained that the first discogram performed by Dr. Guarino was not compromised and that the second discogram with dye did not change is earlier opinion.***

***[P.433-434]Following the hearing, the ALJ admitted a report from Dr. Coyle dated August 13, 2012. In it, Dr. Coyle noted that after his evaluation of Ms. Beatrice in 2007, he***

*opined that the work accident was an aggravation of degenerative disc disease and facet arthritis at levels L4–L5 and L5–S1 and that the prognosis from surgery would be very guarded. He opined that based on medical records, Ms. Beatrice “is at least as debilitated and in all likelihood more debilitated than she was prior to surgery.”* He disagreed with Dr. Highland’s assessment that the discogram without dye performed by Dr. Guarino was not valid noting that “multiple MRIs and CT myelograms were obtained which adequately image neural compression from a disc as well as the character of the annulus and nucleus of the disc. No annular tears, fissures, or disruptions were seen on any of the radiographic studies obtained prior to surgery. In fact, Dr. Highland obtained an MRI of the lumbar spine in the month prior to performing the L4 through S1 fusion, and it showed no evidence of neural compression or disc pathology at the levels operated on.” *Dr. Coyle did not list the October 2009 post-discogram CT with dye study performed by Dr. Tiede as one of medical records that he reviewed \*434 for his report.* He disagreed with Dr. Schermer’s impression that Ms. Beatrice’s bladder dysfunction was related to her back problems stating that a person cannot have a neurogenic bladder without nerve injury or ongoing neural compression and that her use of narcotics and muscle relaxants could be causing the bladder issues.

*[P.434]The ALJ found that Ms. Beatrice sustained an injury, an L4–5 disc bulge and an L5–S1 annular tear, in the March 2006 work accident, the March 2006 work accident was the prevailing factor in the cause of the L4–5 disc bulge and L5–S1 annular tear, the June 2010 fusion surgery was reasonable and necessary to cure and relieve Ms. Beatrice from the effects of the work accident, and the injury sustained by Ms. Beatrice in the work accident resulted in 23% permanent partial disability of the body as a whole. It awarded Ms. Beatrice \$33,587.36 for permanent partial disability benefits, \$11,605.56 for temporary total disability benefits, and \$122,713.72 for medical benefits.*

*[P.434]*Employer appealed to the Commission, and the Commission affirmed the award incorporating the ALJ’s decision. This appeal by Employer followed.

*[P.435]*Employer challenges the Commission’s findings that Ms. Beatrice suffered a compensable injury, that the March 28, 2006 workrelated accident was the prevailing factor in the cause of the compensable injury, and that surgical treatment was reasonable and necessary to cure and relieve Ms. Beatrice from the effects of the work accident. In making these challenges, *it specifically argues that the Commission ignored five physician’s objective medical findings in favor of Ms. Beatrice’s subjective self-serving complaints and testimony, the Commission never found the five physicians’ opinions not credible, the Commission relied only on Dr. Highland’s opinion, which was not supported by objective medical evidence, and the five physicians’ opinions versus Dr. Highland’s prevented Ms. Beatrice from meeting her burden of proof.*

*[P.435]*Once a compensable injury is found, the inquiry turns to calculation of compensation or benefits to be awarded, which can include medical treatment (section 287.140, RSMo Cum.Supp.2013), temporary total disability (section 287.170, RSMo Cum.Supp.2013), and permanent partial or permanent total disability (section 287.190 and section 287.200, RSMo Cum.Supp.2013). Tillotson, 347 S.W.3d at 517–18 . Section 287.140 describes an employer’s obligation to afford medical care and treatment following a compensable injury:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and

medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

**[P.435-436]**Under this statute, an employer is obligated to afford medical treatment that “is \*436 reasonably required to cure and relieve the effects of the injury.” Tillotson, 347 S.W.3d at 518. In fulfilling this obligation, the employer is given control over the selection of a medical provider. *Blackwell v. Puritan– Bennett Corp.*, 901 S.W.2d 81, 85 (Mo.App.E.D.1995) . It is only when the employer fails to provide medical treatment that the employee is free to pick her own provider and assess those costs against her employer. *Id.* “Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment.” *Id.* [15]

**[P.436]***Employer's points on appeal and arguments essentially attempt to re-litigate the medical evidence on appeal.\*\*\*\* Two medical theories were presented in this case. One was that Ms. Beatrice sustained a simple back strain in the accident or aggravated her degenerative disc disease and facet arthritis and that, apparently due to mental issues, she consistently complained of inordinate pain. In this theory, Ms. Beatrice's complaints of urinary and bowel incontinence were caused by her use of narcotic medication to address the inordinate pain complaints. This theory was presented through the reports and medical records of Drs. Conway, Coyle, Bridwell, Carr, and Chabot and the 2007 deposition testimony of Dr. Coyle, in which he stated his opinions at that time within a reasonable degree of medical certainty.*

**[P.436]***\*\*\*\*The second theory, presented through the reports, records, and deposition testimony of Dr. Highland, was that Ms. Beatrice sustained injury to the L4–5 and L5–S1 discs in the accident, which was the source of her pain as well as her incontinence. Dr. Highland opined within a reasonable degree of medical certainty that the lumbar disc bulges and the associated annular tears were most likely traumatic in origin and a consequence of Ms. Beatrice's March 2006 work-related accident and that the two-level fusion surgery was necessary to treat such injuries. He testified that Ms. Beatrice's constant pain, difficulty walking, and urinary and bowel incontinence were consistent with the lumbar injury she had sustained. He further testified that Dr. Schermer's concern that Ms. Beatrice's bladder dysfunction was likely related to her back problems and that she had a neurogenic bladder helped confirm his opinion. 2*

**[P.436-437]**As noted above, “where the right to compensation depends on which of two medical theories should be accepted, the \*437 issue is peculiarly for the Commission's determination.” Bond, 322 S.W.3d at 170 (internal quotes and citation omitted). The Commission is free to believe whatever expert it chooses as long as each opinion is based on substantial and competent evidence, and the appellate court will not disrupt such choice even if the competing expert is worthy of belief. *Hulsey*, 239 S.W.3d at 162 . ***The Commission chose to believe Dr. Highland over the other doctors, expressly finding his opinion credible, and gave Dr. Highland's opinions more weight. Contrary to Employer's arguments, Dr. Highland's opinions were not based solely on Ms. Beatrice's subjective complaints but on objective medical evidence. Dr. Highland was Ms. Beatrice's treating physician, performing physical examinations and reviewing diagnostic tests and reports, including the records and report of an urologist, Dr. Schermer. Dr. Highland also performed the surgery and was able to observe the bulging disc and annular tears at both L4–5 and L5–S1 as he operated. His opinions provided substantial and competent evidence that Ms. Beatrice suffered a compensable injury,***

*that the March 28, 2006 work-related accident was the prevailing factor in the cause of the compensable injury, and that surgical treatment was reasonable and necessary to cure and relieve Ms. Beatrice from the effects of the work accident. The standard of review mandates deference to the Commission's choice to believe Dr. Highland, and Dr. Highland's opinions constituted sufficient competent evidence to support the Commission's award.*

[P.437]The Commission's award is affirmed.

**RANDOLPH COUNTY VS. MOORE-RANSDSELL, 446 S.W.3d 699 (MO.APP. W.D. 11-25-2014)**

**(ISSUES THAT CAN DEVELOP IN PRE-EXISTING INJURY AND CONDITION CASES; MORE THAN AN AGGRAVATION; FURTHER DISABILITY; THIS PATIENT VS. ANOTHER PATIENT; NOT A TRIGGERING OR PRECIPITATING FACTOR; EVIDENCE SPECIFICALLY LINKED WORK ACTIVITY AS THE CAUSE RATHER THAN INJURY COMING FROM A HAZARD TO WHICH SHE WAS EQUALLY EXPOSED IN NORMAL NONEMPLOYMENT LIFE; BECAUSE SHE WAS AT WORK RATHER THAN WHILE SHE WAS AT WORK; QUESTION PRESENTED IS WHETHER THE ACCIDENT IS THE PREVAILING FACTOR IN THE RESULTING INJURY, NOT WHETHER THE COMPENSABLE INJURY IS THE PREVAILING FACTOR IN HER RESULTANT MEDICAL TREATMENT**

*[P.701]Randolph County appeals the Labor and Industrial Relations Commission's final award of workers' compensation benefits to its former employee, Tammy Moore–Ransdell (“Moore–Ransdell”). Randolph County contends the Commission erred in concluding that Moore–Ransdell suffered a compensable injury because: (1) the injury came from a hazard or risk to which she was equally exposed in her normal nonemployment life; and (2) the accident at work was merely a triggering or precipitating factor and not the prevailing factor in causing her resulting medical condition and disability.*

*[P.701-702]Moore–Ransdell, age fifty at the time of the accident, worked for Randolph County for ten years. As a “deeds clerk” in the Assessor's office, Moore–Ransdell worked with “property records cards,” which were stored in filing cabinets. Her medical record as explained through her History and Physical at Boone Hospital Center indicates that she was “well with regard to her low back and lower extremities until Tuesday, February 26, 2008.” On that day, Moore–Ransdell was updating the property records cards. One of the file folders she needed was in the back of the bottom file drawer, which she described as “extremely full” and “jammed up.” Because of defects in the filing system and the location of the file cabinet, Moore–Ransdell had to squat down and twist to remove a file from the tightly jammed bottom file drawer. She squatted down, reached into the back of the file drawer, and twisted her body as she tried to remove the file. She immediately experienced extreme pain in her low back. She could barely stand up and had difficulty \*702 walking. Moore–Ransdell finished working the rest of the day but had too much low back pain the following day to get out of bed.*

*[P.702]On March 1, 2008, Moore–Ransdell spoke to her supervisor about her injury. Her supervisor referred her to Kevin D. Komes, M.D., an orthopedic surgeon, for evaluation of her back pain for workers' compensation purposes. The record indicates that Moore–Ransdell told Dr. Komes that she had low back pain, pain in her buttocks, and numbness in her entire left leg, all of which began immediately after the file cabinet incident. In April 2008, Moore–Ransdell filed a claim for workers' compensation benefits. Randolph County denied her claim and refused to authorize further medical treatment. Moore–Ransdell then sought medical treatment on her own.*

*[P.702]In July 2008, Moore–Ransdell underwent a lumbar discogram , which is a test that places a needle into the disc itself and injects a dye. According to Dr. Highland, the discogram showed degeneration in the discs at L3–4, L4–5, and L5–S1, which are the bottom three discs in the back. The discogram reproduced the pain that Moore– Ransdell had been having in her low back and down her leg. Dr. Highland recommended a three-level fusion of the discs. Moore–Ransdell did not have surgery at that time but attempted a more conservative treatment plan of further therapy, continued steroid injections and pain medication.*

*[P.702]In August 2010, Moore–Ransdell returned to Dr. Highland and reported that the steroid injections had given her only short-term relief and that she was still having back pain and numbness and tingling in her left leg. She was having difficulty living with the pain. Dr. Highland took an x-ray and noted that the three problematic discs had gotten worse, particularly at the L5–S1 level. An MRI showed further degeneration at L3–4 and L4–5, inflammatory changes at L5–S1, increasing bulging of the L3–4 disc, and increasing compression of the nerves at that level. In examining Moore– Ransdell, Dr. Highland noted that she was experiencing more loss of sensation in her left leg than she had in 2008 and that she had a slight weakness to the dorsiflexion of the left foot, which she did not have in 2008. Dr. Highland again recommended that Moore–Ransdell undergo surgery to treat her injury.*

*[P.702-703]In October 2010, he wrote in a letter that Moore–Ransdell had “continuing degeneration of all three segments in her back which were the source of her pain.” He stated, “I clearly feel that her continuing symptoms and her need for surgery \*703 are directly related to the work injury in February 2008.” He stated that his impression of Moore–Ransdell's condition was: “(1) Acute lumbar strain in February 2008; (2) Internal disc disruption to L3–4, L4–5 and L–5–S1 secondary to work injury in February 2008; (3) Need for anterior lumbar fusion L3–4, L4–5 and L5–S1 secondary to work injury in February 2008.”*

*[P.703]In November 2010, Moore–Ransdell underwent anterior fusion surgery. Moore–Ransdell's back and leg pain improved post surgery.*

*[P.703]Q. All right. Let me ask you a hypothetical question, Doctor. If you would assume that the history that Ms. Ransdell gave you when you first saw her was true and correct, that is, that she had back pain and leg pain after squatting down to get a file—something out of a file cabinet and twisting, and that she did that on about February 26th, 2008. And then you saw her—at the times that you saw her, do you have an opinion based on reasonable medical certainty as to whether or not that incident caused the conditions that you found when you examined her?*

*A. Yes.*

*Q. What is your opinion?*

*A. That the injury caused the condition that I treated her for.*

*Q. Okay. All right. And do you have an opinion as to whether or not that injury that she described is what necessitated this course of treatment and surgery that you have now*

*performed?*

*A. Yes.*

*Q. And what is that opinion?*

*A. That it caused the injury and the problem for which we eventually did do the surgery.*

*Q. All right. And in your opinion, the surgery that was performed, was that the appropriate medical procedure to take in Ms. Ransdell[']s case?*

*A. Yes.*

*[P.703]On cross-examination, Dr. Highland agreed with defense counsel that Moore–Ransdell had a degenerative back before the February 26, 2008 accident. He also agreed that aging and normal activities of daily living can cause such degenerative problems to progress over time. Dr. Highland testified that, when he re-evaluated Moore–Ransdell in August 2010, he found that she had increasing stenosis and continuing degeneration of the three discs, which were the source of her pain. He agreed that, without her pre-existing disc degeneration, the lumbar strain she suffered at work on February 26, 2008, would not have necessarily required the three-level fusion procedure that he performed. Dr. Highland explained that the lumbar strain was an “injury to the muscles and ligaments, which is usually a more short-term issue” and that “the continued pain was from the deteriorating discs that she had” (emphasis added).*

*[P.703-704]Dr. Highland answered \*704 affirmatively when asked whether the work accident “triggered a pain from the underlying discs” and when asked whether he had to “address the underlying condition to address that pain.” Dr. Highland also was asked on cross-examination about the factors that contributed to Moore–Ransdell's medical condition. Dr. Highland testified that one factor was the underlying disc degenerative process, one was “possibly” her smoking, and the third was lumbar strain from the incident \*\*\*\*\*at work. Dr. Highland reiterated his medical opinion that “in this patient,” the lumbar strain “was the primary factor” of the overall condition. Dr. Highland also testified that the workplace incident caused the degeneration of the spine to “become symptomatic.”*

*[P.704]On redirect examination, Dr. Highland was asked two questions:*

*Q. Your testimony before—the prevailing cause, I think, is the term we use now, of this condition that she had when she came to see you, that's caused by this squatting down and twisting. Would that be your opinion?*

*A. Yes.*

*Q. All right. Would that be based on reasonable medical certainty?*

*A. Yes.*

*[P.704]Specifically, the ALJ found credible Moore–Ransdell's testimony regarding how the accident occurred and the immediate and intense low back pain that resulted. The ALJ also cited Dr. Highland's opinion that the February 26, 2008 accident caused Moore–Ransdell's low back condition and need for treatment, including surgery. The ALJ examined the content of Dr. Chabot's analysis and stated that she found Dr. Highland's testimony more persuasive than Dr. Chabot's.*

*[P.704] [1] The ALJ determined that Randolph County was liable to Moore–Ransdell for medical expenses in the amount of \$130,574.00, temporary total disability benefits for 100 weeks, and permanent partial disability benefits based upon twenty-five percent disability to the body as a whole. 2 Randolph County filed an application for review with the Commission. The Commission issued a final award affirming and incorporating the ALJ's findings and decision. Randolph County appeals. 3*

**[P.705]**Randolph County's two points on appeal allege error in the Commission's finding that Moore–Ransdell suffered a compensable injury. Section 287.020 governs the determination as to whether an employee has sustained a compensable injury from a work-related accident. **Tillotson**, 347 S.W.3d at 517 . Section 287.020.2 defines an accident for workers' compensation purposes: The word “accident” as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

**[P.705]**Section 287.020.3(1) requires that the injury must have “arisen out of and in the course of employment.” For an injury by accident to be compensable, the accident must be “the prevailing factor in causing both the resulting medical condition and disability.” *Id.* “The prevailing factor” is the “primary factor, in relation to any other factor, causing both the resulting medical condition and disability.” *Id.* Section 287.020.3(2) further provides that an injury is deemed to arise out of and in the course of employment only if: (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

**[P.705]**These provisions are to be strictly construed, and the Commission is to weigh the evidence “impartially without giving the benefit of the doubt to any party.” § 287.800.

**[P.706]***Randolph County contends in its first point that the Commission acted in excess of its authority in compensating Moore–Ransdell because her injury did not arise out of her employment, in that her injury came from a hazard or risk to which she was equally exposed in normal nonemployment life. Specifically, Randolph County argues that the risk was simply the act of bending over, which was not unique to Moore–Ransdell's job and was nothing more than a risk of everyday life to which she was equally exposed in her normal nonemployment life.* [7] [8] [9]

**[P.706]**For an injury to arise out of employment under Section 287.020.3(2)(b), there must be “a causal connection between the injury at issue and the employee's work activity.” *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 510 (Mo. banc 2012) . \*\*\*\**A causal connection does not exist if the injury “merely happened to occur while working but work was not a prevailing factor” and the risk involved was one to which the worker would have been equally exposed in normal nonemployment life. Miller v. Mo. Highway & Transp. Comm'n*, 287 S.W.3d 671, 674 (Mo. banc 2009) . *The injury must have occurred because the risk was due to some condition of the worker's employment. Id. In other words, the employee must have been injured because she was at work and not simply while she was at work. Pope v. Gateway to West Harley Davidson*, 404 S.W.3d 315, 320 (Mo.App.E.D.2012) .

**[P.706]**Applying these principles, the Supreme Court in *Miller* found that an employee whose knee popped while he was walking briskly on an even road surface to retrieve materials needed for his job as a road crew worker failed to prove a causal connection between his work activity and his injury. *Id.* at 672–74 . The court noted that the injury causing risk— walking— was one to which the employee would have been equally exposed in normal nonemployment life and that “[n]othing about work” caused the employee's knee to pop. *Id.* at 674 . **Thus, the court determined that, while the employee's injury may have arisen during the course of his employment because it occurred while he was at work, it did not arise out of his employment**

*under Section 287.020.3(2)(b). Id.*

*[P.706]* Similarly, in *Johme*, 366 S.W.3d 504 , the Supreme Court determined that an employee who was injured in an office kitchen while making coffee when she turned and twisted her ankle, which caused her foot to fall off her high-heeled shoe, failed to show a causal connection between her work and her injury. The court noted that “the evidence did not link her act of making coffee as the cause of her injury and fall,” and the only connection her turning, twisting her ankle, and falling off her shoe had to her work activity was that it occurred while she was at work. *Id.* at 511 . Because the employee's risk of injury from turning, twisting her ankle, and falling off her shoe was a risk to which she would have been equally exposed in her normal nonemployment life, the court held that, under section 287.020.3(2)(b), her injury was not compensable. *Id.* at 511–12 . [10]

*[P.706-707]* ***Randolph County argues that, like the risk of injury from the employee's walking in Miller and from the employee's turning, twisting her ankle, and falling off her shoe in Johme, the risk of injury from Moore–Ransdell's bending over was one to which she was equally exposed outside of work. Randolph County mischaracterizes the risk in this case. The evidence shows that Moore–Ransdell did not suffer the low back injury after merely “bending over” at her place of employment. Rather, she credibly testified that, in attempting to perform her work activity of updating property cards, she squatted down to pull \*707 out a lower file drawer that was “extremely full,” reached into the back of the file drawer, and twisted to remove the file from the tightly packed drawer. In doing so, she experienced immediate extreme pain in her lower back.***

*[P.707]* ***Unlike in Miller and Johme, the evidence here specifically linked Moore–Ransdell's work activity as the cause of her low back injury. She was required to update property cards as one of her primary job duties. Due to Randolph County's storing the property cards in full file drawers, Moore–Ransdell had to squat down, reach into the back of a file drawer, and twist to remove the file containing the property card that she needed to update. Moore–Ransdell injured her back because she was at work, not merely while she was at work.*** See *Pope*, 404 S.W.3d at 320 . Her risk of injury from squatting down, reaching into the back of a file drawer, and twisting to remove files from full file drawers was a risk to which she would not have been equally exposed in her normal nonemployment life.

*[P.707]* ***\*\*\*\*Point Two, Randolph County contends that the Commission's determination that Moore–Ransdell suffered a compensable injury was not supported by competent and substantial evidence and was against the weight of the evidence because the medical evidence showed that her work related accident was merely a triggering or precipitating factor and not the prevailing factor in causing her medical condition or disability.***

*[P.707]* [11] [12] [13] “Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause.” *Bond*, 322 S.W.3d at 170 (internal quotation marks and \*\*\*\*\*citations omitted). See also *T.H. v. Sonic Drive In of High Ridge*, 388 S.W.3d 585, 591 (Mo.App.E.D.2012) (affirming Commission's determination in light of the standard of review that medical testimony was sufficient competent evidence of medical causation where that testimony and claimant's testimony supported determination that sexual assault was prevailing factor in stress and depression);

**[P.708]** [14] The issue, then, is whether Dr. Highland’s testimony, when examined in the context of the whole record as the Supreme Court prescribed in Hampton, constituted competent and substantial evidence to support the Commission’s determination that the injury Moore–Ransdell suffered in the work accident was the primary factor in causing her low back condition and permanent partial disability. ***As the Commission noted in its award, Dr. Highland testified that the February 26, 2008 accident “caused the condition that [he] treated her for”; necessitated the course of treatment that he provided, including the anterior fusion surgery; was “the primary factor” that contributed to “[t]he overall condition of her lumbar spine”; and was the “prevailing cause” ... “of this condition that she had when she came to see [him].”***

**[P.708]** The record contains sufficient competent evidence to support the Commission’s determination that Moore–Ransdell’s workplace accident was the “prevailing” or “primary” factor that caused her injuries. § 287.020.3(1) (As noted above, “ [t]he prevailing factor’ ” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.) To begin, the medical history indicates that Moore–Ransdell was “well” before her injury as to “her low back and lower extremities” and that her problems were new as of her first visit to Dr. Komes soon after the work injury. Additionally, the Commission expressly found that Moore–Ransdell “testified credibly to the squatting and twisting necessitated in pulling a file out of a low, full file drawer in the course of her employment for the Randolph County assessor’s office and the immediate and intense low back pain resulting from that injury.”

**[P.708]** **\*\*\*\*\*Further, the Commission also expressly determined that Dr. Highland was “more persuasive” than Dr. Chabot, and the Commission stated that it based its award on the testimony of Moore–Ransdell and Dr. Highland. The Commission therefore found credible Dr. Highland’s testimony that the lumbar strain from Moore–Ransdell’s workplace accident “was the primary factor” in her overall condition. Smoking was another “possible” factor, but the workplace injury was \*\*\*\*\*the prevailing medical cause of her condition. \*\*\*\*\*Finally, the question presented is whether the workplace accident was the prevailing factor in Moore–Ransdell’s injury, not whether the compensable injury is the prevailing factor in her overall resultant medical treatment. Tillotson, 347 S.W.3d at 518.**

**[P.708-709]** As noted above, Dr. Highland’s key diagnoses were these: “(1) Acute lumbar strain in February 2008; (2) Internal disc disruption L3–4, L4–5 and L5–S1 secondary to work injury in February 2008; (3) \*709 Status post anterior and posterior fusion L3–4, L4–5 and L5–S1 secondary to work injury in February 2008.” Dr. Highland’s testimony explains the diagnoses of the lumbar strain as well as the two conditions related to the discs, both of which are secondary to the work injury. ***Dr. Highland maintained throughout his care of Moore–Ransdell that her continuing symptoms and need for surgery were due to the work injury. His board certified medical opinion was that the secondary diagnoses were not merely precipitated by that work accident, but rather that the squatting down and twisting resulted in lumbar strain that “was the primary factor” of the overall condition.*** Hence, Dr. Highland’s testimony and diagnoses, once found credible by the Commission, leave little room to question the foundation of the Commission’s decision. As noted above, “determinations with regard to causation ... are questions of fact to be ruled upon by the Commission, and the reviewing court may not substitute its judgment on the weight of the evidence or on the credibility of witnesses for that of the Commission.” Spencer, 302 S.W.3d at 800 (citation omitted).

**[P.709]** **\*\*\*\*\***[15] [16] In reaching the opposite conclusion, the Dissent attempts to characterize the degenerative disc issues as apparently inevitable in spite of the workplace strain

or that the disability determination is based only on the continuing pain Moore–Ransdell suffers rather than on the workplace injury. That analysis simply does not bear out upon a full review of Dr. Highland’s expert testimony, the sole expert deemed persuasive. Certainly there was evidence from which the Commission could have determined that the workplace injury merely “triggered” or “precipitated” the condition rather than being the “primary” or “prevailing” factor.

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[P.710] *That there was nothing akin to a loosened piece of disc or a fracture is not the same as saying that there was not “anything acute.” In fact, Dr. Highland diagnosed Moore–Ransdell in part with an “acute lumbar strain.” Regardless, that there was no fracture or injury “like that” does not yield the conclusion that the work accident necessarily could not be the prevailing cause of the injury. Nor should we conclude that the work accident was not the prevailing cause of the injury based on incidental testimony that the source of the pain was disc degeneration or that the strain caused the degeneration to become symptomatic or that lumbar strain was an “injury to the muscles and ligaments, which is usually a more short-term issue” (emphasis added).*

\*\*\*\*\**While it is true that the statute requires more than a simple aggravation of a preexisting condition, it is also true that the record reflects Dr. Highland’s medical opinion that \*\*\*\*\*“in this patient,” the lumbar strain “was the primary factor” of the overall condition. Dr. Highland’s expert medical opinion may leave open the possibility that a lumbar strain in another patient would not necessarily be the prevailing cause of a similar medical condition, but surmising what might hypothetically be the case in another patient ignores what Dr. Highland testified about in “this patient.”* There is no conflict in Dr. Highland’s testimony, and even if there were, the Commission is free to believe some, all or none of any witness’s testimony, so the minor portions which the dissent argues are in conflict may have been found not to be credible. Additionally, our standard of review is clear that “it is irrelevant that there is supportive evidence for the contrary finding.” Hornbeck, 370 S.W.3d at 629. The record as a whole, read in proper context, is clear that Dr. Highland was not merely using conclusory “magic words” in testifying that the workplace accident was the “prevailing factor” in Moore–Ransdell’s medical condition.

**GLEASON V. TREASURER OF THE STATE OF MISSOURI, 455 S.W. 3D 494 (MO. APP. W.D. MARCH 3, 2015)**

**[ANOTHER NON-PRE-EXISTING INJURY CASE]**

**[WHETHER THE RISK SOURCE OF INJURY WAS A RISK TO WHICH THE CLAIMANT WAS EXPOSED IN HIS NORMAL NONEMPLOYMENT LIFE]**

[P.496] *Ceva Logistics employed Gleason as a transportation coordinator. Ceva Logistics works with Ford Motor Company to deliver new vehicles throughout the United States and Mexico. Gleason worked in a supervisory position over a crew of five to seven employees. He testified:*

We would load [the vehicles] on trains and secure them down.... [I]t could be five railroad cars or ten railroad cars of trains which would generally be 75, 80 or 100 some new cars.... [T]hen I would go up [onto the railcars] and

inspect and make sure everything was right and then we would ship it off.  
Gleason was employed in that capacity from February 2007 to November 2007.

[P.496] ***On August 5, 2007, Gleason was walking atop one of the railcars conducting an inspection when he fell approximately 20 to 25 feet to the ground. Gleason sustained injuries to his head, neck, right shoulder, clavicle, and ribs. Gleason has no memory of the circumstances leading up to the fall, the fall itself, or the three days after the fall when he was hospitalized. Accordingly, Gleason cannot explain why he fell. No one testified to having seen the fall.***

[P.496] ***Ceva Logistics and Gleason entered into a compromise settlement that was approved by an Administrative Law Judge (“ALJ”).*** The Stipulation for Compromise Settlement stated that Gleason and Ceva Logistics agreed that “[Gleason], while in the employment of [Ceva Logistics], sustained an

[P.496]accidental injury/occupational disease arising out of and in the course of [Gleason's] employment and that an accidental injury/occupational disease resulted in injury to [Gleason].” Ceva Logistics agreed to pay Gleason a lump sum of \$34,000 in exchange for a release based on a determination that Gleason sustained a permanent disability of 15 percent at the 232 week level on the right side, as well as 13 percent body as a whole referable to the cervical region. 1 ***Gleason's claim against the Second Injury Fund remained pending.***

[P.496]***An ALJ held a hearing on Gleason's claim against the Second Injury Fund.*** Gleason and the Second Injury Fund entered into various stipulations prior to the hearing leaving three issues to be determined: (1) “whether [Gleason] sustained an accident arising out of and in the course and scope of his employment”; (2) “whether [Gleason] suffered any disability either permanent partial or permanent total”; and (3) “whether the Second Injury Fund is liable to [Gleason] for any disability compensation.” ***After considering the evidence presented at the hearing, the ALJ issued its written decision denying Gleason's claim for benefits from the Second Injury Fund. The ALJ concluded that Gleason did not meet his burden of proving that he suffered a work injury on August 5, 2007, in that there was no evidence presented regarding the cause of Gleason's fall. The ALJ also concluded that Gleason was employable on the open labor market after his fall from the railcar, and that his inability***

\*497 to find work resulted from a worsening cardiac condition and the effects of a stroke that occurred after Gleason's fall from the railcar.

[P.497]The Final Award did not incorporate the findings of the ALJ. ***The majority of the Commission concluded that because Gleason was unable to explain why he fell, Gleason had not met his burden to prove that “his injury did not come from a hazard or risk unrelated to his employment to which workers would be equally exposed outside of and unrelated to employment in their normal nonemployment lives.” Thus, the majority concluded that Gleason failed to show that his injury arose out of and in the course of his employment with Ceva Logistics.***

[P.498] “[A] claimant's preexisting disabilities are irrelevant until employer's liability for the last injury is determined.” Lewis v. Second Injury Fund, 435 S.W.3d 144, 157 (Mo.App.E.D.2014). Here, the employer, Ceva Logistics, stipulated its liability for Gleason's 2007 injury and, relevant to this case, stipulated that Gleason's injury arose out of and in the course of Gleason's employment. The Second Injury Fund did not join in this stipulation, however, and remained free to litigate the issue conceded by Gleason's employer. Hoven v.

Second Injury Fund, 414 S.W.3d 676, 680 (Mo.App.E.D.2013) (“The [Second Injury

[P.498] Fund] is not bound by terms of settlement agreements to which it is not a party. Nor is the [Second Injury Fund] collaterally estopped by a settlement agreement to which it is not a party.” (citations omitted)). At most, Gleason's settlement with his employer was evidence that the Commission could consider. *Id.* Gleason thus remained obligated to prove all of the essential elements of his workers' compensation claim against the Second Injury Fund. See *Angus v. Second Injury Fund*, 328 S.W.3d 294, 299 (Mo.App.W.D.2010) (“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim....”).

[P.498]As the employer, Ceva Logistics was responsible to furnish Gleason “compensation under the provisions of [Chapter 287] for personal injury ... by accident ... arising out of and in the course of the employee's employment .” Section 287.120 (emphasis added). “Accident” is statutorily defined as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” Section 287.020.2. ***The Commission found that Gleason suffered an “accident” when he fell from the railcar.***

***[P.498]However, not every “injury ... by accident” is compensable. “Injury” is statutorily defined as “an injury which has arisen out of and in the course of employment.” Section 287.020.3(1). “The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether [a claimant's] injury shall be deemed to have arisen out of and in the course of [his or] her employment.” Johme v. St. John's Mercy Healthcare, 366 S.W.3d 504, 509 (Mo. banc 2012) . Section 287.020.3(2) provides: 4***

An injury shall be deemed to arise out of and in the course of the employment only if:  
(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and  
(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

***[P.498]The Commission found that Gleason's accident was the prevailing factor in causing his injuries as required by section***

***[P.498] 287.020.3(2)(a). The Commission concluded, however, that Gleason did not prove the second factor required by section***

***[P. 499] 287.020.3(2)(b). The Commission concluded as a matter of law that because Gleason could not explain why he fell, “we do not know what hazards or risks gave rise to employee's fall, [so that] we cannot determine if those hazards or risks are related or unrelated to employment and we cannot determine if workers are equally exposed to those hazards or risks outside of and unrelated to employment in their normal nonemployment lives.”***

[P.499][3] In reaching this conclusion, the Commission misapplied the law. “For an injury to be deemed to arise out of an in the course of the employment under section 287.020.3(2)(b), the claimant employee must show a causal connection between the injury at issue and the employee's work activity.” *Johme*, 366 S.W.3d at 510. As the Supreme Court noted in *Johme*, the nature of this “causal connection” was addressed in *Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671 (Mo. banc 2009). 366 S.W.3d at 510–11.

[P.499]In Miller, the Court “considered whether workers' compensation was payable to an employee who was injured when his knee popped and began to hurt while he was walking briskly toward a truck containing repair material that was needed for his job.” Johme, 366 S.W.3d at 510 (citing Miller, 287 S.W.3d at 672). In concluding that the claimant's injury did not arise out of and in the course of employment, Miller explained:

**[P.499]An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. The injury here did not occur because the employee fell due to some condition of his employment. He does not allege that his injuries were worsened due to some condition of his employment or due to being in an unsafe location due to his employment. He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment. ...**

[P.499][T]he the [sic] injury is not compensable, as there is no causal connection of the work activity to the injury other than the fact of its occurrence while at work. Johme, 366 S.W.3d at 511 (quoting Miller, 287 S.W.3d at 674).

*[P.499]“Miller's focus was not on what the employee was doing when he popped his knee—he was walking to a truck to obtain materials for his work—but rather focused on whether the risk source of his injury —walking—was a risk to which he was exposed equally in his ‘normal nonemployment life.’ ”* Id. (emphasis added). “Miller instructs that it is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in ‘normal nonemployment life.’ ” Id. (emphasis added). [4]

*[P.499]The “causal connection” standard announced in Miller and further addressed in Johme thus first requires identification of the risk source of a claimant's injury, that is, identification of the activity that caused the injury, and then requires a comparison of that risk source or activity to normal nonemployment life.*

[P.500]In Johme, the “risk source,” that is to say, the activity that caused the injury, was “turning and twisting [an] ankle and falling off [the claimant's] shoe.” 366 S.W.3d at 511.

[P.500]Here, the Commission expressly found that Gleason “was atop a railcar performing an inspection as part of his duties for employer.” *The Commission expressly found that Gleason “fell 20–25 feet from the top of the railcar and landed on the ground.” The Commission expressly found that Gleason's fall from this height caused Gleason's injuries. Plainly, the “risk source,” that is the activity which caused Gleason's injuries, was falling from a railcar 20 to 25 feet above the ground. This is not a risk source to which Gleason would have been exposed in his “normal nonemployment life.” Borrowing from Johme, “[the Commission's] focus [should] not [have been] on what [Gleason] was doing when he [suffered his*

*[P.500] injuries]—he [had fallen from the top of a railcar where he was conducting an inspection]—but rather [should have been] focused on whether the risk source of his injury—*

*[falling 20 to 25 feet from the top of a railcar]—was a risk to which he was exposed equally in his ‘normal nonemployment life.’ ” 366 S.W.3d at 511 . Plainly, there was a causal connection between Gleason's work activity (working on the top of a railcar) and his injury (injuries incurred after falling 20 to 25 feet from that work location).*

[P.500](Emphasis added.) *Yet, despite controlling Supreme Court precedent on the point, the Commission opted instead to rely on two intermediate appellate decisions out of our Southern District for the alleged proposition that section 287.020.3(2) (b) is not established as a matter of law unless an injured worker cannot explain why he or she fell. This was legally erroneous.*

[P.500]The Commission relied on *Bivins v. St. John's Regional Health Center*, 272 S.W.3d 446 (Mo.App.S.D.2008) , and *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo.App.S.D.2013) . We need not address *Bivins*. Even presuming its holding is inconsistent with *Miller* and *Johme*, a determination we need not and do not make, *Bivins* was decided prior to both Supreme Court cases. It is not controlling. The Commission's reliance on *Porter* is equally misplaced. In *Porter*, a claimant fell on a bathroom floor at her place of employment. 402 S.W.3d at 164 . The claimant “did not recall how she got on the floor,” though she speculated the floor was wet. *Id.* at 165

[P.501] To this point in its discussion, *Porter* is indistinguishable from *Miller*. Just as in *Miller*, the “risk source,” that is the activity that caused *Porter*'s injury, was walking on a smooth surface. Just as in *Miller*, while engaged in this “risk source,” *Porter* was injured. The section 287.020.3(2)(b) inquiry was thus required to turn to whether the “risk source,” that is the activity causing the injury, was one to which the claimant would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. It is a matter of common acceptance that the “risk source” of walking across a smooth surface is a “risk source” a worker is equally exposed to in normal nonemployment life. Thus, in such cases, where the identified cause of an accident involves a risk source to which a worker is equally exposed in normal nonemployment life, unless the worker can establish something about the “risk source” that differentiates it from the equivalent risk in normal nonemployment life, the worker will be unable to establish the required causal connection between a work activity and the injuries sustained. Consistent with this observation, *Porter* was not entitled to benefits not merely because she couldn't explain why she fell, but because she fell while engaged in a risk source encountered in normal nonemployment life. *Under that factual circumstance, because “Porter failed to establish how she fell ..., [she] therefore, failed to show that she was exposed to an unusual risk of injury that was not shared by the general public ”.*

[P.501] *The Commission erroneously concluded that Porter stands for the proposition that every unexplained fall in the workplace is not compensable, as a matter of law, without regard to the risk source related to the fall. 5*

[P.501]*Because this risk source is plainly not one to which a worker would be exposed in normal nonemployment life, Gleason's fall while engaged in the risk source establishes “a causal connection between [his] injur[ies] \*502 at issue and [his] work activity.” Johme, 366 S.W.3d at 510 . Borrowing from Miller, Gleason's “injuries were worsened ... due to being in an unsafe location due to his employment. He was [working on the top of a railcar when he happened to fall 20–25 feet].” 287 S.W.3d at 674 . In contrast to the outcome in Miller, Gleason fell 20 to 25 feet to the ground because of his required work activity. Id. It was thus not necessary for Gleason to establish why he fell because he had already established that he “was exposed to an unusual risk of injury that was not shared by the general public .” Porter, 402 S.W.3d at 174 (emphasis added).*

[P.502]8] *The Second Injury Fund argues that unless we require claimants to prove why they fell, we will be permitting a claimant to recover for injuries resulting from idiopathic causes. [Respondent's Brief, p. 9] We disagree. Section 287.020.3(3) does indeed provide that "[a]n injury resulting directly or indirectly from idiopathic causes is not compensable." However, as we have already noted, a claimant's burden to establish a compensable injury is limited to establishing that the injury arose out of and in the course of employment, which requires proof only of the two criteria set forth at section 287.020.3(2)(a) and (b). Johme, 366 S.W.3d at 509. Once these criteria are established, any claim that an injury is nonetheless not compensable is in the nature of an affirmative defense. See, e.g., Crumpler v. Wal-Mart Assocs., Inc., 286 S.W.3d 270, 273 (Mo.App.S.D.2009) (holding that claimant was aware prior to her hearing of employer's theory of defense that claimant's injury was idiopathic, rendering it harmless error that the defense was not pled by the employer); see also Taylor v. Contract Freighters, Inc, Injury No.: 06-104584, 2009 WL 1719443, at \*8 (Labor & Indus. Relations Comm'n June 16, 2009) (holding that the exclusion from category of compensable injuries of an injury resulting directly or indirectly from idiopathic causes "is in the nature of an affirmative defense to employer," and that it was not the claimant's burden to prove an injury was not idiopathic, but instead the employer's burden to prove that it was). 6 Here, the Second Injury Fund neither alleged, nor sought to establish, that Gleason's injuries resulted directly or indirectly from an idiopathic cause. Gleason's injuries arose out of and in the course of his employment with Ceva Logistics. The Commission committed legal error in concluding otherwise.*

**DIERKES V. KRAFT FOODS A/K/A ADAIR FOODS COMPANY, 471 S.W.3d 726 (MO. APP. W.D. 10-27-2015)**

**(ACUTE COMPENSABLE INJURY ACTIVATES OR AGGRAVATES PRE-EXISTING ASYMPTOMATIC NONDISABLING DEGENERATIVE ARTHRITIC CONDITION TO LEVEL OF DISABILITY; RESPONSIBILITY FOR MEDICAL TREATMENT; EMPLOYEE WITHOUT KNOWLEDGE THAT INJURY WAS WORK-RELATED; FUTURE MEDICAL TREATMENT; TILLOTSON REVISITED)**

*[P.730]Kraft Foods ("Employer") and the Second Injury Fund ("the Fund") separately appeal an award of the Labor and Industrial Relations Commission awarding benefits to Katy Dierks. The Commission's award ordered Employer to pay past medical, future medical, and permanent partial disability benefits to Dierks, and it found the Fund liable for permanent total disability benefits. For the following reasons, the Commission's decision is affirmed.*

*[P.731]Dierks was employed for over a decade as a laborer at Employer's Adair Foods factory in Kirksville, Missouri. Her job duties included loading meat onto pallets, running a meat slicer, checking and weighing boxes, and using pallet jacks to move pallets of meat. On January 17, 2009, Dierks tripped on an air hose that had been left on the floor and landed on her hands and knees on the concrete floor. She immediately experienced sharp pain in her left knee. An injury report was filed by her supervisor, and Dierks later filed a timely claim for workers' compensation.*

*[P.731]Dierks received conservative treatment from Dr. Robert Sparks at the employee*

*clinic. On June 2, 2009, an MRI revealed a tear in Dierks's medial meniscus along with significant arthritis . Dr. Sparks referred Dierks to an orthopedic surgeon for further treatment.*

***[P.731]Employer arranged for Dierks to be seen by Dr. Christopher Main on June 8, 2009. Dr. Main diagnosed Dierks with a work-related left knee contusion but opined that the torn meniscus and arthritis in her knee were not work-related. He recommended surgery to repair the torn meniscus and offered to perform that surgery under Dierks's private health insurance. Dierks then decided to seek treatment from her own orthopedic surgeon, Dr. Peter Buchert, who had performed arthroscopic surgery on her right knee in 2006. Dr. Buchert eventually performed arthroscopic surgery on Dierks's left knee on August 28, 2009. Based upon what he observed during surgery, Dr. Buchert determined that Dierks's torn meniscus had been caused by her work injury. Following surgery, Dierks continued to have significant pain and problems with her left knee and has been forced to walk with a cane. Eventually, Dr. Buchert released Dierks to return to work but permanently restricted her to sedentary work. Employer was not able to accommodate those restrictions. On May 26, 2010, Dierks filed a claim for compensation with the Division of Workers' Compensation. Dierks's claim was heard by an administrative law judge on October 8, 2013. The ALJ subsequently entered her Findings of Fact and Rulings of Law finding that Dierks's January 17, 2009 fall was the prevailing factor in causing the torn meniscus in Dierks's knee and concluding that she, therefore, sustained a compensable, work-related injury. The ALJ found that Dierks had sustained permanent partial disability of 25% to her left lower extremity at the 160 week level. The ALJ also ordered Employer to pay \$12,800 in medical bills incurred by Dierks and ordered Employer to provide future medical treatment for the left knee. The ALJ further found that Dierks was permanently and totally disabled as a result of the disability caused by her work-related injury when combined with the preexisting arthritic condition of her right knee and her "overall level of functioning." Accordingly, the ALJ concluded that the Fund was liable for permanent total disability benefits. Both Employer and the Fund applied for review by the Commission. The Commission ultimately affirmed the ALJ's award and adopted it as its own.***

[P.732] “To determine whether the award is supported by competent and substantial evidence, we examine the evidence in the context of the whole record.” *Cardwell v. Treasurer of Missouri*, 249 S.W.3d 902, 906 (Mo.App.E.D. 2008) . “An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence.” *Id.* “In reviewing the Commission's decision, we view the evidence objectively and not in the light most favorable to the decision of the Commission.” *Poarch v. Treasurer of Missouri—Custodian of the Second Injury Fund*, 365 S.W.3d 638, 642 (Mo.App.W.D. 2012) . “However, we defer to the Commission on issues involving the credibility of witnesses and the weight given to their testimony.” *Id.* [3] Section 287.020.3(1), RSMo Cum. Supp. 2008 provides: “ ‘[a]n injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.’ ” *Claspill v. Fed Ex Freight East, Inc.*, 360 S.W.3d 894, 903 (Mo.App.S.D. 2012).

***[P.732-733] [4] In this case, all parties concede, and the medical evidence uniformly supports, that Dierks, who was 68–years–old at the time of the hearing, had pre-existing degenerative arthritis in both her knees. Dierks testified, however, that she was asymptomatic in her left knee prior to falling at work on January 17, 2009, and nothing in the record indicates problems with the use of her left knee prior to the fall. She most certainly was able to***

*perform all of her work duties up until that time. Dierks further testified that after the accident she had problems with her left knee that never fully went away. Dierks's orthopedic surgeon, Dr. Buchert, testified that Dierks's fall at work was the prevailing factor in causing her torn meniscus and her need for arthroscopic surgery . He based that opinion on Dierks's history and what he saw of the tearing of the meniscus when he was performing the surgery. Similarly, Dr. Koprivica, who performed an independent medical evaluation of Dierks, testified that the meniscus tear was a new structural injury caused by Dierks's fall at work and that her fall was the prevailing factor in causing her need for arthroscopic surgery and permanent injury to her knee . He based his opinion as to causation on Dierks's history, the MRI of Dierks's knee, and Dr. Buchert's findings during surgery. The expert opinions of Drs. Buchert and Koprivica constitute substantial and competent \*733 evidence supportive of the Commission's finding that the fall at work caused the meniscus tear in Dierks's left knee, the need for arthroscopic surgery , and permanent disability to that knee.*

[P.733-734] [8] *In its second point, Employer claims that the Commission erred in ordering Employer to provide future medical treatment in the form of knee replacement surgery. It argues that Dierks's meniscus \*734 tear was appropriately and effectively treated by the arthroscopic surgery and that the overwhelming weight of the medical evidence showed that any need for knee replacement surgery was solely due to Dierks's pre-existing arthritic condition.*

[P.734] [9] [10] [11] “The Missouri Workers' Compensation Law includes an allowance for future medical treatment for injured workers ‘as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.’ ” Null, 425 S.W.3d at 180 (quoting § 287.140.1 ). Thus, in order to receive such benefits, “[a] claimant need only demonstrate a ‘reasonable probability’ that future medical treatment is necessary by reason of his work-related injury.” Id. at 181. “[O]nce it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury.” *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo.App.W.D. 2011) . “[I]n determining whether medical treatment is ‘reasonably required’ to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of preexisting conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition.” Id. [12] [13] “It is well-established law that a preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability.” *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 54 (Mo.App.W.D. 2008) (internal quotation omitted). “And, a claimant can receive an award of future medical benefits if a work injury aggravates a pre-existing condition to the point that the claimant is likely to need future care.” Id.

[P.734] *Dr. Koprivica testified that, while Dierks had preexisting degenerative disease in her knee, it is speculative whether, absent her work injury, it would have ever progressed to a point she would require a knee replacement. He testified to a reasonable degree of medical certainty that the new structural injury to her knee from the work injury and the arthroscopic surgery to treat that injury have accelerated the degenerative process to where Dierks will require a knee replacement in the future.* Accordingly, the record certainly contains competent and substantial evidence that her need for a total knee replacement in the future flows from her work injury. 2

**[P.735] *In its third point, Employer challenges the Commission's award of past medical expenses to Dierks to cover the cost of her arthroscopic surgery . It contends that because Dierks elected to have Dr. Buchert perform arthroscopic surgery on her knee on her own without requesting treatment from Employer or obtaining authorization therefore, the Commission erred in ordering Employer to pay for that treatment. 3***

[P.735] [16] [17] [18] With regard to the employer's obligation to provide medical care and treatment following a compensable injury, § 287.140.1 RSMo Cum. Supp. 2008 provides: In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of such injury.

**[P.735] “[A]n employer's duty to provide statutorily-required medical aid to an employee is absolute and unqualified.” *Downing v. McDonald's Sirloin Stockade*, 418 S.W.3d 526, 529 (Mo.App.S.D. 2014) (internal quotation omitted). “Under this statute, an employer is obligated to afford medical treatment that is reasonably required to cure and relieve the effects of the injury.” *Beatrice v. Curators of Univ. of Mo.*, 438 S.W.3d 426, 435–36 (Mo.App.W.D. 2014) (internal quotation omitted). “In fulfilling this obligation, the employer is given control over the selection of a medical provider.” *Id.* at 436.**

**[P.735] Section 287.140.1 further provides that “[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.” Employer maintains that this provision bars Dierks from recovering the cost for the knee surgery performed by Dr. Buchert.**

**[P.735][19] The problem with Employer's argument, however, is that “[a] desire to choose one's own medical provider [under § 287.140.1] can only arise when an employee has knowledge of the existence of a work-related injury needing medical treatment and can, thus, voluntarily elect to forego the employer's obligation to provide medical treatment.” *Meyers v. Wildcat Materials, Inc.*, 258 S.W.3d 77, 80–81 (Mo.App.S.D. 2008) . Here, the physician chosen by employer erroneously told Dierks that her cartilage tear was not workrelated and that her work-related injury was completely healed. Thus, when Dierks sought to get her knee surgically repaired by Dr. Buchert, she had no reason to believe that employer should be responsible for providing that medical treatment. It was only while performing the surgery that Dr. Buchert saw evidence of an acute injury to the knee and was able to determine that the meniscus tear had been caused by her work injury. Accordingly, the facts of this case are decidedly different than those cases in which the employee knowingly decides to have a work injury treated by his or her own medical provider.**

**[P.735-736][20] Absent reason for her to believe Employer should be responsible for her treatment, Dierks cannot be deemed to \*736 have waived her right to have treatment for her injury provided by Employer under § 287.140.1. See *id.* at 81. Where an employee seeks necessary medical treatment for a work-related condition without knowledge at the time of that treatment that the condition was work-related and the employer is not prejudiced by such treatment, the employer is required to reimburse the employee for such treatment under § 287.140.1 even though the employer did not have the opportunity to select the treatment providers as granted by § 287.140.10. *Id.* at 82.**

[P.736] Accordingly, absent any evidence in this case that Employer was prejudiced, the Commission did not err in awarding past medical expenses to Dierks. Point denied.

**MALAM V. STATE DEPARTMENT OF CORRECTIONS, 2015 WL 3896936 (S.D. 12-22-2015)**

**\*\*\*\*\*THIS CASE WAS ORDERED TRANSFERRED TO THE MISSOURI SUPREME COURT ON DECEMBER 22, 2015.**

**\*\*\*\*\*DO NOT CITE THIS CASE AS SUPPORTING AUTHORITY--ALTHOUGH THE OPINION MAY COME DOWN BY THE TIME OF THIS DISCUSSION**

*[P.1]On August 12, 2011, Ronald Malam (“Claimant”), a correctional officer employed by the Missouri Department of Corrections (“Employer”), was involved in an incident where he was “required to ‘take down’ an uncooperative inmate.” Although Claimant felt nothing unusual at the time, other than “an adrenaline rush,” the incident started a chain of events that ultimately resulted in a significant amount of hospitalization and medical treatment for a “hypertensive crisis” suffered by Claimant. The Labor and Industrial Relations Commission (“the Commission”) ultimately found the largest portion of that medical treatment to be non-compensable under section 287.020 of the workers' compensation law. 1*

*[P.1]Claimant's second point asserts the Commission erred in finding that Claimant failed to prove that his work accident was the prevailing factor in causing his hypertensive crisis because “the Commission failed to first determine whether a compensable injury of any kind occurred, in that a compensable physical and emotional injury did result from the sudden and extreme stresses of the accident that in turn caused the need to treat the hypertensive crisis .”*

[P.1]To determine whether Claimant suffered a compensable injury, the Commission was required to utilize the statutory scheme set forth in section 287.020. *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466, 472 (Mo.App.S.D. 2012) . In pertinent part, that statute provides:

2. The word “accident” as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.
3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability .

[P.2](2) An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury ; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life. Section 287.020.2–3 (emphasis added). 2

[P.2][2] *The determination of whether an accident is the “prevailing factor” causing a claimant's condition is an inherently factual one. Maness v. City of De Soto, 421 S.W.3d 532, 539 (Mo.App.E.D. 2014).*

[P.2]After Claimant's “take down” of the inmate, he and another officer were escorting the inmate to another location within the prison. While doing so, Claimant began to notice that he was short of breath, and he “felt like his lungs were filling up.” Claimant went to get a drink of water, and he began to spit up blood. A nurse noticed what was happening and called an ambulance.

[P.2]Claimant was transported by ambulance to Texas County Memorial Hospital, where he lost consciousness. Chest xrays revealed the presence of a pulmonary edema . *The impression of the treating physician, Dr. Thomas Stubbs, was that Claimant had “severe pulmonary contusions ” and “possibly had aspirated.”*

[P.2]Claimant was eventually intubated and transported to Leste E. Cox Medical Center (“Cox”) in Springfield, where he remained unconscious for approximately a week. During this period, Claimant was evaluated by several doctors. *Dr. Timothy Woods, a pulmonary specialist, noted an abrasion to Employee's left knee, but “no other external trauma [was] noted.” Dr. Woods found, “It does not appear that the patient's disease process is related to trauma. It is likely that trauma precipitated the medical processes he has going on.” Dr. Douglas Ham's impression was “significant congestive heart failure , pulmonary edema .” Dr. Ham further stated, “It is unclear whether this was all related to a possible cardiac contusion tipping him into the congestive heart failure or whether he could have also had a pulmonary contusion which worsened his respiratory and cardiac status or could have been secondary to the stress of the altercation.”* According to Dr. Mark Anderson, a cardiologist, Claimant was suffering from a “hypertensive crisis ” with acute renal and respiratory failure and that he had hypotension and shock associated with the hypertensive crisis . 3

[P.3]*Claimant ultimately recovered with no permanent disability, and he has since returned to work. He sought workers' compensation reimbursement from Employer in the amount of \$138,010.15 for medical expenses billed by Cox. 4 An ALJ denied his claim. Claimant appealed that decision to the Commission, which unanimously affirmed the denial of benefits but modified the award. The Commission found that, although Claimant had suffered a work-related accident, he had failed to prove that the accident was the prevailing factor causing his injuries. See section 287.020.*

### [P.3]The Commission's Findings

[P.3]The Commission, unlike the ALJ, concluded that Claimant had suffered an “accident” pursuant to section 287.020.2. More specifically, it stated:

*We conclude that the incident on August 12, 2011, was (1) unexpected, (2) traumatic, (3) identifiable by time and place of occurrence, and (4) produced at the time objective symptoms of an injury caused by a specific event during a single work shift-namely, employee's difficulty breathing and his spitting up blood. We conclude, therefore, that employee suffered an accident.*

[P.3]With regard to whether Claimant's accident was the prevailing factor causing Claimant's resulting medical condition, the Commission considered the written reports of two medical experts. One of these experts, Dr. Anne–Marie Puricelli, had conducted an independent

medical examination of Claimant at Employer's request. *In her conclusions, where she noted Claimant's preexisting hypertension and cardiomyopathy, Dr. Puricelli opined:*

*It is my opinion that [Claimant] went into acute hypertensive crisis and developed hemoptysis due to the elevated pulmonary capillary pressure that occurred due to his left ventricular failure secondary to the hypertensive crisis. He did not admittedly sustain any trauma. There was minimal exertion that occurred surrounding the subduing of the inmate. He had not been adequately treated for his hypertension or his cardiomyopathy and he was drinking, admittedly, excessive amounts of fluid per day which, in my opinion, exacerbated both his hypertension and his underlying cardiomyopathy. It is my opinion that none of [Claimant]'s current diagnoses are related to any work event that occurred on August 12, 2011.*

*[P.3]The Commission disagreed with Dr. Puricelli's conclusion, however, explaining:*

*This is because Dr. Puricelli did not have the correct facts; she believed, for instance, that [Claimant] did not fall to the ground during the take down of the inmate. She also based her opinion, in part, on her determination that [Claimant]'s preexisting hypertension was inadequately treated before August 12, 2011, but we find no clear indication in the record that this was the case, and Dr. Puricelli does not explain how or why she believed [Claimant]'s hypertension to have been inadequately treated. [Claimant]'s unimpeached and credible testimony suggests (and we so find) that he was taking medications for hypertension and was regularly seeing a physician for checkups regarding his high blood pressure before August 12, 2011.*

*[P.3]The Commission then noted that the only evidence offered by Claimant on this issue was the written report of Dr. Brent Koprivica, who had conducted an independent medical examination on behalf of Claimant. In his report, Dr. Koprivica detailed Claimant's medical history and offered medical observations and opinions. As to causation, Dr. Koprivica opined:*

*[P.4]1. [Claimant]'s described work-related incident with the takedown of the offender on August 12, 2011, is felt to represent the direct, proximate and prevailing factor precipitating his hypertensive crisis. I would like to point out that but for the work injury, it would be impossible to predict that [Claimant] would have developed the hypertensive crisis that has necessitated the care and treatment that followed that event.*

*2. Clearly, [Claimant] had an underlying hypertensive cardiomyopathy identified as far back as 2005. Nevertheless, the prevailing factor precipitating the specific event were the unexpected emotional and physical stresses associated with restraining the offender.*

*[P.4](Emphasis added). Noting the word "precipitating," as used in section 287.020.2, the Commission concluded, "While we believe an accident may be both a precipitating and the prevailing factor causing a compensable injury, this does not appear to be Dr. Koprivica's opinion in this case. Rather, Dr. Koprivica says the accident was the prevailing factor that precipitated [Claimant's] hypertensive crisis." The Commission continued: "Even if we were to credit this opinion from Dr. Koprivica, absent further explanation as to what Dr. Koprivica meant by choosing those specific words, we simply are unable to conclude that [Claimant] has proven the requisite degree of causation to satisfy the requirements of the statute." We find no error in this conclusion.*

#### **[P.4]Analysis**

[P.4][3] [4] [5] Claimant's arguments to the contrary fail for several reasons. For one, Claimant ignores the fact that he had the burden of proving causation. "Medical causation, which is not within common knowledge or experience, must be established by scientific or medical evidence showing the relationship between the complained of condition and the asserted cause." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 461 (Mo.App.E.D. 2008) (emphasis added). In such situations,

*an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding nor—in the absence of expert opinion—is the finding of causation within the competency of the administrative tribunal.*

[P.4]*Silman v. William Montgomery & Assoc.*, 891 S.W.2d 173, 175–76 (Mo.App.E.D. 1995) (citations omitted), overruled on other grounds by *Hampton*, 121 S.W.3d 220. "*Whether a particular matter is beyond lay understanding has been treated as a question of law.*" *Bock v. City of Columbia*, 274 S.W.3d 555, 562 (Mo.App.W.D. 2008).

**[P.4]Here, Claimant argues that the Commission "only considered the medical opinions" and, as a result, "overlooked" or "ignored" other evidence. The problem with this argument is that a "hypertensive crisis" is a sophisticated injury that could be caused by various factors. 5 Further, Dr. Koprivica—Claimant's own expert—noted in his review of Claimant's medical records that Claimant "has a very complex history." As such, the evidence Claimant alleges the Commission ignored or overlooked—adequate treatment of preexisting conditions, no prior history of hypertensive crisis, and the circumstances surrounding the accident—is evidence that would be insufficient to establish that Claimant's hypertensive crisis was directly caused by his work-related accident instead of some other factor. 6**

**[P.5]In this regard, Dr. Koprivica's opinion, which purports to address causation, was necessary to meet Claimant's burden of proof on this issue. However, as the Commission correctly observed, Dr. Koprivica's opinion was limited to a conclusory statement in his report that Claimant's accident was the "prevailing factor precipitating" his injury. The Commission's inability to determine whether Dr. Koprivica was asserting that Claimant's work accident was "the prevailing factor" in causing his resulting treatment and disability (the statutory requirement for compensation) or that his work accident was merely the main "precipitating factor" of his injury went to the weight that the Commission afforded the opinion.** Although Dr. Koprivica's phraseology might have permitted an alternative interpretation, as Claimant strenuously suggests, this is not the standard by which we review the evidence in a workers' compensation appeal. Rather, the weight afforded a medical expert's opinion is exclusively within the discretion of the Commission. *Sartor v. Medicap Pharmacy*, 181 S.W.3d 627, 630 (Mo.App.W.D. 2006) .

**[P.5] [7] Moreover, the Commission's written decision demonstrates that it found that Dr. Koprivica's conclusions, like those of Dr. Puricelli, stemmed from an incorrect understanding of the facts. Specifically, the Commission noted, and the record reflects, that although Dr. Koprivica's report suggested that Claimant had experienced "extreme exertion" in taking down the inmate, Claimant had consistently testified that the event required only**

***“minimal exertion” on his part. 7 When expert testimony is thus impeached, the Commission is free to disregard it, even in the absence of other credible testimony.*** See *Seifner v. Treasurer of State–Custodian of Second Injury Fund*, 362 S.W.3d 59, 67 (Mo.App.W.D. 2012) (finding that where claimant's unopposed expert testimony regarding medical causation had been impeached, the Commission was free to find in the other party's favor). For these reasons, Claimant's first point is denied.

***[P.5]Claimant's second point takes the position that he was not required to prove that his hypertensive crisis was a compensable injury, arguing that the Commission should have determined “whether a compensable injury of any kind occurred, in that a compensable physical and emotional injury did result from the sudden and extreme stresses of the accident that in turn caused the need to treat the hypertensive crisis .” Relying on Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511 (Mo.App.W.D. 2011) , Claimant asserts that he was only required to show that the treatment for his hypertensive crisis “flowed from” the circumstances surrounding his accident. Tillotson does not support such an argument.***

***[P.5-6]Unlike the instant case, there was no dispute in Tillotson that the claimant had suffered a compensable injury.*** See *Tillotson*, 347 S.W.3d at 517 . The dispute there was whether the “prevailing factor” requirement in section 287.020 applied to the determination of what type and extent of medical treatment a claimant with a compensable injury was entitled to receive. *Id.* at 517–18 . The Western District of this Court found that the requirement did not apply to such a question; instead, once a compensable injury is established, the question becomes whether, pursuant to section 287.140, the treatment that followed was reasonably required to cure and relieve the effects of the injury. *Id.* at 518 . \*6

***[P.6]The flaw in Claimant's argument is that he incorrectly conflates his hypertensive crisis with its ensuing treatment and claims that both flowed from some earlier injury attributable to his work accident. A hypertensive crisis is not a medical treatment. It is a medical condition. And the “prevailing factor” requirement does apply when a medical condition or disability, i.e., an injury, is at issue. Compare section 287.020.3(1) with section 287.140.1; Tillotson, 347 S.W.3d at 518 . As noted in Tillotson, there is a “material distinction between determining whether a compensable injury has occurred and determining the medical treatment required to be provided to treat a compensable injury.” 347 S.W.3d at 517 . Tillotson involved the latter situation; this appeal involves the former. See Armstrong, 391 S.W.3d at 472–73 ; Jordan v. USF Holland Motor Freight, Inc., 383 S.W.3d 93, 95 n. 4 (Mo.App.S.D. 2012) .***

***[P.6]To be entitled to compensation for the treatment that flowed from his hypertensive crisis , Claimant was required to first establish that his accident was the prevailing factor in causing his hypertensive crisis .*** As detailed in our analysis of Point I, the Commission did not err in finding that Claimant failed to do. Claimant's second point is also denied, and the decision of the Commission is affirmed.

## **APPLICATION OF "PREVAILING FACTOR" AND "PRE-EXISTING INJURY" TO AN INTERESTING FACT PATTERN**

### **I. Background Facts**

Around 6:00 a.m. on Monday, July 21, 2014, a 59-year-old roofer and the four other members of his roofing crew meet to drive together in company pickup trucks to a roofing job site. The roofer had gone on a float trip the weekend before, and had not experienced any type of health problems. The roofing crew members state that the claimant appeared normal and did not make any complaints about his health or not feeling well. The claimant did not make any complaints about experiencing shortness of breath, chest pain, arm pain, dizziness, or any other type of physical symptom normally characterized as a heart attack symptom. The roofing crew started work early in order to try to avoid the effects of the summer heat. It was between 75 and 80° when the crew began work at about 6:15 a.m. that morning. It was a normal roofing job and there was not anything abnormal or unusual about the work being done or the amount of physical effort involved with the roofing job. Approximately an hour after they began work that Monday morning, the claimant was removing old shingles from a section of the roof that the crew did not consider steep enough to justify wearing safety belts. As he was using a shovel to remove old shingles, the claimant was stung by one or more bees or yellow jackets that flew at him from a nest in the eave of the section where he was working. After stating " oh shit, he got me", the claimant continued with this work. 15 to 30 minutes after the claimant was stung by the bee(s) or yellow jacket(s), one of his coworkers saw the claimant rolling down the roof toward the edge, appearing to be unconscious. The claimant fell from the roof and landed on the ground 12 to 15 feet below. The first coworker who arrived to help the claimant states that although it appeared the claimant was breathing when the coworker arrived to help, the claimant stopped breathing shortly after. First responders and paramedics were able to restore a heartbeat.

The claimant had not experienced shortness of breath or any heart-related symptoms before the incident of July 21, 2014. He was not taking any medications and was not under the treatment of a doctor for any medical condition. The claimant was a pack-a-day smoker for the last 45 years. Medical records from the early 1990s did record one high blood pressure reading, but the claimant was not undergoing any treatment or taking any medication for high blood pressure.

At the hospital following the the incident on July 21, 20014, the claimant was diagnosed with the following: bilateral pulmonary contusions, a fractured sternum, fractured right clavicle, closed head injury, intracerebral hemorrhage, upper extremity fracture, C-3, C-4, C-6 and C-7 fractures, cardiac arrest, and a heart attack.

Following emergency treatment at a local hospital, the claimant was transferred to Research Hospital in Kansas City. He underwent a cardiac catheterization on July 21, 2014, which showed the following:

Left main – moderate diffuse calcified atherosclerotic disease and a high-grade stenosis in the ostium of 50 to 60%.

Circumflex: 70% ostial narrowing

Ramus: 70% proximal narrowing

Right coronary artery: hundred percent proximal narrowing.

He underwent a complex but successful right coronary artery intervention with stenting.

The claimant underwent three vessel coronary bypass surgery on January 21, 2015.

## ISSUES:

The potential scenarios for characterizing the incident are: (1) reaction to the bee or wasp sting, resulting in cardiac arrest and heart attack, dizziness or loss of consciousness due to the cardiac arrest and heart attack, causing claimant to fall from the roof, and suffer head, neck, and clavicle injuries; (2) dizziness or loss of consciousness due to reaction to the wasp sting, causing claimant to fall from the roof, suffer head, neck, and clavicle injuries, suffer cardiac arrest when he hit the ground, and a resulting heart attack; or (3) a wasp sting that had no effect, ventricular fibrillation, cardiac arrest and a heart attack due to pre-existing coronary artery disease, dizziness or loss of consciousness, the fall from the roof, and the resulting head, neck, and clavicle injuries.

## II. The Claimant's Experts

Two board certified cardiologists retained by the claimant as experts were of the opinion that the bee sting was the prevailing factor. One of the doctors provided the explanation below. The other expert did not identify Kounis syndrome by name as the prevailing factor, but described the same series of conditions and events that led to the injuries suffered by the claimant.

"Kounis syndrome first described in 1991 is the occurrence of myocardial ischemia caused by inflammatory mediators released by an allergic insult. There are two variants of Kounis syndrome including type I and type II. Type I Kounis syndrome occurs in patients with normal coronary arteries. The allergic insult causes coronary spasm, which can progress to an acute myocardial infarction. ***Type II Kounis syndrome occurs in patients with pre-existing atheromatous narrowing of the coronary arteries. The allergic response can induce plaque erosion or rupture, which can cause an acute myocardial infarction.*** There are several conditions, drugs and environmental factors that can induce Kounis syndrome. ***Bee stings are one of the causes of Kounis syndrome.*** The venom of a bee contains vasoactive amines including histamine, dopamine, norepinephrine and kinins. The major allergens include: phospholipase, hyaluronidase and acid phosphatase. Injected venom binds to a person's mast cells causing it to release various chemicals including histamine, leukotrienes, prostaglandins and platelet aggravating factors.

***A type II Kounis reaction to the bee sting likely caused the occluded right coronary artery. He had no symptoms of angina or heart problems prior to the bee sting, so he most likely had stable three vessel coronary artery disease. The three vessel coronary artery disease would not have caused him to have a myocardial infarction, suffer a ventricular fibrillation, cardiac arrest, and fall from the roof if he had not had the bee sting on 7-21-14. The work incident of 7-21-14- involving the bee sting is a prevailing factor that caused the M.I., cardiac arrest, fall from the roof, and subsequent injuries."***

## III. The Employer/Insurer's Expert

The employer/insurer denied compensability. A board certified cardiologist offered the following opinion on behalf of the employer/insurer:

[The claimant] almost certainly lost consciousness from ventricular fibrillation due to an acute inferior wall myocardial infarction. The cardiogenic shock was related to associated right

ventricular infarction and transient left ventricular dysfunction resulting from the acute myocardial infarction and cardiac arrest. [The claimant] was at high risk of having a myocardial infarction due to his smoking history. Smoking a pack of cigarettes daily increases the risk of having a heart attack (myocardial infarction) by 160% greater than that of the general population and is one of the two most important risk factors worldwide for acute myocardial infarction (the other being hyperlipidemia). *The absence of preexisting symptoms is irrelevant as myocardial infarction or sudden cardiac death are frequently the first clinical manifestation of coronary artery disease.* In the vast majority of myocardial infarctions, a vulnerable, inflamed coronary plaque either erodes or ruptures, resulting in thrombus formation and acute coronary artery occlusion. About half of the time the culprit plaque or lesion is hemodynamically significant and about half are not. *There may or may not be an identifiable precipitating factor for the plaque erosion or rupture. The prevailing reason for the myocardial infarction is preexisting vulnerable coronary plaque.*

[The claimant]'s case is somewhat unique in that his myocardial infarction occurred shortly after a sting from a yellow jacket wasp. *It is conceivable that the sting was a noxious event that precipitated plaque rupture just like any other stress. Coincidental occurrence of myocardial infarction after a wasp sting is also not ruled out. However, it is likely that [The claimant] suffered from Kounis syndrome, which is essentially an "allergic" myocardial infarction. Mast cells within the heart and body are activated by a foreign compound, in this case venom from a wasp sting, resulting in release of histamine and other vasoactive and inflammatory compounds. This can result in coronary spasm and myocardial infarction in the absence of fixed obstructive coronary artery disease (Type I Kounis syndrome) or thrombus formation in the presence of quiescent preexisting atheromatous disease (Type II Kounis syndrome) as is presumably the case here. [The claimant]'s underlying coronary artery disease and subsequent need for coronary artery bypass graft surgery are in no way related to the wasp sting. These were preexisting lesions related to his cigarette smoking and possible untreated hypertension. In point of fact, [The claimant] had other preexisting atherosclerotic disease as well. The wasp sting simply occurred prior to a myocardial infarction and served to uncover his severe multivessel coronary artery disease.*

#### IV. Analysis of Compensability

##### Compensability-Relevant Case Law

“Injury”-R.S. Mo. 287.020.3 (2005)-

(1) "Injury" is hereby defined to be an injury which has arisen out of and in the course of employment. **An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.**

- (2) an injury shall be deemed to rise out of and in the course of the employment only if:
  - (a) it is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
  - (b) it does not come from a hazard risk related to the employment to which workers would have been equally exposed outside of and unrelated to the employment in the normal non-employment life.
- (3) an injury resulting directly or indirectly from **idiopathic causes** is not compensable.
- (4) **a cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular**

**accident or myocardial infarction suffered by a worker is an injury only if the accident is**

**the prevailing factor in causing the resulting medical condition.**

[The claimant] testified that he does not recall falling off the roof, and does not know why he fell. Witnesses only state that claimant appeared unconscious as he was rolling down the roof. Co-workers will testify that before he fell, [The claimant] did not complain about any type of physical symptoms customarily related to a heart attack. 15 to 20 minutes before he fell, co-workers will testify that [The claimant] was stung by one or more bees or wasps.

“Accident” is statutorily defined as “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.” An injury is not compensable because work was a triggering or precipitating factor. Section 287.020.2.

However, not every “injury ... by accident” is compensable. “Injury” is statutorily defined as “an injury which has arisen out of and in the course of employment.” Section 287.020.3(1). “The express terms of the workers' compensation statutes as revised in 2005 instruct that section 287.020.3(2) must control any determination of whether [a claimant's] injury shall be deemed to have arisen out of and in the course of [his or] her employment.” *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. banc 2012).

“For an injury to be deemed to arise out of an in the course of the employment under section 287.020.3(2)(b), the claimant employee must show a causal connection between the injury at issue and the employee's work activity.” *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 509 (Mo. banc 2012).

“An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor and the risk involved—here, walking—is one to which the worker would have been exposed equally in normal non-employment life. . . . He was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment. [T]he injury is not compensable, as there is no causal connection of the work activity to the injury other than the fact of its occurrence while at work. The injury must occur *because* of work, not merely *while* at work. *Miller v. Missouri Highway & Transportation Commission*, 287S.W.3d 671, 674 (Mo. banc 2009).

“*Miller* instructs that it is not enough that an employee's injury occurs while doing something related to or incidental to the employee's work; rather, the employee's injury is only compensable if it is shown to have resulted from a hazard or risk to which the employee would not be equally exposed in “normal nonemployment life” . The “causal connection” standard announced in *Miller* and further addressed in *Johme* **thus first requires identification of the risk source of a claimant's injury, that is, identification of the activity that caused the injury, and then requires a comparison of that risk source or activity to normal nonemployment life**. In *Miller*, the “risk source,” that is to say, the activity that caused the injury, was “walking on an even road surface. *Gleason v. Treasurer of the State of Missouri as Custodian of the Second Injury Fund*, 455 S.W. 3d 494 (W.D. 2015).

In *Gleason*, just as in [The claimant]’s case, the cause of claimant’s fall was not known. In reversing the LIRC’s decision that the fall was not compensable because the claimant did not know *why* he fell, the Western District Court of Appeals notes at page 500: **“Borrowing from *Johme*, the Commission's focus should not have been on what *Gleason* was doing when he suffered his injuries—he had fallen from the top of a railcar where he was conducting an**

*inspection—but rather should have been focused on whether the risk source of his injury—[falling 20 to 25 feet from the top of a railcar—was a risk to which he was exposed equally in his normal nonemployment life. Johme, supra, 366 S.W.3d at 511 . Plainly, there was a causal connection between Gleason's work activity (working on the top of a railcar) and his injury (injuries incurred after falling 20 to 25 feet from that work location).*

Once a claimant proves that he was injured due to a risk that was not shared by the general public, it is not necessary to prove *why* he fell. *Gleason*, supra at p. 502.

Applying *Miller*, *Johme*, and *Gleason*, to [The claimant]'s case, reveals that regardless of whether the risk source of injury is considered to be getting stung by one or more bees or wasps, or whether the risk source of injury is considered to be falling 10-15 feet from a roof onto the ground, neither is a risk to which [The claimant] is exposed equally in his non-employment life. This is further borne out by the fact that the roofing crew routinely carries bee and wasp spray with it on roofing jobs.

If the employer/insurer attempts to distinguish between the traumatic orthopedic injuries and the cardiac arrest and the heart attack, the result is the same. There can be no question that the risk source of injury (falling 10-15 feet to the ground) caused the traumatic orthopedic injuries. Both Dr. Mankowitz and Dr. Schuman will testify that the bee or wasp sting(s) was the prevailing factor in causing the arterial plaque to erode or rupture, occluding the right coronary artery, and causing an acute inferior wall myocardial infarction. Being subjected to bee and wasp stings while tearing off and putting on roofs is not a risk [The claimant] is equally exposed to in his non-employment life. The roofing crew routinely carried bee and wasp killer in spray cans along in their normal work equipment.

### **Pre-Existing Coronary Artery Disease**

I expect the employer/insurer to argue that [The claimant] simply suffered a heart attack and the traumatic injuries from the fall due to pre-existing coronary artery disease. In January 2015, [The claimant] underwent coronary bypass surgery at Kansas University Medical Center. There is no question that he had pre-existing CAD. There is likewise no question that he had never been treated for, taken medication for, or experienced symptoms of, a heart-related medical condition before July 21, 2014.

Pursuant to R.S. Mo. 287.020.3-(4) ***a cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition.***

As stated above, Dr. Schuman and Dr. Mankowitz will testify that the accident of getting stung by a bee or wasp was the prevailing factor in the scenario that resulted in [The claimant]'s heart attack and traumatic injuries. *Leak v. City of Fulton*, 316 S.W.3d 528 (Mo. App. W.D. 2010) is the most recent case under the 2005 amendments to discuss the issue of compensability of heart attacks. The evidence in [The claimant]'s case does not appear to establish that unusual or abnormal job-related exertion under adverse weather or environmental factors (other than the bee or wasp sting(s) caused [The claimant]'s heart attack. Although the weather had been hot and humid, the roofing crew started at 6:30 a.m. to beat the heat, and the incident occurred about 7:30 a.m., only an hour after the crew began work. The temperature was in the low 80's, and there was nothing unusual or abnormal about the physical exertion level. [The claimant] made no physical complaints. The *only* unusual or abnormal work-related condition or factor was the bee or wasp sting(s), which both Dr. Schuman and Dr. Mankowitz cite as the prevailing factor.

***“When a pre-existing cardiovascular condition and a work related activity contribute to cause an employee’s injury or death, the question is which of the contributing factors was the primary factor in relation to the other factor in causing the resulting injury or death. The determination of whether an accident is the prevailing factor in causing the employee’s condition is inherently a factual one” . . . Leake, supra at p. 533.***

The credible evidence supports the conclusion that between being stung by a wasp or bee, (or falling 12 to 15 feet from a roof), and pre-existing CAD, the prevailing factor (the primary factor in relation to any other factor) in causing the resulting medical condition (Kounis syndrome, erosion or rupture of plaque, occlusion of the artery, heart attack, unconsciousness and disability, was the wasp or bee sting.