FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
by Supplemental Opinion)

Injury No.: 09-103074

Employee: Pamela S. Adkison

Employer: Argosy Riverside Casino

Insurers: 1) Ace American Insurance Co.
2) Zurich American Insurance Co.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.[1] Having reviewed the evidence, read the briefs, heard oral argument, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the ALJ dated March 5, 2012, as supplemented herein.

Preliminaries
On December 31, 2009, employee fell at work and injured her left arm, left shoulder, left hip, and back. Employee proceeded to final hearing of her claims against employer.

The ALJ found that employee's injuries arose out of and in the course of her employment. The ALJ awarded employee reimbursement for past medical expenses ($28,742.33), temporary total disability benefits (13 2/7 weeks, or $6,665.84), permanent partial disability benefits (20% PPD of the left upper extremity at the 175 week level, or $14,803.95), and disfigurement (4 weeks, or $1,691.88).

Employer appealed to the Commission, alleging that the ALJ erred in finding that employee's injuries arose out of and in the course of her employment.

We note that during the Commission's review of this case, employer's Exhibit 1, consisting of a DVD containing surveillance video footage of employee's fall, was destroyed. The Commission contacted both parties prior to the September 12, 2012, oral argument and requested that they stipulate to a replacement DVD and provide the same to the Commission. The Commission received the replacement DVD prior to oral argument and the parties stipulated to its admittance at oral argument.

Discussion
The findings of fact and stipulations of the parties were accurately recounted in the award of the ALJ and, to the extent they are not inconsistent with the findings listed below, they are adopted and incorporated by the Commission herein.

[1] Statutory references are to the Revised Statutes of Missouri 2009 unless otherwise indicated.

Section 287.120 RSMo, "requires employers to furnish compensation according to the provisions of the Worker's (sic) Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee's employment." *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.3 RSMo provides, as follows:

> (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."

A recent Missouri Supreme Court case, *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012), provides guidance as to the application of § 287.020.3 RSMo. Similar to the employee in our case, in *Johme* there was no issue regarding whether the claimant's fall at her workplace was the prevailing factor in causing the injuries for which she sought workers' compensation. As such, the Court concluded that a discussion of employee's case in the context of subsection 287.020.3(2)(a) is not required. Instead, the Court found that the issue was confined to the application of subsection 287.020.3(2)(b), which instructs that employee's injury "shall be deemed to arise out of and in the course of [her] employment only if … it [did] not come from a hazard or risk unrelated to [her] employment to which [she] would have been equally exposed outside of and unrelated to [her] employment in [her] normal nonemployment life." See *Johme*, 366 S.W.3d at 510. We find the same to be true with this case.

The claimant in *Johme* was injured in a fall that occurred in the office kitchen after she made a new pot of coffee to replace a pot of coffee from which she had taken the last cup. As she finished making the new pot of coffee, she turned and twisted her right ankle, which caused her right foot to slip off of her sandal, and she fell onto her right side and then onto her back. At the time of the claimant's fall, she was wearing sandals with a thick heel and a flat bottom, with a one-inch thick sole. The claimant was alone in the kitchen during the fall. There were no irregularities or hazards on the kitchen's floor. The floor was not wet, and there was not any trash on the floor. *Id*. at 505-07.

In determining whether the claimant's injury arose out of and in the course of her employment, the Court in *Johme* cited *Miller v. Missouri Highway & Transportation Commission*, 287 S.W.3d 671 (Mo. banc 2009) in support of its proposition "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.'" *Johme*, 366 S.W.3d at 511.

The claimant in *Miller* was walking briskly toward a truck when he felt a pop and his knee began to hurt. The Court held that the claimant failed to prove that the risk involved – walking – was one to which he would not have been equally exposed to in normal nonemployment life. The Court also focused on the fact that the injury did not occur because the claimant fell due to some condition of his employment; and claimant did 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. The Court found that claimant was simply walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The Court concluded that the injury arose during the course of employment, but did not arise out of employment and under subsections 287.020.2, 287.020.3, and 287.020.10 as currently in force, that is insufficient. *Miller*, 287 S.W.3d at 674.

Applying the principles of *Miller*, the Court in *Johme* focused on the mechanism of the claimant's injury in identifying the "hazard or risk," and concluded that employee "turning, twisting her ankle, and falling off her shoe" was the hazard or risk, which caused the injury. The Court then analyzed whether this hazard or risk had a causal connection to her work activity other than the fact that it occurred in her office's kitchen while she was making coffee. The Court held that this assessment required consideration of whether her 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 concluded that the claimant failed to meet her burden to show that the injury was compensable because "no evidence showed that she was not equally exposed to the cause of her injury – turning, twisting her ankle, or falling off her shoe – … than she would have been when she was outside of her workplace in her 'normal nonemployment life.'" *Id*. at 511-12.

We find that this case is distinguishable from *Miller* and *Johme* and is actually more analogous to *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863 (Mo. App. 2012). In *Duever*, the claimant was the owner of a landscaping and snow and ice removal company. The claimant slipped and fell on a patch of black ice after a meeting on a parking lot, during which he demonstrated the proper way to wire a trailer's tail-lights. *Id*. at 865. The claimant injured his left arm and shoulder when he fell. The fall occurred in a parking lot which employer had access to under the terms of a lease. *Id*.

The Missouri Court of Appeals for the Eastern District distinguished *Duever* from *Miller* by pointing out that in *Miller* there was no evidence that some condition on the road caused Mr. Miller's injury or that it was otherwise work-related. *Id*. 867. Conversely, the claimant in *Duever* was in an unsafe location (an icy parking lot) as a direct function of

his employment as the owner of a landscaping and ice removal company. The court held that the claimant "sustained an injury due to an unsafe condition (the ice itself) over which he had no control given that the owner of the parking lot had hired another company to remove ice on the lot." *Id*.

The court distinguished *Duever* from *Johme* by pointing out that the floor Ms. Johme fell on did not have any irregularities or hazards, and there was no evidence of the employer's negligence. The court reiterated that Mr. Duever's injury "resulted from being in an unsafe location as a function of his employment and slipping on an unsafe icy condition.

In both *Miller* and *Johme*, the Court denied compensation because the evidence failed to establish that the injuries were sustained as a result of some hazard or risk related to the claimants' employment. In this case, like *Duever*, employee fell as a result of a hazard or risk created by her work activities and environment. Employee's fall is not analogous to a knee "just popping," or turning, twisting an ankle, and falling off a shoe on a floor with no irregularities or hazards.

Just prior to employee's accident, she walked through snow and ice on employer's premises. She entered the building through the only employee entrance with melting snow and ice on her shoes. At the time of the actual accident, employee was walking down the only hallway that serviced the employee entrance to the casino. Said hallway contains a slick concrete floor. The hazard or risk that caused the accident was the combination of employee's wet shoes and the slippery, smooth, highly polished, concrete floor. Similar to the claimant in *Duever*, when employee's injury occurred, she was in an unsafe environment as a direct function of her employment as a casino worker.

We specifically make a factual finding that the hazard or risk that caused the accident was the combination of employee's wet shoes and employer's slippery, smooth, highly polished, concrete floor. We further find, based upon employee's testimony, that she walks on polished concrete surfaces more at work than away from work, she would not have been in the hallway where the accident occurred if she was not working, she wore the type of shoes she was wearing at the time of the accident (heels) more at work than away from work, and she would not have walked over the snow and ice on employer's premises on December 31, 2009, but for her going to work for employer on that date. Finally, based upon the aforementioned, we make a factual finding and conclude that the combination of employee's wet shoes and employer's slippery, smooth, highly polished, concrete floor is a risk to which this employee would not be equally exposed to in her normal nonemployment life.

Based upon employee's testimony and the record as a whole, we find that the combination of employee's wet shoes on the slippery, concrete floor in the employee-only hallway was a hazard or risk directly related to her employment to which she would not have been equally exposed to outside of and unrelated to her employment in her normal nonemployment life.

We find, as did the ALJ, that employee's injury was a rational consequence of some hazard connected with the employment, the hazard being the snow and ice outside the

employee-only entrance that caused her shoes to be wet and slippery and caused her to fall on employer's slick concrete floor that had no traction skids, mats, or rugs where employee fell. Unlike the claimants in *Miller* and *Johme*, employee fell in a location rendered hazardous due to her employment.

Award

We affirm the award of the ALJ, as supplemented herein.

The award and decision of Administrative Law Judge Robert B. Miner, issued March 5, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the ALJ's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 7th day of December 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Pamela S. Adkison Injury No.: 09-103074

Employer: Argosy Riverside Casino

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri

Insurer: Ace American Insurance Co.

Hearing Date: December 13, 2011

Date Record Closed: December 29, 2011 Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.

2. Was the injury or occupational disease compensable under Chapter 287? Yes.

3. Was there an accident or incident of occupational disease under the Law? Yes.

4. Date of accident or onset of occupational disease: December 31, 2009.

5. State location where accident occurred or occupational disease was contracted: Riverside, Platte County, Missouri.

6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.

7. Did employer receive proper notice? Yes.

8. Did accident or occupational disease arise out of and in the course of the employment? Yes.

9. Was claim for compensation filed within time required by Law? Yes.

10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was walking on a concrete floor wearing wet shoes when she slipped and fell.

12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Left wrist, left upper extremity, left hip, back, and neck.

14. Nature and extent of any permanent disability: 20% of the left upper extremity at the wrist (175 week level).

15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? None.

17. Value necessary medical aid not furnished by employer/insurer? $28,742.33.

18. Employee's average weekly wages: $752.60.

19. Weekly compensation rate: $501.73 for temporary total disability and $422.97 for permanent partial disability.

20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable from Employer:

Unpaid medical expenses: $28,742.33

13 2/7 weeks of temporary total disability at $501.73 per week: $6,665.84

35 weeks of permanent partial disability at $422.97 per week: $14,803.95

4 weeks of disfigurement at $422.97 per week: $1,691.88

TOTAL FROM EMPLOYER: $51,904.00

22. Second Injury Fund liability: Not determined. Employee’s claim against the Second Injury Fund remains open.

23. Future requirements awarded: None. Employee's claim for future medical aid is denied.

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: David A. Slocum.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Pamela S. Adkison Injury No.: 09-103074

Employer: Argosy Riverside Casino

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri

Insurer: Ace American Insurance Co.

Hearing Date: December 13, 2011

Date Record Closed: December 29, 2011 Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer and Insurer on December 13, 2011 in Riverside, Missouri. Employee, Pamela S. Adkison, appeared in person and by her attorney, David A. Slocum. Employer, Argosy Casino, and Insurer, Ace American Insurance Co., appeared by their attorney, Thomas J. Walsh. Kim Lineen, Employer's Risk and Safety Coordinator, appeared at the hearing. The parties agreed the hearing only involved Employee's claim against Employer and Insurer, and did not involve her claim against The Second Injury Fund, as Employee and The Second Injury Fund had agreed to bifurcate. The Second Injury Fund did not appear at the hearing. David A. Slocum requested an attorney's fee of 25% from all amounts awarded. It was agreed during a December 28, 2011 conference call between the Administrative Law Judge, David Slocum, and Thomas Walsh, that the filing of post-hearing briefs/proposed awards would be waived.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about December 31, 2009, Pamela S. Adkison ("Claimant") was an employee of Argosy Riverside Casino ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.

2. On or about December 31, 2009, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Ace American Insurance Co. ("Insurer").

3. Employer had notice of Claimant's alleged injury.

4. Claimant's Claim for Compensation was filed within the time allowed by law.

5. The average weekly wage was $752.60, the rate of compensation for temporary total disability is $501.73 per week, and the rate of compensation for permanent partial disability is $422.97 per week.

6. Employer/Insurer has paid no compensation.

7. Employer/Insurer has paid no medical aid.

8. The medical treatment Claimant received to treat her December 31, 2009 injury was reasonably required to cure and relieve Claimant from the effects of the December 31, 2009 injury.

9. The fees and charges for the medical treatment Claimant received to treat her December 31, 2009 injury were fair and reasonable and usual and customary.

10. Claimant was temporarily and totally disabled from January 11, 2010 to and including March 23, 2010.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about December 31, 2009, Claimant sustained an injury by accident arising out of and in the course of her employment for Employer.

2. Nature and extent of permanent partial disability and Employer's liability for permanent partial disability benefits and disfigurement.

3. Employer's liability for past medical expenses in the amount of $28,742.33.

4. Employer's liability for temporary total disability from January 11, 2010 to and including April 14, 2010.

5. Employer's liability for future medical aid.

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

A—Curriculum Vita, Michael J. Poppa, M.D.
B—Medical report, Michael J. Poppa, M.D.
C—Medical records of OSI
D—Medical records of North Kansas City Occupational Medicine
E—Medical records of North Kansas City Hospital
F—Medical records of Pinnacle Therapy Services
G—Medical bill summary
H—Medical bill of OSI
I—Medical bill of North Kansas City Occupational Medicine
J—Medical bill of Northland Radiology
K—Medical bill of Midwest Emergency Medical Services
L—Medical bill of North Kansas City Hospital
M—Medical bill of Pinnacle Therapy Services
N—Medical bill of Auburn Pharmacy
P—Brown shoe
Q—Gold-colored shoe

Claimant's Exhibit O, a July 14, 2010 letter from Carl Gallagher, McAnany Van Cleave and Phillips, P.A., to Brian Meyers, was withdrawn, and was not admitted in evidence.

Employer offered the following exhibits which were admitted in evidence without objection.

1—DVD
2—Two (2) photos and medical report
3—Dr. Zarr submission with medical
4—Photo – 1
5—Employee Separation Agreement

The attorneys agreed during the hearing that Exhibit P (a brown shoe) and Exhibit Q (a gold-colored shoe) that had been admitted in evidence would be withdrawn, and that photographs of Exhibits P and Q would be offered at a later time in lieu of the actual shoes. It was agreed that the record would be left open to permit counsel to submit the photographs of the shoes. Color photographs depicting Exhibits P and Q were received by the Administrative Law Judge on December 29, 2011, have been marked Exhibits P1, P2, P3, P4, Q1, Q2, Q3, and Q4, and have been admitted in evidence by agreement. Exhibits P and Q, the actual shoes, have been withdrawn.

The record was closed on December 29, 2011.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Findings of Fact

Summary of the Evidence

Testimony of Claimant

Claimant was born on November 3, 1946. She worked for Employer as a table games dealer. She dealt poker, blackjack, and Let it Ride. She worked with the public at Employer.

Employer had a dress code when Claimant worked there. Claimant was required to wear beige slacks, a blue or green short-sleeve shirt, and brown leather shoes with no open toes or strings. There were no restrictions regarding types or sizes of the shoes. There were no restrictions regarding heel type, heel width, or the material used for the sole of the shoes. Claimant was not allowed to wear tennis shoes at work because of the dress code.

Claimant ordinarily wore brown leather shoes when she worked the table games. She identified Exhibit P as a shoe that she ordinarily wore when she worked at Employer. Exhibit P is brown leather with a heel that is approximately one and one-half inches high and one inch wide.

Claimant did not normally wear heeled shoes when she was not working for Employer. She wore heeled shoes for special occasions, such as parties or going out to dinner. She wore heeled shoes more at Employer than away from Employer.

Claimant identified a hallway at Employer in the video, Exhibit 1. Exhibit 1 contains surveillance video recordings of Employer's premises taken on December 31, 2009. Claimant identified the employee-only hallway area in the video where employees enter the building to come to work. The hallway services a cafeteria. The floor of the hall is cement. Employer has only one employee entrance. That entrance also services the entrance to the casino floor from another end of the hall.

On December 31, 2009, Claimant's husband took Claimant to work at Employer's employee entrance. He dropped Claimant off at work within fifteen-to-twenty feet of the employee entrance at an area that was not as close as where the car is shown in the video.

Claimant walked over ice, snow, and salt to get into the entrance on December 31, 2009. She would not have walked over that area but for going to work that day. There were rugs on the floor inside the entrance area of the entrance hall. The rugs extended somewhat into the entrance hall. There were no other rugs in the entrance hall.

Claimant walked over the rugs, turned, walked down a bare concrete hall a ways, and then slipped and fell. Claimant had ice and snow on her shoes when she slipped and fell. The snow and ice on her shoes had started melting, and her shoes were wet when she fell. She slipped on a polished smooth concrete floor. Exhibit 1 shows Claimant slipping and falling in the hall about fifteen seconds into the video.

There were no traction skids, rugs, or mats where Claimant fell. Claimant testified the shoes she wore on December 31, 2009 did not cause her to fall. She said she fell because her shoes were wet.

Claimant felt pain in her left arm, left hip, back, and left shoulder when she landed on the floor. She landed hard on her left side.

Claimant identified Exhibit Q, the gold-colored shoe she was wearing when she slipped and fell at work on December 31, 2009. The gold-colored shoe is different than the shoe Claimant normally wore at work. Employees were told that they could dress up on New Year's Eve and to not wear their normal uniform at work that day. This was the first time Claimant was allowed to dress up at work.

The gold-colored shoe has a heel that is approximately one and one-quarter inches high and about one inch wide. The EMT report (Exhibit 2) refers to a two inch heel. Claimant testified that the EMT report is not correct when it refers to a two inch heel.

Claimant testified that the soles of the heels on the shoes that she wore on the day of the injury are no lower than the soles of the heels on the shoe that she normally wore at work. The soles of the shoes that she wore on the date of injury are tapered in the back and more narrow at the bottom and top than the other shoes. The width of the heels of the soles on the shoes she wore on the date of the accident is about two quarters of the width of the shoes she normally wore at work. Claimant stated that shoes with heels can be more wobbly than other shoes. She agreed that there is less surface area on the shoes she wore on the day of the accident than on her normal work shoes.

The floor where Claimant fell is cleaned with a mop, a bucket, and a buffer. Claimant walks on a polished concrete floor more at Employer than away from work. Claimant would not have been in the hallway where she fell but for working for Employer.

Claimant identified the video in Exhibit 1 at seventeen minutes and nine seconds into the video. Part of the video shows the employee entrance where employees come and go. There are metal detectors on the right and left. Security personnel check employees to make sure that they have badges. If employees do not have a badge, they are required to show their driver's license and get a temporary badge. No one other than employees is allowed in that entrance. The area is a high traffic area. The outside door leads to the outside of the building. People go in and out of the door on a regular basis.

The right lower portion of the video shows a yellow triangle that is a caution sign indicating a slippery floor. That sign was placed there by an employee of Employer. That sign was there because it was a snowy and slick day. There had been a bad snow storm on December 31, 2009.

The video at seventeen minutes seven seconds shows a black mark on the left which are traction skids. The video at seventeen minutes sixteen seconds shows ice melt on the ground.

Traction skids are placed on some areas of the floor at work to help reduce slipperiness because a lot of food is carried in the hall.

The video at seventeen minutes twenty three seconds shows the outside entrance of Employer's building. Claimant's husband, Claimant in a wheelchair, and Claimant's husband's car are shown in the video. Winter material, mostly ice, is on the ground. Claimant's husband's car is shown parked in an area that is not a regular parking spot.

Claimant was asked how she injured herself when she went to the hospital after her fall. Claimant agreed that page 51 of Exhibit E, a December 31, 2009 Emergency Room record, notes that she stated that she slipped at work. Claimant was referred to North Kansas City Hospital Occupational Medicine. Claimant agreed the history of her accident contained in the January 4, 2010 record of North Kansas City Hospital Occupational Medicine (Exhibit D, page 36) states that she was walking, her shoes were wet, and she slipped and fell.

Claimant broke two bones in her left arm from the fall and had surgery on her left arm and wrist. She had hardware placed by Dr. Barnhill on January 13, 2010. The Operative Report of Dr. Barnhill in Exhibit C, page 25, notes that Dr. Barnhill performed an open reduction internal fixation for Claimant's left radius fracture.

Claimant had physical therapy after her surgery. An April 14, 2010 physical therapy record (Exhibit F, page 256) notes that Claimant's last date of physical therapy was April 14, 2010. The record notes Claimant was getting shooting pain and numbness in her fingers at that time. She testified she did not have those pains or complaints before

her work injury. Page 257 of the physical therapy records (Exhibit F) dated April 12, 2010 notes that Claimant could not bend her wrist. Her left wrist was noted to be painful and she reported increased tingling and numbness. She did not have those complaints before her fall. She still has those complaints.

Page 258 of the physical therapy notes dated April 12, 2010 states that Claimant had decreased range of motion and decreased grip strength in her left upper extremity. Claimant reported to physical therapy that she had continued difficulty with minimal strength activities, and had difficulty cutting her food and holding a cup or glass with any liquid in it.

Claimant testified her left arm and left upper extremity complaints never fully resolved. She still has complaints that she relates to the accident. She has pain in her left shoulder. She has noticed a decrease in strength. She has numbness and tingling in her fingers and she drops things. She has difficulty getting dressed. She needs help buttoning buttons. Claimant's left upper extremity pain is a three or four on an average day. It is a seven on her worst day.

Claimant testified her left upper extremity got red and hot after the accident. She has experienced a burning sensation, increased sweating, sensitivity to touch, and swelling in her left upper extremity since the accident. Claimant still has pain, swelling, burning, and shooting pains all the way to her left shoulder. Claimant still has left hip pain that goes to the center of her back. She did not have that pain prior to the fall.

Claimant still has plates and screws in her arm. Dr. Barnhill told Claimant that they would not be able to take the screws out, because if they did, her bones would collapse.

Claimant did not work for Employer after her surgery. Employer never offered to accommodate Claimant's restrictions. She continued to treat after her injury up until April 14, 2010. Claimant testified she was released by the doctor on April 14, 2010. She still had limitations until April 14, 2010. She was limited in her ability to perform physical tasks up until that time.

Claimant has seen her family doctor for her arm since April 2010. She has also seen a couple of neurologists.

Claimant received FMLA until March 28, 2010. She was told by Employer that she could apply for another position. She applied for security and surveillance positions, but was not offered those positions. She received a letter from Employer that those positions had been filled.

Exhibit 5 is a Separation Agreement between Employer and Claimant. Employer was doing away with the poker room. Claimant received $1,800.00. Claimant signed the agreement on March 24, 2010. She stated that her employment was terminated when she signed the document. No doctor had told Claimant that she could not go back to any type of work when she signed the agreement.

Claimant identified Exhibit 2 and Exhibit 4, photos showing the area where she fell. Exhibit 2 showed mints on the floor that had been in her purse. Claimant does not know when the photographs in Exhibit 2 and Exhibit 4 were taken or if anything was done to the area before the photographs were taken.

The video from at eighteen minutes forty three seconds shows a guard in the entrance hall doing something with his foot and bending over. The first photographs of the area were taken at twenty minutes four seconds.

Claimant said that she no longer has complaints about her neck, even though Dr. Poppa in his report made reference to disability in her neck.

I find Claimant's testimony to be credible.

The Administrative Law Judge observed Claimant's scar on her left upper extremity. She has only one scar. The scar is approximately three inches long and approximately one-sixteenth of an inch wide. The Administrative Law Judge assesses four weeks for disfigurement for the scarring on Claimant's left arm.

Medical Evidence

A North Kansas City Hospital Emergency Room note dated December 31, 2009 of Dr. Ricky Radakovich in Exhibit E states in part at page 51:

> The patient is a 63-year-old white female who slipped at work, falling on an outstretched left wrist. She developed deformity and pain over the distal aspect of the wrist. She has full range of motion of her fingers. She did not strike her head or lose consciousness. She denies neck or back pain.

The history of Claimant's accident contained in the January 4, 2010 record of North Kansas City Hospital Occupational Medicine (Exhibit D, page 36) notes that Claimant "was walking & shoes were wet & slipped and fell."

Exhibit C includes Dr. Gregory Barnhill's January 4, 2010 report pertaining to Claimant. The report states in part (page 28):

> . . . . The patient presents today after sustaining a fall while walking to work at Argosy Casino. The patient slipped on a tiled floor and fell on her outstretched left hand. She had immediate pain and swelling in the left wrist after the fall. She denies any other injury with her fall.

The results of Dr. Barnhill's physical examination are noted in his report. Dr. Barnhill's Impression is noted to be: "left comminuted distal radius fracture with ulnar styloid fracture." A long-arm cast was applied to the left upper extremity.

Exhibit C (page 25) includes Dr. Barnhill's Operative Report dated January 13, 2010. The report notes that Dr. Barnhill performed an open reduction internal fixation left distal radius fracture for Claimant. The post-operative diagnosis is noted to be "left comminuted greater than 3-part distal radius fracture."

The Pinnacle Therapy Services record dated April 12, 2010 (Exhibit F, page 258) notes Claimant reported continued difficulty with minimal strength activities and pressure to her wrist. The Discharge Plan was to continue two times a week for four more weeks with physician okay.

A Pinnacle Therapy Services record dated May 5, 2010 (Exhibit F, page 255) notes a new script was given when Claimant came back to the clinic on April 14, 2010, and that Claimant did not return after that day's treatment. The record also notes that all of the short-term goals were achieved and none of Claimant's long-term goals were achieved for advanced ADL skills that require strength of endurance and full ROM. The Discharge Plan states: "Discharge the patient secondary to script expiring and patient not rescheduling."

Exhibits C though F are medical treatment records relating to Claimant's December 31, 2009 injury. Exhibits H through N are medical bills relating to Claimant's December 31, 2009 injury. Exhibit G is a medical bill summary relating to the injury. It shows Claimant's medical bill relating to the injury total $28,707.33, not including $35.00 in prescription charges of Dr. Barnhill shown in Exhibit N.

Evaluation of Dr. Michael Poppa

Exhibit A is the Curriculum Vitae of Dr. Michael Poppa. Dr. Poppa is a graduate of the University Of Health Sciences-Kansas City College Of Osteopathic Medicine. He is affiliated with Mid-America Rehabilitation Hospital. He has active licenses in Missouri, Kansas, and Oklahoma. He is Board Certified by the American Osteopathic Board of Preventive Medicine.

Exhibit B is Dr. Poppa's May 27, 2011 report addressed to Claimant's attorney pertaining to Claimant. The report notes Claimant was seen and evaluated in Dr. Poppa's office on May 27, 2011 for the purpose of an independent medical evaluation. The report notes in part (Exhibit B, pages11-12):

> Miss Adkison states she was performing her regular job duties when she sustained an injury to her left arm, left shoulder, left upper extremity, left hip, left lower extremity, tailbone, back and spine. According to Ms. Adkison, while in the course and scope of her employment on 12/31/09, she stated, 'I was getting ready to time in, in an employee restricted area' when she slipped on melted snow/ice causing her to lose her balance and fall, landing on her left low back/buttocks with her left upper extremity backwards. She states she experienced immediate symptoms involving her left arm, left shoulder, left upper extremity, left hip, left lower extremity, tailbone, back and spine.

Dr. Poppa's report sets forth the history of Claimant's treatment following the accident. Dr. Poppa's report notes Claimant stated she continued to experience symptoms and was seen by her primary care physician after her release from care in April 2010. She told Dr. Poppa she had persistent neck, left shoulder and facial pain and was referred to a neurologist for consultation. Dr. Poppa's report notes: "She continues to experience pain and symptoms involving her left arm, left shoulder, left upper extremity, left hip, left lower extremity, tailbone, back, spine and face."

Dr. Poppa's report notes Claimant's husband helps Claimant with dressing and putting hair in a ponytail. It notes Claimant has problems using the left arm. The report notes Claimant still had pain in her neck, arm, shoulder and left side of face. Nerve pains are noted to have kept her from sleeping and socializing. She is noted to drop things a lot and cannot lift her grandchildren on her lap.

The results of Dr. Rope's physical examination of Claimant are noted in his report. Complaints of pain and limitation in range of motion are described.

Dr. Poppa's May 27, 2011 report sets forth Conclusions (Exhibit B, pages 15-17) that include the following:

> Based upon today's history, physical examination and review of provided medical records, I have the following opinions:

1) Ms. Adkison has reached maximum medical improvement regarding her work related injury, which occurred on 12/31/09 while employed by Argosy Casino ….

. . . . . .

2) Ms. Adkison's work related injury was the direct, proximate and prevailing factor causing both her work related medical conditions and disability. The prevailing factor is the primary factor in relation to any other factor causing her work related medical condition and disability.
3) The treatment Ms. Adkison has received to date regarding her work related medical condition from all providers has been reasonable, appropriate and directly necessary to cure and relieve the effects of her injury.
4) The medical expenses incurred by Ms. Adkison as a result of her work accident dated 12/31/09 are reasonable and necessary as a result of her work injury.
5) As it relates to additional treatment involving her left upper extremity/wrist, Ms. Adkison may require removal of the orthopedic hardware based on her level of pain tolerance.
6) As it relates to employment, Ms. Adkison is limited in her functional capabilities. She should avoid repetitive gripping, grasping or bending of her left wrist greater than 2 times per minute. She should avoid lifting greater than 2 pounds on an occasional basis.
7) It is my opinion Ms. Adkison was temporarily and totally disabled as a result of her work injury from 12/31/09 until her release from the care of Dr. Barnhill.
8) As a result of Ms. Adkison's work related injury involving her left upper extremity/wrist with post-operative residuals secondary to open reduction and internal fixation with retained hardware, it is my opinion she has a 30% permanent partial disability of her left upper extremity between the wrist and elbow (200 week level). Ms. Adkison's disability rating involving her left upper extremity/wrist takes into consideration decreased range of motion, decreased strength, decreased function and residual pain.
9) As a result of Ms. Adkison's work related conditions involving her neck and back, it is my opinion she has a 5% permanent partial disability of the body as a whole.
10) Taking into consideration all disabilities (left upper extremity/cervical spine/lumbar spine), it is my opinion she has an overall 20% permanent partial disability of the body as a whole.

> The above medical opinions are based on a reasonable degree of medical certainty.

Evaluation of Dr. James Zarr

Exhibit 3 contains the medical report of Dr. James Zarr dated August 29, 2011 addressed to Employer's attorney, with Dr. Zarr's Curriculum Vitae and records and reports Dr. Zarr maintained at the time of the examination. Dr. Zarr is licensed in Missouri and Kansas and is a Diplomate and Fellow of the American Board of Physical Medicine and Rehabilitation and a Diplomate of the American Board of Electrodiagnostic Medicine.

Dr. Zarr examined Claimant on August 29, 2011. His report sets forth the history of her accident on December 31, 2009 while employed by Employer. The report states in part: "On that date, the patient had walked in from the parking lot. She had snow and ice on her shoes as she was walking inside a hallway the snow and ice was melting and she slipped and fell landing on her left wrist."

The history of Claimant's treatment is set forth in Dr. Zarr's report. Claimant rated her average daily pain at five on a scale of ten. Dr. Zarr's reports sets forth results of his physical examination of Claimant. The report notes Claimant has tenderness to palpation around the surgical scar on her left volar aspect of the distal forearm. Grip strength is noted to be 50 pounds with the right hand and 35 pounds with the left hand.

Dr. Zarr's Impression is noted to be: "1. Left distal radius fracture secondary to a fall. 2. Status post ORIF with plating of the left distal radius fracture."

Dr. Zarr's report concludes with the following Comment:

> I feel this patient has reached maximum medical improvement. I do feel she has suffered permanent disability from the left wrist fracture which occurred on December 31, 2009. I am rendering a 5% permanent disability of the left upper extremity at the level of the left wrist. This patient can return to full time regular duty work without restrictions. I do not feel this patient will need any further diagnostic evaluation or treatment as a result of the injury of December 31, 2009. All of my opinions have been rendered within a reasonable degree of medical certainty.

Employer's EMT medical report dated December 31, 2009 regarding the incident (Exhibit 2) states in part that Claimant stated "she was walking down the hall and slipped on the floor and fell."

The surveillance video (Exhibit 1) shows three uniformed persons with Claimant within about a minute and a half of the time she fell. Two other uniformed persons arrived within ten minutes of the fall. The video does not show the condition of Claimant's shoes after the fall.

The video shows the parking lot about seventeen minutes after the fall. The parking lot is mostly free of ice and snow. Some snow and ice appear on the ground outside the employee entrance to the building.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence and the application of the Workers' Compensation Law, I make the following Rulings of Law:

Injury by accident arising out of and in the course of employment

Section 287.808, RSMo[1] provides:

> The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.800, RSMo provides:

> 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.
>
> 2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission,

[1] All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc*., 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.020.2, RSMo provides:

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.

Section 287.020.3, RSMo provides in part:

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.

(5) The terms ‘injury’ and ‘personal injuries’ shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of ‘accident’, ‘occupational disease’, ‘arising out of’, and ‘in the course of the employment’ to include, but not be

limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo.App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Section 287.030.2, RSMo provides: "2. Any reference to the employer shall also include his or her insurer or group self-insurer."

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri,* 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence,* 955 S.W.2d 570, 575 (Mo.App. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220, 226 (Mo. banc 2003). [2] The quantum of proof is reasonable probability. *Thorsen v. Sachs Elec. Co.,* 52 S.W.3d 616, 620 (Mo.App.2001); *Downing v. Willamette Industries, Inc*., 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis,* 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen,* 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.,* 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer,* 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company,* 503 S.W.2d 697, 703 (Mo.App. 1974).

Based on the substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find that the credible evidence has established that Claimant sustained a compensable injury arising out of and in the course of her employment for Employer which resulted from an accident on December 31, 2009 in Employer's workplace. I find that Claimant's accident while working for Employer was the prevailing factor in causing her injury, her resulting disability, and the need for the medical treatment she received. This conclusion is supported by the following.

I find that this occurrence qualifies as an "accident" as defined by Section 287.020.2, RSMo. I find that Claimant had an unexpected traumatic event when she slipped and fell on December 31, 2009, and her fall produced an objective symptom of an injury, pain in her left arm and shoulder, left hip and back, which was caused by a specific event during a single work shift.

[2] Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton*'s effect thereon will not be further noted.

Claimant testified that she had ice and snow on her shoes when she slipped and fell. The snow and ice had started melting and her shoes were wet when she fell. She testified that she slipped on Employer's polished smooth concrete floor and that there were no rugs or traction skids where she fell. I find this testimony is credible.

The history of Claimant's fall contained in the treatment records and reports of Dr. Poppa and Dr. Zarr is consistent with Claimant's testimony.

Employer offered no witnesses at the hearing. No EMTs testified at the hearing or by deposition to refute or contradict Claimant's testimony. Employer's EMT medical report dated December 31, 2009 regarding the incident states Claimant stated "she was walking down the hall and slipped on the floor and fell."

In *Bivins v. St. John's Regional Health Center*, 272 SW3d 446 (Mo.App. 2009), the Southern District Court of Appeals affirmed the Commission's denial of benefits to a claimant who fell at work. The court noted that the Commission found that there was no rational connection between claimant's work and the injury that was sustained.

In *Bivins*, a nurse, claimant's supervisor, testified that he discussed claimant's general condition with her. The supervisor denied that claimant told him she had fallen because her foot had stuck to the floor. Employer's health manager testified she spoke with claimant the day after the accident. She said the claimant told her that she "just fell". She also testified that claimant did not advise her that her foot did stick to the floor. The testimony of the officers, nurse and employee health manager were all found to be credible. The *Bivens* court also noted that written documentation would not substantiate claimant's contention that she advised hospital personnel that her foot had stuck to the floor.

The court noted in *Bivins* at 449 that the Commission had found and concluded "that the employee was walking in a hallway on the premises of employer when the employee 'just fell', meaning that she simply or merely fell, without explanation." The court notes that the Commission did not find credible "employee's trial testimony that her foot stuck to the floor immediately prior to falling." The Commission specifically found that the most credible version of what transpired was that employee "just fell", i.e., the injury simply was the result of an unexplained fall.

The court in *Bivens* stated at 449:

> Due to the fact that the injury was the result of an unexplained fall, the commission is unable to determine clearly if there was any condition of employment that contributed to the result of injury.

> The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be at issue if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and is part of the employment. It is not sufficient that the employment may simply furnish an indication for an injury for some unconnected source.

The *Bivins* case is distinguishable from the case at hand. In *Bivins*, Employer presented evidence that there was nothing on the floor that would have caused Claimant's foot to stick or would have caused her to slip or trip. The Court noted that photographs taken immediately after the incident provided no evidence of anything on the floor. In the case at hand, Employer offered no still photographs of the floor taken immediately after the incident. The surveillance video does not clearly show the condition of the floor where Claimant stepped at the time of the accident.

In *Bivins*, employer offered a dispatch report and emergency nursing record stating that claimant tripped, and neither indicated that claimant's foot stuck to the floor. In the case at hand, no records were offered contradicting Claimant's statement of how the accident occurred.

In *Bivins*, an officer who responded to the incident involving claimant asked claimant if she had tripped. Claimant responded that she "just fell", and did not advise the officer that she had fallen because her right foot stuck to the floor. In the case at hand, Employer did not offer testimony of the EMTs or anyone else investigating the accident. Employer did not refute Claimant's statements regarding how the accident occurred.

In *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671 (Mo. 2009), claimant was walking briskly toward a truck when he felt a pop and his knee began to hurt. The Court noted there was "nothing about the road surface, his work clothes or the job that caused any slip, strain or unusual movement, and he did not fall or otherwise sustain any additional injuries due to the popping. He just felt a pop." *Id.* at 672. The Missouri Supreme Court stated in *Miller* at 674:

> 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 Mr. Miller 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.

The *Miller* court noted that claimant did 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. The court noted that claimant was walking on even road surface when his knee happened to pop and that nothing about work caused it to do so.

Miller is also distinguishable from the case at hand. Claimant's injury did not occur merely because she was walking and she suffered a pop in her knee. Here, she asserts, and I believe, that she slipped on the concrete floor because her shoes were wet after walking through snow and ice, and the slip caused her to fall. I find that her injury arose during the course of employment and also arose out of her employment.

I find that that Claimant's accident is the prevailing factor in causing her injury. I also find that her accident 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. I find that there was a rational connection between Claimant's work and the injury sustained. I find that Claimant's injury was a rational consequence of some hazard connected with the employment, the hazard being the snow and ice outside the employee entrance she tracked in from outside the employee entrance that caused her shoes to be wet and slippery and caused her to fall on Employer's concrete floor that had no traction skids, mats, or rugs where Claimant fell. I find Claimant fell in an unsafe location due to her employment.[3]

[3] I also find the evidence does not establish that Claimant's claim should be denied because of the type of shoes she wore at the time she fell. The type of shoes Claimant wore does not negate my findings that Claimant tracked in snow and ice from outside the employee entrance that caused her shoes to be wet and slippery and caused her to fall on Employer's concrete floor that had no traction skids, mats, or rugs where she fell, and that she fell in an unsafe location due to her employment. I find the evidence does not establish Claimant's accident was caused by the type of shoes she wore when she slipped and fell. *See Stricker v. Children's Mercy Hosp.*, 304 S.W.3d 189 (Mo.App. 2009).

In believing the Claimant's testimony, I find that the condition of Employer's premises exposed Claimant to an unusual risk or injury from such hazard which was not shared by the general public, and that the injury was a rational consequence of that hazard to which the Claimant had been exposed and which existed because of and as part of the employment. I find that Claimant's injury was not sustained due to an unexplained fall. I find that Claimant's work was not a triggering or precipitating factor.

Permanent Partial Disability and Disfigurement

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc*., 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const*., 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co*., 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc*., 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson, 721 S.W.2d* at 161-2; *Barrett v. Bentzinger Brothers, Inc*., 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

Section 287.190, RSMo provides for permanent partial disability benefits. Section 287.190.6(2), RSMo provides:

> Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In 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 tests or diagnostic procedures.

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc*., 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co*., 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission "is free to find a disability rating higher or lower than that expressed in medical testimony." *Jones v. Jefferson City School Dist*., 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that "[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, 'the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.'" *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Claimant sustained a left wrist fracture from her fall. She had surgery to repair the fracture. She has reduced grip strength in her left hand compared to the right. She continues to have pain in her left wrist. She has numbness and tingling in her fingers and she drops things. She has difficulty getting dressed. She needs help buttoning buttons. She has pain in her left hip that goes to her back. She no longer has complaints relating to her neck.

Dr. Barnhill noted on January 4, 2010 that Claimant denied any other injury from her fall other than her left wrist injury. Dr. Barnhill only treated Claimant's left upper extremity. Claimant's physical therapy treatments were limited to her left wrist.

On August 29, 2011, Dr. Zarr assessed 5% permanent disability of Claimant's left upper extremity at the wrist from her December 31, 2009 fall. I find Dr. Zarr's assessment of permanent disability is not credible.

Dr. Zarr felt Claimant could return to work without restrictions. I find this opinion is credible.

On May 27, 2011, Dr. Poppa assessed 30% permanent partial disability of the left upper extremity between the wrist and elbow (200 week level) and 5% permanent partial disability of the body as a whole for conditions involving Claimant's back and neck, or an overall 20% permanent partial disability of the body as a whole. Dr. Poppa does not assess a specific percentage of disability to Claimant's back. I find Dr. Poppa's assessment of permanent disability is not credible. I also find Dr. Poppa's restrictions are not credible.

Based on the substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find that as a result of Claimant's December 31, 2009 compensable work injury, Claimant has sustained 20% permanent partial disability of the left upper extremity at the wrist (175 week level), or 35 weeks of compensation. I award Claimant 35 weeks of permanent partial disability from Employer at the rate of $422.97 per week, which amounts to $14,803.95.

I also assess an additional 4 weeks for disfigurement for the scarring on Claimant's left arm resulting from the December 31, 2009 accident. I award Claimant the additional sum of $1,691.88 in disfigurement from Employer.

Liability for Past Medical Expenses

Claimant requests an award of $28,742.33 in past medical expenses for treatment provided to Claimant identified in Exhibits G through N, including $35.00 in prescription medication expenses prescribed by Dr. Barnhill shown in Exhibit N.

Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment … as may reasonably be required … to cure and relieve [the employee] from the effects of the injury."

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects

of the injury. *Chambliss v. Lutheran Medical Center,* 822 S.W.2d 926 (Mo.App. 1991); *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990); *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. *Martin v. Mid-America Farm Lines, Inc*., 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994); *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992); *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992). The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. *Martin*, 769 S.W.2d at 111; *Esquivel v. Day's Inn of Branson*, 959 S.W.2d 486, 488 (Mo.App. 1998).

The law in Missouri provides that while the employer has the right to name the treating physician, it waives that right by failing or neglecting to provide necessary medical aid to the injured worker. *Emert v. Ford Motor Co.,* 863 S.W.2d 629, 631 (Mo.App.1993); *Shores v. General Motors Corp.,* 842 S.W.2d 929, 931 (Mo.App.1992); *Herring v. Yellow Freight System, Inc.,* 914 S.W.2d 816, 822 (Mo.App. 1995); *Hawkins v. Emerson Elec. Co.,* 676 S.W.2d 872, 879 (Mo.App. 1984). The Court in *Shores* stated at 931-932:

> The case law under §287.140(1) establishes the employer's right to provide medical treatment of its choice, however, this right is waived when the employer fails to provide necessary medical treatment after receiving notice of an injury. *Wiedower v. ACF Indus., Inc.,* 657 S.W.2d 71, 74 (Mo.App.1983). 'Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the [claimant] may make his own selection and have the cost assessed against the employer.' *Id.*
>
> In the present case, there is substantial evidence which supports a finding that employer had notice of claimant's injuries and refused to provide medical treatment. On the day she was injured, and thereafter whenever the pain made it difficult to work, claimant reported to the plant dispensary to receive medical aid. At some point, a nurse at the dispensary informed claimant that she was no longer welcome and should consult her own doctor for further treatment.

Employer had notice of Claimant's December 31, 2009 injury on December 31, 2009. Employer refused to provide medical aid to Claimant under workers' compensation after her December 31, 2009 injury. As in *Shores,* there is substantial evidence which supports a finding that Employer had notice of Claimant's injuries and

refused to provide medical treatment. Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the claimant may make his own selection and have the cost assessed against the employer.

Dr. Poppa stated the treatment Claimant had received regarding her work related medical condition from all providers has been reasonable, appropriate and directly necessary to cure and relieve the effects of her injury. He also stated the medical expenses incurred by her as a result of her work accident dated December 31, 2009 are reasonable and necessary as a result of her work injury. I find these opinions to be credible.

I find the medical bills in evidence were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the Claimant's injury. I find that the medical care Claimant received on and after December 31, 2009 that is represented by the medical bills and treatment records in evidence was reasonably necessary to cure and relieve her of the effects of her December 31, 2009 accident that arose out of and in the course of her employment for Employer.

I have previously found that Claimant's December 31, 2009 compensable accident while working for Employer was the prevailing factor in causing her injury, her resulting disability, and the need for medical treatment.

The parties stipulated that Employer/Insurer has paid no medical aid, the treatment Claimant received was reasonably required to cure and relieve Claimant from the effects of the December 31, 2009 injury, and the fees and charges for the medical treatment Claimant received to treat her December 31, 2009 injury were fair and reasonable and usual and customary.

Employer did not pay Claimant's medical expenses for which she seeks payment. The evidence documents that Claimant received the treatment for the injury that is represented by the expenses for which she seeks payment. Employer offered no evidence that the charges were not fair and reasonable and usual and customary.

The medical bills in evidence document that the medical expenses for services rendered to Claimant are in the amount of $28,742.33. I find that the requested past unpaid medical expenses in the total amount of $28,742.33, were reasonable and necessary and causally related to Claimant's December 31, 2009 injury sustained in the course of her employment for Employer. I further find that the charges were fair and reasonable and usual and customary, and that they should be paid by Employer. Claimant is awarded the sum of $28,742.33 from Employer for these past medical expenses.

Liability for temporary total disability

Claimant requests an award for past temporary total disability benefits from January 11, 2010 to and including April 14, 2010.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc*. 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 909 (Mo.App. 2008); *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Cardwell*, 249 S.W.3d at 909; *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is “whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition.” *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant’s employability on the open market includes the anticipated length of time until claimant’s condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant’s condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant did not work for Employer after her January 13, 2010 left wrist surgery. Employer did not offer Claimant work after the surgery. Employer never offered to accommodate Claimant's restrictions. Claimant continued to receive treatment for her injury until April 14, 2010. She still had limitations until April 14, 2010.

Dr. Barnhill's final release is not in evidence. The Pinnacle Therapy Services record dated May 5, 2010 (Exhibit A, page 255) notes a new script was given when Claimant came back to the clinic on April 14, 2010, and that Claimant did not return after that day's treatment.

It is Dr. Poppa's opinion that Claimant was temporarily and totally disabled as a result of her work injury from December 31, 2009 until her release from the care of Dr. Barnhill. I find this opinion is credible.

Claimant testified she was released by the doctor on April 14, 2010. I find this testimony to be credible. I find that Claimant was released by Dr. Barnhill on April 14, 2010. I find Claimant reached maximum medical improvement on April 14, 2010.

The parties stipulated, and I find, that the weekly temporary total disability compensation rate is $501.73 and that no compensation has been paid. The parties also stipulated that Claimant was temporarily and totally disabled from January 11, 2010 to and including March 23, 2010.

Based upon the foregoing, I find that Claimant has proven that as a result of her injury at Employer on December 31, 2009, she was not able to return to work, was temporarily and totally disabled, and is entitled to temporary total benefits, from January 11, 2010 to and including April 14, 2010.

I therefore order Employer to pay Claimant temporary total disability benefits from January 11, 2010 to and including April 14, 2010, which is 13 2/7 weeks, at the rate of $501.73 per week, which amounts to $6,665.84.

Liability for Additional Medical Aid

Claimant has requested an award for additional medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required . . . to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers,* 132 S.W.3d at 266; *Mathia v. Contract Freighters,*

Inc., 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co*., 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

Medical aid may be required even though it merely relieves the employee's suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brolier*, 163 S.W. 2d at 115.

The court in *Tillotson v. St. Joseph Medical Center*, --- S.W.3d ----, 2011 WL 2313691 (Mo.App. W.D.) states:

> 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, 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.*

The court in *Tillotson* also states:

> 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.

Claimant testified Dr. Barnhill released her on April 14, 2010. No records or reports of Dr. Barnhill addressing any possible need for future medical treatment were offered in evidence. Claimant testified she still has plates and screws in her arm and that Dr. Barnhill told her that they would not be able to take screws out, because if they did, her bones would collapse. I find this testimony to be credible.

Dr. Zarr stated on August 29, 2011 within a reasonable degree of medical certainty that Claimant had patient has reached maximum medical improvement. He did not feel Claimant will need any further diagnostic evaluation or treatment as a result of the injury of December 31, 2009. I find these opinions to be credible.

Dr. Poppa stated that as it relates to additional treatment involving Claimant's left upper extremity/wrist, she "may require removal of the orthopedic hardware based on her level of pain tolerance." His opinion does not state there is a *reasonable probability* that Claimant will need the removal of her orthopedic hardware. I find Dr. Poppa's opinion is not sufficient to justify an award of future medical in this case.

I find Claimant is at maximum medical improvement and that she failed to prove that she reasonably requires any additional medical aid to cure or relieve her of the effects of her December 31, 2009 injury. I deny Claimant's request for additional medical treatment in this case.

Attorney's Fees

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: David A. Slocum.

Employee's claim against the Treasurer of the State of Missouri as Custodian of the Second Injury Fund has not been determined and remains open.

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation