

AWARD

Employee: Jimmie Alston

Injury No. 08-022783

Dependents:

Employer: Dish Network

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Company

Hearing Date: January 30, 2012

Checked by: RJD/ga

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: March 17, 2008
5. State location where accident occurred or occupational disease was contracted: Randolph 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 carrying a 16' ladder, slipped in mud and fell backwards landing on his back, with immediate pain in his low back.
12. Did accident or occupational disease cause death? No. Date of death? N/A

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13. Part(s) of body injured by accident or occupational disease: Low back, body as a whole.
14. Nature and extent of any permanent disability: 25% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: unknown
16. Value necessary medical aid paid to date by employer/insurer? unknown
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$768.80
19. Weekly compensation rate: \$512.58 for temporary total disability benefits; \$389.04 for permanent partial disability benefits
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. From Employer/Insurer:

100 weeks of permanent partial disability benefits	\$38,904.00
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22. From the Second Injury Fund:

24 weeks of permanent partial disability benefits	\$9,336.96
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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:

Scott Wilson

Employee: Jimmie Alston

Injury No. 08-022783

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jimmie Alston

Injury No: 08-022783

Employer: Dish Network

Insurer: Ace American Insurance Company

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**DIVISION OF WORKERS'
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ISSUES DECIDED

These cases (Injury No. 08-022783 and Injury No. 08-084032) were consolidated for hearing. The hearing was held on January 30, 2012 in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted, and the cases were submitted on February 21, 2012.

The hearing was held to determine the following issues in Injury No. 08-022783:

1. The nature and extent of permanent partial disability, if any, in reference to Claimant's low back;
2. Whether the work injury of March 17, 2008, was the cause of any or all of the injuries and conditions alleged by Claimant;
3. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. The liability, if any, of the Second Injury Fund for permanent partial disability benefits;
5. Whether Employer shall be ordered to provide future medical benefits; and
6. Whether Employer shall be ordered to reimburse Claimant for medical expenses incurred.

The hearing was held to determine the following issues in Injury No. 08-084032:

1. Whether Claimant, Jimmie Alston, sustained an accident arising out of and in the course of his employment with Dish Network Corporation on August 6, 2008;
2. Whether the work accident of August 6, 2008 (if found to have been sustained) was the cause of any or all of the injuries and conditions alleged by Claimant;
3. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. The nature and extent of Claimant's permanent partial disability, if any;

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5. Whether Employer shall be ordered to provide future medical benefits; and
6. Whether Employer shall be ordered to reimburse Claimant for medical expenses incurred.

STIPULATIONS

In Injury No. 08-022783, the parties stipulated as follows:

1. The Missouri Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the evidentiary hearing is proper in Randolph County and adjoining counties; the parties agreed, on the record, to a change of venue to Cole County for purposes of the evidentiary hearing;
3. The claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The average weekly wage is \$768.80, resulting in compensation rates of \$512.58/\$389.04;
6. Jimmie Alston, Claimant, sustained an accident arising out of and in the course of his employment with Dish Network Corporation, on March 17, 2008;
7. The notice requirement of Section 287.420, RSMo, is not a bar to the claim for compensation herein; and
8. Ace American Insurance Company fully insured the Missouri Workers' Compensation liability of Dish Network Corporation at all relevant times.

In Injury No. 08-084032, the parties stipulated as follows:

1. The Missouri Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the evidentiary hearing is proper in Cole County;
3. The claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The average weekly wage is \$768.80, resulting in compensation rates of \$512.58/\$404.66;
6. The notice requirement of Section 287.420, RSMo, is not a bar to the claim for compensation herein; and
7. Ace American Insurance Company fully insured the Missouri Workers' Compensation liability of Dish Network Corporation at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Jimmie L. Alston, Jr. ("Claimant"), as well as Claimant's deposition testimony; the narrative reports and deposition testimony of Dr. Eli

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Shuter; medical records; medical bills; Claim for Compensation and Answer filed in Injury No. 08-084032; official notice was also taken of the Division of Workers' Compensation's file in Injury No. 08-084032, which showed that Employer-Insurer's Answer was not timely filed.

DISCUSSION

Jimmie Alston ("Claimant") was born on September 4, 1967. As stipulated, Claimant was injured on March 17, 2008 while in the course and scope of his employment with Dish Network ("Employer"), a satellite television provider. Claimant began working for Employer in 2007. He worked four days a week; he testified that it was not unusual to work fifteen hours or more in a day. On March 17, 2008, Claimant was working as a "Field Service Specialist II" (satellite dish system installer) for Dish Network and was at a customer's residence in Higbee, Missouri during a rain storm. As Claimant was carrying a 16' ladder (called a "Little Giant") back to the company van he slipped in mud and fell backwards onto a rock/gravel flowerbed, landing on his back, with immediate pain in his low back. Claimant notified his supervisor, Robert Wilson, of the injury that same day, who asked him to first go to see a chiropractor for his pain. Claimant went to Pressley Chiropractic for three visits for treatment, but with no improvement of his low back pain. He filled out a written report of injury for Employer, and the Employer/Insurer authorized treatment at Urgent Care at University Hospital, where he received treatment by Dr. Tran on March 24, 2008, for low back pain and pain down his left leg. Claimant was taken off work, and was treated conservatively and then referred to the University's orthopedic clinic. Claimant was then seen by Dr. Joel Jeffries on May 7, 2008, who ordered an MRI. The MRI of May 14, 2008 showed a large central extruded disc fragment at S1. Dr. Jeffries told Claimant he had a herniated or "blown disc" and referred him to Dr. Theodore Choma, an orthopedic surgeon at University Hospital, who recommended surgery on the disc. The surgery was authorized and Dr. Choma performed an L5-S1 laminotomy and microdiscectomy on May 27, 2008.

After the surgery, Claimant followed up with Dr. Choma, but had a lot of fluid draining from the wound and possible infection. Dr. Choma released Claimant to light duty work on June 11, 2008. Employer had Claimant working light duty assembling satellite dishes, sitting in a plastic chair which aggravated his back pain, which he reported and was told by a company nurse to buy a "donut" for his chair. Although the surgery did improve his back pain, Claimant continued to have numbness radiating into right his buttock, and he noticed that his right calf was still weak.

Dr. Choma released Claimant back to full duty work as a dish installer as of August 4, 2008. Claimant was sent back to work on three or four "big jobs" (bigger houses, requiring more wiring work) when on August 6, 2008, he claims he sustained another work-related back injury. Claimant testified that he was working on a house in Jefferson City that had not been "pre-wired" and was carrying a 28 foot ladder weighing 85 pounds back to the van, and as he twisted to swing the ladder he felt increased pain in his low back. Claimant testified that he finished the day although his back was hurting, and later that evening he drove his daughter to college in Tulsa, Oklahoma, and stayed overnight at his parents' house in Tulsa. Claimant testified that the next morning when he woke up, he went to get coffee in the kitchen and as he

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was standing at the kitchen counter he instantly felt severe pain in his low back and right leg, and that he “knew right away” that he had re-injured the same part of his low back. He testified he had not done anything at all that morning before he felt the increased pain in his back and down his leg other than to get out of bed.

Claimant testified that he reported the injury and what had happened over the weekend to his manager the first thing when he got to work that Sunday. Employer then sent Claimant back to Urgent Care at University Hospital, where he again saw Dr. Tran on August 11, 2008. Dr. Tran noted the following history: “WORK COMP: CARRYING A LADDER LAST THURSDAY AND RE-INJURED HIS BACK. HAD SURGERY 8 WEEKS AGO AND NOW HAS PAIN UNDER THE INCISION. PAIN RADIATES TO FEET.” Claimant was given Percocet and taken completely off of work, and referred back to the University’s Orthopedic Department.

On August 22, 2008 Claimant was seen by Dr. Jeff Lehmen, an orthopedic resident at the University Orthopedic Department. Dr. Lehmen’s records from that visit give the same history of having lifted a 28 foot ladder on August 6, 2008 and the next day had back pain with right lower extremity radiculopathy similar to the symptoms he experienced previous to the first surgery. Dr. Lehmen ordered a lumbar MRI, which was performed that day. All of that treatment including the MRI was authorized by Employer. Claimant returned to Dr. Lehmen after the MRI and was told that he had a recurrent herniated disc at L5-S1, the same level as the prior herniated disc and surgery. Dr. Lehmen detailed the “History of Present Illness” as:

Just 2 weeks ago on August 6, 2008, the patient was lifting a 28 foot ladder during the day and states the next day he noticed his back pain began with right lower radiculopathy similar to the symptoms he experienced previous to surgery. Also, the night before he had a long drive to Tulsa, Oklahoma. He was wondering if the injury was sustained while lifting the ladder.

Dr. Lehmen then noted in his conclusion, after discussing treatment options of an injection, discectomy, or fusion surgery, that “it was also discussed with the patient that disk was likely not due to when he was lifting the ladder, but when he noticed the pain the next day.” Claimant testified that no further treatment was authorized after that.

Formal, written demand was made for additional treatment to Employer-Insurer’s attorneys on September 4, 2008 which was denied. A Claim for Compensation was filed with the Division on or about September 16, 2008, and was given Injury No. 08-084032. The Claim for Compensation form also included a demand for additional medical treatment. The Employer-Insurer’s Answer was filed out-of-time.

Claimant then saw his primary care physician, Dr. Vahabsadeh, who referred him to Dr. Randal Trecha, an orthopedic surgeon at the Columbia Orthopaedic Group. Dr. Trecha first saw Claimant on September 28, 2008 and took a history of the original work comp injury in March, the discectomy performed by Dr. Choma, and being released back to work, before having “recurrent symptoms when he carried a ladder at work” and noted, “This problem began on August 6, 2007.” (It is clear that “2007” is a clerical error and should be “2008”.)

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Dr. Trecha tried a steroid injection without benefit, and then recommended discectomy and fusion. Dr. Trecha then performed an anterior lumbar fusion at L4-L5 and L5-S1 with instrumentation on December 9, 2008 at Boone Hospital. Dr. Trecha noted in his "History of the Present Illness" in the Discharge Summary from Boone Hospital following the surgery that "he is post discectomy by Dr. Choma at the University Hospital earlier in 2008. He improved for a period of time. He was on light duty. His symptoms returned when he was carrying a ladder." That surgery was paid by Claimant's own health plan.

Claimant was off of work completely following the fusion surgery until June 29, 2009. Claimant again developed infection following that surgery, and had to have another surgery to clean out the surgical site and was hospitalized for five days at Boone Hospital Center. Claimant then underwent physical therapy at Peak Performance, and Dr. Trecha released him on June 29, 2009 to return on an "as-needed" basis with activity "as tolerated." He was not able to return to his job with Dish Network.

Dr. Eli Shuter found "It is also my opinion that the prevailing cause of the recurrent disc herniation in August 2008 was the occurrence of carrying an 85 pound ladder on August 6, 2008. Accordingly the surgeries performed by Dr. Trecha on December 9, 2008 and on January 9, 2009 were the direct result of that injury."

Claimant was seen by Dr. Charles Bondurant, a neurosurgeon, in 2004 for neck pain, upper back pain and lower back pain. Lumbar spine MRI indicated degenerative changes at all levels, particularly at L5-S1. Cervical spine MRIs also showed degeneration from C4 to T1. Surgery was recommended (but not done) at the C7-T1 level, but no lumbar surgery was discussed. Claimant testified that he had no low back symptoms between 2004 and March 17, 2008. Claimant has had neck surgeries in 2010 and 2011.

In my view of the evidence, there is little question that Claimant sustained an accident arising out of and in the course of his employment on August 6, 2008. Both Dr. Trecha and Dr. Shuter found that Claimant sustained a recurrent disc herniation as a result of carrying a 28 foot ladder weighing 85 pounds, twisting and feeling back pain. The fact that the back pain became debilitating the next day after he drove to Tulsa does not, *ipso facto*, mean that the drive was the cause of the recurrent disc herniation, nor does it mean that the incident with the ladder was *not* the cause of the recurrent disc herniation. The only medical evidence that might contradict Dr. Trecha's and Dr. Shuter's unequivocal testimony that the ladder incident was the cause of the recurrent disc herniation is from the resident physician, Dr. Lehmen: "It was also discussed with patient that this disk herniated was likely not due to when he was lifting a ladder but when he noticed the pain which was the next day." Dr. Lehmen, a resident physician, saw Claimant on only one occasion. He was never provided a complete history. He did not testify in this case (as did Dr. Shuter) and was not subject to cross-examination. Dr. Lehmen's sentence does not stand for the proposition that the drive to Tulsa caused the recurrent disc herniation; Claimant slept for seven hours after the drive to Tulsa, and then "the next day" experienced the debilitating pain when he went to get coffee in the kitchen and as he was standing at the kitchen counter he instantly felt severe pain in his low back and right leg. Dr. Lehmen's sentence stands for (if

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anything) the absurd proposition that Claimant's standing at his parent's kitchen counter drinking coffee caused the recurrent disc herniation.

I find that Claimant did sustain an accident arising out of and in the course of his employment with Dish Network on August 6, 2008. I further find that the work accident of August 6, 2008 was the prevailing factor in the cause of the recurrent disc herniation and the need for the lumbar discectomy and fusion surgery performed by Dr. Trecha on December 9, 2008.

TTD. Claimant is claiming unpaid TTD of 29 weeks, from the date of the fusion surgery on December 9, 2008 to June 29, 2009 when he was released back to work. It is clear from the records that he was unable to work following the fusion surgery by Dr. Trecha, and that Dr. Trecha had him completely off of work or on severe restrictions through June 29, 2009 when he released him on an as-needed basis. His Employer had terminated him by that time. He was not paid any TTD during that time, as Employer had denied causation regarding the second surgery. Claimant testified that he was able to work for First Student Transportation for a few weeks prior to the fusion surgery, but was not able to work after the surgery while seeing Dr. Trecha. He is therefore owed TTD from December 9, 2008 to June 29, 2009, a period of 29 weeks, at the stipulated rate of \$512.58, totaling \$14,864.82. The TTD is payable in Injury No. 08-084032.

Permanent Partial Disability. Claimant testified credibly that he still suffers constant pain in his low back which radiates down his right leg/buttocks. He testified that he cannot sit or drive for more than 30 minutes at a time without increased pain, and that if he stands for more than 30 minutes his back "locks up" and his pain increases. He testified he has to lie down several times throughout a typical day due to his back pain. He testified that his pain is a 4-5 out of 10 constantly, and that it increases to 8-9 out of 10 with activity. He has problems sleeping at night and has to get up every night due to pain, between once and three times a night. He takes Aleve 400 mg twice a day, and uses ice daily.

The medical records all reflect that Claimant sustained a herniated disc in the original accident of March 17, 2008 requiring surgery, and that he continued to have pain until he was released back to work and had the second injury on August 6, 2008. The evidence is clear he had a recurrent herniated disc that required surgery, and that the fusion surgery performed by Dr. Trecha was directly caused by the work injuries. The only permanent partial disability "ratings" in evidence are those of Dr. Shuter, who rated Claimant as suffering 40 percent of a person due to the injuries, with 25 percent due to the injury of March 2008 and the first surgery, and 15 percent due to the recurrent herniated disc and fusion surgery as a result of the August 6, 2008 injury. Given that Dr. Shuter's opinions regarding the extent of Claimant's permanent partial disability due to the injuries are the only physician's ratings in the record as to the extent of permanent partial disability, and because they are fully supported by all of the evidence in the record, they should be adopted.

It is also clear that Claimant had no prior disability to his low back. The only medical records in evidence are those of Dr. Bondurant in 2004, for which he recovered and testified he had no real ongoing pain or problems until the injury of March 17, 2008. Dr. Shuter testified on cross-examination that he did not believe any pre-existing degeneration or spondylosis

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contributed to the need for the fusion or the resulting disability, explaining: “I don’t think so because when he had been treated for the degenerative disc disease by Dr. Bondurant in 2004 he was free of symptoms until the injury in March 2008...So the degenerative disc disease was not causing symptoms at that time. There is no basis for any prior permanent partial disability to be assessed to Claimant’s low back, or for Employer to get any sort of “credit” or reduction of the current level of Claimant’s permanent partial disability, as his permanent disability is solely due to the work injuries.

In Injury No. 08-022783, I find that Claimant sustained a permanent partial disability of 25% of the body as a whole. This entitles Claimant to 100 weeks of permanent partial disability benefits at the stipulated rate of \$389.04, totaling \$38,904.00.

In Injury No. 08-084032, I find that Claimant sustained a permanent partial disability of 15% of the body as a whole. This entitles Claimant to 60 weeks of permanent partial disability benefits at the stipulated rate of \$404.66, totaling \$24,279.60.

Payment/reimbursement for cost of medical treatment. Employer denied any further medical treatment as a result of either injury after the MRI and the resident physician’s examination on August 22, 2008. At that point, Employer became responsible for any further medical treatment later found to be reasonable and necessary, even though “unauthorized” and originally at the Claimant’s own expense.

The employer is required to provide medical treatment “as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” Section 287.140.1 RSMo. The claimant bears the burden of proof on this issue. *Sutton v. Vee Jay Cement Contracting*, 37 S.W.3d 803, 808 (Mo. App. E.D. 2000). The employer has the right to authorize treatment and select the treating physician at the employer’s cost. Section 287.140.10 RSMo. If the Employer refuses to provide treatment, the employee is free to seek treatment on his or her own and assess the costs to the employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 84-85 (Mo. App. E.D. 1995). In order to assess the costs against the employer, the claimant must show that the costs were necessary, reasonable and related to the accident. *Martin v. Mid-America Farm Lines*, 769 S.W.2d 105, 111-12 (Mo. 1989). This is initially shown by the testimony of the claimant and the medical records. *Id.* Claimant has more than met that burden, here.

Formal, written demand was made for additional treatment to Employer/Insurer’s attorneys on September 4, 2008 which was denied. A Claim for Compensation was filed with the Division on or about September 16, 2008, and was given Injury No. 08-084032. The Claim for Compensation form included a demand for additional medical treatment, as well. The Employer’s Answer was filed out-of-time.

Claimant then saw his primary care physician, Dr. Vahabsadeh, who referred Claimant to Dr. Randal Trecha, an orthopedic surgeon at the Columbia Orthopaedic Group. Dr. Trecha first saw Claimant on September 28, 2008 and took a history of the original work-related injury that March, the discectomy performed by Dr. Choma, and the release back to work, before having “recurrent symptoms when he carried a ladder at work” and noted, “This problem began on

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August 6...” Dr. Trecha tried a steroid injection without benefit, and then recommended fusion surgery to remove the disc. Dr. Trecha then performed an anterior lumbar fusion at L4-L5 and L5-S1 with hardware instrumentation on December 9, 2008 at Boone Hospital. He then had another surgery and was hospitalized for seven days due to an infection of the surgical site. Mr. Alston underwent post-operative physical therapy, and followed-up with Dr. Trecha through June 29, 2009 when Dr. Trecha released him on an as-needed basis.

All of the medical bills for his treatment after having the MRI and seeing the resident physician on August 22, 2008 were paid by Claimant or his own health plan. Employer denied all further treatment after that date, and as the injury of August 6, 2008 is compensable Employer is therefore responsible for the medical bills incurred. The bills are contained in Employee’s Exhibit N, which total almost \$127,000.00 (after considering the Employer paid \$3,501.00 for authorized treatment), as reflected in the chart summarizing all charges and payments made, and balances still due and owing. Dr. Shuter found all of those charges to be reasonable and necessary as a result of the injury of August 6, 2008. That opinion is supported by the records of Dr. Trecha and other evidence, and there is no other opinion regarding the reasonableness and necessity of the medical bills in evidence. Dr. Shuter’s opinion is adopted and the bills contained in Employee’s Exhibit N are Employer’s responsibility. The bills paid by Claimant’s health plan total \$75,335.27, the unpaid balances total \$1,140.59, and Claimant paid \$90.00 himself, for a total of \$76,565.86, which is the total amount of bills which should be awarded.

Employer is to be given no further benefit from any third-party having paid the bills, as they were not paid by Employer under Chapter 287, RSMo., as clearly explained in Section 287.270, RSMo. (Supp. 1999), which states in pertinent part:

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;

The case law is also clear that Employer is given no benefit of bills paid by Employee’s own health plan, or even an Employer’s own health plan or insurance. In *Shaffer v. St. John’s Regional Health*, 943 S.W.2d 803 (Mo.App.1997) the court held that the employer was not entitled to a credit against workers’ compensation benefits for medical bills submitted to and paid by a health insurance carrier pursuant to a health plan paid by the employer. *Id.* at 807-808. The court in *Shaffer* stated that in that case, as in this case, there was no evidence that employee’s medical bills were paid directly by the employer or its workers’ compensation insurer, and since the evidence reflected that at least some of the medical bills were paid by the employee’s health insurance carrier, the employer was not entitled to any credit for medical bills paid.

The *Shaffer* court cited and quoted from *Homan v. American Can Co.*, 535 S.W.2d 574, 576 (Mo.App.W.D. 1976), holding:

Section 287.270 requires benefits to come from the employer or its insurer for Workmen’s Compensation liability. Payments from any other source are not credited on benefits payable under the Workmen’s Compensation Chapter. *Shaffer*, 943 S.W.2d 803, 807.

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It is also clear that the medical bills should be paid directly to Employee as part of the Award, and Employee would then be responsible for payment of the lien or subrogation claims made by the health plan. In *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (Mo.App. E.D. 1983) the Eastern District rejected the employer's argument that the court should order the medical bills to be paid directly to the hospital rather than ordering the bills be paid directly to employee. The court dismissed the argument that the employee would receive a "windfall" since employee's insurance company originally paid the bills because "the insurance company may be entitled to reimbursement from the employee." *Id.* at 75. See also, *Homan v. American Can Co.*, 535 S.W.2d 574, 576 (Mo.App. 1976). The fact that Claimant has accepted benefits from another source does not estop him from asserting his rights to compensation under the act. *Davies v. Carter Carburetor, Division of ACF Industries, Inc.*, 429 S.W.2d 738, 752 (Mo. 1968).

It is well settled that the burden of substantiating any sort of "credit" for bills paid by any health plan lies squarely on the employer. *Shaffer*, 943 S.W.2d 803, 808; *Ellis v. Western Elec. Co.*, 664 S.W.2d 639, at 643 (Mo.App.S.D. 1984); *Point v. Westinghouse Elec. Corp.*, 382 S.W.2d 436, 439 (Mo.App.E.D. 1964). In this case, Employer entirely failed to meet that burden of proof or present any such evidence whatsoever, as the evidence reflects the Employer should have paid Claimant's medical bills for the work-related injury of August 6, 2008 but did not. Because Employer denied causation and denied of the medical benefits which were required under the Act, Employer is liable for the \$76,565.86 in past medical expenses.

Future medical care. Another issue to be decided is whether Employer shall be ordered to provide Claimant with ongoing and future medical treatment pursuant to Section 287.140. In *Dean v. St. Luke's Hospital*, 936 S.W.2d 601 (Mo.App. W.D. 1997), the Western District Court of Appeals stated (at 603):

The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

Dr. Shuter did not address the issue of future medical treatment. When Claimant was released by Dr. Trecha on June 29, 2009, Dr. Trecha's report stated: "We discussed conservative care of his back and back care precautions." The term "conservative care" is ambiguous; it can be construed as non-surgical medical care (physical therapy, medications, injections), or it can simply mean the patient caring for his back in a conservative manner. Even if the term "conservative care" as used in Dr. Trecha's note clearly refers to medical care, the "reasonable probability" that such medical care will be needed in the future is not addressed. I find that the evidence is insufficient to support an award of future medical care.

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Second Injury Fund liability. Claimant is seeking permanent partial disability benefits from the Second Injury Fund in Injury No. 08-022783 only. Claimant had pre-existing disability to his cervical spine, including a herniated disc at C4-T1, as set forth Dr. Shuter's report and deposition testimony. Claimant testified that he had injured his cervical spine and had ongoing neck pain after diving into a lake at Finger Lakes State Park in 2002. The medical records in evidence reflect that he received treatment from his primary care physician, Dr. Weston, and then was referred to a neurosurgeon, Dr. Charles Bondurant in 2002. Dr. Bondurant diagnosed a herniated disc at C7-T1 with encroachment on the left side causing radicular problems down the left arm/hand, and in his records of October 21, 2002 he recommended they "move toward consideration of operative intervention." He recommended a decompression surgery of at least the C7-T1 level, and possibly the C5-C7 levels, as well, but wanted EMG and CT-myelograms before performing surgery. His records show the a CT myelogram was performed on October 29, 2002 which showed C5-6 and C6 degeneration, and a post-myelogram CT showed the left-sided herniated disc at C7-T1 with impingement on the left root of C8. In November, 2002, he noted that he "offered cervical laminotomy, foraminotomy, and discectomy" at that time.

Claimant then received additional treatment from Dr. Bondurant in 2004, who noted the herniated disc at C7-T1 was still causing discomfort down his left arm into the fingers of his left hand. Dr. Bondurant also noted four levels of degenerative changes and encroachment in his cervical spine, and that the EMG studies from 2002 showed C8 and/or T1 radicular irritation. His records from June 23, 2004 reflect that he recommended surgery, given Claimant's neck problems had continued for two years, and specifically noted that Mr. Alston "does feel that his discomfort rises to the level to consider operative intervention." Dr. Bondurant wrote work-restrictions of "no pushing/pulling/lifting with force >40 lbs" at that time. Dr. Bondurant's last note of July 19, 2004 reflect that Claimant was still having neck pain radiating down his left arm causing numbness in his fingers of his left hand. He again discussed surgery, but Claimant wanted to hold off still, though Claimant was warned that delaying surgery could cause permanent nerve damage. Dr. Bondurant's notes of July 19, 2004 clearly state, "Mr. Alston returns and continues with left upper extremity discomfort and left hand weakness.... With this, I am tempted to seek decompression at this level. I have discussed operative and not operative issues with Mr. Alston and have offered posterior approach to C7/T1 laminotomy and foraminotomy and as possible discectomy." Claimant still wanted to hold off for as long as possible on surgery, though surgery was clearly recommended by July 2004.

Claimant testified credibly that his neck pain continued and increased from 2004 up until the two work injuries in 2008. He testified that in late 2007 and early 2008 he still had shooting pain and numbness down his left arm into his hand and fingers, and that he even lost use of his left tricep muscle. He testified that his neck and left arm pain did affect his work at that time, but that he worked through it. He further testified that he did have to have neck surgery in September, 2010, which didn't help, and then had to have a neck fusion in December, 2011, and that he is now unable to work due to his neck and back pain and limitations, such that he now has to apply for Social Security Disability.

Dr. Shuter testified that Claimant had a pre-existing permanent partial disability of 25% of the body as a whole at the cervical spine, which when combined with Claimant's low back

Employee: Jimmie Alston

Injury No. 08-022783

injury of March 17, 2008 created a total disability to the body as a whole greater than the simple sum of the separate components.

INJURY NO. 08-022783 – FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties have already stipulated in Injury No. 08-022783, I make the following findings of fact and rulings of law:

1. As a result of the work-related accident of March 17, 2008, Claimant sustained a significant disc herniation at L5-S1.
2. As a result of the work-related accident of March 17, 2008, Claimant required and underwent an L5-S1 laminotomy and microdiscectomy surgery on May 27, 2008.
3. Claimant was released to light duty work on June 11, 2008, but was not released to full duty work until August 4, 2008.
4. As a result of the work-related accident of March 17, 2008, Claimant sustained a permanent partial disability of 25% of the body as a whole.
5. All TTD benefits have been paid in Injury No. 08-022783.
6. All medical benefits have been paid in Injury No. 08-022783, and Claimant is not in need of future medical care for the March 17, 2008 injury.
7. At the time of the March 17, 2008 work-related accident and injury, Claimant had a preexisting permanent partial disability of 15% of the body as a whole with reference to the cervical spine, which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
8. The credible evidence establishes that the March 17, 2008 injury, combined with the pre-existing permanent partial disability, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 100 weeks for last injury + 60 weeks for preexisting disability = 160 weeks. 160 weeks x 15% = 24 weeks of overall greater disability.
9. The Second Injury Fund is liable for the payment of 24 weeks of permanent partial disability benefits at the stipulated rate of \$389.04, totaling \$9,336.96.
10. Claimant's testimony was credible.
11. Dr. Shuter's testimony was credible.

Employee: Jimmie Alston

Injury No. 08-022783

INJURY NO. 08-084032 – FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties have already stipulated in Injury No. 08-084032, I make the following findings of fact and rulings of law:

1. Claimant sustained an accident arising out of and in the course of his employment with Employer on August 6, 2008, when he was carrying a 28 foot ladder weighing 85 pounds, twisted and felt back pain.
2. As a result of the work-related accident of August 6, 2008, Claimant sustained a recurrent disc herniation at L5-S1.
3. On August 22, 2008 Claimant was seen by Dr. Jeff Lehmen, an orthopedic resident at the University of Missouri-Columbia who discussed with Claimant “that this disk herniated was likely not due to when he was lifting a ladder but when he noticed the pain which was the next day.”
4. After receiving Dr. Lehmen’s note, Employer denied all benefits in Injury No. 08-084032, including medical benefits, despite Claimant’s written demands for medical treatment.
5. Employer and Insurer did not file a timely answer in Injury No. 08-084032.
6. As a result of the work-related accident of August 6, 2008, Claimant required extensive medical treatment, including an anterior lumbar fusion at L4-L5 and L5-S1 with instrumentation done on December 9, 2008, and another surgery to clean out the surgical site which had become infected; Claimant has been required to use his private health insurance and his personal funds to pay for the needed treatment.
7. Employer and Insurer are responsible for payment of the needed medical treatment in the amount of \$76,565.86; that amount is properly payable to Claimant, and not to the health care providers. None of the health care providers is a party to this action.
8. From the date of the fusion surgery, December 9, 2008 to June 29, 2009 when Claimant was released back to work, Claimant was unable to compete in the open market for employment due to his August 6, 2008 injury and recovery from necessary surgeries to address that injury, and thus is entitled to temporary total disability benefits for that 29-week period.
9. Claimant is not in need of future medical care for the August 6, 2008 injury based upon the evidence presented.
10. As a result of the work-related accident of August 6, 2008, Claimant sustained a permanent partial disability of 15% of the body as a whole.
11. Claimant’s testimony was credible.
12. Dr. Shuter’s testimony was credible.

Employee: Jimmie Alston

Injury No. 08-022783

ORDER IN INJURY NO. 08-022783

In Injury No. 08-022783, Employer and Insurer are ordered to pay Claimant the sum of \$38,904.00 for permanent partial disability benefits.

Also in Injury No. 08-022783, the Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant the sum of \$9,336.96 for permanent partial disability benefits.

Claimant's attorney, Scott Wilson, is allowed 25% of all sums awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

ORDER IN INJURY NO. 08-084032

In Injury No. 08-084032, Employer and Insurer are ordered to pay Claimant the sum of \$14,864.82 for temporary total disability benefits, \$24,279.60 for permanent partial disability benefits, and the sum of \$76,565.86 for medical expenses.

Claimant's attorney, Scott Wilson, is allowed 25% of all sums awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Made by:

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation

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

Injury No.: 08-084032

Employee: Jimmie Alston

Employer: Dish Network

Insurer: Ace American Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge 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 administrative law judge dated April 18, 2012. The award and decision of Chief Administrative Law Judge Robert J. Dierkes, issued April 18, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge'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 23rd day of January 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jimmie Alston

Injury No. 08-084032

Dependents:

Employer: Dish Network

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund (dismissed)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Insurer: Ace American Insurance Company

Hearing Date: January 30, 2012

Checked by: RDJ/ga

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: August 6, 2008
5. State location where accident occurred or occupational disease was contracted: Cole 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 carrying a 28' ladder, twisted his body and felt pain in his low back. The pain became debilitating the next morning.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back, body as a whole.
14. Nature and extent of any permanent disability: 15% permanent partial disability of the body as a whole.
15. Compensation paid to-date for temporary disability: unknown
16. Value necessary medical aid paid to date by employer/insurer? unknown
17. Value necessary medical aid not furnished by employer/insurer? \$76,565.86

Employee: Jimmie Alston

Injury No. 08-084032

- 18. Employee's average weekly wages: \$768.80
- 19. Weekly compensation rate: \$512.58 for temporary total disability benefits; \$404.66 for permanent partial disability benefits
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. From Employer/Insurer:

60 weeks of permanent partial disability benefits	\$24,279.60
29 weeks of temporary total disability benefits	\$14,864.82
Reimbursement for necessary medical expenses	\$76,565.86

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:

Scott Wilson

Employee: Jimmie Alston

Injury No. 08-084032

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jimmie Alston

Injury No: 08-084032

Employer: Dish Network

Insurer: Ace American Insurance Company

Add'l Party: Second Injury Fund

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: RJD/ga

ISSUES DECIDED

These cases (Injury No. 08-022783 and Injury No. 08-084032) were consolidated for hearing. The hearing was held on January 30, 2012 in Jefferson City. The parties requested leave to file post-hearing briefs, which leave was granted, and the cases were submitted on February 21, 2012.

The hearing was held to determine the following issues in Injury No. 08-022783:

1. The nature and extent of permanent partial disability, if any, in reference to Claimant's low back;
2. Whether the work injury of March 17, 2008, was the cause of any or all of the injuries and conditions alleged by Claimant;
3. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. The liability, if any, of the Second Injury Fund for permanent partial disability benefits;
5. Whether Employer shall be ordered to provide future medical benefits; and
6. Whether Employer shall be ordered to reimburse Claimant for medical expenses incurred.

The hearing was held to determine the following issues in Injury No. 08-084032:

1. Whether Claimant, Jimmie Alston, sustained an accident arising out of and in the course of his employment with Dish Network Corporation on August 6, 2008;
2. Whether the work accident of August 6, 2008 (if found to have been sustained) was the cause of any or all of the injuries and conditions alleged by Claimant;
3. Whether Employer shall be ordered to pay temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
4. The nature and extent of Claimant's permanent partial disability, if any;

Employee: Jimmie Alston

Injury No. 08-084032

5. Whether Employer shall be ordered to provide future medical benefits; and
6. Whether Employer shall be ordered to reimburse Claimant for medical expenses incurred.

STIPULATIONS

In Injury No. 08-022783, the parties stipulated as follows:

1. The Missouri Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the evidentiary hearing is proper in Randolph County and adjoining counties; the parties agreed, on the record, to a change of venue to Cole County for purposes of the evidentiary hearing;
3. The claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The average weekly wage is \$768.80, resulting in compensation rates of \$512.58/\$389.04;
6. Jimmie Alston, Claimant, sustained an accident arising out of and in the course of his employment with Dish Network Corporation, on March 17, 2008;
7. The notice requirement of Section 287.420, RSMo, is not a bar to the claim for compensation herein; and
8. Ace American Insurance Company fully insured the Missouri Workers' Compensation liability of Dish Network Corporation at all relevant times.

In Injury No. 08-084032, the parties stipulated as follows:

1. The Missouri Division of Workers' Compensation has jurisdiction over this case;
2. Venue for the evidentiary hearing is proper in Cole County;
3. The claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. Both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. The average weekly wage is \$768.80, resulting in compensation rates of \$512.58/\$404.66;
6. The notice requirement of Section 287.420, RSMo, is not a bar to the claim for compensation herein; and
7. Ace American Insurance Company fully insured the Missouri Workers' Compensation liability of Dish Network Corporation at all relevant times.

EVIDENCE

The evidence consisted of the testimony of Jimmie L. Alston, Jr. ("Claimant"), as well as Claimant's deposition testimony; the narrative reports and deposition testimony of Dr. Eli

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Injury No. 08-084032

Shuter; medical records; medical bills; Claim for Compensation and Answer filed in Injury No. 08-084032; official notice was also taken of the Division of Workers' Compensation's file in Injury No. 08-084032, which showed that Employer-Insurer's Answer was not timely filed.

DISCUSSION

Jimmie Alston ("Claimant") was born on September 4, 1967. As stipulated, Claimant was injured on March 17, 2008 while in the course and scope of his employment with Dish Network ("Employer"), a satellite television provider. Claimant began working for Employer in 2007. He worked four days a week; he testified that it was not unusual to work fifteen hours or more in a day. On March 17, 2008, Claimant was working as a "Field Service Specialist II" (satellite dish system installer) for Dish Network and was at a customer's residence in Higbee, Missouri during a rain storm. As Claimant was carrying a 16' ladder (called a "Little Giant") back to the company van he slipped in mud and fell backwards onto a rock/gravel flowerbed, landing on his back, with immediate pain in his low back. Claimant notified his supervisor, Robert Wilson, of the injury that same day, who asked him to first go to see a chiropractor for his pain. Claimant went to Pressley Chiropractic for three visits for treatment, but with no improvement of his low back pain. He filled out a written report of injury for Employer, and the Employer/Insurer authorized treatment at Urgent Care at University Hospital, where he received treatment by Dr. Tran on March 24, 2008, for low back pain and pain down his left leg. Claimant was taken off work, and was treated conservatively and then referred to the University's orthopedic clinic. Claimant was then seen by Dr. Joel Jeffries on May 7, 2008, who ordered an MRI. The MRI of May 14, 2008 showed a large central extruded disc fragment at S1. Dr. Jeffries told Claimant he had a herniated or "blown disc" and referred him to Dr. Theodore Choma, an orthopedic surgeon at University Hospital, who recommended surgery on the disc. The surgery was authorized and Dr. Choma performed an L5-S1 laminotomy and microdiscectomy on May 27, 2008.

After the surgery, Claimant followed up with Dr. Choma, but had a lot of fluid draining from the wound and possible infection. Dr. Choma released Claimant to light duty work on June 11, 2008. Employer had Claimant working light duty assembling satellite dishes, sitting in a plastic chair which aggravated his back pain, which he reported and was told by a company nurse to buy a "donut" for his chair. Although the surgery did improve his back pain, Claimant continued to have numbness radiating into right his buttock, and he noticed that his right calf was still weak.

Dr. Choma released Claimant back to full duty work as a dish installer as of August 4, 2008. Claimant was sent back to work on three or four "big jobs" (bigger houses, requiring more wiring work) when on August 6, 2008, he claims he sustained another work-related back injury. Claimant testified that he was working on a house in Jefferson City that had not been "pre-wired" and was carrying a 28 foot ladder weighing 85 pounds back to the van, and as he twisted to swing the ladder he felt increased pain in his low back. Claimant testified that he finished the day although his back was hurting, and later that evening he drove his daughter to college in Tulsa, Oklahoma, and stayed overnight at his parents' house in Tulsa. Claimant testified that the next morning when he woke up, he went to get coffee in the kitchen and as he

Employee: Jimmie Alston

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was standing at the kitchen counter he instantly felt severe pain in his low back and right leg, and that he “knew right away” that he had re-injured the same part of his low back. He testified he had not done anything at all that morning before he felt the increased pain in his back and down his leg other than to get out of bed.

Claimant testified that he reported the injury and what had happened over the weekend to his manager the first thing when he got to work that Sunday. Employer then sent Claimant back to Urgent Care at University Hospital, where he again saw Dr. Tran on August 11, 2008. Dr. Tran noted the following history: “WORK COMP: CARRYING A LADDER LAST THURSDAY AND RE-INJURED HIS BACK. HAD SURGERY 8 WEEKS AGO AND NOW HAS PAIN UNDER THE INCISION. PAIN RADIATES TO FEET.” Claimant was given Percocet and taken completely off of work, and referred back to the University’s Orthopedic Department.

On August 22, 2008 Claimant was seen by Dr. Jeff Lehmen, an orthopedic resident at the University Orthopedic Department. Dr. Lehmen’s records from that visit give the same history of having lifted a 28 foot ladder on August 6, 2008 and the next day had back pain with right lower extremity radiculopathy similar to the symptoms he experienced previous to the first surgery. Dr. Lehmen ordered a lumbar MRI, which was performed that day. All of that treatment including the MRI was authorized by Employer. Claimant returned to Dr. Lehmen after the MRI and was told that he had a recurrent herniated disc at L5-S1, the same level as the prior herniated disc and surgery. Dr. Lehmen detailed the “History of Present Illness” as:

Just 2 weeks ago on August 6, 2008, the patient was lifting a 28 foot ladder during the day and states the next day he noticed his back pain began with right lower radiculopathy similar to the symptoms he experienced previous to surgery. Also, the night before he had a long drive to Tulsa, Oklahoma. He was wondering if the injury was sustained while lifting the ladder.

Dr. Lehmen then noted in his conclusion, after discussing treatment options of an injection, discectomy, or fusion surgery, that “it was also discussed with the patient that disk was likely not due to when he was lifting the ladder, but when he noticed the pain the next day.” Claimant testified that no further treatment was authorized after that.

Formal, written demand was made for additional treatment to Employer-Insurer’s attorneys on September 4, 2008 which was denied. A Claim for Compensation was filed with the Division on or about September 16, 2008, and was given Injury No. 08-084032. The Claim for Compensation form also included a demand for additional medical treatment. The Employer-Insurer’s Answer was filed out-of-time.

Claimant then saw his primary care physician, Dr. Vahabsadeh, who referred him to Dr. Randal Trecha, an orthopedic surgeon at the Columbia Orthopaedic Group. Dr. Trecha first saw Claimant on September 28, 2008 and took a history of the original work comp injury in March, the discectomy performed by Dr. Choma, and being released back to work, before having “recurrent symptoms when he carried a ladder at work” and noted, “This problem began on August 6, 2007.” (It is clear that “2007” is a clerical error and should be “2008”.)

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Dr. Trecha tried a steroid injection without benefit, and then recommended discectomy and fusion. Dr. Trecha then performed an anterior lumbar fusion at L4-L5 and L5-S1 with instrumentation on December 9, 2008 at Boone Hospital. Dr. Trecha noted in his "History of the Present Illness" in the Discharge Summary from Boone Hospital following the surgery that "he is post discectomy by Dr. Choma at the University Hospital earlier in 2008. He improved for a period of time. He was on light duty. His symptoms returned when he was carrying a ladder." That surgery was paid by Claimant's own health plan.

Claimant was off of work completely following the fusion surgery until June 29, 2009. Claimant again developed infection following that surgery, and had to have another surgery to clean out the surgical site and was hospitalized for five days at Boone Hospital Center. Claimant then underwent physical therapy at Peak Performance, and Dr. Trecha released him on June 29, 2009 to return on an "as-needed" basis with activity "as tolerated." He was not able to return to his job with Dish Network.

Dr. Eli Shuter found "It is also my opinion that the prevailing cause of the recurrent disc herniation in August 2008 was the occurrence of carrying an 85 pound ladder on August 6, 2008. Accordingly the surgeries performed by Dr. Trecha on December 9, 2008 and on January 9, 2009 were the direct result of that injury."

Claimant was seen by Dr. Charles Bondurant, a neurosurgeon, in 2004 for neck pain, upper back pain and lower back pain. Lumbar spine MRI indicated degenerative changes at all levels, particularly at L5-S1. Cervical spine MRIs also showed degeneration from C4 to T1. Surgery was recommended (but not done) at the C7-T1 level, but no lumbar surgery was discussed. Claimant testified that he had no low back symptoms between 2004 and March 17, 2008. Claimant has had neck surgeries in 2010 and 2011.

In my view of the evidence, there is little question that Claimant sustained an accident arising out of and in the course of his employment on August 6, 2008. Both Dr. Trecha and Dr. Shuter found that Claimant sustained a recurrent disc herniation as a result of carrying a 28 foot ladder weighing 85 pounds, twisting and feeling back pain. The fact that the back pain became debilitating the next day after he drove to Tulsa does not, *ipso facto*, mean that the drive was the cause of the recurrent disc herniation, nor does it mean that the incident with the ladder was *not* the cause of the recurrent disc herniation. The only medical evidence that might contradict Dr. Trecha's and Dr. Shuter's unequivocal testimony that the ladder incident was the cause of the recurrent disc herniation is from the resident physician, Dr. Lehmen: "It was also discussed with patient that this disk herniated was likely not due to when he was lifting a ladder but when he noticed the pain which was the next day." Dr. Lehmen, a resident physician, saw Claimant on only one occasion. He was never provided a complete history. He did not testify in this case (as did Dr. Shuter) and was not subject to cross-examination. Dr. Lehmen's sentence does not stand for the proposition that the drive to Tulsa caused the recurrent disc herniation; Claimant slept for seven hours after the drive to Tulsa, and then "the next day" experienced the debilitating pain when he went to get coffee in the kitchen and as he was standing at the kitchen counter he instantly felt severe pain in his low back and right leg. Dr. Lehmen's sentence stands for (if

Employee: Jimmie Alston

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anything) the absurd proposition that Claimant's standing at his parent's kitchen counter drinking coffee caused the recurrent disc herniation.

I find that Claimant did sustain an accident arising out of and in the course of his employment with Dish Network on August 6, 2008. I further find that the work accident of August 6, 2008 was the prevailing factor in the cause of the recurrent disc herniation and the need for the lumbar discectomy and fusion surgery performed by Dr. Trecha on December 9, 2008.

TTD. Claimant is claiming unpaid TTD of 29 weeks, from the date of the fusion surgery on December 9, 2008 to June 29, 2009 when he was released back to work. It is clear from the records that he was unable to work following the fusion surgery by Dr. Trecha, and that Dr. Trecha had him completely off of work or on severe restrictions through June 29, 2009 when he released him on an as-needed basis. His Employer had terminated him by that time. He was not paid any TTD during that time, as Employer had denied causation regarding the second surgery. Claimant testified that he was able to work for First Student Transportation for a few weeks prior to the fusion surgery, but was not able to work after the surgery while seeing Dr. Trecha. He is therefore owed TTD from December 9, 2008 to June 29, 2009, a period of 29 weeks, at the stipulated rate of \$512.58, totaling \$14,864.82. The TTD is payable in Injury No. 08-084032.

Permanent Partial Disability. Claimant testified credibly that he still suffers constant pain in his low back which radiates down his right leg/buttocks. He testified that he cannot sit or drive for more than 30 minutes at a time without increased pain, and that if he stands for more than 30 minutes his back "locks up" and his pain increases. He testified he has to lie down several times throughout a typical day due to his back pain. He testified that his pain is a 4-5 out of 10 constantly, and that it increases to 8-9 out of 10 with activity. He has problems sleeping at night and has to get up every night due to pain, between once and three times a night. He takes Aleve 400 mg twice a day, and uses ice daily.

The medical records all reflect that Claimant sustained a herniated disc in the original accident of March 17, 2008 requiring surgery, and that he continued to have pain until he was released back to work and had the second injury on August 6, 2008. The evidence is clear he had a recurrent herniated disc that required surgery, and that the fusion surgery performed by Dr. Trecha was directly caused by the work injuries. The only permanent partial disability "ratings" in evidence are those of Dr. Shuter, who rated Claimant as suffering 40 percent of a person due to the injuries, with 25 percent due to the injury of March 2008 and the first surgery, and 15 percent due to the recurrent herniated disc and fusion surgery as a result of the August 6, 2008 injury. Given that Dr. Shuter's opinions regarding the extent of Claimant's permanent partial disability due to the injuries are the only physician's ratings in the record as to the extent of permanent partial disability, and because they are fully supported by all of the evidence in the record, they should be adopted.

It is also clear that Claimant had no prior disability to his low back. The only medical records in evidence are those of Dr. Bondurant in 2004, for which he recovered and testified he had no real ongoing pain or problems until the injury of March 17, 2008. Dr. Shuter testified on cross-examination that he did not believe any pre-existing degeneration or spondylosis

Employee: Jimmie Alston

Injury No. 08-084032

contributed to the need for the fusion or the resulting disability, explaining: “I don’t think so because when he had been treated for the degenerative disc disease by Dr. Bondurant in 2004 he was free of symptoms until the injury in March 2008...So the degenerative disc disease was not causing symptoms at that time. There is no basis for any prior permanent partial disability to be assessed to Claimant’s low back, or for Employer to get any sort of “credit” or reduction of the current level of Claimant’s permanent partial disability, as his permanent disability is solely due to the work injuries.

In Injury No. 08-022783, I find that Claimant sustained a permanent partial disability of 25% of the body as a whole. This entitles Claimant to 100 weeks of permanent partial disability benefits at the stipulated rate of \$389.04, totaling \$38,904.00.

In Injury No. 08-084032, I find that Claimant sustained a permanent partial disability of 15% of the body as a whole. This entitles Claimant to 60 weeks of permanent partial disability benefits at the stipulated rate of \$404.66, totaling \$24,279.60.

Payment/reimbursement for cost of medical treatment. Employer denied any further medical treatment as a result of either injury after the MRI and the resident physician’s examination on August 22, 2008. At that point, Employer became responsible for any further medical treatment later found to be reasonable and necessary, even though “unauthorized” and originally at the Claimant’s own expense.

The employer is required to provide medical treatment “as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” Section 287.140.1 RSMo. The claimant bears the burden of proof on this issue. *Sutton v. Vee Jay Cement Contracting*, 37 S.W.3d 803, 808 (Mo. App. E.D. 2000). The employer has the right to authorize treatment and select the treating physician at the employer’s cost. Section 287.140.10 RSMo. If the Employer refuses to provide treatment, the employee is free to seek treatment on his or her own and assess the costs to the employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 84-85 (Mo. App. E.D. 1995). In order to assess the costs against the employer, the claimant must show that the costs were necessary, reasonable and related to the accident. *Martin v. Mid-America Farm Lines*, 769 S.W.2d 105, 111-12 (Mo. 1989). This is initially shown by the testimony of the claimant and the medical records. *Id.* Claimant has more than met that burden, here.

Formal, written demand was made for additional treatment to Employer/Insurer’s attorneys on September 4, 2008 which was denied. A Claim for Compensation was filed with the Division on or about September 16, 2008, and was given Injury No. 08-084032. The Claim for Compensation form included a demand for additional medical treatment, as well. The Employer’s Answer was filed out-of-time.

Claimant then saw his primary care physician, Dr. Vahabsadeh, who referred Claimant to Dr. Randal Trecha, an orthopedic surgeon at the Columbia Orthopaedic Group. Dr. Trecha first saw Claimant on September 28, 2008 and took a history of the original work-related injury that March, the discectomy performed by Dr. Choma, and the release back to work, before having “recurrent symptoms when he carried a ladder at work” and noted, “This problem began on

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August 6...” Dr. Trecha tried a steroid injection without benefit, and then recommended fusion surgery to remove the disc. Dr. Trecha then performed an anterior lumbar fusion at L4-L5 and L5-S1 with hardware instrumentation on December 9, 2008 at Boone Hospital. He then had another surgery and was hospitalized for seven days due to an infection of the surgical site. Mr. Alston underwent post-operative physical therapy, and followed-up with Dr. Trecha through June 29, 2009 when Dr. Trecha released him on an as-needed basis.

All of the medical bills for his treatment after having the MRI and seeing the resident physician on August 22, 2008 were paid by Claimant or his own health plan. Employer denied all further treatment after that date, and as the injury of August 6, 2008 is compensable Employer is therefore responsible for the medical bills incurred. The bills are contained in Employee’s Exhibit N, which total almost \$127,000.00 (after considering the Employer paid \$3,501.00 for authorized treatment), as reflected in the chart summarizing all charges and payments made, and balances still due and owing. Dr. Shuter found all of those charges to be reasonable and necessary as a result of the injury of August 6, 2008. That opinion is supported by the records of Dr. Trecha and other evidence, and there is no other opinion regarding the reasonableness and necessity of the medical bills in evidence. Dr. Shuter’s opinion is adopted and the bills contained in Employee’s Exhibit N are Employer’s responsibility. The bills paid by Claimant’s health plan total \$75,335.27, the unpaid balances total \$1,140.59, and Claimant paid \$90.00 himself, for a total of \$76,565.86, which is the total amount of bills which should be awarded.

Employer is to be given no further benefit from any third-party having paid the bills, as they were not paid by Employer under Chapter 287, RSMo., as clearly explained in Section 287.270, RSMo. (Supp. 1999), which states in pertinent part:

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;

The case law is also clear that Employer is given no benefit of bills paid by Employee’s own health plan, or even an Employer’s own health plan or insurance. In *Shaffer v. St. John’s Regional Health*, 943 S.W.2d 803 (Mo.App.1997) the court held that the employer was not entitled to a credit against workers’ compensation benefits for medical bills submitted to and paid by a health insurance carrier pursuant to a health plan paid by the employer. *Id.* at 807-808. The court in *Shaffer* stated that in that case, as in this case, there was no evidence that employee’s medical bills were paid directly by the employer or its workers’ compensation insurer, and since the evidence reflected that at least some of the medical bills were paid by the employee’s health insurance carrier, the employer was not entitled to any credit for medical bills paid.

The *Shaffer* court cited and quoted from *Homan v. American Can Co.*, 535 S.W.2d 574, 576 (Mo.App.W.D. 1976), holding:

Section 287.270 requires benefits to come from the employer or its insurer for Workmen’s Compensation liability. Payments from any other source are not credited on benefits payable under the Workmen’s Compensation Chapter. *Shaffer*, 943 S.W.2d 803, 807.

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It is also clear that the medical bills should be paid directly to Employee as part of the Award, and Employee would then be responsible for payment of the lien or subrogation claims made by the health plan. In *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (Mo.App. E.D. 1983) the Eastern District rejected the employer's argument that the court should order the medical bills to be paid directly to the hospital rather than ordering the bills be paid directly to employee. The court dismissed the argument that the employee would receive a "windfall" since employee's insurance company originally paid the bills because "the insurance company may be entitled to reimbursement from the employee." *Id.* at 75. *See also, Homan v. American Can Co.*, 535 S.W.2d 574, 576 (Mo.App. 1976). The fact that Claimant has accepted benefits from another source does not estop him from asserting his rights to compensation under the act. *Davies v. Carter Carburetor, Division of ACF Industries, Inc.*, 429 S.W.2d 738, 752 (Mo. 1968).

It is well settled that the burden of substantiating any sort of "credit" for bills paid by any health plan lies squarely on the employer. *Shaffer*, 943 S.W.2d 803, 808; *Ellis v. Western Elec. Co.*, 664 S.W.2d 639, at 643 (Mo.App.S.D. 1984); *Point v. Westinghouse Elec. Corp.*, 382 S.W.2d 436, 439 (Mo.App.E.D. 1964). In this case, Employer entirely failed to meet that burden of proof or present any such evidence whatsoever, as the evidence reflects the Employer should have paid Claimant's medical bills for the work-related injury of August 6, 2008 but did not. Because Employer denied causation and denied of the medical benefits which were required under the Act, Employer is liable for the \$76,565.86 in past medical expenses.

Future medical care. Another issue to be decided is whether Employer shall be ordered to provide Claimant with ongoing and future medical treatment pursuant to Section 287.140. In *Dean v. St. Luke's Hospital*, 936 S.W.2d 601 (Mo.App. W.D. 1997), the Western District Court of Appeals stated (at 603):

The standard for proof of entitlement to an allowance for future medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need future medical treatment. (Citation omitted.) Neither is it necessary, however, that the claimant present conclusive evidence of the need for future medical treatment. (Citation omitted.) To the contrary, numerous workers' compensation cases have made clear that in order to meet their burden claimants such as Ms. Dean are required to show by a "reasonable probability" that they will need future medical treatment.

Dr. Shuter did not address the issue of future medical treatment. When Claimant was released by Dr. Trecha on June 29, 2009, Dr. Trecha's report stated: "We discussed conservative care of his back and back care precautions." The term "conservative care" is ambiguous; it can be construed as non-surgical medical care (physical therapy, medications, injections), or it can simply mean the patient caring for his back in a conservative manner. Even if the term "conservative care" as used in Dr. Trecha's note clearly refers to medical care, the "reasonable probability" that such medical care will be needed in the future is not addressed. I find that the evidence is insufficient to support an award of future medical care.

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Second Injury Fund liability. Claimant is seeking permanent partial disability benefits from the Second Injury Fund in Injury No. 08-022783 only. Claimant had pre-existing disability to his cervical spine, including a herniated disc at C4-T1, as set forth Dr. Shuter's report and deposition testimony. Claimant testified that he had injured his cervical spine and had ongoing neck pain after diving into a lake at Finger Lakes State Park in 2002. The medical records in evidence reflect that he received treatment from his primary care physician, Dr. Weston, and then was referred to a neurosurgeon, Dr. Charles Bondurant in 2002. Dr. Bondurant diagnosed a herniated disc at C7-T1 with encroachment on the left side causing radicular problems down the left arm/hand, and in his records of October 21, 2002 he recommended they "move toward consideration of operative intervention." He recommended a decompression surgery of at least the C7-T1 level, and possibly the C5-C7 levels, as well, but wanted EMG and CT-myelograms before performing surgery. His records show the a CT myelogram was performed on October 29, 2002 which showed C5-6 and C6 degeneration, and a post-myelogram CT showed the left-sided herniated disc at C7-T1 with impingement on the left root of C8. In November, 2002, he noted that he "offered cervical laminotomy, foraminotomy, and discectomy" at that time.

Claimant then received additional treatment from Dr. Bondurant in 2004, who noted the herniated disc at C7-T1 was still causing discomfort down his left arm into the fingers of his left hand. Dr. Bondurant also noted four levels of degenerative changes and encroachment in his cervical spine, and that the EMG studies from 2002 showed C8 and/or T1 radicular irritation. His records from June 23, 2004 reflect that he recommended surgery, given Claimant's neck problems had continued for two years, and specifically noted that Mr. Alston "does feel that his discomfort rises to the level to consider operative intervention." Dr. Bondurant wrote work-restrictions of "no pushing/pulling/lifting with force >40 lbs" at that time. Dr. Bondurant's last note of July 19, 2004 reflect that Claimant was still having neck pain radiating down his left arm causing numbness in his fingers of his left hand. He again discussed surgery, but Claimant wanted to hold off still, though Claimant was warned that delaying surgery could cause permanent nerve damage. Dr. Bondurant's notes of July 19, 2004 clearly state, "Mr. Alston returns and continues with left upper extremity discomfort and left hand weakness.... With this, I am tempted to seek decompression at this level. I have discussed operative and not operative issues with Mr. Alston and have offered posterior approach to C7/T1 laminotomy and foraminotomy and as possible discectomy." Claimant still wanted to hold off for as long as possible on surgery, though surgery was clearly recommended by July 2004.

Claimant testified credibly that his neck pain continued and increased from 2004 up until the two work injuries in 2008. He testified that in late 2007 and early 2008 he still had shooting pain and numbness down his left arm into his hand and fingers, and that he even lost use of his left tricep muscle. He testified that his neck and left arm pain did affect his work at that time, but that he worked through it. He further testified that he did have to have neck surgery in September, 2010, which didn't help, and then had to have a neck fusion in December, 2011, and that he is now unable to work due to his neck and back pain and limitations, such that he now has to apply for Social Security Disability.

Dr. Shuter testified that Claimant had a pre-existing permanent partial disability of 25% of the body as a whole at the cervical spine, which when combined with Claimant's low back

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injury of March 17, 2008 created a total disability to the body as a whole greater than the simple sum of the separate components.

INJURY NO. 08-022783 – FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties have already stipulated in Injury No. 08-022783, I make the following findings of fact and rulings of law:

1. As a result of the work-related accident of March 17, 2008, Claimant sustained a significant disc herniation at L5-S1.
2. As a result of the work-related accident of March 17, 2008, Claimant required and underwent an L5-S1 laminotomy and microdiscectomy surgery on May 27, 2008.
3. Claimant was released to light duty work on June 11, 2008, but was not released to full duty work until August 4, 2008.
4. As a result of the work-related accident of March 17, 2008, Claimant sustained a permanent partial disability of 25% of the body as a whole.
5. All TTD benefits have been paid in Injury No. 08-022783.
6. All medical benefits have been paid in Injury No. 08-022783, and Claimant is not in need of future medical care for the March 17, 2008 injury.
7. At the time of the March 17, 2008 work-related accident and injury, Claimant had a preexisting permanent partial disability of 15% of the body as a whole with reference to the cervical spine, which was of such seriousness as to constitute a hindrance or obstacle to employment or reemployment.
8. The credible evidence establishes that the March 17, 2008 injury, combined with the pre-existing permanent partial disability, causes 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 100 weeks for last injury + 60 weeks for preexisting disability = 160 weeks. 160 weeks x 15% = 24 weeks of overall greater disability.
9. The Second Injury Fund is liable for the payment of 24 weeks of permanent partial disability benefits at the stipulated rate of \$389.04, totaling \$9,336.96.
10. Claimant's testimony was credible.
11. Dr. Shuter's testimony was credible.

INJURY NO. 08-084032 – FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties have already stipulated in Injury No. 08-084032, I make the following findings of fact and rulings of law:

1. Claimant sustained an accident arising out of and in the course of his employment with Employer on August 6, 2008, when he was carrying a 28 foot ladder weighing 85 pounds, twisted and felt back pain.

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2. As a result of the work-related accident of August 6, 2008, Claimant sustained a recurrent disc herniation at L5-S1.
3. On August 22, 2008 Claimant was seen by Dr. Jeff Lehmen, an orthopedic resident at the University of Missouri-Columbia who discussed with Claimant “that this disk herniated was likely not due to when he was lifting a ladder but when he noticed the pain which was the next day.”
4. After receiving Dr. Lehmen’s note, Employer denied all benefits in Injury No. 08-084032, including medical benefits, despite Claimant’s written demands for medical treatment.
5. Employer and Insurer did not file a timely answer in Injury No. 08-084032.
6. As a result of the work-related accident of August 6, 2008, Claimant required extensive medical treatment, including an anterior lumbar fusion at L4-L5 and L5-S1 with instrumentation done on December 9, 2008, and another surgery to clean out the surgical site which had become infected; Claimant has been required to use his private health insurance and his personal funds to pay for the needed treatment.
7. Employer and Insurer are responsible for payment of the needed medical treatment in the amount of \$76,565.86; that amount is properly payable to Claimant, and not to the health care providers. None of the health care providers is a party to this action.
8. From the date of the fusion surgery, December 9, 2008 to June 29, 2009 when Claimant was released back to work, Claimant was unable to compete in the open market for employment due to his August 6, 2008 injury and recovery from necessary surgeries to address that injury, and thus is entitled to temporary total disability benefits for that 29-week period.
9. Claimant is not in need of future medical care for the August 6, 2008 injury based upon the evidence presented.
10. As a result of the work-related accident of August 6, 2008, Claimant sustained a permanent partial disability of 15% of the body as a whole.
11. Claimant’s testimony was credible.
12. Dr. Shuter’s testimony was credible.

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ORDER IN INJURY NO. 08-022783

In Injury No. 08-022783, Employer and Insurer are ordered to pay Claimant the sum of \$38,904.00 for permanent partial disability benefits.

Also in Injury No. 08-022783, the Treasurer of the State of Missouri, as custodian of the Second Injury Fund, is ordered to pay Claimant the sum of \$9,336.96 for permanent partial disability benefits.

Claimant's attorney, Scott Wilson, is allowed 25% of all sums awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

ORDER IN INJURY NO. 08-084032

In Injury No. 08-084032, Employer and Insurer are ordered to pay Claimant the sum of \$14,864.82 for temporary total disability benefits, \$24,279.60 for permanent partial disability benefits, and the sum of \$76,565.86 for medical expenses.

Claimant's attorney, Scott Wilson, is allowed 25% of all sums awarded as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon.

Made by:

ROBERT J. DIERKES
Chief Administrative Law Judge
Division of Workers' Compensation