

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

Injury No.: 01-064994

Employee: Jerry W. Barnette
Employer: Sachs Electric Company
Insurer: St. Paul Guardian Insurance Company
Date of Accident: June 26, 2001
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 19, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued October 19, 2005, 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 19th day of April 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Jerry W. Barnette Injury No.: 01-064994
Dependents: N/A Before the
Division of Workers'
Employer: Sachs Electric Company **Compensation**
Department of Labor and Industrial
Additional Party: None Relations of Missouri

Insurer: St. Paul Guardian Insurance Company

Hearing Date: July 11, 2005 Checked by: JHP:tr

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: June 26, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Mo.
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:
Twisted right ankle while walking on uneven concrete.
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: Right ankle and both knees
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$40,197.32
16. Value necessary medical aid paid to date by employer/insurer? \$69,917.11

Employee: Jerry W. Barnette Injury No.: 01-064994

17. Value necessary medical aid not furnished by employer/insurer? See Findings
18. Employee's average weekly wages: \$1,040.00
19. Weekly compensation rate: \$599.96 TTD/PTD \$314.26 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: See Findings
44 6/7 weeks of temporary total disability (or temporary partial disability) \$26,912.49
Permanent total disability benefits in the amount of \$599.96 per week from
Employer beginning August 18, 2003 for Claimant's lifetime Indefinite
22. Second Injury Fund liability: No

TOTAL: INDEFINITE

23. Future requirements awarded: See Findings

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:

John Weller

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Jerry W. Barnette	Injury No.: 01-064994
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Sachs Electric Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	None	Jefferson City, Missouri
Insurer:	St. Paul Guardian Insurance Company	Checked by: JHP

A hearing in this proceeding was held on July 11, 2005. All parties submitted proposed awards on August 11, 2005. Additional time was required in issuing this award due to the complexities of this case.

STIPULATIONS

The parties stipulated that on or about June 26, 2001:

- 1.the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
- 2.the employer's liability was insured by St. Paul Guardian Insurance Company;
- 3.the employee's average weekly wage was \$1,040.00;
- 4.the rate of compensation for temporary total disability and permanent total disability was \$599.96 and the rate of compensation for permanent partial disability was \$314.26; and
- 5.the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

- 1.the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;

- 2.compensation has been paid in the amount of \$40,197.32 representing 67 weeks of benefits covering the period from June 27, 2001 to October 8, 2002; and
- 3.employer/insurer have paid \$69,917.11 in medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

- 1.whether the current pathology in claimant knees developed as a result of the work-related injury to claimant's right ankle;
- 2.if the employee sustained a compensable injuries to his knees, whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for medical bills for treatment of his knees;
- 3.whether the employee should be provided with any future medical treatment;
- 4.whether employee is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to any additional temporary total disability compensation subsequent to October 7, 2002; and
- 5.the nature and extent of any permanent disability sustained by the employee as a result of the work-related injury or injuries of June 26, 2001.

MEDICAL CAUSATION

Employee claims that he developed arthritis and meniscal tears in his knees as a result of an altered gait during his long convalescence from a severe right ankle fracture. While employer/insurer concede that claimant sustained a severe fracture to his right ankle on June 26, 2001, they contend that the pathology in claimant's knees is due to his morbid obesity and natural deterioration from aging.

The employee must establish a causal connection between the accident and the claimed injuries. Davies v. Carter Carburetor Div., 429 S.W.2d 738 (Mo. 1968); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Blankenship v. Columbia Sportswear, 875 S.W.2d 937, 942 (Mo. App. 1994); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo. App. 1990); Cox v. General Motors Corp., 691 S.W.2d 294 (Mo. App. 1985); Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974); Smith v. Terminal Transfer Company, 372 S.W.2d 659, 664 (Mo. App. 1963).

Amendments made to Section 287.020.2 in 1993 require that the injury be "clearly work related" for it to be compensable. An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. Injuries which are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. Kasl, *supra* at 853. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). An accident may be both a triggering event and a substantial factor in causing an injury. *Id.* Subsection 2 also provides that an injury must be incidental and not independent of employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment." The extent to which the 1993 amendments have further modified prior caselaw will be determined by the appellate courts. *See Cahall*, *supra* at 372.

The quantum of proof is reasonable probability. Davies, *supra* at 749; Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); White v. Henderson Implement Co., 879 S.W.2d 575, 577 (Mo. App. 1994); Fischer at 199; Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983); Griggs at 703. "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); Fischer 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). Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo. App. 1985). The fact finder may accept

only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. 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, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

On the other hand, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768 (Mo. App. 1994); Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S. W. 2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993). Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

Prior to the 1993 amendments the appellate courts had held that an injury, though not directly caused by the accident, but which follows the natural consequences of the original accident is compensable as part of the original accident so long as the accident is the "efficient, exciting, superinducing, concurring or contributing cause." Manley v. American Packing Co., 253 S.W.2d 165, 169 (Mo. 1952); Fiedler v. Production Credit Association, 429 S.W.2d 307, 317 (Mo. App. 1968). If an accident seriously weakens and impairs the use of a part of the body and if a subsequent injury is due to the weakened part of the body rather than to some external cause, then the subsequent injury may be referred back to the original injury. Manley, *supra*, at 170. An injury following a second incident may be the legitimate consequence of the first accident "if it results from or is contributed to by a condition brought about by the first accident. Whether this is so is a question of fact for the Commission" Oertel v. John D. Streett & Company, 285 S.W.2d 87, 97 (Mo. App. 1955). The natural consequences that flow from a compensable primary injury are compensable unless they result from "an independent intervening cause attributable to claimant's own intentional conduct." Wilson v. Emery Bird Thayer Company, 403 S.W.2d 953, 958 (Mo. App. 1966). It is unclear what effect the 1993 amendments have had on the foregoing rules.

FINDINGS OF FACT

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Accident

Jerry Barnette, employee herein, has been a journeyman electrician since 1967. He worked for Sachs Electric Company several times between 1990 and 2001. He worked on assignment from a union hall. (Claimant's Testimony)

On June 26, 2001 Mr. Barnette twisted his right ankle on uneven concrete and fell to his knees while working at the A. G. Edwards Building in St. Louis. (Claimant's Testimony) At the time of his injury he weighed 260 pounds and stood 5'11". (Employer/Insurer's Exhibit 1, depo ex 2, p. 2)

Medical Treatment for Right Ankle

Employee went to an occupational medicine clinic where he sat around for many hours with his ankle dangling. Dr. Joseph J. Williams, an orthopedic surgeon, examined him 9-1/2 hours after the accident. Dr. Williams noted severe swelling, ecchymosis and blistering of the right ankle. (Employer/Insurer's Exhibit 1, depo ex 2, p. 2) X-rays taken of the right ankle showed a displaced spiral fracture of the fibula, a nondisplaced fracture of the posterior malleolus, a chip fracture of the

medial malleolus, and tilting of the talus in the mortise. Employee was treated with a CAM walker and Vicoprofen. He was advised to keep his leg elevated.^[1] (Claimant's Exhibit D, depo ex 1, p. 2)

On June 28, 2001 employee was admitted to a hospital for wound management and diabetes control. He underwent a Venous Doppler study which was negative for deep vein thrombosis. He was discharged on July 2.^[2] (Claimant's Exhibit D, depo ex 1, p. 2)

On July 9, 2001 Dr. Williams noted that claimant had been hospitalized due to "fracture blisters" and excessive swelling of the right ankle. X-rays taken of the right ankle showed that the talus had moved out of the mortise. He was advised that surgery would be scheduled as soon as his skin healed. (Claimant's Exhibit D, depo ex 1, p. 2)

Dr. Williams performed an open reduction and internal fixation of employee's right ankle fracture with dislocation on July 20, 2001. X-rays taken of the right ankle on August 3, 2001 showed the fracture to be in good alignment with the dislocation reduced. Mr. Barnette was told to not place any weight on his right leg for a month and then to begin physical therapy. Claimant returned to his residence in Louisiana. (Claimant's Exhibit D, depo ex 1, p. 2)

Dr. James Lillich, an orthopedic surgeon in Shreveport, Louisiana, took over employee's care. He examined claimant on September 6, 2001. X-rays taken of his right ankle revealed good maintenance of the ankle mortise and subluxation. He was treated with a CAM walker and physical therapy and advised to begin partial weightbearing. (Claimant's Exhibit B, depo ex 2, p. 20)

On October 11, 2001 employee told Dr. Lillich that he was experiencing increasing pain and swelling in his right ankle. Dr. Lillich thought that he was having traumatic synovitis related to therapy. He suspended the therapy and prescribed Celebrex. (Claimant's Exhibit B, depo ex 2, p. 18)

Because of complaints of continued swelling Dr. Lillich had a Doppler ultrasound performed on his right leg on October 25, 2001. It ruled out deep vein thrombosis. Dr. Lillich thought that the swelling was related to the previous fracture. He noted that claimant had some edema in both legs for which he was taking a diuretic. He recommended resumption of physical therapy and the use of a JOBE compression boot. He was to continue wearing the surgical hose and air-cast. (Claimant's Exhibit B, depo ex 2, p. 17)

On November 15, 2001 Dr. Lillich noted that claimant was making good progress in physical therapy. X-rays taken of the right ankle showed the fracture to be well healed with good maintenance of the ankle joint mortise. He complained of some hypersensitivity of the foot, which Dr. Lillich thought was due to aggravation of his neuropathy. He recommended that Mr. Barnette use a treadmill and obtain the JOBE compression stocking. (Claimant's Exhibit B, depo ex 2, p. 16)

On December 6, 2001 Dr. Lillich noted that the swelling had improved, but employee was having painful paresthesias on the plantar aspect of his foot, which Dr. Lillich thought was secondary to swelling and neuropathy. His neuropathy was being treated with a TENS unit. He continued the physical therapy for three weeks. (Claimant's Exhibit B, depo ex 2, pp 15) Employee underwent a functional capacity evaluation on January 7, 2002. He was unable to stand on his toes for greater than 6 seconds and unable to stand on his heels. (Claimant's Exhibit B, depo ex 2, pp 44-45)

Mr. Barnette complained of considerable pain and swelling in the right ankle on January 8, 2002. Dr. Lillich ordered a CT scan which was performed on January 21. It showed fluid collection displacing the medial tendons and a nonunion of a portion of the fibula fracture. (Claimant's Exhibit B, depo ex 2, pp 14 & 46) Dr. Lillich recommended debridement of the arthrosis and excision of the nonunion and grafting of the lateral malleolus. (Claimant's Exhibit B, depo ex 2, p. 12)

On February 15, 2002 Dr. Lillich performed an arthroscopic debridement of the extensive fibrous tissue in the tibial talar joint and removal of the screws and plate. He elected to place an internal bone stimulator since claimant was diabetic. The electrodes and Grafton putty were placed in the space between the two fracture fragments. A semi-tubercular plate was inserted over the lateral aspect with some compression. (Claimant's Exhibit B, depo ex 2, pp 37-38)

Claimant progressed to an air cast and physical therapy was initiated on April 10, 2002. On May 15 Dr. Lillich thought that the fracture site had healed. The bone stimulator was removed on May 31. (Claimant's Exhibit B, depo ex 2, pp 8-9 & 39) Claimant underwent physical therapy from June 12 to August 6. He was fitted with an ankle-foot orthosis (AFO) with a hinged ankle on the right side. (Claimant's Exhibit B, depo ex 2, pp 5-7)

X-rays taken on September 3, 2002 showed good healing of the fracture. Dr. Lillich opined that claimant was at maximum medical improvement. He recommended a functional capacity evaluation. It was performed on September 10,

2002. (Claimant's Exhibit B, depo ex 2, p. 4) Employee then weighed 285 pounds. He walked with a limp. Increased antalgic gait was noted with all weightbearing. Muscle testing revealed significant weakness in the right calf muscle. Right ankle dorsiflexion was restricted by 40 degrees; plantar flexion was decreased by 36 degrees. The therapist concluded that Mr. Barnette was able to function in the light physical demand level. He noted that claimant appeared to unstable with movements secondary to right ankle instability. He recommended that claimant avoid use of a ladder.(Claimant's Exhibit B, depo ex 2, pp 21-36)

On October 2, 2002 Dr. Lillich noted that claimant was still having some difficulties with climbing and descending steps. The ankle-foot orthosis allowed him to ambulate for short distances. Dr. Lillich rated his permanent disability and recommended that claimant not perform any type of job which would require any type of squatting, climbing, or prolonged standing or walking for greater than three or fours hours per day. (Claimant's Exhibit B, depo ex 2, p. 3)

Dr. Joseph Williams reexamined claimant on March 6, 2003. He noted that employee had chronic swelling of his right foot, ankle, and calf and signs of chronic venous stasis in both legs with discoloration of the skin over the mid portion of both legs. He had 90 degrees of dorsiflexion and 30 degrees of plantar flexion. X-rays taken of the right ankle revealed lateral tilting of the talus and the subtalar joint of his talus and the ankle joint and arthritis in the lateral aspect of the talus. The screws appeared to be slightly protruding into the ankle joint. He thought that claimant was at maximum medical improvement and concurred with the functional capacity evaluation. He also recommended that claimant be evaluated by a pain management clinic for control of his chronic swelling and pain. He also thought that claimant might benefit from removal of the plate and screw. (Employer/Insurer's Exhibit 1, depo ex 1, pp 4-5)

Claimant was referred to Dr. Douglas C. Brown, an orthopedic surgeon, in Monroe, Louisiana for additional treatment of his right ankle. Dr. Brown examined claimant on April 15, 2003. Dr. Brown noted that employee walked with a slight limp on the right. Swelling was noted around the right ankle; tenderness was noted over the fibula over the palpable screw heads. Dr. Brown recommended removal of the plate and screws. They were removed on May 12. (Claimant's Exhibit C, depo ex 3, pp 1-3)

On June 16, 2003 Dr. Brown prescribed physical therapy with Wied Physical Therapy for gait training and given a Stromgren elastic ankle support. (Claimant's Exhibit C, depo ex 2, p. 5) On July 18, 2003 Dr. Brown noted that claimant was walking with less of a limp. He continued physical therapy. (Claimant's Exhibit C, depo ex 3, p. 5) On August 18, 2003 Mr. Barnette told Dr. Brown that his ankle felt "decent". On examination the ankle had satisfactory range of motion without pain. Dr. Brown opined that employee was able to return to his former employment. (Claimant's Exhibit C, depo ex 3, p. 6)

Dr. Brown rechecked claimant's right ankle on September 11, 2003 and noted that it had full motion without pain or swelling. (Claimant's Exhibit C, depo ex 3, p. 7)

Claimant was reexamined by a colleague of Dr. Brown on July 2, 2004. Mr. Barnette told him that he sometimes stumbled over the right foot and continued to have pain in the right ankle. On examination the right ankle had full range of motion with good dorsiflexion and plantar strength against resistance. He had tenderness within the lateral joint line, but no significant swelling. X-rays taken of the ankle revealed degenerative collapse and osteoarthritis throughout the entire right ankle. There was no shift of the ankle mortise. (Claimant's Exhibit C, depo ex 3, p. 8)

Dr. Brown reexamined claimant's right ankle on July 23, 2004. He indicated that Mr. Barnette had right ankle osteoarthritis secondary to bimalleolar fractures. (Claimant's Exhibit C, depo ex 2, p. 25)

Medical Treatment for Knees

On December 23, 2002 employee told Dr. Lillich that he was having increasing pain in his left knee. Dr. Lillich thought it was secondary to his antalgic gait and having to place extra weight on the left knee for such a long time. He discontinued Celebrex and prescribed Bextra and recommended that claimant be examined by a pain specialist. (Claimant's Exhibit B, depo ex 2, p. 2)

Dr. Williams examined claimant's left knee on March 6, 2003. He noted that Mr. Barnette had a new complaint of left knee pain on December 23, 2002. Employee had full range of motion, no ligament laxity to varus, valgus, anterior, or posterior testing. He had negative McMurray's sign, Lachman examination, and drawer test. X-rays taken of both knees showed some patellofemoral osteoarthritis with mild symmetrical osteoarthritic changes in both knees. He did not find any objective evidence of an abnormality in employee's left knee (Employer/Insurer's Exhibit 1, depo ex 1, pp 4-5)

On August 18, 2003 Mr. Barnette told Dr. Brown that he was experiencing bilateral knee pain which he claimed to

have reported to the insurance adjustor. On examination Dr. Brown noted that both knees had mild synovial thickening, mild varus deformity, crepitant patella femoral movement. Claimant brought prior x-rays^[3] which showed mild osteoarthritis. Dr. Brown diagnosed claimant with bilateral knee osteoarthritis and injected both knees with Xylocaine and dexamethasone. He noted that claimant was taking Celebrex. (Claimant's Exhibit C, Pages 37-38 & depo ex 3, p. 6)

Dr. Brown rechecked employee's knees on September 12, 2003 and noted that both knees had moderate effusion, tender joint lines, and painful ranges of motion. He ordered MRIs of both knees. (Claimant's Exhibit C, depo ex 3, p.7) They were performed on September 17. The radiologist thought that there was a relatively acute to subacute injury to the posterior horn of the medial meniscus and an old injury to the posterior horn of the lateral meniscus of the left knee. The radiologist indicated that there was a subacute injury to the posterior horn of the medial and lateral menisci of the right knee. (Claimant's Exhibit C, depo ex 2, pp 13-14) Mr. Barnette told Dr. Brown that he wanted his meniscal tears corrected simultaneously. (Claimant's Exhibit C, depo ex 2, p. 17)

On September 27, 2003 Dr. Brown performed arthroscopic surgery on both knees. In the right knee the medial meniscus head had chronic tears in the posterior and middle thirds and the leading edge of the lateral meniscus was less involved. He trimmed the tears back to stable rim tissues. In addition Dr. Brown found grade IV chondromalacia and femoral osteophytes beneath the patella and grade III chondromalacia on the medial femoral condyle. He shaved the surfaces down smoothly and resected the osteophytes. In the left knee there were minimal leading edge degenerative changes of the lateral meniscus which were shaved smoothly. In addition Dr. Brown found a large osteophyte beneath the medial facet of the patella. He trimmed the osteophyte and shaved the patella and medial femoral condyle. (Employer/Insurer's Exhibit 1, depo ex 4)

On November 3, 2003 a nurse in Dr. Brown's office fitted employee's knees with patella centering braces. Claimant was noted to be still using a cane to walk. (Claimant's Exhibit C, depo ex 2, p. 22) On November 24, 2003 Dr. S. Granger, a colleague of Dr. Brown, noted crepitus with range of motion of knees, but no effusion. He opined that he did not anticipate employee returning to further gainful employment. (Claimant's Exhibit C, Pages 20 & 23 & depo ex 2, pp 22-23)

Claimant was reexamined by Dr. Brown's nurse practitioner on July 2, 2004. Mr. Barnette reported grinding and popping under the right kneecap. On examination there was no effusion in the right knee; he had full range of motion with moderate patella femoral crepitus. Other tests were normal. His knee was injected with Depo Medrol. (Claimant's Exhibit C, Pages 42-43 & depo ex 2, p. 8)

Dr. Brown reexamined claimant's knees on July 23, 2004. He recommended Hyaluronic acid injections in both knees. (Claimant's Exhibit C, depo ex 2, p. 25) Employee's left and right knees were injected on August 12 and 16, 2004 respectively and reinjected on August 19 and 24 and 26 and 30, and September 1 and 10, 2004 respectively. (Claimant's Exhibit C, depo ex 3, pp 9-16)

Claimant's Testimony

The injury to employee's right ankle has caused claimant to walk with his right ankle everted so that his foot and ankle are pointing outward when he attempts to walk. He walks with an antalgic gait that puts additional stress on his left knee. The stress of walking with his foot everted places additional stress on his right knee.

Medical Opinions

Dr. Lillich testified by deposition on behalf of claimant on April 6, 2005. He opined that claimant sustained a trimalleolar fracture as a result of the June 26, 2001 incident. (Claimant's Exhibit Pages 6-7) He indicated that because claimant was having inordinate pain for a fracture, he ordered a CT scan which showed a nonunion of the lateral malleolus and some scar tissue formation within the ankle joint. Dr. Lillich removed the previous plate, grafted the area where the fracture had not healed and placed an internal bone stimulator. Eventually the fracture healed and Dr. Lillich removed the bone stimulator. (Claimant's Exhibit C, Pages 8-9)

Dr. Lillich subsequently prescribed an ankle-foot orthosis (AFO), a molded plastic brace for the foot, to limit some of employee's pain and make the ankle more functional.

Dr. Lillich testified that on December 23, 2002 claimant was having problems with his left knee which Dr. Lillich felt was probably secondary to a significant limp. (Claimant's Exhibit B, Pages 16-17)

Dr. Brown testified by deposition on behalf of claimant on April 7, 2005. He explained that he removed the plate and

screws placed by Dr. Lillich because they were causing claimant some pain. (Claimant's Exhibit C, Page 10)

Dr. Brown testified that in 2003 employee was limping and complaining of pain in his knees and developing a bowlegged deformity and his x-rays showed degenerative arthritic narrowing of the knee joint. Dr. Brown recommended bilateral arthroscopic surgery on claimant's knees to clean out the torn cartilage in his knees and smooth up the joint surfaces to give him a little more longevity of his knee joint because he thought that employee would probably need a knee replacement. (Claimant's Exhibit C, Pages 13-14)

Dr. Brown opined that claimant's limp during 2001 and 2002 placed additional stress on employee's knees, especially given his weight of 283 pounds. He indicated that the antalgic gait was the result of the trimalleolar fracture. He further opined that claimant's ankle fracture and the subsequent surgeries and his antalgic gait were a substantial factor in causing the aggravation of the osteoarthritic condition in both knees requiring the surgeries. (Claimant's Exhibit C, Pages 14-16)

On cross examination Dr. Brown agreed that the operative procedures which he performed on Mr. Barnette's knees were caused by osteoarthritis. He stated that he found chronic tears in the medial meniscus of the right knee. He indicated that the right knee was worse than the left knee. (Claimant's Exhibit C, Pages 39-40) He also agreed that he would have expected more damage in the left knee as his limp favored the right knee. He agreed that claimant's age and weight contributed to cause the surgeries which he performed. (Claimant's Exhibit C, Pages 40-41)

On redirect examination Dr. Brown opined that employee's limping caused stress on the arthritic condition of his knees and was a substantial factor in changing the pathology of his knees. He stated that surgery is an option for someone who develops an increase in the severity of symptoms during a period of limping. (Claimant's Exhibit C, Pages 46-47) On recross examination Dr. Brown agreed that if claimant's osteoarthritis had been symptomatic, that condition could have itself caused claimant to limp. (Claimant's Exhibit C, Pages 47-48)

Dr. Robert P. Poetz, an osteopathic physician and surgeon, testified by deposition on behalf of claimant on June 28, 2005. He examined claimant on March 4, 2004. Claimant described the accident of June 26, 2001. Dr. Poetz reviewed the medical records through November of 2003. Dr. Poetz diagnosed claimant with bilateral knee degenerative joint disease with internal derangement secondary to right ankle fracture of June 26, 2001. He opined that claimant's knee problems were directly related to favoring the right ankle as he reported no prior problems with pain in the knees previously. (Claimant's Exhibit D, Pages 8-9 & depo ex 1, p. 8) On cross examination he stated that both conditions in the knees were attributable in part to the June 26, 2001 injury. (Claimant's Exhibit D, Page 22) He stated that there was an increase in the degenerative changes and internal derangement in the left knee after the ankle injury. (Claimant's Exhibit D, Page 25) He agreed that the procedure on the right knee was more extensive than the procedure on the left knee. (Claimant's Exhibit D, Page 28)

Dr. Poetz explained that when claimant was shifting his weight to his left leg, he also shifted the left ankle, knee, hip and low back in order to maintain his balance. This shifting of weight put greater wear and tear on different parts of the knee than normal. (Claimant's Exhibit D, Page 24-25)

Dr. Poetz pointed out that x-rays of the knees showed mild osteoarthritic changes in both knees. He stated that this description suggests that the wear and tear changes in the knees were a more recent nature. If the changes had been there for twenty years, Dr. Poetz would have expected them to have been described as moderate or severe. (Claimant's Exhibit D, Pages 22-23)

Dr. Poetz indicated that patients who are heavy and have weight-bearing joint problems have a more difficult time maintaining good health of those joints. He added that they tend to gain weight because of their inability to adequately exercise their body because of the joint dysfunctions in the weight-bearing joints. He described claimant as morbidly obese. (Claimant's Exhibit D, Pages 10-11) On cross examination he agreed that degenerative knee problems are seen more frequently in obese patients of claimant's age than non-obese patients. (Claimant's Exhibit D, Pages 17-18)

Dr. Williams testified by deposition on behalf of employer/insurer on May 11, 2005. He stated that claimant did not complain of any right or left knee pain during 2001 and that he complained of left knee pain only on March 6, 2003. (Employer/Insurer's Exhibit 1, Page 8)

Dr. Williams testified that the x-rays which he took on March 6, 2003 showed some patellofemoral osteoarthritis with mild osteoarthritic changes in both knees. He opined that employee's left knee symptoms had no relationship to the right ankle injury. (Employer/Insurer's Exhibit 1, Page 10)

In reviewing the September 27, 2003 operative report for the right knee, Dr. Williams opined that the pathologies

described by Dr. Brown were osteoarthritis. (Employer/Insurer's Exhibit 1, Pages 15-17) In reviewing the operative report for the left knee, Dr. Williams opined that the operative findings described osteoarthritis. He indicated that Dr. Brown just cleaned up an arthritic knee. (Employer/Insurer's Exhibit 1, Page 17)

Dr. Williams opined that there was no relationship between the ankle injury and employee's knee problems. He further opined that claimant's excessive weight was a factor in causing the problems in his knees. He indicated that Mr. Barnette's weight of 289 pounds was close to 100 pounds heavier than he should be. He indicated that he has been carrying that extra weight on his knee joints. (Employer/Insurer's Exhibit 1, Pages 21-22)

On cross examination Dr. Williams agreed that during claimant's convalescence he was putting more stress on his left leg and knee when he walked. (Employer/Insurer's Exhibit 1, Page 31) He agreed that walking on an arthritic joint can aggravate it to the point that it becomes symptomatic. (Employer/Insurer's Exhibit 1, Pages 40-41) On re-direct examination Dr. Williams opined that claimant's altered gait did not explain how his right ankle injury caused right knee symptoms. (Employer/Insurer's Exhibit 1, Page 41)

Dr. Williams testified that the operative report regarding the knees said nothing about any acute injury to either knee; it described chronic tears to the medial meniscus. (Employer/Insurer's Exhibit 1, Page 39)

Additional Findings

Claimant's knees were asymptomatic prior to June 26, 2001. Drs. Brown and Poetz testified that limping causes additional stress to the knee. Dr. Poetz noted that as the initial x-rays showed mild osteoarthritis in both knees, it was likely that claimant's osteoarthritis developed more recently than over many years. While claimant's weight of 260 pounds prior to June 26, 2001 may have contributed to his osteoarthritis, his weight of 280+ pounds during his convalescence added even more stress to his knees. Based on the credible testimony of claimant and of Drs. Brown and Poetz, I find that claimant's altered gait during his long convalescence from his right ankle fracture of June 26, 2001 aggravated the degenerative osteoarthritis and meniscal pathology in claimant's knees, causing them to become symptomatic and necessitating the arthroscopic surgeries performed by Dr. Brown on September 27, 2003 and the subsequent Hyaluronic acid injections.

REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement for medical and hospital bills incurred as a result of treatment provided for both knees. The parties stipulated that if the claimant's knee conditions are found compensable, employer/insurer would agree to indemnify the claimant for any claims for reimbursement for medical expenses related to said knee conditions asserted by Medicare and/or IBEW Health & Welfare Plan or its insurer.

As I have found that claimant's altered gait during his long convalescence from his right ankle fracture of June 26, 2001 aggravated the degenerative osteoarthritis and meniscal pathology in claimant's knees, causing them to become symptomatic, and necessitating the arthroscopic surgeries performed by Dr. Brown on September 27, 2003 and the subsequent Hyaluronic acid injections, employer/insurer are hereby ordered pursuant to the stipulation of the parties to indemnify claimant for any claims for reimbursement for medical expenses related to said knee conditions asserted by Medicare and/or IBEW Health & Welfare Plan or its insurer.

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his right ankle.

Section 287.140 Mo. Rev. Stat. (2000) 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." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. 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. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); 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.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; 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, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Medical Opinions

Dr. Lillich testified that he talked with Mr. Barnette about the possibility of an ankle fusion if the arthritis becomes too painful. (Claimant's Exhibit B, Pages 10-11)

Dr. Lillich testified that he prescribed support hose which extends up into the calf in order to limit the amount of swelling in claimant's right leg and hopefully reduce the pain. (Claimant's Exhibit B, Pages 11-12)

Dr. Lillich testified that the physical therapist prescribed the TENS unit in December of 2001 to help with some of employee's pain. (Claimant's Exhibit B, Page 14)

Dr. Lillich testified that on October 2, 2002 he recommended that claimant continue to wear the compression stocking and use the ankle-foot orthosis. (Claimant's Exhibit B, Page 15)

Dr. Brown testified that the TENS unit was for claimant's ankle pain. He said it might also help employee's diabetic peripheral neuropathy. (Claimant's Exhibit C, Page 12)

Dr. Brown agreed that the compression stocking was for claimant's chronic ankle swelling. (Claimant's Exhibit C, Page 12)

Dr. Brown testified that claimant underwent a series of injections of Hyaluronic acid in August and September of 2004 in order to replace the normal joint fluid with a synthetic fluid that nourishes the remaining articular cartilage in the hope that some of the cartilage will regenerate. (Claimant's Exhibit C, Pages 17-18)

On November 24, 2003 Dr. Granger discussed with employee that he may require a fusion for his right ankle. (Claimant's Exhibit C, depo ex 2, p. 23)

On July 23, 2004 Dr. Brown indicated that claimant will probably need a total knee replacement. (Claimant's Exhibit C, depo ex 2, p. 25)

Dr. Poetz recommended nonsteroidal anti-inflammatory medication, the use of a TENS unit, and the wearing of support hose. He opined that claimant would eventually require a fusion of his right ankle. (Claimant's Exhibit D, depo ex 1, p. 8)

On March 6, 2003 Dr. Williams indicated that Mr. Barnett may have to have an ankle fusion some time in the future. (Employer/Insurer's Exhibit 1, depo ex 2, p. 5)

Dr. Williams reexamined claimant on February 8, 2005. Mr. Barnette's chief complaint was pain in and instability from his right ankle. He was using an orthosis with the right ankle. He walked with a mild limp. He weighed 286 pounds. On examination his knees were stable to anterior, posterior, varus and valgus stress testing. He detected 3+ crepitation in the knees secondary to osteoarthritis and some chronic swelling. X-rays taken of the knees revealed mild osteoarthritis of both knees. There was mild swelling of the right ankle with 30 degrees of dorsiflexion and 20 degrees of plantar flexion. X-rays taken of the ankle revealed mild osteoarthritic changes. The fractures were well healed and in excellent alignment. (Employer/Insurer's Exhibit 1, depo ex 5, pp 3-5)

Dr. Williams opined that claimant had some mild arthritis of the right ankle and that he would benefit from anti-inflammatory medications, occasional injections of cortisone, ice treatments, dietary supplements, and physical therapy. (Employer/Insurer's Exhibit 1, Pages 18-19 & depo ex 5, p. 1) Though he had recommended pain management following his March 6, 2003 examination of employee, Dr. Williams did not suggest pain management following the February 8, 2005 examination. (Employer/Insurer's Exhibit 1, Page 39)

On cross examination Dr. Williams agreed that claimant's ankle will be swollen for a long period of time because of the arthritis. (Employer/Insurer's Exhibit 1, page 27)

On cross examination Dr. Williams agreed that claimant may have to have an ankle fusion done sometime in the future. The appropriate time for surgery would be when his pain is not relieved by the usual conservative measures and interferes with his quality of life. (Employer/Insurer's Exhibit 1, Page 24) On redirect examination he stated that claimant was not a candidate for an ankle fusion as of February 8, 2005. (Employer/Insurer's Exhibit 1, Page 40)

Additional Findings

As all of the physicians agree that claimant will require future medical treatment for his right ankle, I find that claimant will continue for the foreseeable future to require medical treatment for his right ankle including support hose, anti-inflammatory and pain medications, a TENS unit, an ankle-foot orthosis, and occasional injections of cortisone. Employer/insurer are hereby ordered to provide and pay for "such medical treatment and for such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." In addition, as all of the physicians agreed that claimant will eventually require an ankle fusion, I so find. Employer/insurer are further ordered to provide and pay for fusion surgery of claimant's right ankle at such time as he elects to undergo it.

TEMPORARY TOTAL DISABILITY

Employee is seeking temporary total disability compensation for the period from October 8, 2002 to August 18, 2003.

Section 287.170 Mo. Rev. Stat. (2000) 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 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. Vinson v. Curators of Un. of Missouri, 822 S.W.2d 504 (Mo. App. 1991); Phelps vs. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. 1991); Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo. App. 1985).

With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition." Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo. App. 1996). The refusal of an employer to allow an employee, who has been released by the treating physician to return to light duty work, to return to such work is some evidence that the employee could not find any reasonable or normal employment. Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 821 (Mo. App. 1995). However, an employer is not required to either provide light duty or pay temporary total disability compensation solely because the employee is still receiving medical treatment for a condition which is reasonably expected to improve. Cooper v. Medical Center of Independence, 955 S.W.2d 570, 575 (Mo. App. 1997).

An employee's unsuccessful attempts to perform some of the activities connected with his or her job do not in and of themselves constitute conclusive evidence that the employee was capable of working after the accident. Reeves v.

Midwestern Mortg. Co., 929 S.W.2d 293, 296-96 (Mo. App. 1996). The failure of an employee who is released to light duty to seek sporadic or light duty work in the open labor market would not automatically disqualify the employee from receiving temporary total disability compensation. Cooper, supra at 575. While the ability of the employee to physically perform some work is relevant, it is not dispositive. Idem. An employee's ability to engage in occasional or light duty work in a protected environment where the employee is able to work at his or her own pace or with the help of friends or family members, does not necessarily disqualify employee from receiving temporary and total disability compensation. Minnick v. South Metro Fire Prot. Dist., 926 S.W.2d 906, 910-11 (Mo. App. 1996). Employee's performance of some work during the period of temporary disability is not controlling on whether employee was temporarily and totally disabled. Other factors, such as economic necessity, the expected period of time until claimant's medical condition reaches maximum medical improvement, the nature of the continuing course of treatment, whether there is a reasonable expectation that claimant will return to his or her former job, the nature of the work, and whether such work should not have been performed from a medical standpoint are important in deciding that issue. Cooper, supra at 576; Brookman, supra.

The employee has the burden of proving that he or she is unable to return to any employment. 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). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Unlike proof of permanency, evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern., 771 S.W.2d 850, 851 (Mo. App. 1989).

Temporary disability payments are intended to cover a healing period. Temporary total disability is to be granted only for the time prior to when the employee can return to work. Temporary total disability is not expected to encompass disability after the condition has reached the point where further improvement is not expected. Where further improvement of employee's is not likely, employee is no longer temporarily and totally disabled. Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Williams v. Pillsbury, 694 S.W.2d 488, 489 (Mo. App. 1985). Employer is entitled to a credit for any temporary total disability payments made with respect to any period after employee is no longer temporarily totally disabled. Parker v. Mueller Pipeline, Inc., 807 S.W.2d 518, 522 (Mo. App. 1991).

Medical Opinions

Dr. Lillich opined on September 3, 2002 that claimant was at maximum medical improvement. Claimant underwent a functional capacity evaluation on September 10. On October 2, 2002 Dr. Lillich noted that claimant was still having some difficulties with climbing and descending steps. The ankle-foot orthosis allowed him to ambulate for short distances. Dr. Lillich rated his permanent disability and recommended that claimant not perform any type of job which would require any type of squatting, climbing, or prolonged standing or walking for greater than three or four hours per day. (Claimant's Exhibit B, depo ex 2, pp 3-4)

On December 23, 2002, Dr. Lillich thought that the increasing pain in employee's left knee secondary to the antalgic gait and having to bear extra weight on his left knee for such a long time. He recommended further examination of the knee. (Claimant's Exhibit B, depo ex 2, p. 2) The insurance carrier refused treatment for the knee and referred the claimant to Dr. Williams. On March 6, 2003 Dr. Williams noted chronic swelling and tenderness of claimant's foot and ankle. Although he found Mr. Barnette to be at maximum medical improvement, he recommended further surgery on claimant's ankle. (Employer/Insurer's Exhibit 1, depo ex 1, pp 4-5)

Claimant returned to Louisiana and sought treatment from Dr. Brown. When he first examined claimant on April 15, 2003, Dr. Brown noted that employee was not working. Dr. Brown performed surgery on his ankle on May 12 and continued to treat employee's right ankle through August 18. Dr. Brown opined as of August 18, 2003 that claimant could work regarding his ankle; but that he could not work regarding his ankle and the osteoarthritis in both knees. (Claimant's Exhibit C, Pages 24-25) When Dr. Brown reexamined claimant on July 23, 2004 he thought that claimant could only work in an extremely light or a sedentary job, such as office work. At that time claimant's main problem was with his knees; he had also developed some progressive arthritis in his ankle between August of 2003 and July 23, 2004. (Claimant's Exhibit C, Pages 25-27)

Additional Findings

As treatment for claimant's right ankle resumed with Dr. Brown and continued to August 18, 2003, find that claimant was temporary and totally disabled from October 8 to August 18, 2003.

ALLEGED PERMANENT TOTAL DISABILITY

Employee claims that he is permanently and totally disabled as a result of the work-related injury of June 26, 2001.

An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); accord, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability 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." The words "inability to return to any employment" mean "that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1982). The words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d. 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S. W. 2d 899, 904 (Mo. App. 1984). Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993). Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. 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. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 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. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. 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 v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. 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 v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Employer is liable for any aggravation of a preexisting asymptomatic (nondisabling) condition caused by the primary injury even though the accident would not have produced the injury in a person not having the condition. Gennari v. Norwood Hills Corporation, 322 S.W.2d 718, 722-23 (Mo. 1959); Miller v. Wefelmeyer, 890 S.W.2d 372, 376 (Mo. App. 1994); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652, 654 (Mo. App. 1983); Johnson v. General Motors Assembly Division, 605 S.W.2d 511, 513 (Mo. App. 1980); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 891 (Mo. App. 1975); Mashburn v. Chevrolet Kansas City Div., G.M. Corp., 397 S.W.2d 23 (Mo. App. 1965); Garrison v. Campbell "66" Express, 297 S.W.2d 22 (Mo. App. 1956); accord, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994); Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20 (Mo. App. 1993). In Weinbauer claimant had preexisting cervical osteoarthritis. In Johnson claimant had preexisting spondylolisthesis.

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant, I make the following findings of fact.

Mr. Barnette was 57 years old when he sustained a tri-malleolar fracture of his right ankle and 59 years old when he reached maximum medical improvement for his ankle fracture on August 18, 2003. He resides in Monroe, Louisiana.

Claimant took some courses at Louisiana Tech after graduating from high school. He became a journeyman electrician in 1967. He was earning a substantial wage in the year prior to his injury.

Employee has not been able to work since his injury because of chronic pain and swelling in the right foot and ankle. He is only able to walk about a half block before he has to sit down and rest his right ankle. He elevates his right foot frequently throughout the day. He continues to wear an ankle-foot arthrosis and compression stockings. He also uses a TENS unit for pain. He continues to use these supports and devices on a regular basis. His right ankle and foot swell everyday.

Medical Opinions

Dr. Lillich testified that on October 2, 2002 he recommended that employee work in a sedentary job which did not require any type of standing or walking. He added that claimant should not perform any job which required any type of squatting, climbing, prolong standing or walking for greater than 3 or 4 hours per day. (Claimant's Exhibit B, Pages 14-15)

Dr. Lillich opined that claimant sustained 20% impairment of the whole person as a result of the right ankle injury. (Claimant's Exhibit C, Page 15)

On July 23, 2004 Dr. Brown indicated that Mr. Barnette was disabled from the arthritis in his knees and the previous ankle fracture and secondary posttraumatic arthritis. He indicated that employee was unable to stand, squat, climb or walk for extended periods of time. He recommended a sedentary or extremely light duty job. (Claimant's Exhibit C, depo ex 2, p. 25)

Dr. Brown agreed that on August 18, 2003 employee complained of only minimal discomfort in his right ankle. (Claimant's Exhibit C, Page 36)

Dr. Poetz examined claimant on February 23, 2004. Claimant told him that he had pain in his right foot and swelling in the ankle when he walked too much. He wore an ankle support because it was weak. Employee stated that he was unable to walk long distances. He complained of pain in his knees. He stated that they popped and he wore plastic braces to help with his pain. (Claimant's Exhibit D, Pages 7-8)

On examination Dr. Poetz found that the right ankle had restricted 20% of inversion and that he lacked full pronation and supination in the right ankle by 10%. He noted that employee was unable to squat and the right foot was everted (tilted

inward and downward) significantly. He noted puffiness and edema of the right forefoot and ankle and foot distal to the surgery site. (Claimant's Exhibit D, Pages 13-14) He noted loss of full extension of the knees by 10% and full flexion by 25%. He noted crepitus in both knees with range of motion. (Claimant's Exhibit D, Page 15)

Dr. Poetz diagnosed claimant with a displaced spiral fracture of the right fibula, fracture of the posterior malleolus, and chip fracture of the medial malleolus. He opined that claimant sustained 50% permanent partial disability of the right ankle as a result of the June 26, 2001 work-related injury. (Claimant's Exhibit D, Page 12 & depo ex 1, p. 7)

Dr. Poetz diagnosed claimant with bilateral knee degenerative joint disease with internal derangement. He opined that claimant sustained 35% permanent partial disability of each knee as a result of the June 26, 2001 work-related injury. (Claimant's Exhibit D, Pages 14-15 & depo ex 1, p. 8)

Dr. Poetz further opined that claimant was not employable in the open labor market and was permanently and totally disabled as a direct result of the June 26, 2001 injury. Dr. Poetz indicated that claimant was in pain all the time, that he was not able to ambulate comfortably without being in pain, that he was not able to walk long distances and needed support to walk. (Claimant's Exhibit D, Pages 7 & 15-16) He based his opinion on the combination of disabilities in claimant's right ankle and both knees. (Claimant's Exhibit D, Pages 18-19)

Dr. Williams reexamined claimant on February 8, 2005. Mr. Barnette's chief complaint was pain in and instability from his right ankle. He was using an orthosis with the right ankle. He walked with a mild limp. He weighed 286 pounds. On examination his knees were stable to anterior, posterior, varus and valgus stress testing. He detected 3+ crepitation in the knees secondary to osteoarthritis and some chronic swelling. X-rays taken of the knees revealed mild osteoarthritis of both knees. There was mild swelling of the right ankle with 30 degrees of dorsiflexion and 20 degrees of plantar flexion. X-rays taken of the ankle revealed mild osteoarthritic changes. The fractures were well healed and in excellent alignment. (Employer/Insurer's Exhibit 1, depo ex 5, pp 3-5)

Dr. Williams opined that claimant sustained 20% permanent partial disability of the right ankle as a result of the work-related accident. (Employer/Insurer's Exhibit 1, Page 19)

Dr. Williams opined that claimant had 20% permanent partial disability of the each knee due to his osteoarthritis. (Employer/Insurer's Exhibit 1, Page 20)

Vocational Opinions

Sherry Browning, a vocational expert, testified at the hearing on behalf of claimant. Claimant described the initial injury. She reviewed the medical records and noted the restrictions recommended by the physicians. Ms. Browning personally interviewed claimant and solicited responses to questionnaires, achievement testing and vocational interest inventory questions. She observed the claimant's behavior during her interview of approximately four hours duration. Her vocational analysis performed in meticulous detail and set out in her report of September 2004 concludes that Mr. Barnette is not employable in the open labor market as a result of his physical limitations. Ms. Browning clearly testified that claimant has been unemployable since his injury of June 2001 and that he remained unemployable at the time of this hearing and in the future. She found that claimant possessed some transferable skills, but he was limited in any employment opportunities due to his physical capabilities. She further indicated that employee's diabetes and hypertension were not factors in her analysis. She further testified that the claimant's knee conditions were a factor to be considered in his inability to work, but that his physical limitations relating to his right ankle alone prohibited the claimant from any employment. She further testified that she relied on the ratings and limitations found by all of the physicians. Ms. Browning surveyed respective employers in the Monroe, Louisiana area and determined that the physical demands for these positions would exceed Mr. Barnette's abilities. (Claimant's Exhibit C)

Additional Findings

Based on the credible opinions of Drs. Poetz and Brown, I find that all of the disability in claimant's knees are due to the work-related aggravation of his preexisting asymptomatic conditions. E.g. Miller v. Wefelmeyer, 890 S.W.2d 372, 376 (Mo. App. 1994) (aggravation of preexisting bilateral pars planitis); Weinbauer v. Gray Eagle Distributors, 661 S.W.2d 652, 654 (Mo. App. 1983) (aggravation of preexisting cervical osteoarthritis); Johnson v. General Motors Assembly Division, 605 S.W.2d 511, 513 (Mo. App. 1980) (aggravation of preexisting spondylolisthesis).

Based on the credible opinions of Dr. Poetz and the credible vocational assessment by Ms. Browning and taking into account claimant's educational and employment background, his age of 59 years as of August 18, 2003, and the permanent

restrictions recommended by Dr. Brown, I find that the claimant was and remains unemployable in the open labor market and is therefore permanently and totally disabled as a result of the combination of the work-related injury to his right ankle and the injuries to both knees.

As I have found that claimant reached maximum medical improvement and was released to return to work as of August 18, 2003, I further find that claimant became permanently and totally disabled as of August 18, 2003. The obligation to pay permanent disability compensation commences under Section 287.160.1 Mo. Rev. Stat. (2000) on the date when the claimant's permanent disability begins. Kramer v. Labor & Indus. Rel. Com'n, 799 S.W.2d 142, 145 (Mo. App. 1990); Hall v. Wagner Div.-McGraw-Edison, 782 S.W.2d 441, 443-44 (Mo. App. 1989). As I have found that claimant became permanently and totally disabled on August 18, 2003, permanent total disability compensation should have begun on that date.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder, including past due temporary total disability compensation, in favor of the employee's attorney, John Weller, for necessary legal services rendered to the employee.

Date: _____ Made by: _____

John Howard Percy
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

- _____
[\[1\]](#) The treating records of Dr. Williams were not in evidence.
[\[2\]](#) The treating records of the hospital were not in evidence.
[\[3\]](#) The most recent x-rays were those taken by Dr. Williams on March 6, 2003.