

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

Injury No.: 09-063719

Employee: Susan Barton
Employer: Green Acres Home of West Plains & Newton Group Home
Insurer: Guarantee Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Safety violation under § 287.120.5 RSMo

We agree with the administrative law judge's conclusion that employer is not entitled under § 287.120.5 RSMo to any reduction in the compensation owed employee. The courts have enumerated the following four elements that must be proven by the employer in order to justify a reduction of compensation under § 287.120.5:

1. [T]hat the employer adopted a reasonable rule for the safety of employees;
2. that the injury was caused by the failure of the employee to obey the safety rule;
3. that the employee had actual knowledge of the rule; and
4. that prior to the injury the employer had made a reasonable effort to cause his or her employees to obey the safety rule.

Carver v. Delta Innovative Servs., 379 S.W.3d 865, 869 (Mo. App. 2012).

Our thorough review of the record reveals no evidence that would support a finding that employee's injuries were caused by her failure to wear a seatbelt or her purported failure to drive within the posted speed limit on August 24, 2009. We conclude, therefore, that employer failed to meet its burden of proof under § 287.120.5. Because this conclusion is dispositive of the issue, we discern no need to analyze whether employer's generalized "obey all laws" rule was reasonable, or whether employer made

Employee: Susan Barton

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a reasonable effort to cause its employees to obey such a rule, and hereby disclaim the administrative law judge's additional findings, analysis, and conclusions on that topic.

Liability for permanent total disability

The administrative law judge determined employee is not employable in the open labor market; we agree. We note that in assigning liability for employee's permanent total disability to the employer, the administrative law judge questioned whether employee's preexisting morbid obesity could properly be considered a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment for purposes of § 287.220 RSMo. In determining that employee's preexisting morbid obesity could not be considered a preexisting permanent partial disability, the administrative law judge relied on the decision of *Loven v. Greene County*, 63 S.W.3d 278 (Mo. App. 2001).

While we appreciate the administrative law judge's careful and thorough analysis with respect to this issue, we question whether the *Loven* decision is dispositive, as it would seem the issue whether employee's preexisting morbid obesity constituted a permanent partial disability is a purely factual one that would fall within the "unique province" of the administrative law judge or this Commission to decide. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007). We note also that the *Loven* court's focus on the extent to which the employee's obesity caused him difficulty in the past contrasts with a number of other Missouri cases cautioning that for purposes of triggering Second Injury Fund liability under § 287.220, "the proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition." *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted), see also *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 371 (Mo. App. 2005); *E.W. v. Kan. City Sch. Dist.*, 89 S.W.3d 527, 538 (Mo. App. 2002); and *Carlson v. Plant Farm*, 952 S.W.2d 369, 373 (Mo. App. 1997).

With that said, we note that employer's Application for Review filed with the Commission does not challenge the administrative law judge's determination that employer is liable for permanent total disability benefits, and that in employer's brief, employer affirmatively states that it is not challenging that determination, but rather requests that we confine our review solely to the issue of the safety penalty under § 287.120.5. For this reason, we will not further consider the issue of employee's permanent total disability or whether liability properly lies with the Second Injury Fund in this case.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued November 7, 2013, is attached and incorporated by this reference.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Employee: Susan Barton

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

Given at Jefferson City, State of Missouri, this 7th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Susan Barton

Injury No. 09-063719

Dependents: N/A

Employer: Green Acres Home of West Plains & Newton Group Home

Insurer: Guaranty Insurance Company

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

Hearing Date: August 15, 2013

Checked by: LTW

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 24, 2009
5. State location where accident occurred or occupational disease was contracted: Howell 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: While engaged in employment with the Employer, which included operating a motor vehicle while transporting a special needs person to a store, Employee suffered a motor vehicle accident. As a consequence of this work incident Employee sustained injuries to her upper and lower extremities, and body as a whole.
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: Left Upper Extremity, Right Lower Extremity, Left Lower Extremity (BAW)
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$10,859.94

- 16. Value necessary medical aid paid to date by employer/insurer? \$439,615.38
- 17. Value necessary medical aid not furnished by employer/insurer? \$8,251.39
(\$424.25 represents out-of-pocket expenses to be paid directly to employee, while \$7,827.14 represents payment of Medicaid / Medicare expenses.)
- 18. Employee's average weekly wages: \$385.49
- 19. Weekly compensation rate: \$257.00
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$8,251.39

Future medical care: (See Award)

(Employee is entitled to future medical care from Employers and Insurer.)

Weeks of temporary total disability (or temporary partial disability): \$12,894.19

(The sum of \$12,894.19 represents payment of temporary total disability compensation at the applicable compensation rate of \$257 per week for the period of August 24, 2009, to June 2, 2011 (92 3/7 weeks), less credit of \$10,859.94. \$23,754.13 - \$10,859.94 = \$12,894.19)

Weeks of permanent partial disability from Employer / Insurer: N/A

Weeks of disfigurement from Employer / Insurer: N/A

Permanent total disability benefits from Employer / Insurer: (See Award)

(Employee is entitled to permanent total disability benefits from Employers and Insurer beginning June 2, 2011, at the rate of \$257.00 per week, for Employee's lifetime.)

- 22. Second Injury Fund liability: No

TOTAL: \$257.00 PER WEEK, EFFECTIVE JUNE 2, 2011, AND CONTINUING FOR EMPLOYEE'S LIFETIME, PLUS FUTURE MEDICAL CARE

- 23. Future requirements awarded: Future medical care and permanent total disability compensation (See Award)

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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Randy Alberhasky, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Susan Barton

Injury No. 09-063719

Dependents: N/A

Employer: Green Acres Home of West Plains & Newton Group Home

Insurer: Guaranty Insurance Company

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

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 15, 2013. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about September 16, 2013.

The employee appeared personally and through her attorney Randy Alberhasky, Esq. The employer and insurer appeared through their attorney, Christopher Moberg. The Treasurer of Missouri, as the Custodian of the Second Injury Fund, appeared through its attorneys, Cara Harris and Catherine Goodnight, Assistant Attorneys General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about August 24, 2009, Green Acres Home of West Plains and Newton Group Home were employers operating under and subject to The Missouri Workers' Compensation Law and during this time were fully insured by Guaranty Insurance Company.
- (2) On the alleged injury date of August 24, 2009, Susan Barton was an employee of the employers, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about August 24, 2009, the employee, Susan Barton, sustained an accident, which resulted in her suffering certain injuries to her body as a whole.
- (4) The above-referenced employment and accident occurred in Howell County, Missouri. The parties agree to venue lying in Howell County, Missouri. Venue is proper.
- (5) The employee notified the employer of her injury as required by Section 287.420, RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the claimed accident of August 24, 2009, the employee's average weekly wage was \$385.49, which is sufficient to allow a compensation rate of \$257.00 for temporary total disability compensation / permanent total disability compensation, and permanent partial disability compensation.
- (8) Temporary total disability compensation has been provided to the employee in the amount of \$10,859.94, representing 93 weeks in disability benefits, payable for the periods of August 25, 2009, through June 6, 2011, paid at a rate of \$233.56 per week, less payment of a 50 percent reduction. (The employer and insurer assert entitlement to a reduction based on their claim the employee committed a safety penalty violation.)
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$439,615.38 in medical expenses.

The issues to be resolved by hearing include:

- (1) Whether the claimed accident of August 24, 2009, arose out of and in the course of the employee's employment with the employers?
- (2) Whether the employers and insurer are obligated to pay for certain past medical care and expenses?
- (3) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (4) Whether the employee is entitled to temporary total disability compensation? (The employee seeks payment of 92 weeks of temporary total disability compensation, payable for the period of August 24, 2009 through March 26, 2012, less credit of \$10,859.94 already paid to the employee).
- (5) Whether the employee sustained any permanent disability as a consequence of the claimed accident of August 24, 2009; and, if so, what is the nature and extent of the disability?

- (6) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?
- (7) Whether the Employers and Insurer are entitled to statutory reduction in benefits in an amount of 25 to 50 percent, pursuant to Section 287.120.5, RSMo?
- (8) Whether the Employee is entitled to statutory increase in benefits in an amount of 15 percent, pursuant to Section 287.120.4, RSMo?
- (9) Whether Section 287.120.5, RSMo is unconstitutional and in violation of the due process and equal protection clauses of the Missouri and Federal Constitutions?

EVIDENCE PRESENTED

The employee testified at the hearing in support of her claim. Also, the employee presented at the hearing of this case the testimony of her father, Frank Barton. In addition, the employee offered for admission the following exhibits:

- Exhibit A.....Medical Records and Bills from Alliance Rehab (Certified 07-25-13)
- Exhibit B..... Medical Records and Bills from NHC West Plains (Certified 11-23-11)
- Exhibit C..... Medical Records and Bills from Oxford Healthcare (Certified 12-01-11)
- Exhibit D.....Medical Records from Ozarks Medical Center (Certified 12-29-11)
- Exhibit E.....Medical Records from Ozarks Medical Center (Certified 04-05-13)
- Exhibit F.....Medical Records from Ozarks Medical Center (Certified 05-15-13)
- Exhibit G.....Medical Records from Ozarks Medical Center (Certified 08-01-13)
- Exhibit H..... Medical Records from Ozarks Medical Center Orthopedic Clinic (Certified 04-24-13)
- Exhibit I..... Medical Records from Ozarks Medical Center Orthopedic Clinic
- Exhibit J.....Medical Records from SMCHC (Certified 11-17-11)
- Exhibit K.....Medical Records from SMCHC (Certified 08-06-13)
- Exhibit L..... Medical Records from Mercy Hospital (Certified 11-15-11)
- Exhibit M.....Medical Record from University of Missouri Hospitals & Clinics (Certified 12-08-11)
- Exhibit N.....Medical Bills from Boyce-Bynum Pathology Lab

- (Certified 07-15-13)
- Exhibit O.....Medical Bills from Ozarks Medical Center Orthopedic Clinic
(Certified 07-29-13)
- Exhibit P..... Medical Bills from Mercy & Clinics (Certified 11-08-11)
- Exhibit Q..... Medical Report of P. Brent Koprivica, M.D.
- Exhibit R..... Vocational Report of James M. England, CRC
- Exhibit S..... Claim for Compensation
- Exhibit T..... Answer of Employers & Insurer to Claim for Compensation
- Exhibit U..... Answer of Second Injury Fund to Claim for Compensation
- Exhibit V..... Photographs of Accident Scene
- Exhibit W..... Photographs of Employee at Home
- Exhibit X..... Section 287.210, RSMo Letter (Dated 05-21-12)
- Exhibit Y..... Disclosure of Medical Records Letter (Dated 05-31-12)
- Exhibit Z..... Employer / Insurer Counsel Letter (Dated 01-18-13)
- Exhibit AA..... Employee Counsel Letter (Dated 03-07-13)
- Exhibit BB..... Employee Counsel Letter (Dated 03-26-13)
- Exhibit CC..... Disclosure of Medical Records Letter (Dated 04-10-13)
- Exhibit DD..... Disclosure of Medical Records Letter (Dated 04-29-13)
- Exhibit EE..... Disclosure of Medical Records Letter (Dated 05-17-13)
- Exhibit FF..... Section 287.210, RSMo Letter (Dated 06-12-13)
- Exhibit GG..... Disclosure of Medical Records Letter (Dated 07-22-13)
- Exhibit HH..... Disclosure of Medical Records Letter (Dated 07-31-13)
- Exhibit II..... Disclosure of Medical Records Letter (Dated 08-01-13)
- Exhibit JJ..... Disclosure of Medical Records Letter (Dated 08-06-13)
- Exhibit KK..... Disclosure of Medical Records Letter (Dated 08-08-13)
- Exhibit LL..... Deposition of P. Brent Koprivica, M.D.
(Inclusive of Deposition Exhibits)
- Exhibit MM..... Deposition of Susan Barton (Dated 08-06-13)
- Exhibit NN..... Deposition of James M. England, CRC

The exhibits were received and admitted into evidence. (In seeking admission of Exhibits D and MM the employee sought to admit the exhibits with specific redactions. In this regard the employee moved to redact statements made by the employee, which referenced the speed she was traveling at the time of the accident. The employers and insurer objected to the redaction, asserting that such statements are not hearsay but party admissions. The undersigned overruled the motion and admitted Exhibit D into evidence without any redaction. Similarly, the undersigned admitted Exhibit MM into evidence without redaction.)

The employers and insurer presented one witness at the hearing of this case –Michelle Perkins. In addition, the employers and insurer offered for admission the following exhibits:

- Exhibit 1..... Medical Report of Edwin Roeder, M.D.
- Exhibit 2..... Deposition of Susan Barton
- Exhibit 3..... Deposition of James England

(Inclusive of Deposition Exhibits)

Exhibit 4.....	Section 287.020, RSMo
Exhibit 5.....	Section 287.120, RSMo
Exhibit 6.....	Pay History Report (TTD Payments)
Exhibit 7.....	Missouri Uniform Accident Report
Exhibit 8.....	Policy Manual Acknowledgment Page
Exhibit 9.....	Wage Statement

Exhibits 1, 2, 3, 4, 5, 6, 8, and 9 were received and admitted into evidence. The employee objected to Exhibit 7 on grounds that the exhibit constituted inadmissible hearsay. The undersigned sustained the objections of the employee, resulting in Exhibit 7 being received but denied admission into evidence.

The Second Injury Fund presented one witness at the hearing of this case – Wilbur Swearingin, CRC. In addition, the Second Injury Fund offered for admission the following exhibits:

Exhibit I.....	CV of Wilbur Swearingin, CRC
Exhibit II.....	Vocational Report of Wilbur Swearingin, CRC

The exhibits were received and admitted into evidence.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Notice of Amended Lien (Missouri Department of Social Services)
- Notice of Commencement / Termination of Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Background & Employment

The employee, Susan Barton, is 50 years of age, having been born on June 9, 1963. Ms. Barton resides in Pomona, Missouri. Ms. Barton is 5 feet, 10 inches tall, and weighs approximately 400 pounds. She has weighed 400 pounds or more throughout her adult life.

Ms. Barton graduated from high school (West Plains Senior High) in 1981. The following year she attended trade school, obtaining certification as a nursing assistant (CNA) in 1982. Notably, Ms. Barton worked in this profession as a CNA for approximately 17 to 18 years.

In 1982, upon obtaining her CNA certification Ms. Barton engaged employment with King's Daughter and Sons Nursing Home in Mexico, Missouri. She worked in this employment for approximately 2-3 years. Thereafter, she obtained employment with Presbyterian Manor, working as a CNA. She engaged in this employment for approximately one year.

In or around 1985 to 1987 Ms. Barton became a stay-at-home mom, providing care for her two infant sons. Thereafter, Ms. Barton obtained employment with Westview Nursing Home working as a CNA. She later obtained employment with Kingdom Projects and Sheltered Workshop (a handicap employment facility). In her employment with Sheltered Workshop Ms. Barton worked as a supervisor; she engaged in this employment for approximately 1 year. Following her employment with Sheltered Workshop Ms. Barton obtained employment with Fulton Rehabilitation Center and engaged in this employment for approximately 2 years.

After Fulton Rehabilitation Center, Ms. Barton worked for Ozark Horizons State School in West Plains. In this employment Ms. Barton worked as a teacher's aide, a bus attendant and a bus driver. She worked in this employment for approximately two years without suffering any injuries. Ms. Barton then returned to her former employment with Westview Nursing Home, working in this employment as a CNA for four years. Thereafter, she obtained employment with the employers Newton Group Home/Green Acres Home of West Plains. Notably, during this employment Ms. Barton obtained certification as a certified medical technician (CMT).

In her employment with the employers, Newton Group Home/Green Acres Home of West Plains, Ms. Barton worked as a CMT and CNA working with special needs adults. The job required her to have a vehicle and to take care of adult patients in a group home setting. During her last several months of employment before the accident, she was responsible for taking care of just one patient, a young adult female (hereinafter referred to as the "special needs patient"). The special needs patient had a history of seizures and mental illness and a propensity to become violent at times. On one occasion, as described by Barton, while driving the special needs patient in her car Ms. Barton had to stop the vehicle and force the special needs patient to step outside of the car until she calmed down. Ms. Barton's employment responsibilities included driving this special needs patient to various public places, such as Wal-Mart or convenience stores, in order to encourage the special needs patient and to assist her in engaging with the public. In describing this work activity Ms. Barton noted that the special needs patient would ride with her in the front seat and was very talkative; the special needs patient would constantly need feedback from Ms. Barton. Also, according to Ms. Barton, the special needs patient experienced seizures, typically once a week at unpredictable times. If she was having a seizure,

Ms. Barton would have to stop immediately what she was doing and tend to her to make sure that she did not injure herself.

Ms. Barton further testified that because of her size, she did not fit within the parameters of the seatbelt manufacturing capacity, and thus she lacked the ability to use her seatbelt. According to Ms. Barton, the inability to use a seatbelt has been a problem for her during her entire adult life, including when she was hired to work for the employers. Also, Ms. Barton noted that she drove an older model vehicle, which she owned and provided for her employment. The employers did not provide her with a car or with a seatbelt that would fit her and accommodate her size.

Ms. Barton's supervisors never said anything to her about seatbelts or told her she needed to use one. Similarly, the supervisors never rode along with her to see if she was using a seatbelt. The only instruction she was ever given was generally to "obey all laws". In speaking to this general safety policy, Elizabeth Michelle Perkins, an administrator with Newton Group Home/Green Acres Home of West Plains, testified that the employer required Ms. Barton to provide her own vehicle, and no effort was made to inspect the vehicle or make sure Ms. Barton utilized a seat belt or complied with all applicable laws. However, Ms. Perkins noted that the employers' demonstrated concern for Ms. Barton's safety and the safety of the patients, as evidenced by the employers loaning Ms. Barton an amount of money specifically designed to enable her to purchase new tires for her vehicle.

Prior Medical Conditions

Prior to sustaining the work injury of August 24, 2009, Ms. Barton suffered or presented with injuries and/or medical conditions (or physical conditions). These prior conditions include:

- **Right Knee:** In or around 1992 Ms. Barton sustained an injury to her right knee, which occurred while engaged in her employment as a CNA in a nursing facility in Fulton, Missouri. The nature of this injury necessitated receipt of surgical repair, which involved arthroscopic surgery. The injury involved a workers' compensation case, which Ms. Barton resolved through a settlement agreement. Ms. Barton, however, could not recall the percentage of disability agreed to by the parties. Nor did she present evidence of the Stipulation for Compromise Settlement entered into by the parties and approved by the administrative law judge.

In discussing the effects of this injury and the nature of any disability attributable to the right knee prior to the accident of August 24, 2009, Ms. Barton stated that following the temporary period of recovery for the 1992 injury she experienced no further difficulty with the right knee. According to Ms. Barton, she was not governed by any permanent physical restrictions. She did not have any limitations on how far she could walk or how long she could stand. She had no difficulty being able to bend, twist or do anything else she needed to do with her knee.

Dr. Koprivica, an examining physician retained by the employee, does not offer an opinion of permanent disability referable to the right knee, predating the work injury of August 24, 2009. In contrast, Dr. Roeder, an examining physician retained by the employer and insurer, opines that predating the injury of August 24, 2009, Ms. Barton presented with a permanent partial disability of 19 percent, referable to the right knee. Dr. Roeder attributes this permanent disability to degenerative changes.

- Morbid Obesity: Ms. Barton is 5 feet, 10 inches tall, and weighs approximately 400 pounds. Throughout her adult life she has weighed 400 pounds or more, which classifies her as morbidly obese. At times she has weighed in excess of 450 pounds. Dr. Koprivica defines morbid obesity as a physical condition existing when an individual weighs 100 pounds or more above that individual's ideal body weight.

The nature of this physical condition can impact a person's physical well being, as well as activities of daily living. For example, the excess body mass can have damaging effects on weight-bearing joints, including the back, hips, knees, feet and ankles. Similarly, the excess body mass can cause a person to develop insulin resistance, and place the person at risk of becoming diabetic. Also, the nature of morbid obesity produces inactivity and a deconditioning of the body. Obstructive sleep apnea is another complication associated with this physical condition.

In addition, the physical stature of a morbidly obese person can affect choice of activities, as well as the way in which morbidly obese persons perform activities. For example, because of her size, she did not fit within the parameters of the seatbelt manufacturing capacity, and thus she lacked the ability to use her seatbelt. According to Ms. Barton, the inability to use a seatbelt has been a problem for her during her entire adult life, including when she was hired to work for various employers.

According to Ms. Barton, she never felt that her weight interfered with her job duties at any of her past employment. In fact, she acknowledged that at times she felt her girth and size were assets to her in dealing with some of the heavy lifting required in some of her past employments as a Certified Nurse's Assistant. Further, Ms. Barton testified generally prior to the injury of August 24, 2009, she was able to take care of herself and others.

Accident

On August 24, 2009, while engaged in employment and performing her work duties with the employers, Newton Group Home/Green Acres Home of West Plains, Ms. Barton was involved in a motor vehicle accident. At the time of this accident Ms. Barton was on Porter Waggoner Blvd in West Plains, Missouri, and was engaged in her employment driving the special needs patient to Sonic Drive-In for a soda. (The special needs patient was wearing a seatbelt, but Ms. Barton was not wearing her seatbelt, which she never did because the seatbelt was not sufficiently large enough to fit or secure Ms. Barton.) The special needs patient was

sitting next to Ms. Barton and talking; Ms. Barton was attentive to the special needs patient and listening to her. In doing so, Ms. Barton became distracted and hit the front corner of a vehicle that had stopped in front of her and had become situated in the middle turning lane. (Porter Waggoner Blvd. is a five lane road with two lanes going in different direction and a turning lane in the middle.) Apparently, the impact from this vehicle resulted in Ms. Barton's vehicle hitting another vehicle.

According to Ms. Barton, upon hitting the first vehicle, she was rendered unconscious and does not remember hitting the second vehicle. Photographs of the vehicle indicate that Ms. Barton's vehicle suffered significant damage. While in her vehicle Ms. Barton regained consciousness, but was in severe pain. An ambulance was called to the scene and paramedics provided Ms. Barton with emergent medical treatment, and then transported her to the emergency room of the local hospital (Ozarks Medical Center). Although the police responded to the accident scene Ms. Barton does not recall talking to any police officer.

Medical Treatment

The motor vehicle accident of August 24, 2009, caused Ms. Barton to sustain multiple traumatic injuries. These injuries include:

- Right Lower Extremity: Ms. Barton suffered a displaced, comminuted distal femur fracture that had a supracondylar component, as well as intra-articular component. This fracture led to a nonunion, which required a second surgical intervention. The nature and extent of this injury includes development of progressive post-traumatic degenerative osteoarthritis.
- Left Lower Extremity: Ms. Barton suffered lacerations about the left knee region without obvious intra-articular involvement of the left knee. She later developed cellulitis, in part because of her predominant sitting posture and the edema that she develops associated with dependency of her legs due to her constant sitting.
- Left Wrist: Ms. Barton suffered an open distal radius and ulnar fracture on the left wrist. The injury was treated initially with pinning.
- Head: Ms. Barton suffered loss of consciousness.

The initial treatment provided to Ms. Barton by the attending physicians of Ozarks Medical Center included morphine for treatment of pain associated with the significant injuries and diagnostic studies for assessment of the injuries. The attending physicians diagnosed Ms. Barton with a severe fracture of her right lower extremity with a comminuted distal femur fracture that had an intra-articular component. There was displacement. Separately, there was an open left distal radius and ulnar fractures. An external fixator was placed on the right femur, while the left forearm and wrist fractures were treated with debridement and placement of pins. She was stabilized and transferred to St. John's Regional Medical Center.

Upon transfer to St. John's Regional Medical Center Ms. Barton underwent an open reduction and internal fixation of her right distal femur fracture. She was hospitalized from August 25, 2009, through September 3, 2009. Once discharged, she was transferred into an inpatient nursing home facility, National Health Care, where she had previously worked. She was there from September 3, 2009, through October 15, 2010.

Ms. Barton experienced problems with healing of the fracture. She was then referred to University Hospital, resulting in Dr. Murtha providing treatment on March 4, 2010. At that time, it was noted that she had a nonunion along with cellulitis of the opposite extremity. She was hospitalized by Dr. Murtha on March 31, 2010, and underwent an open reduction and internal fixation of the right femoral nonunion. While in the hospital, on April 2, 2010, Ms. Barton underwent additional surgery that involved removal of a screw. She remained in the hospital until being discharged on April 5, 2010.

Ms. Barton received follow-up care as an outpatient through the University of Missouri Orthopedic Clinic. She was seen for her follow-up with Dr. Murtha on April 22, 2010, and thereafter her care was transferred to Dr. Crist, who assumed the necessary care and treatment of Ms. Barton. Ms. Barton presented to Dr. Crist on June 1, 2010, July 13, 2010, and September 21, 2010. During this treatment period Dr. Crist noted that Ms. Barton demonstrated certain muscle pain with valgus stressing of the right knee. However, Dr. Crist determined the right knee to be clinically stable, prescribed partial progressive weight bearing. Ms. Barton continued to maintain partial weight bearing until November 2, 2010, when Dr. Crist recommended full weight bearing with a walker. At that point, Barton was taking two Percocet a day for pain.

On December 14, 2010, it was noted that Ms. Barton was having increased pain. Despite that pain, it was felt that she should wean from Percocet, with directions to finish her Percocet prescription and then start on Norco. Ms. Barton's obesity continued to complicate and hinder the healing process. On March 01, 2011, Dr. Crist noted that Ms. Barton was walking up to 300 feet in physical therapy. On June 2, 2011, Ms. Barton was released at maximal medical improvement. Permanent sedentary restrictions were placed. It was noted that Barton was using an electric wheelchair for longer walks outside her home, although she utilized a walker in her home and for short durations outside the home.

Independent Medical Examinations

P. Brent Koprivica, M.D.

P. Brent Koprivica, M.D., a physician practicing in the specialty of occupational medicine, testified by deposition in behalf of the employee. Dr. Koprivica performed an independent medical examination of the employee on March 26, 2012. At the time of this examination, Dr. Koprivica took a history from Ms. Barton, reviewed various medical records, and performed a physical examination of her. In light of this examination, Dr. Koprivica opined that the motor vehicle accident of August 24, 2009, had caused Ms. Barton to sustain multiple

traumatic injuries. According to Dr. Koprivica, these injuries included consideration of the following:

- Ms. Barton sustained a severe fracture of her right lower extremity with a comminuted distal femur fracture that had an intra-articular component; there was displacement. The injury to the right lower extremity was treated initially with an external fixator, which was placed on the right femur. She later underwent an open reduction and internal fixation of her right distal femur fracture; but she experienced problems with healing of the fracture and experienced nonunion. This required open reduction and internal fixation of the right femoral nonunion, which was followed with further surgery involving removal of a screw.
- Ms. Barton sustained an open left distal radius and ulnar fractures. The left upper extremity was treated initially with debridement and placement of pins.
- The nature of Ms. Barton's healing process, which required her to be predominantly in a sitting posture, caused her to sustain further injury to her left lower extremity. This additional injury involved development and complication of opposite lower extremity cellulitis.

In assessing the nature and extent of these injuries Dr. Koprivica opined that Ms. Barton was at maximum medical improvement, and she had sustained multiple disabilities. In rendering this opinion Dr. Koprivica propounded the following comments:

In looking at Ms. Barton's presentation, I would apportion a sixty (60) percent permanent partial disability to the body as a whole based on the lower extremity injuries that have led to her needing to use a wheelchair for gait assistance.

Regarding the fracture of the left upper extremity, I would separately apportion a fifteen (15) percent permanent partial disability of the left upper extremity at the level of the forearm (200-week level).

Finally, with the contention of weight gain and the development of disabling symptoms based on her obesity, I would apportion a five (5) percent permanent partial disability to the body as a whole.

When one combines these multiple permanent partial disabilities attributable to the injury of August 24, 2009, it is my opinion that it is probable that Ms. Barton is permanently totally disabled.

In addressing the question of Ms. Barton's employability Dr. Koprivica acknowledged that he would defer or suggest a formal vocational evaluation. Yet, he offers explanation for his

opinion that Ms. Barton is unemployable in the open and competitive labor market. In this regard, Dr. Koprivcia states:

My belief at this point is that it is unrealistic to believe that any ordinary employer would employ Ms. Barton as she would present at this time of hire.

She would be limited primarily to sedentary activities.

The issues of incontinence will certainly be a negative consideration regarding employability.

Significantly, in rendering his opinion of permanent total disability Dr. Koprivica considers the issue of Ms. Barton's morbid obesity to part of the disabling limitations and restrictions that render her unemployable. Although he identifies Ms. Barton's morbid obesity to involve a preexisting medical condition, he did not identify it as a preexisting industrially disabling condition.

In his deposition testimony Dr. Koprivica propounded in pertinent part the following comments:

Q. Your observations and opinions on page 12 you note that she developed a complication of cellulitis in her lower extremity. What caused that to develop?

A. My belief is that her need to sit with the dependent legs increased the chronic edema that she has and associated with the dependency and chronic edema, she developed a secondary cellulitis. So I felt that was a direct and natural consequence of- - from complications that were attributable to the injury in the motor vehicle accident.

Q. You also note a recent gain in her weight that you say is associated to inactivity as a result of the work injury. Is there any treatments or therapy or physical regimen that you'd prescribe for her to help cure and relieve the effects of the work injury as it related to her weight?

A. Well, I suggested that she be provided access to a facility where she could walk- - exercise in water. Aqua therapy is something that people with morbid obesity can perform. It's going to need to be a facility where she can get access in and out of the pool. She's not going to be able to- - there are facilities that have- - they're built so that people in wheelchairs can actually get into the pool. It kind of has an incline into the water surface. But she need to get in the water and be able to do aqua therapy which I think would help her with burning calories, help her conditioning. That's what I suggested anyways.

Q. Why will burning calories and improving her conditioning, what will that have to do with her work injuries regarding the fractures of her leg and arm?

A. Well, one of the problems she has is that if she doesn't exercise, the - - her overall strength reduces. If you exercise those muscles, then you're going to be able to strengthen and, hopefully, improve her quality of life in terms of function. By exercising and burning more calories, then that will assist her in trying to lose weight, and it's possible, if she has access to that facility, that that 50 pounds she lost, that there could be some improvement in that situation. Now, if you're asking me statistically the likelihood of that, I think it's - - she has a relatively poor prognosis in her situation, but that would be - - to me, that's the appropriate way to try to improve her quality of life is trying to get her into a situation where she can succeed, can indeed exercise, and with diet, hopefully, she can lose some weight.

Q. You reference posttraumatic changes in her knee, risk of surgery. Can you explain what you mean by that?

A. Yeah. When you disrupt the joint from a fracture, you develop progressive arthritis with a loss of cartilage. And, ultimately, her knee is going to be in a situation where the cartilage loss is such that it's producing chronic pain even though she's not walking. And the limited amount of standing and walking she does will be so severe in terms of pain that she won't be able to stand or walk at all. That's what the concern is.

Q. Would her potential need for surgical intervention on her knee be related to the work injury?

A. Yeah, it's a direct and natural consequence of the severity of the fracture, and its intra-articular nature of the right knee, that she would need potential surgical intervention. The question is going to be whether or not realistically she is a candidate to do - - to have that performed. You know, unfortunately, if she can't have that performed, then she's going to be more limited where she can't even use the walker anymore, and she's just going to be a hundred percent of the time in the wheelchair.

Q. And is it your opinion that she does or does not have any preexisting disabilities that were a hindrance or obstacle to her employment?

A. Well, my belief is that she did not have any preexisting industrial disability. That's based solely on her description of her capabilities prior to this work injury. She clearly was morbidly obese, and morbid obesity has the potential of being a significant industrial disability. But what she

told me her capabilities were prior to this injury are such that I don't believe it's of significance if that's true. And I put in my report a hypothetical consideration that if it were determined that she was not totally disabled based on the primary injury, that under that scenario there's clearly contribution of her morbid obesity to her total disability presentation at this point. What I understood her history to be was that the further aggravation to her weight combined with the other disabilities as to why she's disabled from her morbid obesity. But if that's not the acceptance as being factually the case, the level of her disability- - or the level of her obesity was competent to be industrial disabling. I just don't believe that she gives a history that that's the case. But under the hypothetical, if it were determined that, indeed, there was a preexistent disability based on her weight, I apportioned 15 percent for that.

Edwin M. Roeder, M.D.

Edwin M. Roeder, M.D., a physician practicing in the specialty of orthopedic surgery, testified in behalf of the employers and insurer through the submission of a complete medical report. Dr. Roeder performed an independent medical examination of the employee on December 18, 2012. At the time of this examination, Dr. Roeder took a history from Ms. Barton, reviewed various medical records, and performed a physical examination of her. In light of this examination, Dr. Roeder opined that the motor vehicle accident of August 24, 2009, had caused Ms. Barton to sustain multiple traumatic injuries. Dr. Roeder further opined that Ms. Barton was at maximum medical improvement, which she had reached as of the date Dr. Crist noted on June 2, 2011. And Dr. Roeder expressed belief that Ms. Barton's condition did not warrant "any current treatment."

In rendering this opinion Dr. Roeder acknowledged that Ms. Barton was continuing to experience pain; and if she continued to have significant pain hardware removal would be a consideration. In this context Dr. Roeder propounded the following comments:

IMPRESSION: Ms. Barton is a 49-year-old female who was involved in a motor vehicle accident on 08/24/2009 with a resulting intraarticular fracture of her right distal femur and fracture of the right distal radius. She was appropriately treated with appropriate stabilization of the femur and tibia. She ultimately underwent open reduction and internal fixation of both the left distal radius and right distal femur by Dr. Tony Caron of St. John's on 08/26/2009. She developed a nonunion of the right femur treated by Dr. Yvonne Murtha on 03/31/2010 and 04/02/2010 and went on to union. Several preexisting diagnoses have complicated her treatment. The patient is morbidly obese. It is my opinion that her obesity and deconditioning contribute substantially to her slow/incomplete recovery after the injury. Plain radiographs from Ozarks Medical Center reviewed personally as well as a CT scan report from St. John's also show degenerative changes in the

knee which were certainly preexisting. It was the opinion of Dr. Brett Crist who completed her Impairment Rating on 06/02/2011 that degenerative changes were preexisting as well. While these may not have been symptomatic prior to the injury, the injury could have triggered significant symptoms. It is my opinion with reasonable degree of medical certainty, that the patient has undergone reasonable care including physical therapy. I feel she has reached maximum medical improvement as of the date noted by Dr. Crist on 06/02/2011.

DISPOSITION: I do not believe any current treatment is warranted. Again, I would suggest if she continues to have significant pain, hardware removal is a consideration. It is my opinion that the patient's obesity and degenerative changes in her knee were preexisting and have had a significant bearing on her recovery. I do not see any particular benefit to additional physical therapy. She has undergone extensive therapy. I do agree that weight loss would be beneficial, but she should be more than able to progressively ambulate and do exercises on her own at this time. Her pain is managed with antiinflammatories which can be obtained over-the-counter.

In a follow-up, Dr. Roeder issued a supplemental opinion on January 2, 2013. In this supplemental opinion Dr. Roeder opined that Ms. Barton presents with a permanent partial disability of 24 percent referable to the right lower extremity, and a permanent partial disability of 3 percent referable to the left upper extremity. In regard to the right lower extremity Dr. Roeder apportions the disability – he attributes 5 percent to the motor vehicle accident of August 24, 2009, and 19 percent to preexisting degenerative changes. Further, in addressing the question of potential hardware removal Dr. Roeder propounded the following comments:

The patient is very large and I think there is really no potential for palpable deep hardware about the femur. I think in the presence of her degenerative arthritis, it would give her very little pain improvement. I would not suggest hardware removal from the femur as a reasonable option at this point for care of this patient.

I do not think with minimal symptoms, I do not think removal of hardware about the left distal radius is a reasonable consideration.

Disputed Medical Treatment (Post Independent Medical Examinations)

On February 5, 2013, Ms. Barton presented to Dr. David Dennehey, an orthopedic surgeon, with complaints of episodes of sharp pain and crunching in the right knee area, with bending being painful. X-rays showed possible penetration of the screws into the joint. A CT arthrogram was ordered to evaluate possible torn cartilage. In a follow-up visit, on March 7, 2013, Dr. Dennehey noted that the CT scan revealed penetration of the joint with two distal screws, which required removal. Dr. Dennehey also noted that Ms. Barton had nonunion

osteoarthritis. In light of these findings, Dr. Dennehey recommended knee arthroscopy, removal of the two penetrating screws and repair of the pseudarthrosis. Ms. Barton subsequently underwent this surgery on March 20, 2013. This surgery included repair of the right femur non-union with AlloSource Allograft, removal of two distal screws that had invaded the right knee (post right knee arthroplasty), and debridement chondroplasty of the lateral compartment of the knee. Ms. Barton remained hospitalized until March 22, 2013.

On April 9, 2013, Ms. Barton presented to the emergency room with complaints of drainage and pain attributable to her surgical wound. She was admitted into the hospital, and remained under the physician's care at the hospital until being discharged on April 12, 2013. She continued to receive follow-up care from Dr. Dennehey.

On May 2, 2013, Ms. Barton presented to Dr. Dennehey with complaints of medial compartment pain. She was given injections of Cortisone and Marcaine in her right knee.

On June 1, 2013, Ms. Barton fell out of her wheelchair, which caused her to experience an increase in pain in her right knee and thigh, the severity of which prompted her to return to the hospital for additional treatment.

On August 14, 2013, Ms. Barton presented to Dr. Dennehey for continuing follow-up treatment. On this occasion Dr. Dennehey administer another injection into her right knee. Ms. Barton continued to receive follow-up treatment from Dr. Dennehey.

Vocational Opinions

Wilbur T. Swearingin, CRC

Wilbur T. Swearingin, CRC, a vocational expert, performed a vocational evaluation of Ms. Barton on December 12, 2012. At the time of this examination, Mr. Swearingin took a history from Ms. Barton, reviewed various medical records, and performed a vocational assessment. Notably, Mr. Swearingin did not perform any vocational tests. In this regard Mr. Swearingin noted that he performed the vocational evaluation in Ms. Barton's home, and the nature of this setting was not suitable for administration of academic and vocational aptitude tests.

Although Mr. Swearingin performed the vocational evaluation at the request of Ms. Barton's attorney, he testified by deposition in behalf of the Second Injury Fund. In light of his vocational evaluation of Ms. Barton, Mr. Swearingin opined that Ms. Barton is governed by restrictions and limitations that render her unemployable in the open and competitive labor market. Further, in finding and concluding that the disability attributable to the motor vehicle accident of August 24, 2009, considered isolation, renders Ms. Barton unemployable in the open and competitive labor market, Mr. Swearingin notes that the disability necessarily includes Ms. Barton's morbid obesity. In this regard, Mr. Swearingin propounds the following comments:

As a result of the automobile accident of August 2009, Ms. Barton had fractures of her right leg and right wrist. Susan required open reduction and internal fixation of her fractures, with the fracture in and about her knee developing a non-union. A second operative procedure was performed to remove hardware and again stabilize this fracture. Ms. Barton has severe pain in and about her right knee such that she is minimally ambulatory and uses wheelchair for mobility. Due to her prolonged convalescence and inactivity, Ms. Barton gained a hundred pounds of weight, which she says she has now lost. Susan presents with a large pendulous abdomen, which covers her entire lap and extends down over her knees. Ms. Barton states that once she loses another fifty pounds, her physician plans to refer her to a plastic surgeon for removal of a large portion this pendulous abdomen. At this point it is unknown whether additional weight loss and surgical revision of her pendulous abdomen would permit Ms. Barton to become more ambulatory and lessen her pain. Considering Ms. Barton's impairments, including the disabilities affecting her right leg and left wrist along with her morbid obesity, medical restrictions, impaired mobility, her overall appearance and presentation, limited educational background, and history of personal aide work, I believe Susan Barton is neither placeable nor employable in the open labor market. As Ms. Barton presents, she is permanently and totally disabled. It is my opinion Ms. Barton's permanent and total disability arises from occupational injury of August 24, 2009 in isolation.

Notably, in rendering his opinion Mr. Swearingin acknowledges that Ms. Barton's morbid obesity involves a condition that is not without limitations and restrictions. Mr. Swearingin agreed that obesity can have the potential to cause difficulty with employment and that certainly there are some jobs Ms. Barton would be unable to do because of her size, including being a lineman. However, Mr. Swearingin states, Ms. Barton never had any difficulty obtaining or maintaining employment in any of the fields in which she chose to be employed due to her morbid obesity.

James England, CRC

James England, Jr., CRC, a vocational expert, performed a vocational evaluation of Ms. Barton on March 5, 2013. At the time of this examination, Mr. England took a history from Ms. Barton, reviewed various medical records, and performed certain vocational testing of her. According to Mr. England, the vocational tests included administration of the Wide-Range Achievement Test, Revision 3, which established Ms. Barton being able to read at the high school level and perform math at the sixth grade level.

Mr. England opined that he believed Ms. Barton's obesity would have been "viewed negatively by employers" and "certainly had a negative effect on her overall employment potential before the auto accident" Mr. England found Ms. Barton to be very pleasant and

motivated. He believes that she could be employed currently in a sedentary capacity. He, however, felt that with the amount of weight she was carrying, it would be difficult for her to get around and difficult for her to be picked over alternative candidates for employment. He also opined that if she is permanently and totally disabled it is due to a combination of the effects of her work injury of August 24, 2009, and her pre-existing morbid obesity. He opined that unless she loses weight, she is currently unemployable in the open labor market.

On cross-examination by the Second Injury Fund, Mr. England admitted at times morbid obesity causes ancillary problems including diabetes, difficulty walking, difficulty standing, and difficulty with bending and twisting. He also agreed that at times morbid obesity will cause people to have stints of unemployment due to being passed over for other candidates who are not morbidly obese. Mr. England believed that Dr. Roeder noted problems Ms. Barton had prior to her work injury with limitations caused by her obesity.

In his deposition Mr. England acknowledged that Ms. Barton was previously involved in employment that required fairly heavy activity, and that at times it was very strenuous work. Similarly, Mr. England acknowledged that Ms. Barton had previously testified she had no difficulty doing any of her previous jobs because of her obesity. And Ms. Barton told him she never had difficulty doing any jobs because of her morbid obesity, and that she never had difficulty obtaining or maintaining employment prior to the August 24, 2009, injury. In this regard, Mr. England noted Ms. Barton was able to drive prior to the injury of August, 2009 despite being morbidly obese, and that she used no assistive devices for ambulation prior to the injury in August, 2009. Also, Mr. England acknowledged, prior to the injury in August, 2009, Ms. Barton had no limits on how long she could stand, sit, walk, and twist.

In discussing Ms. Barton's morbid obesity and its impact on her Mr. England propounded the following testimony:

Q. So it appears that Ms. Barton is the exception to the rule of her morbid obesity impacting her ability to find employment, is that correct?

A. I'd say that's true.

Q. Ok. So while normally you see people who are morbidly obese, to the extent that Ms. Barton was, having difficulty obtaining employment, with respect to Ms. Barton particularly, you don't see that in her past history, correct?

A. Correct.

* * *

Q. If you were, Mr. England, to look at the specifics of Ms. Barton, which we've gone over in great detail, prior to the injury in August 2009, despite

that she was morbidly obese, there is no evidence that that had interfered with her ability to obtain employment; is that correct?

A. Nothing specific that I know of, no.

Q. There is likewise no evidence with respect to Ms. Barton specifically that her morbid obesity has ever interfered with her ability to do any aspect of any job that she had ever obtained; is that correct?

A. I'd say that's fair."

Present Complaints

Since the injury of August 24, 2009, Ms. Barton has been unable to take care of herself, much less able to take care of anyone else. She is unable to ambulate or to leave her house without the assistance of others. She is confined to a wheelchair or walking with a walker, and has pain on a regular basis in her lower extremities. Additionally, she lacks balance and stamina.

FINDINGS AND CONCLUSIONS

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

I. Accident & Injury

The employers and insurer acknowledge that the employee was involved in a motor vehicle accident on August 24, 2009, and this accident caused the employee to sustain certain traumatic injuries to her right lower extremity and left upper extremity. Similarly, the employers and insurer do not dispute that at the time of this accident the employee was engaged in her employment with the employers. Notably, on August 24, 2009, while engaged in employment and performing her work duties with the employers, Newton Group Home/Green Acres Home of West Plains, Ms. Barton was involved in a motor vehicle accident. At the time of this accident Ms. Barton was on Porter Waggoner Blvd in West Plains, Missouri, and as part of her employment she was driving a special needs patient to Sonic Drive-In for a soda. Ms. Barton and the special needs patient were engaged in conversation – the special needs patient was sitting next to Ms. Barton and talking; Ms. Barton was attentive to the special needs patient and listening to her. In doing so, Ms. Barton became distracted and hit the front corner of a vehicle that had stopped in front of her and had become situated in the middle turning lane.

The impact of the collision with the first vehicle resulted in Ms. Barton's vehicle hitting a second vehicle. (Upon hitting the first vehicle Ms. Barton was rendered unconscious and does not remember hitting the second vehicle.) Photographs of the vehicle indicate that Ms. Barton's vehicle suffered significant damage. Yet, the employers and insurer dispute the compensability of this accident, contending that the accident did not arise out of and in the course of her employment with the employers. In making this argument the employers and insurer assert a technical or legal defense, and examine the specific language of Section 287.020.3(2), RSMo.

Section 287.020.3(2), RSMo, in pertinent part, states:

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

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

The arguments of the employers and insurer focus on part (b), contending that the automobile accident involves an activity that Ms. Barton is equally exposed outside of and unrelated to her employment in her normal nonemployment life. As such, the employers and insurer contend the accident did not arise out of and in the course of her employment; it is not a compensable accident.

This issue is resolved in favor of the employee. Ms. Barton testified that as part of her job she was to drive this special needs patient to various commercial establishments in order to encourage interaction with the public. Further, this patient has a history of being violent and suffering from seizures at unpredictable times. If she went into a seizure, Ms. Barton would need to give her immediate attention so that she did not harm herself. On one occasion, Ms. Barton had to stop the vehicle and ask the patient to get out until she calmed down. As a result, as was noted by Dr. Koprivica in his testimony, Ms. Barton had to monitor and pay particular attention to the patient while Ms. Barton was driving. Also, Ms. Barton would drive this special needs patient to various places on a daily basis, more often than she drove by herself or for her sister. Her sister did not suffer from seizures and had no violent tendencies. Further, this special needs patient would talk constantly and expect feedback and reassurance from Ms. Barton. Consequently, at the time of the accident Ms. Barton had become distracted by the special needs patient and lost her focus on the road.

Accordingly, after consideration and review of the evidence, I find and conclude that the employment environment of Ms. Barton with the employers, Newton Group Home/Green Acres Home of West Plains, created a greater risk of injury than that faced by Ms. Barton in her everyday nonemployment life, both on a qualitative and quantitative basis. This case thus seems more similarly situated to *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010), and *Pope v. Gateway to the W. Harley Davidson* (Mo. App. 2012), while being distinguishable from *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012).

The motor vehicle accident in this case encompasses a heightened qualitative risk faced by Ms. Barton because she had to watch over her patient at the same time she drove and tried to keep an eye on the road. She was responsible for the patient's welfare in the car. The accident happened because she became distracted by her patient. Similarly, there was an increased quantitative risk faced by Ms. Barton because she drove every day with the patient as a requirement of her job. When she was off work she would only drive a couple of times a week to the store. She drove more when she worked than when she did not work.

For the foregoing reasons, I find and conclude that the employee, Susan Barton, sustained an injury by accident on August 24, 2009, which arose out of and in the course of her employment with the employers, Newton Group Home/Green Acres Home of West Plains.

II. Medical Care

The employee seeks payment of certain past medical care and expenses. The adjudication of this issue requires consideration of Section 287.140, RSMo. In pertinent part this statute states:

1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a

location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. *The choice of provider within the location selected shall continue to be made by the employer.* In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

2. *If it be shown to the division or the commission that the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, the division or the commission may order a change in the physician, surgeon, hospital or other requirement.*

* * *

10. *The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses. For the purpose of this subsection, subsection 2 of section 287.030 shall not apply. (Emphasis added.)*

In light of the statutory mandate of Section 287.140, RSMo the employer is given control over the selection of the employee's medical providers. *See Martin v. Town & Country Supermarkets*, 20 S.W.3d 836, 844 (Mo. App. S.D. 2007) (citing *Blackwell v. Puritan Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. E.D. 1995)). However, the courts have generally recognized that the employer's right to select the medical provider can be waived. First, this forfeiture can occur if an employer fails or refuses to select a health care provider for the employee, and thus fails to provide needed medical treatment. *Blackwell*, 901 S.W.2d at 85. In such instances, the employee may select his or her own medical providers and hold the employer liable for the costs. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. S.D. 2007) (citations omitted). The employer is deemed to have waived the right to select the health care provider by failing or neglecting to provide it. *Herring v. Yellow Freight Systems*, 914 S.W.2d 816, 822 (Mo. App. W.D. 1995) (*overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003)).

Secondly, under Section 287.140.2, RSMo the right to select the medical provider can be removed from the employer and given to the employee by order of a judge if "the requirements are being furnished in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby..." As stated, this question concerns whether the *requirements being furnished* provide grounds for believing the employee is subject to having his or her life, health or recovery compromised. Although this question may commonly examine and relate specifically to the selection of the health care provider and the health care provider's treatment, the phrase "*requirements being furnished*" suggests that the concern may include the actions of the employer (or insurer) in how the treatment is being furnished. The remedy offered in this section appears to allow for such recognition as the remedy is not limited to the judge ordering a change in the selection of the health care provider but may include other requirements in order to provide such appropriate relief. See Section 287.140.2, wherein it states

“the division or commission may order a change in physician, surgeon, hospital or *other requirement.*” Emphasis added.

The medical records and bills admitted into evidence on behalf of the employee involve treatment occurring prior to and after January 2013. Prior to January 2013 the employers and insurer were providing the employee with medical care, and had not refused or declined any request by the employee to provide her with medical care. Any medical care received by the employee prior to January 2013, and prior to the employers and insurer refusing to provide the employee with medical care, and which did not involve medical care through a physician or health care provider selected by the employers and insurer is the responsibility of the employee. The employee’s request for payment of these medical expenses are denied, as this medical care occurred through a provider not selected by the employers and occurred prior to the employers and insurer forfeiting their right to select the health care provider.

Yet, the medical care and expenses incurred by the employee subsequent to the employers and insurer refusing to provide her with medical care offers a different conclusion. This medical care involves treatment provided by Dr. Dennehey through Ozarks Medical Center. The actions of the employee in requesting medical care and the actions of the employers and insurer in denying medical care, as well as the treatment obtained by Ms. Barton are noted below.

Subsequent to being released from medical care and determined to be at maximum medical improvement, Ms. Barton continued to experience pain in her right leg and in the latter part of 2012 she requested the employers and insurer to provide her with additional medical care. In January 2013 the employers and insurer referred Ms. Barton to Dr. Roeder for an independent medical examination. Dr. Roeder addressed this medical care concern during his examination of Ms. Barton. Dr. Roeder opined that Ms. Barton did not require any additional medical care from the employers and insurer. Notably, in rendering this opinion Dr. Roeder concluded that Ms. Barton’s large size precluded need to address hardware removal, stating that because she is very large “there is really no potential for palpable deep hardware about the femur.”

In addition, Dr. Roeder opined that Ms. Barton’s presenting pain and symptomology relates to her degenerative arthritis, which he identified as a preexisting medical condition. Thus, while Dr. Roeder acknowledges that Ms. Barton is experiencing pain and symptomology associated with her right lower extremity, which may warrant medical care, he relates the symptoms and pain to the degenerative arthritis. As such, Dr. Roeder does not believe Ms. Barton needs additional medical care relative to the work injury of August 24, 2009.

Upon receipt of Dr. Roeder’s medical opinion, on January 18, 2013, the employers and insurer sent a letter to Ms. Barton’s attorney (Exhibit Z) informing him that Ms. Barton’s appointment with Dr. Crist for evaluation of her leg would not be authorized. Without the employers and insurer providing her with medical care, and seeking to obtain medical care for her presenting pain and symptomology, on February 5, 2013, Ms. Barton presented to Dr. David Dennehey, an orthopedic surgeon, with complaints of episodes of sharp pain and crunching in the right knee area, with bending being painful. X-rays showed possible penetration of the screws into the joint. A CT arthrogram was ordered to evaluate possible torn cartilage. In a follow-up visit, on March 7, 2013, Dr. Dennehey noted that the CT scan revealed penetration of the joint with two distal screws, which required removal. Dr. Dennehey also noted that Ms.

Barton had nonunion osteoarthrosis. In light of these findings, Dr. Dennehey recommended knee arthroscopy, removal of the two penetrating screws and repair of the pseudarthrosis.

On March 7, 2013, Barton's attorney faxed a letter to the attorney for the employers and insurer (Exhibit AA) requesting authorization for surgery on Ms. Barton's knee by Dr. Dennehey. The employers and insurer declined to provide Ms. Barton with the requested medical care. As a consequence, on March 20, 2013, Ms. Barton underwent surgical repair of the right femur non-union with AlloSource Allograft, removal of two distal screws that had invaded the right knee (post right knee arthroplasty), and debridement chondroplasty of the lateral compartment of the knee. Ms. Barton remained hospitalized until March 22, 2013.

On March 26, 2013, Ms. Barton's attorney faxed another letter to the attorney for the employers and insurer (Exhibit BB) informing them that Ms. Barton had undergone surgery to repair the failed hardware in the right leg. The employers and insurer were given every opportunity to provide treatment, but refused to do so, continuing to deny liability as a defense, based on the medical opinion of Dr. Roeder.

On April 9, 2013, Ms. Barton presented to the emergency room with complaints of drainage and pain attributable to her surgical wound. She was admitted into the hospital, and remained under the physician's care at the hospital until being discharged on April 12, 2013. She continued to receive follow-up care from Dr. Dennehey. On May 2, 2013, Ms. Barton presented to Dr. Dennehey with complaints of medial compartment pain. She was given injections of Cortisone and Marcaine in her right knee. Because Ms. Barton continued to experience pain in her right knee and thigh she returned to the hospital for additional treatment. The employers and insurer continued to deny responsibility for providing employee with this medical care.

At no time subsequent to issuance of Dr. Roeder's opinion in January 2013 did the employers and insurer elect to send Ms. Barton back to Dr. Roeder for another IME or have any doctor address the issue of whether the surgery and treatment were needed to cure and relieve the effects of the accident. At no time did the employers and insurer offer to select and provide Ms. Barton with medical care following receipt of Dr. Roeder's opinion.

In seeking additional medical opinion relative to this concern, Ms. Barton's attorney asked Dr. Koprivica to review the surgery and treatment records and to render an opinion whether the removal of the hardware was medically necessary to cure and relieve the employee from effects of the injuries caused by the motor vehicle accident of August 24, 2009. Dr. Koprivica opined that the medical care was causally related to the motor vehicle accident, and further opined that this additional medical care was reasonable and medically necessary in order to cure and relieve the employee from the effects of the motor vehicle accident.

After consideration and review of the evidence, I resolve the differences in medical opinion in favor of Dr. Dennehey and Dr. Koprivica, who I find credible, reliable and worthy of belief. I further find and conclude that the disputed medical care obtained by Ms. Barton was reasonable, necessary and causally related to the work injury. In particular the treatment flows from the injuries caused by the motor vehicle accident of August 24, 2009.

There is really no credible evidence that the right leg and left wrist injuries did not result from the accident. Dr. Koprivica testified that the accident was the prevailing factor in causing

these injuries, as well as associated complications like sleep apnea, cellulitis, the non-union of the bones and ultimately the need to remove the hardware. Dr. Roeder attributed 19% out of a total of 24% disability in the right leg to preexisting degenerative arthritis. His opinion is not credible and does not begin to address the hardware that was installed and then removed from the knee, the development of cellulitis and sleep apnea and Barton's need to use a wheelchair or walker to be mobile. Further, Dr. Roeder's opinion is inconsistent with the law and the legal principle enunciated in *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 517 (Mo. App. 2011).

Notably, Ms. Barton testified, and her employment history in conjunction with the medical records bare out, that she had no ongoing disability in the knee before the accident and that whatever disability she now has is attributable to the accident. She was highly functional before the accident and became immediately bedridden and immobile following the accident. Arthritis had nothing to do with her leg or arm breaking, or the need for instrumentation and her inability to walk without assistance. There is no doubt that her disabilities relate do the accident and the medical treatment flows from the injuries caused by the accident.

Finally, I find and conclude that the failure of the employers and insurer to provide Ms. Barton with this medical care constitutes a denial, and a basis for forfeiture of their right to select the health care provider. Accordingly, the employers and insurer are liable for payment of the medical care and expenses incurred by Ms. Barton. This medical care and expenses are in the amounts and as follows:

Health Care Provider	Date of Treatment	Amount Billed	Adjustment Medicare / Medicaid / Write-off	Medicaid / Medicare Payment	Out-of-Pocket Expenses	Amount Owed by Employee
Ozarks Medical Center	02-05-13	\$ 48.00	\$ 00.00	\$ 00.00	\$ 00.00	\$ 345.00
		\$ 133.00	\$ 00.00	\$ 00.00	\$ 00.00	
		\$ 164.00	\$ 00.00	\$ 00.00	\$ 00.00	
		\$ 345.00	\$ 00.00	\$ 00.00	\$ 00.00	
	02-12-13	\$ 1,493.25				\$ 00.00
		\$ 120.00	\$ 1,424.05	\$ 46.88	\$ 00.00	
		\$ 89.50	\$ 73.12	\$ 106.78	\$ 00.00	
		\$ 13.50	\$ 16.36	\$ 49.06	\$ 00.00	
		\$ 1,716.25	\$ 1,513.53	\$ 202.72	\$ 00.00	
	03-07-13			\$ 22.56		\$ 00.00
				\$ 16.86		
		\$ 77.25	\$ 37.83	\$ 39.42	\$ 00.00	
	03-18-13 To 03-22-13			\$ 50.84		\$ 00.00
				\$ 7.31		
				\$ 4,799.27		
				\$ 0.59		
			\$ 38.95	\$ 102.86		
			\$ 21.86	\$ 1.83		
			\$33,316.82	\$ 12.71		
			\$ 798.26	\$ 25.72		
			\$ 670.42	\$ 0.15		
			\$ 114.43	\$ 343.19		
		\$40,305.21	\$34,960.74	\$ 5,344.47	\$ 00.00	

Health Care Provider	Date of Treatment	Amount Billed	Adjustment Medicare / Medicaid / Write-off	Medicaid / Medicare Payment	Amount Paid by Employee	Amount Owed by Employee
Ozarks Medical Center (Continued)	03-20-13	\$ 904.50 <u>\$ 77.25</u> \$ 981.75	\$ 476.45 <u>\$ 404.24</u> \$ 880.69	\$ 101.06	\$ 00.00	\$ 00.00
	04-04-13	\$ 49.50 <u>\$ 32.00</u> \$ 81.50	\$ 55.64	\$ 25.86	\$ 00.00	\$ 00.00
	04-09-13 To 04-12-13		\$ 224.11 \$ 42.38 \$ 6,331.81 \$ 368.50 <u>\$ 51.48</u> \$ 7,018.28	\$ 128.39 \$ 18.02 \$ 32.75 \$ 4.60 \$ 899.65 <u>\$ 154.41</u> \$ 1,237.82	\$ 00.00	\$ 00.00
	05-02-13	\$ 58.50 \$ 20.75 \$ 2,370.38 \$ 18.00 \$ 50.83 <u>\$ 113.50</u> \$ 2,631.96	\$ 18.00 <u>\$ 1,947.45</u> \$ 1,965.45	\$ 119.36 <u>\$ 467.90</u> \$ 587.26	\$ 00.00	\$ 79.25
	06-01-13	\$ 260.50 \$ 304.00 \$ 331.00 \$ 107.75 \$ 34.00 <u>\$ 34.00</u> \$ 1,071.25	\$ 669.75 \$ 50.34 \$ 49.46 <u>\$ 12.67</u> \$ 782.22	\$ 175.08 \$ 45.74 \$ 14.37 \$ 11.67 \$ 3.67 <u>\$ 38.00</u> \$ 288.53	\$ 00.00	\$ 00.00
	06-27-13	\$ 79.75 \$ 92.75 <u>\$ 37.75</u> \$ 210.25	Unknown	Unknown	Unknown	Unknown
	Total:	\$55,676.42	\$47,214.38	\$7,827.14	\$ 00.00	\$ 424.25

In determining the employee's entitlement to compensation for payment of past medical expenses the Missouri Courts have determined that an employee may not be entitled to compensation for healthcare provider write-offs. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003). In the context of payments made by Medicaid or Medicare and the adjustments attendant thereto, the Missouri Courts have "ruled that an employee is not entitled to compensation for Medicaid [or Medicare] write-off amounts when the total amount

submitted to Medicaid will never be sought from claimant.” *Id.*, citing *Mann v. Varney Construction*, 23 S.W.3d 231, 233 (Mo.App. E.D. 2000). Accordingly, in light of the foregoing, the employers and insurer are ordered to pay directly to the employee the sum of \$424.25 in past medical care and expenses. The employers and insurer are further ordered to pay the medical expenses paid by Medicaid or Medicare in the amount of \$7,827.14.

Future Medical Care

The employee seeks an award for future medical care. In order to receive an award of future medical benefits under Chapter 287, RSMo, an employee does not need to show “conclusive evidence” of a need for future medical treatment. Instead, the employee need only show a “reasonable probability” that because of her work related injury, future medical treatment will be necessary. *Stevens v. City of Citizens Memorial Healthcare Foundation*, 244 S.W. 3d 43 (Mo. App. 2008). In this context it must be shown that the need for future medical care “flows(s) from the accident.” *Landers v. Chrysler Corp.*, 963 S.W. 2d 275 (Mo. App. 1997) at 283. Further, the phrase “to cure and relieve” has been construed to mean treatment that “give comfort even though restoration to soundness is beyond avail.” *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996) (parenthesis omitted).

In considering the question of future medical care Dr. Koprivica testified, credibly, that Ms. Barton would need future medical care for treatment of her injuries, including treatment providing gait assistance and conditioning. The employer and insurer are ordered to provide the employee, Susan Barton, with such medical care as may be reasonable, necessary and causally related to the work injuries caused by the motor vehicle accident of August 24, 2009.

III.

Temporary Disability Compensation

The employers and insurer paid to the employee temporary total disability compensation in the amount of \$10,859.94, which represents 93 weeks in disability benefits, payable for the period of August 24, 2009, through June 6, 2011. The employers and insurer paid this temporary disability compensation at a rate of \$233.56 per week, which involved use of a weekly rate less than the applicable weekly rate of \$257.00 Further, the payment of temporary disability compensation by the employers and insurer includes the unilateral taking of a 50 percent reduction. (The employer and insurer assert entitlement to a reduction based on their claim the employee committed a safety penalty violation.)

The evidence is supportive of a finding, and I find and conclude that Ms. Barton reached maximum medical improvement on June 2, 2011, when the treating physician, Dr. Crist, determined Ms. Barton to be at maximal medical improvement and released her from his care. Notably, at the time of this release Dr. Crist prescribed permanent work restrictions. Additionally, at this time Ms. Barton had received a prescription for, and was utilizing, an electric wheelchair for longer walks outside her home, although she utilized a walker in her home and for short durations outside the home.

Also, immediately following the accident, Ms. Barton was hospitalized and then interned in a nursing home for over a year. She has never been able to return to employment of any kind. She has been wheelchair bound, or sometimes ambulates short distances with the assistance of a

walker. She no longer drives out of fear. She has had multiple surgeries, most recently in March of 2013, to treat her right leg, including twice removing hardware and once for treatment of cellulitis, a condition causally related to the work injury. The evidence is thus supportive of a finding, and I find and conclude that for the period of August 24, 2009, to June 2, 2011, Ms. Barton was temporarily and totally disabled; and this disability is causally related to the injuries caused by the motor vehicle accident of August 24, 2009.

Therefore, the employers and insurer are ordered to provide to the employee temporary total disability compensation in the amount of \$12,894.19. This sum represents payment of temporary disability compensation at the applicable compensation rate of \$257 per week for the period of August 24, 2009, through June 2, 2011 (92 3/7 weeks), less credit of \$10,859.94. The employers and insurer are not entitled to a safety penalty reduction. (See, Point V, below.)

IV.

Permanent Disability Compensation & Liability of Second Injury Fund

The motor vehicle accident occurring on August 24, 2009, caused Ms. Barton to sustain multiple traumatic injuries, including disabling injuries to her right lower extremity, left lower extremity and left upper extremity. As a result of this accident, Ms. Barton has undergone significant and multiple surgical treatments, including hardware replacement and removal. She suffered a non-union of her leg fracture and was unable to return to her home for over one year following the accident. After being released from the hospital, she was forced to reside in a nursing facility where others were required to care for her, as she was unable to care for herself.

As a result of the work injury of August 24, 2009, Ms. Barton is no longer able to move about; she is unable to work; she has to have someone take her places; she is confined to a wheelchair or walking with a walker, and she suffers pain on a regular basis in her leg. According to Ms. Barton, she is currently unable to work, although she would very much like to work. She lacks balance and stamina, and is unable fully to take care of her own needs. She requires assistance from others in order to perform daily life activities. Notably, in considering this concern I accept as true Ms. Barton's testimony; I find Ms. Barton credible, reliable and worthy of belief.

The overwhelming weight of the evidence, including analysis of medical and vocational expert opinion, is supportive of a finding that the employee is unemployable in the open and competitive labor market. Dr. Koprivica, James England and Wilbur Swearingin all agree that Barton is incapable of employment in the open labor market. *See Cooper v. Medical Center, Independence*, 955 S.W.2d 570, 576 (Mo. App. 1997). Dr. Koprivica offers medical explanation for his opinion of Ms. Barton being permanently and totally disabled. In rendering this opinion Dr. Koprivica considers the issue of Ms. Barton's morbid obesity to part of the disabling limitations and restrictions that render her unemployable. Although he identifies Ms. Barton's morbid obesity to involve a preexisting medical condition, he did not identify it as a preexisting industrially disabling condition.

Further, in opining that Ms. Barton is unemployable and offering explanation for his opinion, Dr. Koprivica acknowledges that he would defer or suggest a formal vocational evaluation. In this context both vocational experts offer vocational opinions that support a finding that Ms. Barton is unemployable in the open and competitive labor market. Mr.

Swearingin opines that Ms. Barton is governed by restrictions and limitations that render her unemployable in the open and competitive labor market. Similarly, Mr. England, the other vocational expert testifies that Ms. Barton is unemployable in the open and competitive labor market.

Although Dr. Roeder assigns ratings for permanent partial impairment, he does not address specifically the issue of whether Ms. Barton is permanently and totally disabled; nor does he provide opinions regarding Ms. Barton's permanent restrictions or morbid obesity as it relates to being a preexisting disability. Yet, to the extent there are differences in medical opinions I resolve the differences in favor Dr. Koprivica, who I find credible, reliable and worthy of belief. Accordingly, the evidence is supportive of a finding that Ms. Barton is unemployable in the open and competitive labor market.

Yet, a question remains, is Ms. Barton permanently and totally disabled as a consequence of the accident of August 24, 2009, considered alone and in isolation? The adjudication of this issue requires consideration of an additional question, was the employee's morbid obesity, as it existed prior to August 24, 2009, a permanent disability?

Mr. England says the limitations and restrictions that render Ms. Barton permanently and totally disabled requires consideration of her morbid obesity; he thus opines that the accident of August 24, 2009, considered alone, does not render Ms. Barton unemployable in the open and competitive labor market. In contrast, Dr. Koprivica and Mr. Swearingin opine that Ms. Barton's total disability is attributable to the work injury, considered alone. Yet, like Mr. England, both Dr. Koprivica and Mr. Swearingin acknowledge that the limitations and restrictions caused by Ms. Barton's morbid obesity is a necessary component to the limitations and restrictions that render her unemployable in the open and competitive labor market. Without consideration of Ms. Barton's morbid obesity and the restrictions that relate solely to her morbid obesity, all three experts agree that the restrictions relating specifically to the motor vehicle accident, considered alone, would not be of sufficient severity to render Ms. Barton unemployable in the open and competitive labor market.

Dr. Koprivica testified that prior to the work injury of August 24, 2009, the employee suffered from morbid obesity, and morbid obesity is a medical condition. According to Dr. Koprivica, morbid obesity is a physical condition existing when an individual weighs 100 pounds or more above that individual's ideal body weight. In light of Ms. Barton being 50 years of age, 5 feet, 10 inches tall, and weighing approximately 400 pounds, she is morbidly obese. And she has been morbidly obese throughout her adult life, as she has weighed 400 pounds or more, and at times has weighed in excess of 450 pounds. Considering the longevity and uninterrupted nature of this medical condition, Ms. Barton's morbid obesity is a permanent medical condition.

Generally speaking, there is agreement among all experts testifying in this case that morbid obesity is a physical condition that causes individuals to be governed by restrictions and limitations, and serves as a hindrance or obstacle to certain employment opportunities. In this regard Dr. Koprivica notes that the nature of this physical condition can impact a person's physical well being, as well as activities of daily living. For example, the physical stature of a morbidly obese person can affect choice of activities, as well as the way in which morbidly obese persons perform activities. Also, the nature of morbid obesity produces inactivity and a

deconditioning of the body. And medically the excess body mass can have damaging effects on weight-bearing joints, including the back, hips, knees, feet and ankles. Similarly, the excess body mass can cause a person to develop insulin resistance, and place the person at risk of becoming diabetic. Obstructive sleep apnea is another complication associated with this physical condition.

Specifically to this case, the experts agree that Ms. Barton's morbid obesity precluded her from certain potential employment opportunities. According to Mr. England, and not disputed by Mr. Swearingin, Ms. Barton's obesity would have been "viewed negatively by employers" and "certainly had a negative effect on her overall employment potential before the auto accident" Mr. England further opines that considering the amount of weight she was carrying prior to the work injury, it would have been difficult for her to get around and difficult for her to be picked over alternative candidates for employment. At times morbid obesity will cause people to have stints of unemployment due to being passed over for other candidates who are not morbidly obese. An example of Ms. Barton's morbid obesity serving as a hindrance or obstacle to employment (or potential employment) is her inability to use a seat belt. Because of her size, she did not fit within the parameters of the seatbelt manufacturing capacity, and thus she lacked the ability to use her seatbelt. As acknowledged by Ms. Barton, the inability to use a seatbelt has been a problem for her during her entire adult life, including when she was hired to work for various employers.

However, while her morbid obesity may have been a hindrance or obstacle to certain potential employment, Ms. Barton testified that she never pursued and failed to obtain employment, or lost employment, because of her morbid obesity. According to Ms. Barton, she never felt that her weight interfered with her job duties at any of her past employment. In fact, she acknowledged that at times she felt her girth and size were assets to her in dealing with some of the heavy lifting required in some of her past employments as a Certified Nurse's Assistant. Further, Ms. Barton testified generally prior to the injury of August 24, 2009, she was able to take care of herself and others.

The restrictions and limitations caused by the work injury of August 24, 2009, without consideration of Ms. Barton's morbid obesity, is not sufficient to render Ms. Barton unemployable in the open and competitive labor market. Yet, if the restrictions and limitations caused by Ms. Barton's morbid obesity is included in consideration of the limitations and restrictions caused by the work injury of August 24, 2009, then she is permanently and totally disabled. Hence, is Ms. Barton's preexisting morbid obesity (as a physical / medical condition) a permanent disability? If no, then Ms. Barton's morbid obesity is relevant consideration in determining the liability of the employers and insurer insofar as it would be a factor or characteristic of the employee, premised on the common law principle of taking individuals as you find them. Conversely, if the answer to the question is yes, then Ms. Barton's morbid obesity would not be relevant consideration in determining the liability of the employers and insurer insofar as it is a preexisting disability not applicable to the last injury, but would be relevant in considering the liability of the Second Injury Fund.

The Second Injury Fund argues that Ms. Barton's preexisting morbid obesity did not serve as an actual hindrance or obstacle to Ms. Barton's specific employment or personal life activities, and thus does not qualify as a permanent disability. In support of their position, the Second Injury Fund cites *Loven v. Greene County* 63 S.W.2d. 278, 284 (Mo. App. S.D. 2001), and notes that prior to the work injury of August 24, 2009, Ms. Barton's morbid obesity did not

cause her to experience specifically any difficulty doing any of her jobs over the years. Similarly, the Second Injury Fund notes that Ms. Barton testified that prior to the work injury she was able to do everything she wanted to do in her personal life too. And like the employee in *Loven v. Greene County* 63 S.W.2d. 278, 284 (Mo. App. S.D. 2001) Ms. Barton testified that at times her size was an asset to her being able to do some of the lifting required in her job.

The evidence presented in this case indicates that prior to August 24, 2009, Ms. Barton's morbid obesity was a permanent medical condition; and it precluded her from engaging in certain potential employment opportunities. Although Ms. Barton's morbid obesity did not keep her from obtaining any specific job, and it did not prevent her from doing most activities, it did have an impact on her life prior to August 24, 2009. For example, Ms. Barton's morbid obesity prevented her from using a seat belt while operating or riding in motor vehicles. Ms. Barton acknowledges that the inability to use a seatbelt has been a problem for her during her entire adult life, including when she was hired to work for various employers. Arguably, these factors should be sufficient to render Ms. Barton's morbid obesity, as it existed prior to August 24, 2009, a permanent disability. Assessment of permanent disability is not dependent on the medical condition causing the employee to experience an actual hindrance or obstacle to employment.

Yet, under *Loven* there appears to be a reluctance or refusal to classify morbid obesity as a disability, if it as a medical condition did not cause the employee to suffer actual and measurable loss of employment, or it did not cause the employee to experience any harm in the performance of employment and/or personal activities. And as noted by the Second Injury Fund the effect of Ms. Barton's morbid obesity appears very similar to the situation involving the employee in *Loven*, wherein the court declined to find the employee's morbid obesity as a preexisting permanent disability.

Accordingly, while Ms. Barton's morbid obesity might be viewed as a preexisting disability, insofar as it involves a preexisting permanent medical condition and served minimally as a hindrance or obstacle to potential employment and certain activities of the employee, too many factors supporting the decision in *Loven* apply similarly to this case. Therefore, following the principle enunciated in *Loven* I find and conclude that the employee's morbid obesity, as it existed prior to August 24, 2009, is not a permanent disability.

After consideration and review of all of the evidence, I find and conclude that as a consequence of the August 24, 2009, accident and the injuries resulting from this incident, considered alone and in isolation, which includes consideration of the employee's morbid obesity, Ms. Barton is governed by permanent restrictions and limitations that render her unemployable in the open and competitive labor market. Thus, while Ms. Barton suffered from a preexisting medical condition in the nature of morbid obesity, I find and conclude that the last injury (work injury of August 24, 2009), considered alone, renders Ms. Barton permanently and totally disabled.

Therefore, the employers and insurer are ordered to pay to the employee, Susan Barton, the sum of \$257.00 per week for the employee's lifetime. The payment of permanent total disability compensation by the employers and insurer is effective as of June 2, 2011, when she reached maximum medical improvement. Further, for the foregoing reasons, the Claim for Compensation filed against the Second Injury Fund is denied.

V.
Safety Penalty

The employers and insurer assert that the employee committed a safety violation under Section 287.120.5, RSMo, and thus claim entitlement to a 50 percent penalty reduction in benefits owed to the employee. Conversely, the employee asserts that the employers committed a safety violation under Section 287.120.4, RSMo, and is thereby entitled to the statutory penalty enhancement of 15 percent of the benefits owed by the employers. These issues are discussed below.

Alleged Safety Penalty Violation By Employee

The adjudication of whether the employee committed a safety violation under Section 287.120.5, RSMo, involves consideration of Section 287.120.5, RSMo, which states:

Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

Further, in asserting any claim or defense based upon a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true. Section 287.808, RSMo. As an issue involving a factual proposition, this statutory penalty provision is thus an affirmative defense or claim, which places the burden of proof on the employers. The proof necessary is as follows:

1. The employer must have adopted a rule for the safety of employees.
2. The rule must be reasonable.
3. The employee failed to obey the rule.
4. The employee's injury was caused by his or her failure to obey the rule.
5. The employee had actual knowledge of the rule.
6. The employer had, prior to the injury, made a reasonable effort to cause his or her employees to obey or follow the rule so adopted for the safety of the employees.

See, Thompson v. ICI American Holding, 347 S.W.3d 624 (Mo. App. W.D. 2011). Moreover, the statute is strictly construed; the employers and insurer must prove *each and every element* of the

defense within the letter of the statute.

The employers and insurer contend the employee committed two separate violations of Section 287.120.5, RSMo. First, the employers and insurer allege that at the time of the motor vehicle accident the employee failed to stay within the posted speed limit. Secondly, at the time of the motor vehicle accident the employee failed to wear a seat belt. The argument fails for multiple reasons.

First, the employers did not adopt a policy specifically requiring employees to wear safety belts or seat belts while operating a motor vehicle. Similarly, the employers did not adopt policy specifically requiring employees not to drive a motor vehicle over the posted speed limit. Rather, the employers simply communicated an unwritten statement informing employees generally to “obey all laws.” Words in statutes must have meaning and the statute requires the employer to *adopt* a policy. Merely informing employees to “obey all laws” is not a policy, and is no more of an adopted policy than an employer simply telling its employees to “not be negligent.” Such a general “policy” provides no meaningful guidance to the employees above what all members of society are expected to do – obey our laws.

Also, while such a general statement of conduct may have a safety benefit it is too vague to conclude it is a policy the employers adopted for the statutory required purpose - “safety of employees.” The purpose of such a general statement could be nothing more than to avoid additional costs being incurred by the employers. Again, the burden of proof is on the employers to prove the existence of a policy, as well as the purpose of the policy to be for the “safety of employees.”

Secondly, and perhaps the most compelling reason for not finding a safety penalty violation, there is no evidence that the injuries sustained by the employee were caused by her failure to operate the motor vehicle within the posted speed limit. Similarly, there is no evidence that injuries Ms. Barton sustained were caused by her failure to wear the safety belt while operating the motor vehicle. In considering application of this element of proof, the courts have recognized that there must be a causal connection between the violation of the employer’s safety rule and the employee’s injury. *Davis v. Roadway Express, Inc.*, 764 S.W.2d 145 (Mo. App. S.D. 1989); and *Swillum v. Empire Gas Transport, Inc.*, 698 S.W.2d 921 (Mo. App. S.D. 1985). The failure of an employee to obey a safety rule does not authorize the imposition of the penalty statute *unless the injury is caused by the Employee’s failure*. *Swillum v. Empire Gas Transport, Inc.*, *supra*. The statute itself dictates that the penalty shall apply only when the injury is caused by the employee’s failure to obey the safety rule.

A. Speeding

At best, any determination that at the time of the motor vehicle accident Ms. Barton was traveling at a speed in excess of the posted limit is premised on speculation. The evidence supportive of the employers claim of speeding is limited to a notation in the medical records, which reference the employee speeding while suffering a motor vehicle accident. We do not know who made the statement, or whether it was provided by anyone with a firsthand account of the accident. Nor do we know the specific speed occurring at the time of the accident. On the other hand, we know that the medical records indicate that Ms. Barton was knocked

unconscious, and is identified at the hospital as a “poor historian.” Also, at the time of Ms. Barton’s admission, she was in severe pain, had little recollection of the accident and was already taking morphine.

In addition, even if we assume Ms. Barton was speeding in excess of the posted speed limit at the time of the accident, there is no evidence that “the injury is caused” by the failure of the employee to obey the speed limit. Further, the employers and insurer did not offer any expert opinion to prove that the motor vehicle accident, and the injuries sustained by Ms. Barton, were caused by speeding. The burden of proof is on the employers and insurer to prove this necessary factual proposition. Without such proof, the employers and insurer have failed to sustain their burden of proof.

B. Safety Seat Belt

The allegation that the employee violated Section 287.120.5, RSMo, is premised on a finding that at the time of the motor vehicle accident the employee was not wearing a seat belt in violation of Section 307.178, RSMo. In relevant part, this statute states:

2. Each driver ... shall wear a properly adjusted and fastened safety belt that meets federal National Highway, Transportation and Safety Act requirements. ... The provisions of this section and section 307.179 *shall not be applicable to persons who have a medical reason for failing to have a seat belt fastened about their body*, nor shall the provisions of this section be applicable to persons while operating or riding a motor vehicle being used in agricultural work-related activities. ... [Emphasis added.]

In addressing this concern Ms. Barton testified that because of her morbid obesity (medical reason) she did not have the seat belt fastened about her body. Simply stated, she was too large; she did not fit within the parameters of the seatbelt manufacturing capacity, and thus she lacked the ability to use her seatbelt. According to Ms. Barton, the inability to use a seatbelt has been a problem for her during her entire adult life, including when she was hired to work for the employers. Ms. Barton thus offers a medical reason and justification for not wearing a seat belt. The employers and insurer did not offer any evidence to the contrary. Hence, excused by a medical reason Ms. Barton’s failure to wear a seat belt is not a violation of law.

In addition, as with the claim of speeding, there is no evidence that the injuries sustained by Ms. Barton were caused by her failure to wear a seatbelt. The injuries sustained by Ms. Barton involved her left upper extremity and both lower extremities, including fractures to the right leg and left arm; it is difficult and highly speculative to surmise that they were sustained because she was not wearing a seat belt. Seemingly, these injuries would have occurred just the same with or without a seat belt. More importantly, the employers did not offer any expert testimony from a physician or other expert, such as an engineer, to prove that the failure to wear a seat belt caused the injuries in this case. Again, without such proof, the employers and insurer have failed to sustain their burden of proof.

Finally, there is no evidence that prior to the injuries sustained by Ms. Barton the employers made a reasonable effort to cause his or her employees to obey or follow the rule

so adopted for the safety of the employees. Strictly construing this latter element, before the penalty can be enforced, the employer must have “made a reasonable effort to cause his or her employees to use the safety device ... or follow the rule so adopted...” The employers did not present any evidence of satisfying this requirement. Notably, the employers’ witness, Elizabeth Michelle Perkins, testified that no one ever drove along with Ms. Barton to make sure that she was wearing her seatbelt or otherwise complying with the laws of the road. Indeed, because Ms. Barton could not fit within the seatbelt, and never wore the seatbelt, any effort by the employers to cause Ms. Barton to wear a seatbelt would have produced discovery of this medical concern. Yet, the employers indicate they were never aware of Ms. Barton not being able to wear her seat belt, and thus never took any action to correct or respond to the problem.

The employers required Ms. Barton to have a car and to use it to transport patients, but they never sought to ensure that she obeyed any of the safety laws, including seatbelt usage by Ms. Barton. The evidence presented by the parties does not support proof of “reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.” Nor is there evidence that this general statement was adopted for the specific purpose of providing safety of the employee. The general statement to “obey all laws” makes no reference to safety; and the purpose of such a general rule may just as easily exist for the purpose of protecting against employer liability and providing employer justification for terminating an employee, without regard to safety of the employee.

The burden of proving the factual proposition of a statutory safety penalty violation is on the employers, and the evidence is not supportive of a finding that each element of proof has been satisfied. After consideration and review of the evidence, I find and conclude that the employers and insurer failed to sustain their burden of proof. The employers and insurer are not entitled to a statutory penalty reduction in benefits. The claim for a statutory penalty reduction under Section 287.120.5, RSMo is denied.

Alleged Safety Penalty Violation By Employers

The adjudication of whether the employers committed a safety violation under Section 287.120, RSMo, involves consideration of Section 287.120.4, RSMo, which states:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

As with the safety penalty statute governing actions of employees, this safety penalty statute requires the injury sustained by the employee to be causally related to the safety violation. In this case there is no such evidence. No physician or other expert offered any opinion that Ms. Barton’s injuries were caused by the failure of the employee to wear a seat belt, even if the undersigned determined employers were statutorily obligated to provide Ms. Barton with a seatbelt of sufficient size for Ms. Barton to use.

Thus, for the foregoing reasons, I find and conclude that the employee failed to sustain her burden of proof. The employee is not entitled to a statutory penalty enhancement in benefits. The claim for a statutory penalty enhancement under Section 287.120.4, RSMo is denied.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable. The Award is subject to modifications as provided by law.

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation