

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

Injury No.: 10-006737

Employee: James M. Blanton
Employer: American Airlines
Insurer: New Hampshire Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 27, 2011. The award and decision of Administrative Law Judge Robert B. Miner, issued October 27, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 24th day of May 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: James M. Blanton

Injury No.: 10-006737

Employer: American Airlines

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

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

Insurer: New Hampshire Insurance Co.

Hearing Date: September 15, 2011

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Cumulative to January 30, 2010.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee repetitively used his right upper extremity repairing airplanes in the course of his employment as a mechanic for Employer that resulted in injury to the right upper extremity.

- 12. Did accident or occupational disease cause death? No.
- 13. Part(s) of body injured by accident or occupational disease: Right upper extremity.
- 14. Nature and extent of any permanent disability: 20% of the right upper extremity at the 210 week level combining with preexisting disability to result in Second Injury Fund permanent partial disability as described in Award.
- 15. Compensation paid to-date for temporary disability: \$11,598.84.
- 16. Value necessary medical aid paid to date by employer/insurer? \$7,395.55.
- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$1,318.25.
- 19. Weekly compensation rate: \$807.48 for temporary total disability and \$422.97 for permanent partial disability.
- 20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

42 weeks of permanent partial disability from Employer at the rate of \$422.97 per week = \$17,764.74

2 weeks of disfigurement from Employer at the rate of \$422.97 per week = \$845.94

TOTAL FROM EMPLOYER: \$18,610.68

22. Second Injury Fund liability:

24.6 weeks of permanent partial disability from Second Injury Fund at the rate of \$422.97 per week = \$10,405.06

TOTAL FROM SECOND INJURY FUND: \$10,405.06

23. Future requirements awarded: None.

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

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

AWARD

Employee: James M. Blanton

Injury No.: 09-044464

Employer: American Airlines

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

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

Insurer: New Hampshire Insurance Co.

Hearing Date: September 15, 2011

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Cumulative to June 12, 2009.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Platte County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee repetitively used his left upper extremity repairing airplanes in the course of his employment for Employer that resulted in injury to the left upper extremity.

- 12. Did accident or occupational disease cause death? No.
- 13. Part(s) of body injured by accident or occupational disease: Left upper extremity.
- 14. Nature and extent of any permanent disability:
- 15. Compensation paid to-date for temporary disability:
- 16. Value necessary medical aid paid to date by employer/insurer?
- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages:
- 19. Weekly compensation rate:
- 20. Method wages computation:

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:

weeks of temporary total disability (or temporary partial disability)

weeks of permanent partial disability from Employer

weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning for claimant's
lifetime.

- 22. Second Injury Fund liability:

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

weekly differential
beginning

payable by SIF for weeks
and, thereafter, for claimant's lifetime.

TOTAL:

23. Future requirements awarded:

Said payments to begin
and review as provided by law.

and to be payable and be subject to modification

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James M. Blanton

Injury No.'s: 09-044464 &
10-006737

Employer: American Airlines

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

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

Insurer: New Hampshire Insurance Co.

Hearing Date: September 15, 2011

Checked by: RBM

PRELIMINARIES

A final hearing was held in these cases on Employee's claims against Employer and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund on September 15, 2011 in Riverside, Missouri. Employee, James M. Blanton, appeared in person and by his attorney, Gary R. Bradley. Employer, American Airlines, and Insurer, New Hampshire Insurance Co., appeared by their attorney, David F. Menghini. The Second Injury Fund appeared by its attorney, Benita Seliga. Gary R. Bradley requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

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

1. On or about June 12, 2009 and January 30, 2010, James M. Blanton ("Claimant") was an employee of American Airlines ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about June 12, 2009 and January 30, 2010, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by New Hampshire Insurance Co. ("Insurer").
3. Claimant and Employer/Insurer agreed that on or about June 12, 2009 and January 30, 2010, Claimant sustained injuries by accident or occupational disease in Kansas City, Platte County, Missouri, arising out of and in the course of his employment. The Second Injury Fund denied that on or about June 12, 2009 and January 30, 2010, Claimant sustained injuries by accident or occupational disease arising out of and in the course of his employment.

4. Employer had notice of Claimant's alleged injuries.
5. Claimant's Claims for Compensation were filed within the time allowed by law.
6. The average weekly wage was \$1,318.25 in both cases. In Injury Number 09-044464, the rate of compensation for temporary total disability is \$772.53 per week and the rate of compensation for permanent partial disability is \$404.66 per week. In Injury Number 10-006737, the rate of compensation for temporary total disability is \$807.48 per week and the rate of compensation for permanent partial disability is \$422.97 per week.
7. Employer/Insurer has paid \$17,187.78 in temporary total disability in Injury Number 09-044464, and Employer/Insurer has paid \$11,598.84 in temporary total disability in Injury Number 10-006737.
8. Employer/Insurer has paid \$33,584.45 in medical aid in Injury Number 09-044464, and Employer/Insurer has paid \$7,395.55 in medical aid in Injury Number 10-006737.
9. Claimant and Employer/Insurer agreed that Claimant be awarded permanent partial disability of 20% of the left upper extremity at the 210 week level and 4 weeks of disfigurement in Injury Number 09-044464. Claimant and Employer/Insurer agreed that Claimant be awarded permanent partial disability of 20% of the right upper extremity at the 210 week level and 2 weeks of disfigurement in Injury Number 10-006737. The Second Injury Fund did not join in this agreement in this paragraph.
10. Claimant is seeking permanent partial disability benefits only from the Second Injury Fund, and is not seeking permanent total disability benefits from the Second Injury Fund.

ISSUES

Claimant and Employer/Insurer agreed that there is a dispute between them on the issue of Employer/Insurer's liability for future medical aid.

Claimant and the Second Injury Fund agreed that there are disputes between them on the following issues:

1. Whether on or about June 12, 2009 and January 30, 2010, Claimant sustained injuries by accident or occupational disease arising out of and in the course of his employment for Employer.

2. Nature and extent of permanent partial disability.
3. Liability of the Second Injury Fund for permanent partial disability benefits.

Claimant testified in person. Claimant also called Lois Redell as a witness. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

A—Deposition of Dr. Brent Koprivica with deposition exhibits (Exhibit A was admitted subject to objections contained in the deposition.)

B—Notebook containing medical records

C—18 weeks pay stubs

D—16 weeks pay stubs

F—Attorney's Contract.

Employer offered Exhibit 1, medical report of Dr. Paul Nasaab, which was admitted without objection.

The Second Injury Fund offered the following exhibits which were admitted in evidence without objection:

SIF 1—Claim for Compensation in Injury Number 09-044464

SIF 2—Claim for Compensation in Injury Number 10-006737

The Court granted Claimant's oral motion to amend that portion of the Claims for Compensation against the Second Injury Fund to allege a back injury in "1974", rather than in "1972" that is shown in the claims.

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

Claimant's attorney waived the filing of a post-hearing brief at the September 15, 2011 hearing. He presented an oral argument at the conclusion of the evidence on September 15, 2011. It was agreed at the hearing that the post-trial brief/proposed award of the Second Injury Fund would be due on October 7, 2011.

The Second Injury Fund's attorney sent her proposed Findings of Fact and Rulings of Law to the court on October 14, 2011 with an email apologizing for the delay, and stating, "I have been significantly delayed by my other briefs." Claimant's attorney sent an email to the court on October 20, 2011 advising he had received the Second Injury

Fund's proposed award and asking the court to disregard the filing as not timely filed. The court finds the Second Injury Fund's attorney has demonstrated good cause for the late filing of its proposed award, and the court permits the filing of the proposed award of the Second Injury Fund even though it was filed after October 7, 2011. Claimant's attorney's request that the filing of the Second Injury Fund's proposed award be disregarded is denied.

The court has considered Claimant's attorney's oral argument and the proposed Findings of Fact and Rulings of Law submitted by the attorney for the Second Injury Fund.

Findings of Fact

Summary of the Evidence

Claimant's Testimony

Claimant started working for TWA in January 1965 as an airplane mechanic. He worked in fleet service where he cleaned airplanes. He then went to a mechanic's job. He changed many components in the airplanes. He used air tools in his job. He did a lot of lifting and pushing in his job. Much of the gear that he worked with was heavy. He did that work day in and day out. His job also involved tearing down jet engines, and taking out fans, turbines, and every component of the engines. He lifted weights between 50 and 150 pounds.

Eighty percent of his job was straight out over his head. He worked on ladders. He worked with sheet metal. He cut out pieces of sheet metal and used a wrist hammer to put the pieces back on.

Claimant had a left carpal tunnel condition in 2009. It started with his left thumb. The thumb went completely numb and then the numbness went to his hand. He notified Employer and was sent to the company doctor. Dr. Newland performed left carpal tunnel surgery.

Claimant had off and on pain in his elbows for two years before 2009, but no numbness until 2009. The numbness came on gradually and eventually it caused him to go to the doctor.

Dr. Nassab later performed a left epicondyle release and a left ulnar transposition of the left elbow. Claimant had constant pain in his left elbow prior to his left elbow surgery. Claimant is left-hand dominant.

Claimant's left thumb improved a little after the left upper extremity surgeries. The left thumb is still almost completely numb. It is difficult for him to pick up things. He had very little grip strength.

Claimant had right upper extremity problems working overhead for Employer. He had right elbow pain and numbness. He reported those problems to Employer, and Employer sent Claimant to Dr. Nassab after testing by Corporate Care. Dr. Nassab did surgery on the right hand and the right elbow at the same time. Claimant had constant pain in his right elbows prior to his right elbow surgery.

Claimant testified he worked in pain. The company did not provide accommodations. Claimant would get help from buddies at work to help lift on a daily basis.

Claimant has lost grip strength on both sides. Claimant has had a lot of problems lifting since his elbow surgeries. He is not able to pick up small items. It is difficult for him to open bottles. He does not do yard work. Pushing a mower hurts his arm. His wife mows the yard. Claimant now hires someone to do painting and plumbing. He is not able to lift heavy things. He needs help to put the battery in and out of his fishing boat. He cannot use a carpet shampooer. He cannot do car repairs anymore.

Claimant earned \$1,318.00 per week in wages the last several years at Employer.

Claimant stated that Dr. Nassab gave him a twenty pound weight restriction on his right upper extremity and a fifty pound weight restriction on his left upper extremity.

Claimant was an inspector for Employer in 2008 and 2009. He did not work maintenance then. He did paperwork. He was a lead man and did an administrative job while he worked as an inspector. After Claimant's first elbow surgery in October, 2009, he returned to work twelve weeks later, in January, 2010, as a mechanic. He had been bumped off the inspector job due to seniority. Claimant worked until he had his surgery in April, 2010.

Claimant worked until his third surgery in July, 2010. Claimant never returned to work after his right arm surgeries. He retired on August 31, 2010. Employer's plant closed in August 2010. Claimant had planned to work until age 66. Claimant was born on January 20, 1946.

Claimant estimated that he has one-half the grip strength that he had before his elbow surgeries. He estimated that he is able to lift about one-half above his waist as he could before his elbow surgeries.

Claimant stated that he is not making a claim against the Second Injury Fund relating to his diabetes or his heart stent.

Claimant was allowed to work overtime for Employer, except when he was on restrictions after his surgeries. When American Air took over TWA in 2001, his overtime was reduced to about ten percent of what it had been.

Claimant had a camper and travel trailer. He normally drove with the camper and travel trailer. He and his wife took trips six times per summer with the camper and travel trailer. He hooked and unhooked the trailer. Claimant did not have a travel trailer between 2007 and 2010.

Claimant first injured his back in 1974. He had back surgery following his 1974 back injury. Dr. DyRagos operated on Claimant's back in 1974. Claimant's back acted up on him in 1979. Dr. DyRagos performed an L4-5 disk excision on Claimant in 1979.

Claimant had a problem with his left leg prior to his back surgery. After his surgery, his left leg pain was gone, but he cannot heel walk with his left leg. Claimant has had problems with his left leg and his left foot since his back surgeries.

Claimant did not request formal accommodations from his Employer after his last back surgery. He used mechanical devices to lift that were provided by Employer. Workers helped each other out when they were hurt.

Claimant testified that his back surgeries have changed everything that he does. He had to learn to lift with his legs, not his back. He learned not to over extend himself. He gets help from co-workers or from mechanical devices at Employer to help him lift.

Claimant's lower back has hurt daily since his last back surgery. He takes an aspirin daily in the morning and at night. He was diagnosed with acid reflux and now takes arthritis strength Tylenol, and at times he takes Ibuprofen. He takes this medication for his back and his elbows. He does not take prescription pain medication.

Claimant testified he is not seeking any medical bills or additional treatment for his right upper extremity or his left upper extremity from Employer. He stated no doctors told him that he needs additional surgery or other treatment for either of his upper extremities. Claimant testified that Dr. Nassab told him he did not need more treatment for either elbow. Claimant testified Dr. Koprivica stated he believed that Claimant did not need more treatment to his right or left upper extremities as a result of his employment at Employer. Claimant stated he understands he will be foreclosed from seeking any more medical treatment in the future from the Employer in these cases. He is

not seeking any more treatment or payment of medical bills or expenses for either of his upper extremities.

I find Claimant's testimony to be credible unless discussed otherwise later in this Award.

Testimony of Lois Jean Redell

Claimant's attorney called Lois Jean Redell as a witness. She has been a friend and neighbor of Claimant for five years. Ms. Redell is retired and is at her home most of the time. Her house is directly across the street from Claimant's house. The living area in her house faces the street and Claimant's house. She observes daily activities of Claimant and his wife. Ms. Redell testified Claimant's wife does the mowing. Claimant's wife drives ninety percent of the time. Claimant's wife always carries the groceries into the house. Ms. Redell has not seen Claimant engaged in heavy lifting. Claimant has two grandchildren, including a young boy with only one leg. Claimant's wife is the one who always picks up and carries that grandchild. I find Ms. Redell's testimony to be credible.

Medical Evidence

Dr. P. Brent Koprivica

The deposition of Dr. P. Brent Koprivica, with deposition exhibits, was admitted as Exhibit A. Dr. Koprivica's Curriculum Vitae (Koprivica Deposition Exhibit 1) notes he is a licensed medical doctor in Missouri and Kansas. He is Board Certified by the American Board of Emergency Medicine and the American Board of Preventative Medicine in occupational medicine.

Dr. Koprivica's January 26, 2011 report (Koprivica Deposition Exhibit 2) notes he evaluated Claimant on January 26, 2001 at the request of Claimant's attorney. Dr. Koprivica reviewed Claimant's medical records, completed a medical history, recorded Claimant's complaints, and performed a physical examination of Claimant. Dr. Koprivica's report summarizes Claimant's treatment.

Dr. Koprivica's summary of Claimant's medical treatment is consistent with the medical records in evidence. The medical records in Exhibit B include the operative reports for Claimant's L4-5 back surgery by Dr. DyRagos on February 18, 1974. The records substantiate that Claimant underwent a "Partial hemilaminectomy L4-L5 on the left with excision of L4 extruded disc" on February 18, 1974 for a herniated nucleus pulposus L4-5 on the left. The records also document that Claimant had a "lumbar

exploration with partial hemilaminectomy L4-L5 on the left with excision of a recurrent disc at L4” on August 27, 1979 for a recurrent ruptured disc at L4-5 left.

The records in Exhibit B include the operative reports for Claimant’s left carpal tunnel surgery by Dr. Newland on October 23, 2009, and Claimant’s left and right upper extremity surgeries performed by Dr. Nassab that are described in Dr. Koprivica’s report.

Dr. Koprivica’s report notes Dr. Nassab’s 20 pound restriction on the right and 50 pound restriction on the left. Dr. Koprivica’s report notes Claimant’s complaints of pain and loss of strength in the upper extremities. The report notes Claimant accommodated at work by using mechanical devices or getting assistance from co-workers with heavier lifting activities because of lumbar impairment.

Dr. Koprivica’s January 26, 2011 report sets forth several conclusions. These include the following.

1. Mr. Blanton’s hand and upper extremity use activities as an aircraft mechanic place stresses and risks on his upper extremities which are unique to that employment. Mr. Blanton is not exposed to that same extent of risk away from work.

Further, the nature of his work activities as an aircraft mechanic are competent to result in cumulative injury.

As a result of Mr. Blanton’s work place activities as an aircraft mechanic with cumulative injury through June 12, 2009, Mr. Blanton developed severe carpal tunnel on the left treated with surgical release. There are ongoing residuals with some residual hypoesthesia as well as weakness of pinch and grip strength in his dominant upper extremity.

Separately, Mr. Blanton developed chronic left lateral epicondylitis, chronic left medial epicondylitis and ulnar neuropathy on the left. Mr. Blanton is status post a separate surgery with lateral epicondylar release, left medial epicondylar release and left anterior subcutaneous transposition of the ulnar nerve.

2. In reference to the occupational disease claim of June 12, 2009, Mr. Blanton is at maximum medical improvement.

.....

4. I do not have any other future surgical treatment or other treatment to recommend regarding the residuals from this claim.

.....

6.

.....

In looking at the issues of disability and realizing that Mr. Blanton had severe carpal tunnel syndrome on the left treated surgically, cubital tunnel syndrome on the left that has been treated with anterior transposition of the ulnar nerve, chronic medial epicondylitis for which medial epicondylar release has been performed as well as chronic lateral epicondylitis for which lateral epicondylar release has been performed, I would assign a residual thirty (30) percent permanent partial disability of the left upper extremity at the level of the elbow (210-week level) under Missouri statutes.

8. Pre-dating the primary injury of June 12, 2009, Mr. Blanton did have pre-existent industrial disability based on the history of two prior surgical interventions on the lumbar spine at the L4-L5 motion segment level.

Historically, Mr. Blanton self-accommodated in his employment by using mechanical lifting devices and/or assistance from co-workers on heavier lifting.

Mr. Blanton would have an obstacle to work that required any frequent or constant bending at the waist, pushing, pulling or twisting of heavy physical demand.

Based on his prior lumbar impairment representing the pre-existent industrial disability, I would assign a twenty (20) percent permanent partial disability to the body as a whole as ongoing prior to the June 12, 2009, claim date.

9. When one combines the pre-existent industrial disability in the lumbar region with the additional disability involving the left upper extremity, significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities. I would consider a 10 percent enhancement factor to represent the synergism of combining these disabilities.

10. Mr. Blanton’s work injury claim for occupational disease of January 30, 2010, represents the direct, proximate and prevailing factor in the development of moderate severity right carpal tunnel syndrome treated surgically, chronic right lateral epicondylitis treated with lateral epicondylar release and cubital tunnel syndrome on the right treated with ulnar nerve decompression.

The same ergonomic factors involved in his vocation that led to the impairments of the left upper extremity, led to the impairments involving the right upper extremity.

11. Mr. Blanton is at maximal medical improvement in reference to the primary injury claim of January 30, 2010.

.....

12.

.....

Mr. Blanton’s work activities as a mechanic represent the prevailing factor in the development of the impairments involving the right upper extremity.

15. For the primary injury of January 30, 2010, considered in isolation, in and of itself, for the considerations I have outlined, I would assign a separate twenty-five (25) percent permanent partial disability of the right upper extremity at the level of the elbow (210-week level).

.....

17. When one combines the pre-existent industrial disability in the lumbar region and the industrial disability involving the left upper extremity with the additional disability attributable to the primary injury claim of January 30, 2010, significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities.

With the opposite upper extremity involvement associated with this combination of disabilities, I would consider an enhancement factor of

15 percent above the simple arithmetic sum of the separate disabilities.

.....

18. I do not see any future medical treatment needs regarding the January 30, 2010, claim regarding the cumulative injury to the right upper extremity.

I would note that the above opinions have all been given within a reasonable degree of medical certainty, unless otherwise expressed.

Dr. Koprivica testified regarding portions of his report. His testimony is consistent with his report. Dr. Koprivica testified at pages 19-20 of his deposition:

So before June of '09, in summary, the only thing that I identified I thought was of significance, was the fact that he had a multiple operated low back that limited his capacities in terms of the extent of bending, twisting, lifting and carrying that he could perform. He did do fairly well with that and he still maintained his work, but he had to accommodate. He had to get assistance from co-workers. He had to use assistive devices.

There would be a significant obstacle to him if he lost his job with TWA or American Airlines and he had to go out and seek another job, there would have been significant impact from that. At least that's my belief.

Dr. Koprivica testified at page 27 of his deposition:

Well, subjectively first, regarding the primary claims for both upper extremities. Mr. Blanton told me that he still had loss of strength in both of his hands. He also had loss of strength in the left elbow. He said the surgery on the left helped the pain. On the right, he found that the numbness complaints had actually done better than they did on the left. Relatively. But overall, even though he had had surgery, subjectively his big complaint was that he still had loss of capability, because of loss of strength and endurance in using his upper extremities. That involvement was not only his hands but also at the elbow level.

Dr. Koprivica testified regarding Claimant's limitations. He testified: "If you look at his grip strength, he did have significant loss of strength in both hands." (Koprivica

deposition, page 31). “He also has pinch strength deficits.” (Koprivica deposition, page 32). He did have some complaints of numbness. (Koprivica deposition, page 32). His motion was reduced on the left from some residual scarring compared to what it should be. (Koprivica deposition, page 34). “He still had some lateral epicondyle pain, which is a tennis elbow pain, with specific provocative testing.” (Koprivica deposition, page 35). “I also looked at his low back, where he had a surgical scar. He had had two prior surgeries, so that I thought was confirmatory of the history that I was given regarding his prior surgeries. He had loss of motion of his low back.” (Koprivica deposition, pages 36-37).

Dr. Koprivica was asked the following question and gave the following answer (Koprivica deposition, pages 39):

Q. Do you believe the cumulative occupational hazards are the primary cause of both the June 12, 2009 and January 30th, 2010 upper extremity injuries?

A. My opinion is that his workplace exposure risk in that cumulative injury was the direct, proximate and prevailing cause for his development of multiple—the multiple conditions affecting both upper extremities. That included bilateral carpal tunnel syndrome that was treated surgically, bilateral chronic lateral epicondylitis that was treated surgically. Chronic medial epicondylitis and cubital tunnel syndromes bilaterally that were treated surgically.

Dr. Koprivica was asked the following question and gave the following answer (Koprivica deposition, pages 41-42):

Q. Now, in isolation, the June 12, 2009 left upper extremity injury in combination with the low lumbar injury, could you please state what your opinion is regarding enhanced disability or combination of disability regarding the two and Second Injury Fund liability?

A. Yes. My opinion was that predating June 12th, 2009, there was significant industrial disability based on his multiple operations on the lumbar spine. I quantified that as a 20 percent permanent/partial disability of the body as a whole. When you combine the disability of the lumbar spine with the disability of the left upper extremity, I felt that there was a synergistic effect that was represented by a 10 percent load factor. What I mean by that is, if you just look at the simple arithmetic sum of the separate disabilities, you would multiply that 10 percent to calculate the enhancement based on the synergism from combining the disabilities.

Q. To be more specific, your opinion is that 20 percent body as a whole or 80 weeks, in combination with the 30 percent left upper extremity elbow of 63 weeks, has a total of 143 weeks, of which you would add an additional 10 percent enhancement factor, or an additional 14.3 weeks against the Fund; is that correct?

A. Yes.

Dr. Koprivica was asked the following questions and gave the following answers (Koprivica deposition, pages 43-45):

Q. Now I would like to ask you the Second Injury Fund liability question. In consideration of the prior multiple lower lumbar surgeries, the prior injury of June 12, 2009 to the left upper extremity, and the opinion that you have just given us of January 30, 2010 concerning the right upper extremity, what enhancement to factor or what combination effect would you give any enhancement reference to the Second Injury Fund?

A. In looking at that issue. First, as I have said earlier, but I will repeat it. I don't believe the he is totally disabled. That's not my belief. I do believe there is a greater synergism when you combine the disability that predated January 30, 2010, with the additional disability of January 30, 2010, than what I expressed for the June 12, 2009 claim. The reason is, when you look at that combined effect, we are now combining opposite upper extremity disabilities, which I believe is greater synergism when you have the same body part, essentially the same body part on opposite extremities being combined. And you are also considering the fact that you are also adding additional disability in the lumbar region. My opinion is that the enhancement factor or load factor for the primary injury of January 30, 2010 should be a 15 percent enhancement factor.

Q. To be specific, then would you combine your earlier opinions of the low back 20 percent body as a whole 80 weeks, together with your June 12, 2009 opinion of 63 weeks, or 30 percent of the left elbow; together with your right upper extremity 25 percent disability at the 210 week level, or 52.5 weeks, to bring the total of 195.5 weeks. Is that correct, Doctor?

A. Yes. Then you multiply that by 15 percent to calculate the weeks of disability enhancement from synergism.

Q. That would be an additional 29.3 weeks for the 15 percent additional synergism that you've just testified about; is that correct?

A. That is correct. I will also repeat this. I don't believe—even though there is a potential to consider other disabling conditions, I don't believe that the other conditions I identified reached that level of significance that there would be more synergism.

Dr. Koprivica was asked the following question and gave the following answer (Koprivica deposition, page 60):

Q. I would ask you, Doctor, are your findings all consistent with Dr. Nassab's weight limitations contained on Page 8 of your report of 50 pounds on the left, and 20 pounds on the right, your abnormal findings, objective medical tests that were abnormal, your clinical abnormal findings, are they all consistent with the permanent disability you testified about?

A. Yes.

Dr. Koprivica was asked the following question and gave the following answer (Koprivica deposition, page 63):

Q. So both of these primary injuries for the '09 number and the 2010 number are occupational diseases; is that right?

A. That's my opinion.

Dr. Paul Nassab

Exhibit B includes Dr. Paul Nassab's April 7, 2010 Operative Report pertaining to surgery on Claimant's left upper extremity and his July 7, 2010 Operative Report pertaining to surgery on Claimant's right upper extremity. Dr. Nassab's Office Note dated September 7, 2010 in Exhibit B pertaining to Claimant states in part, "I am going to give him a 20 pound weight limit on the right and a 50 pound weight limit on the left." Dr. Nassab's October 25, 2010 Office Visit note state in part: "I believe that his lateral epicondylitis and cubital tunnel are resolved. We are going to put mmet [*sic*] as an MMI for this."

Dr. Nassab's December 20, 2010 report pertaining to Claimant (Exhibit 1) states in part:

The above named patient has reached maximum medical improvement and no further appointments have been scheduled.

The permanent partial disability of the patient listed above is estimated at five percent (5%) of the left and eight percent (8%) of the right for epicondylitis and carpal [*sic*] tunnel. Medical opinions addressing compensability and disability are stated within a reasonable degree of medical certainty are based upon objective medical findings;

.....

Rulings of Law

Based on the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

1. Did Claimant sustain injuries by accident or occupational disease arising out of and in the course of his employment for Employer on or about June 12, 2009 and January 30, 2010?

Section 287.808, RSMo¹ provides:

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

Section 287.800, RSMo provides:

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

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

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.020.2, RSMo provides:

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

Section 287.020.3, RSMo provides in part:

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

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

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

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

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

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the

meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Occupational diseases are compensable under the Missouri Workers' Compensation Act. Sections 287.067.1, 2, RSMo. An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo provides:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3, RSMo provides:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and

disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.8, RSMo provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

Section 287.063.1 provides:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 228 (Mo.banc 2003)²; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App 1988); *Jackson v. Risby Pallet and*

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

Lumber Co., 736 S.W.2d 575, 578 (Mo.App. 1987). In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

The court in *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 2011 WL 4031146, 33 (Mo.App. 2011) states:

Employer liability for occupational disease claims does not depend on those claims falling within § 287.120. Section 287.120.1 specifies employer liability for "personal injury or death of the employee by accident," and provides that the administrative workers' compensation remedy is exclusive of other remedies with respect to such claims. Section 287.120.1 is not the only provision that imposes liability on employers for work-related injury claims, however. With respect to occupational disease claims, § 287.063 provides:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to

occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

Similarly, § 287.067.2 provides for the compensability of occupational disease claims generally:

An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The “prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Notably—and unlike the prior statute—these provisions make occupational disease claims compensable, and make employers liable for such claims, without reference to the definition of “accident” in § 287.020.2. Thus, such claims are made compensable under the Act, and employers are rendered liable for such claims, independently of § 287.120, including its exclusivity provisions.

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

Transporters, 844 S.W.2d 463, 466 (Mo.App. 1992). “Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

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

Claimant described his repetitive work activities as a mechanic for Employer for several years before his 2009 and 2010 upper extremity injuries. He lifted and pushed. He used air tools. Much of his work was done straight out over his head. I find Claimant's description of his work activities to be credible.

Dr. Koprivica testified it was his opinion that Claimant's workplace exposure risk in that cumulative injury was the direct, proximate and prevailing cause for his development of the multiple conditions affecting both upper extremities. He stated, “That included bilateral carpal tunnel syndrome that was treated surgically, bilateral chronic lateral epicondylitis that was treated surgically. Chronic medial epicondylitis and cubital tunnel syndromes bilaterally that were treated surgically.” I find this opinion to be credible.

I believe and find that Claimant's occupational exposure and repetitive work activities for Employer was the prevailing factor in causing injuries to the left upper extremity and the right upper extremity and disability.

I do not find that Claimant's injuries were from accidents. Claimant did not attribute them to accidents, and the medical evidence does not either. I find that the credible evidence establishes that Claimant sustained gradual and progressive injuries which resulted from repeated and constant exposure to hazards he encountered in Employer's workplace that resulted in injuries to the left upper extremity and the right upper extremity and disability.

I find that the causation opinions of Dr. Koprivica are persuasive and credible and support the conclusion that Claimant's work for Employer was the prevailing factor in causing Claimant's injuries to the right upper extremity and the left upper extremity and disability.

I find that Dr. Koprivica's conclusions regarding causation prove the probability that Claimant sustained occupational diseases from repetitive work activities that was caused by conditions in Claimant's workplace while employed by Employer.

I find that Claimant has met his burden to prove that his repetitive work for Employer was the prevailing factor in causing injuries to his left upper extremity and his right upper extremity and resulting disability. I find that Claimant sustained compensable occupational diseases arising out of and in the course of his employment for Employer from repetitive work activities during his work for Employer in Injury Number 09-044464 and Injury Number 10-006737. I find that Claimant was exposed to a risk that was greater than and different from that which affects the public generally.

I find that on or about June 12, 2009 and January 30, 2010 Claimant sustained compensable injuries by occupational disease arising out of and in the course of his employment for Employer. I find Claimant's June 12, 2009 occupational disease was the prevailing factor in causing injury to his left upper extremity, and resulting disability to his left upper extremity. I find Claimant's January 30, 2010 occupational disease was the prevailing factor in causing injury to his right upper extremity, and resulting disability to his right upper extremity.

Liability of Employer

Liability for Permanent Disability and Disfigurement

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

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions

addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

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

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

An agreement between an employee and an employer to settle does not bind the Commission, but “does serve as relevant evidence of the nature and extent of the employee's permanent disability attributable to the primary injury.” *Totten v. Treasurer of the State of Missouri, as Custodian of the Second Injury Fund*, 116 S.W.3d 624, 628 (Mo.App. 2003).

Claimant had surgeries on his left and right upper extremities. He described his complaints and limitations relating to his upper extremities. Claimant has lost grip strength on both sides. He has problems lifting since his elbow surgeries. He is not able to pick up small items. It is difficult for him to open bottles. He does not do yard work, painting, or plumbing. He is not able to lift heavy things. I find Claimant’s description of his limitations and complaints to be credible.

Claimant and Employer/Insurer agreed that Claimant be awarded permanent partial disability of 20% of the left upper extremity at the 210 week level and 4 weeks of disfigurement in Injury Number 09-044464. Claimant and Employer/Insurer agreed that Claimant be awarded permanent partial disability of 20% of the right upper extremity at the 210 week level and 2 weeks of disfigurement in Injury Number 10-006737.

Dr. Koprivica reviewed Claimant’s treatment records and performed a physical examination of Claimant. Dr. Koprivica noted Claimant complained of loss of strength and endurance in using his upper extremities. Dr. Koprivica found loss of strength, numbness, and limitation of motion in Claimant’s upper extremities. I find Dr. Koprivica’s description of Claimant’s limitations and complaints to be credible.

Dr. Koprivica assigned 30% permanent partial disability of the left upper extremity at the level of the elbow (210 week level) attributable to the June 12, 2009 injury. I find this assessment of disability is not credible. Dr. Nassab treated Claimant’s left and right upper extremities. He assigned permanent partial disability of 5% of the left. I find this assessment of disability is not credible.

Dr. Koprivica assigned 25% permanent partial disability of the right upper extremity at the level of the elbow (210 week level) attributable to the January 30, 2010 injury. I find this assessment of disability is not credible. Dr. Nassab assigned permanent partial disability of 8% of the right. I find this assessment of disability is not credible.

I find that as a result of Claimant’s June 12, 2009 compensable work injury, Claimant has sustained an additional 20% permanent partial disability of the left upper extremity at the 210 week level, or 42 weeks of compensation. I also find Claimant has sustained 4 weeks of disfigurement as a result of his June 12, 2009 work injury. I award Claimant 42 weeks of permanent partial disability and 4 weeks of disfigurement from

Employer at the rate of \$404.66 per week, which amounts to \$18,614.36 in Injury Number 09-044464.

I find that as a result of Claimant's January 30, 2010 compensable work injury, Claimant has sustained an additional 20% permanent partial disability of the right upper extremity at the 210 week level, or 42 weeks of compensation. I also find Claimant has sustained 2 weeks of disfigurement as a result of his January 30, 2010 work injury. I award Claimant 42 weeks of permanent partial disability and 2 weeks of disfigurement from Employer at the rate of \$422.97 per week, which amounts to \$18,610.68 in Injury Number 10-006737.

Liability for Additional Medical Aid

Claimant and Employer have requested the court determine Employer's liability for additional medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment . . . as may reasonably be required . . . to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

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

Medical aid may be required even though it merely relieves the employee's suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking*,

Incorporated, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brollier*, 163 S.W. 2d at 115.

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

To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required. *Id.*

The court in *Tillotson* also states:

In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

Claimant testified he is not seeking any medical bills or additional treatment for his right upper extremity or his left upper extremity from Employer. He stated no doctors told him that he needs additional surgery or other treatment for either of his upper extremities. Claimant testified that Dr. Nassab told him he did not need more treatment for either elbow. I find this testimony to be credible.

Claimant’s treating doctor, Dr. Nassab noted on December 20, 2010 that Claimant had reached maximum medical improvement. I find this opinion to be credible.

Dr. Koprivica found Claimant to be at maximum medical improvement in reference to Claimant’s cumulative injury claims of June 12, 2009 and January 30, 2010. His report states he did not have any future medical treatment to recommend regarding the residuals from these claims. I find these opinions to be credible.

I find that Claimant did not prove that he reasonably requires any additional medical aid to treat his June 12, 2009 injury or his January 30, 2010 injury. I find that

Claimant does not now need any medical treatment for his left upper extremity or his right upper extremity as a result of his work injuries. I find Claimant is at maximum medical improvement and that he failed to prove that he reasonably requires any additional medical aid to cure or relieve him of the effects of his work injuries. I deny Claimant's request for additional medical treatment in these cases.

Liability of the Second Injury Fund

Section 287.220.1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the

balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

“To create Second Injury Fund liability, the pre-existing disability must combine with the disability from the subsequent injury in one of two ways: (1) the two disabilities combined result in a greater degree of disability than the sum of the degree of disability from the pre-existing condition and the degree of disability from the subsequent injury; or (2) the pre-existing disability combines with the disability from the second injury to create permanent total disability.” *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995).

In order for a claimant to recover against the Second Injury Fund, he or she must prove that he or she sustained a compensable injury, referred to as “the last injury,” which resulted in permanent partial disability. Section 287.220.1, RSMo. A claimant must also prove that he or she had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he or she become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo.App. 2008). (Omitting citations). In order for a claimant to be entitled to recover permanent partial disability benefits from the Second Injury Fund, he or she must prove that the last injury, combined with his or her pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. *Elrod v. Treasurer of Missouri as Custodian of the Second Injury Fund*, 138 S.W.3d 714, 717-18 (Mo. banc 2004). See also *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo.App. 2003); *Shipp v. Treasurer*, 99 S.W.3d 44 (Mo.App. 2003).

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the Claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent “disability.” (Omitting citations). The disability, whether known or unknown, must exist at the time the work-related injury was sustained, *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.” *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. 1999); *Luetzinger v. Treasurer of Mo.*, 895 S.W.2d 591 (Mo.App. 1995) (emphasis added). “The nature and the extent of the permanent-partial preexisting condition must be proven by a reasonable degree of certainty. (Omitting citation). Expert opinion evidence is necessary to prove the extent of the preexisting disability.” *Messex*, 989 S.W.2d at 215.

Claimant must show that: (1) he or she has preexisting disability that reaches Second Injury Fund threshold, (2) he or she has additional disability from a compensable

injury that qualifies for Second Injury Fund threshold, and (3) that his or her preexisting disability combines with his or her present injury to result in a greater degree of disability than the sum of either disabilities alone, “. . . that is, a synergistic enhancement in which the combined totality is greater than the sum of the independent parts.” *Searcy*, 894 S.W.2d at 178.

Claimant’s counsel orally argued at the conclusion of the evidence that Claimant is requesting an Award against the Second Injury Fund in the 2009 case in the amount of \$4,936.85 based upon 20% body as a whole for pre-existing disability for the low back, or 80 weeks, plus 42 weeks for 20% of the left elbow for the 2009 injury, using a 10% load at the agreed compensation rate.

Claimant also requests an Award against the Second Injury Fund in the 2010 case of \$10,405.06 based upon 80 weeks for the pre-existing low back condition, plus 42 weeks for the pre-existing condition left elbow, plus 42 weeks for the 2010 right elbow injury, using a 15% load at the agreed compensation rate.

The Second Injury Fund argues in its proposed Findings of Fact and Rulings of Law that Claimant’s claims against the Second Injury Fund in these cases should be denied because Claimant did not have an “injury” as defined under the Workers’ Compensation Act. The Second Injury Fund cites *State ex rel. KCP & L Greater Missouri Operations Co. v. Cook*, 2011 WL 4031146 (Mo.App. 2011) and *Robinson v. Hooker*, 323 S.W.3d 413 (Mo.App. 2010) in support of its position. I disagree with the Second Injury Fund’s position. I find Claimant did have compensable injuries in Injury Number 09-044464 and Injury Number 10-006737 as defined under the Worker’s Compensation Act.

As stated previously, the *KCP&L* court found occupational disease claims are made compensable under the Act independently of § 287.120, including its exclusivity provisions. I find Claimant’s occupational disease claims are compensable under the Workers’ Compensation Act. I find the provisions of Section 287.220.1, RSMo are applicable to Claimant’s claims in these cases.

I have found Claimant has permanent partial disability of 20% of the left upper extremity at the 210 week level resulting from his June 12, 2009 work injury. I find this is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

I have found Claimant has permanent partial disability of 20% of the right upper extremity at the 210 week level resulting from his January 30, 2010 work injury. I find this is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo.

It is also necessary to determine whether Claimant had preexisting permanent partial disability at the time the June 12, 2009 and January 30, 2010 injuries were sustained, and whether his preexisting permanent partial disability was a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed, and whether the preexisting permanent partial disability equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities.

Claimant described how his history of his preexisting low back condition was disabling prior to the work injuries of June 12, 2009 and January 30, 2010. Claimant had low back pain before those work injuries that interfered with his work and daily activities. He had surgery at L4-5 in 1974 and again in 1979. He treated his pain with over-the-counter pain medication. He had help lifting at work. I find Claimant's description of his limitations and complaints to be credible.

Claimant's testimony is corroborated by the medical records admitted in evidence at the hearing. The records substantiate Claimant's medical treatment prior to October 29, 2007. The records document his two L4-5 back surgeries

Dr. Koprivica noted Claimant had loss of strength and limitation of motion in his upper extremities. He concluded Claimant had preexisting industrial disability in the lumbar region and left upper extremity before the January 20, 2010 injury. I find these opinions to be credible.

Dr. Koprivica noted Claimant self-accommodated in his employment by using mechanical lifting devices and/or assistance from co-workers on heavier lifting. Dr. Koprivica report states Claimant would have an obstacle to work that required any frequent or constant bending at the waist, pushing, pulling or twisting of heavy physical demand. Dr. Koprivica testified it was his opinion that predating June 12, 2009, "there was significant industrial disability based on his multiple operations on the lumbar spine." Dr. Koprivica assigned a twenty (20) percent permanent partial disability to the body as a whole as ongoing prior to the June 12, 2009 based on his prior lumbar impairment representing the pre-existent industrial disability claim date. I find these opinions to be credible.

The Second Injury Fund did not present any evidence regarding the issue of preexisting disability.

I believe and find that Claimant had preexisting permanent partial disability of 20% of the body as a whole at the 400 week level, which is 80 weeks, due to his low back condition at the time the June 12, 2009 injury was sustained. This preexisting permanent

partial disability is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo. I also find that Claimant's preexisting permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed, as required by Section 287.220.1, RSMo.

I also believe and find that Claimant had preexisting permanent partial disability of 20% of the body as a whole at the 400 week level, which is 80 weeks, due to his low back condition and permanent partial disability of 20% of the left upper extremity at the 210 week level resulting from Claimant's June 12, 2009 work injury at the time the January 30, 2010 injury was sustained. This preexisting permanent partial disability is sufficient to meet the Second Injury Fund threshold required by Section 287.220.1, RSMo. I also find that this preexisting permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to Claimant's employment or to obtaining reemployment if he becomes unemployed, as required by Section 287.220.1, RSMo.

It must also be determined whether Claimant's preexisting permanent partial disability combined with the work injuries sustained on June 12, 2009 and January 30, 2010 to result in a greater degree of disability than the sum of either disability alone. I find that it does.

Dr. Koprivica's noted as to the June 12, 2009 injury and the pre-existent industrial disability in the lumbar region that "significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities." He considered a 10% enhancement factor to represent the synergism of combining these disabilities. I find these opinions to be credible. The Second Injury Fund did not present any credible evidence or expert opinion to the contrary.

Based on the competent and substantial evidence, I find that Claimant's preexisting lumbar spine permanent partial disability combines with the work injury of June 12, 2009 to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities. I find that the synergistic effect of these disabilities is 10% above the simple sum of the disabilities, or 12.2 weeks of compensation.

Dr. Koprivica concluded that when one combines the pre-existent industrial disability in the lumbar region and the industrial disability involving the left upper extremity with the additional disability attributable to the primary injury claim of January 30, 2010, "significant enhancement of the combined disabilities arises above the simple arithmetic sum of the separate disabilities." Dr. Koprivica testified he believed there is greater synergism when you have the same body part, essentially the same body part on opposite extremities being combined. Dr. Koprivica also states: "With the opposite

upper extremity involvement associated with this combination of disabilities, I would consider an enhancement factor of 15 percent above the simple arithmetic sum of the separate disabilities.” I find these opinions to be credible.

I find that Claimant’s preexisting lumbar spine and left upper extremity permanent partial disability combines with the work injury of January 30, 2010 to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities. I find that the synergistic effect of these disabilities is 15% above the simple sum of the disabilities, or 24.6 weeks of compensation.

Calculation of Second Injury Fund Liability

Injury Number 09-044464

The Second Injury Fund liability of 12.2 weeks in Injury Number 09-044464 is calculated as follows:

For the June 12, 2009 injury (Injury No. 09-044464)— 20% of the left upper extremity at the 210 week level, which is 42 weeks.

For preexisting permanent partial disability—20% of the body as a whole (400 week level), which is 80 weeks, due to Claimant’s lumbar spine condition at the time the June 12, 2009 injury was sustained.

Number of weeks for the combination of the primary left upper extremity injury and the preexisting lumbar spine condition: $42 \text{ weeks} + 80 \text{ weeks} = 122 \text{ total weeks} \times .10$ (enhancement factor) = 12.2 weeks.

Accordingly, I find that the Second Injury Fund is liable to Claimant in Injury Number 09-044464 for 12.2 weeks of compensation at the stipulated weekly compensation rate of \$404.66, which is \$4,936.85. I award the sum of \$4,936.85 in favor of Claimant against the Second Injury Fund in Injury Number 09-044464.

Injury Number 10-006737

The Second Injury Fund liability of 24.6 weeks in Injury Number 10-006737 is calculated as follows:

For the July 30, 2010 injury (Injury No. 10-006737)— 20% of the right upper extremity at the 210 week level, which is 42 weeks.

For preexisting permanent partial disability for the June 12, 2009 left upper extremity injury (Injury No. 09-044464) at the time the July 30, 2010 injury was sustained—20% of the left upper extremity at the 210 week level, which is 42 weeks.

For preexisting permanent partial disability due to Claimant’s lumbar spine condition at the time the July 30, 2010 injury was sustained—20% of the body as a whole (400 week level), which is 80 weeks.

Number of weeks for the combination of the primary right upper extremity injury and the pre-existing left upper extremity injury and the preexisting lumbar spine condition: 42 weeks + 42 weeks + 80 weeks = 164 total weeks x .15 (enhancement factor) = 24.6 weeks.

Accordingly, I find that the Second Injury Fund is liable to Claimant in Injury Number 10-006737 for 24.6 weeks of compensation at the stipulated weekly compensation rate of \$422.97, which is \$10,405.06. I award the sum of \$10,405.06 in favor of Claimant against the Second Injury Fund in Injury Number 10-006737.

Attorney’s Fees

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

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