

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

Injury No.: 10-034774

Employee: Elmer T. Bowyer  
Employer: Mineral Area Community College/MACC  
Insurer: M U S I C

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we reverse the award and decision of the administrative law judge.

**Introduction**

The parties submitted the following issues for determination by the administrative law judge: (1) whether on or about May 6, 2010, employee sustained an accident or an occupational disease arising out of and in the course of his employment; (2) whether the employee's injury was medically causally related to the accident or occupational disease; (3) whether employer is liable for employee's past medical expenses in the amount of \$43,763.03; (4) whether employer is obligated to provide employee with future medical treatment; (5) whether employee is entitled to temporary total disability benefits from June 7, 2011, to July 18, 2011; and (6) whether employee is entitled to permanent partial disability benefits.

The administrative law judge concluded that employee failed to offer credible evidence that he sustained an occupational disease arising out of and in the course of his employment.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred because employee performed physically demanding work over a period of 30 years, and there is no evidence of outside causes for employee's shoulder condition.

For the reasons set forth herein, we reverse the administrative law judge's award and decision.

**Findings of Fact**

Employee was 58 years of age at the time of the hearing before the administrative law judge. Employee worked for employer for approximately 30 years. During most of his time working for employer, employee worked as a maintenance supervisor. Employee's duties included supervising the other maintenance workers and performing maintenance tasks. Employee estimates he split his time in half between administrative and general maintenance tasks; employer's witness Russell Straughan disagreed and estimated employee spent 75% of his time on supervisory or administrative duties.

We find employee's testimony more persuasive than that of Mr. Straughan as to the nature of employee's work duties. We find that employee spent half of his time on administrative tasks and the other half on general maintenance duties, which included

Employee: Elmer T. Bowyer

- 2 -

cutting grass, unloading trucks at the book store, plowing snow in the winter, leaf removal in the fall, trimming trees, power washing buildings, stripping and waxing floors, painting, cleaning walkways, gardening and mulching, operating chainsaws, hooking and unhooking mowers, and driving dump trucks.

Employee described certain tasks which he performed frequently. Employee was responsible for cutting grass almost every day during the spring and summer; employee operated the mower for about 6 hours per day. Employee repetitively used his arms and shoulders to maneuver the levers on the lawnmower.

In the winter, employee was responsible for plowing snow. This task involved driving the plow trucks and operating the manual transmission as well as the levers to maneuver the plow blade. Employee described pain in his right shoulder that sharply increased during the winter of early 2010, when he had to plow a lot of snow.

Employee frequently helped set up and tear down events. This task involved setting up and tearing down a stage, chairs, and tables. The chairs stacked together, which required use of the arms at the shoulder level or higher.

The month of May was particularly hectic for employee and the maintenance crew. Employee explained that getting the campus ready for graduation required performing as many jobs in one week as the crew normally performed in one month, such as sweeping, mopping, waxing, painting, mowing grass, making sure parking lots were clean, and other tasks.

On May 6, 2010, employee reported to his supervisor that he felt he'd hurt his right shoulder in the course of his work duties. Employer sent employee to Dr. Frank Krewet, who took x-rays, ordered an MRI, and released employee to return to full duty. Employer then sent employee to Dr. Michael Milne for an independent medical evaluation. Dr. Milne diagnosed right shoulder impingement and right shoulder rotator cuff tendinosis and opined that employee's work is likely an aggravating factor in causing this condition, but not the primary or prevailing factor. Dr. Milne opined that employee should consider a cortisone injection and physical therapy; if this did not work, he would recommend an MRI of the shoulder. Dr. Milne returned employee to work at full duty. Based on Dr. Milne's opinion, employer declined to authorize any further medical treatment.

Employee sought treatment on his own with Dr. Michael Ralph on May 11, 2011. Dr. Ralph ordered an MRI, which revealed a full thickness tear of the posterior half of the distal supraspinatus tendon associated with partial tendon retraction, proximal long head biceps tendinosis without tendon tear or rupture, and mild AC osteoarthritic disease. Dr. Ralph recommended surgery, which he performed on June 7, 2011. Dr. Ralph released employee to return to work in a light duty capacity on July 18, 2011, and to work without restrictions on February 21, 2012.

Employee submitted the bills and medical records generated in connection with treatment for his right shoulder. Employee also provided testimony describing his course of treatment. At

Employee: Elmer T. Bowyer

- 3 -

the hearing before the administrative law judge, employee claimed that his medical bills total \$43,763.03, but we note that this amount includes \$808.00 in charges from Radiology & Imaging Management for a CT scan of the abdomen on December 2, 2011. Employee did not provide any testimony or medical records to demonstrate that this CT scan was related to the work injury; it appears instead from Dr. Ralph's treatment notes that this CT scan may have been related to employee's concurrent treatment for throat cancer. We find that the total amount of charges generated in connection with treatment for the work injury is \$42,955.03. We note that employee testified that he is not seeking any additional medical treatment for his right shoulder.

Expert medical testimony

Employer presents Dr. Milne, who opined that employee's work is likely an aggravating factor in causing his right shoulder injury, but not the primary or prevailing factor. Dr. Milne rated employee's injury at 6% permanent partial disability of the right shoulder. Dr. Milne reviewed Dr. Ralph's treatment records and opined that he could not connect employee's right shoulder injury to his employment because employee did not report a specific injury, and Dr. Milne does not believe operating a lawn mower can cause a rotator cuff tear. Dr. Milne did admit that the performance of employee's work duties could cause chronic wear and tear to employee's shoulder.

Employer also presents Dr. Michael Nogalski, who opined that employee suffered an aggravation of a preexisting chronic rotator cuff tear as a result of a "claimed 5/6/10 event." *Transcript*, page 326. Dr. Nogalski's testimony appears to have little bearing on the issues involved in this case; employee is not claiming an injury resulting from his work on May 6, 2010, but instead a gradual onset injury to his right shoulder.

Employee presents Dr. Ralph, who opined that employee's work activity is the prevailing factor in causing employee to develop the right rotator cuff tear. Dr. Ralph explained that employee's work for employer over 30 years regularly involved vigorous activity of the upper extremities, and that this caused the wear and tear seen in employee's right shoulder. Dr. Ralph rated employee's injury at 25% permanent partial disability of the right shoulder, and opined that employee's medical treatment for the right shoulder was reasonable and necessary.

After careful consideration, we find most persuasive the opinion of Dr. Ralph. We adopt his opinions (and so find) that employee's work activity is the prevailing factor in causing employee to develop a rotator cuff tear and associated disability and that employee's medical treatment was reasonable and necessary. We find that employee suffers a 20% permanent partial disability of the right shoulder. We note that Dr. Ralph did not offer any testimony indicating that employee has a need for future medical treatment as a result of his right shoulder injury.

**Conclusions of Law**

Occupational disease arising out of and in the course of employment

Section 287.067.1 RSMo provides, as follows:

Employee: Elmer T. Bowyer

- 4 -

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.

We have credited Dr. Ralph's opinion that employee's work activity is the prevailing factor in causing employee to develop a rotator cuff tear and associated disability. Dr. Ralph's credible findings demonstrate that employee sustained an occupational disease that appears to have had its origin in a risk connected with the employment, and that appears to have flowed from that source as a rational consequence. We conclude employee sustained an occupational disease arising out of and in the course of his employment for purposes of the foregoing section.

Medical causation

Section 287.067.2 RSMo provides, as follows:

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.

In the context of occupational disease, the courts have clarified that:

A claimant must submit medical evidence establishing a *probability* that working conditions caused the disease, although they need not be the sole cause. 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.

*Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009)(citations omitted)(emphasis in original).

Again, we have credited Dr. Ralph's opinion that employee's work activity is the prevailing factor in causing employee to develop a rotator cuff tear and associated disability. Given Dr. Ralph's credible findings, we conclude that employee's occupational exposure was the prevailing factor in causing the resulting medical conditions of a right rotator cuff tear and a 20% permanent partial disability of the right shoulder.

Employee: Elmer T. Bowyer

- 5 -

Past medical expenses

Section 287.140.1 RSMo provides, as follows:

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.

Employer has an “absolute and unqualified duty” to furnish medical care under § 287.140 RSMo; once a compensable injury is shown (as it was here) employee needs only to prove that the disputed treatments “flow” from the work injury. See *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007); *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011). The courts have consistently held that an award of past medical expenses is supported when the employee provides (1) the bills themselves; (2) the medical record reflecting the treatment giving rise to the bill; and (3) testimony identifying the bills. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989). If employee does so, the burden shifts to employer to prove some reason the award of past medical expenses is inappropriate (such as employee’s liability for them has been extinguished, the bills are not reasonable, etc.) *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-23 (Mo. 2003).

Here, employee claims unpaid past medical expenses for treatment he received for his right shoulder injury after employer declined to authorize any further medical treatment. We have found that employee’s medical bills total \$42,955.03, but employer argues that employee is not liable for the charges shown on the bills because of adjustments related to certain payments by employee’s health insurance. Employer did not provide any testimony or other evidence to demonstrate that employee’s liability has been reduced in connection with these adjustments.

Turning to the bills themselves, we note that they reflect partial payments by employee’s insurance, as well as adjustments. For example, the bills from St. Anthony’s Medical Center reflect a \$55.49 partial payment by the employee’s insurance, with a \$338.51 adjustment denoted “984 Blue Cross Adj.” *Transcript*, page 231. These adjustments appear to be related to some agreement between the medical provider and employee’s insurance company. The courts have held that an employer is not entitled to benefit from such adjustments. See *Proffer v. Fed. Mogul Corp.*, 341 S.W.3d 184, 190 (Mo. App. 2011). This is because § 287.270 RSMo specifically provides that “[n]o savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer’s insurer for liability under this chapter, shall be considered in determining the compensation due hereunder ...” Where employer has not shown that “the healthcare providers allowed write-offs and reductions for their own purposes,” see *Farmer-Cummings*, 110 S.W.3d at 823, and where the adjustments instead appear to have been contingent upon the circumstance of employee’s insurance having paid a portion of the expenses for this workers’ compensation injury, we are not persuaded that employee’s recovery of past medical expenses should be reduced.

Employee: Elmer T. Bowyer

- 6 -

Employee provided his past medical bills, the medical records reflecting the treatments giving rise to the bills, and testimony describing his treatment. We conclude employee is entitled to his past medical expenses in the amount of \$42,955.03.

Future medical treatment

Section 287.140.1 RSMo provides for an award of future medical treatment where the employee can prove a reasonable probability that he has a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-54 (Mo. App. 2008). The parties asked the administrative law judge to resolve the issue whether employer is liable for future medical treatment, but employee testified he is not seeking additional treatment for his right shoulder. We have noted that Dr. Ralph did not specifically address future medical treatment. In his brief filed with this Commission, employee makes no mention of future medical treatment; it appears employee has abandoned his claim for future medical treatment.

We conclude that there is insufficient evidence to support an award of future medical treatment. We conclude that employer is not liable to provide employee with future medical treatment.

Temporary total disability benefits

Section 287.170 RSMo provides for temporary total disability benefits to cover the employee's healing period following a compensable work injury. The test for temporary total disability is whether, given employee's physical condition, an employer in the usual course of business would reasonably be expected to employ him during the time period claimed. *Cooper v. Medical Ctr. of Independence*, 955 S.W.2d 570, 575 (Mo. App. 1997). Accordingly, we look to the evidence of employee's physical condition following the work injury.

Dr. Ralph performed surgery on employee's right shoulder on June 7, 2011, and thereafter took him off work until July 18, 2011. We conclude that, given employee's physical condition, no employer in the usual course of business would reasonably be expected to employ him during the claimed period. We conclude that employer is thus liable for 5 and 6/7 weeks of temporary total disability benefits at the stipulated rate of \$633.74 per week, for a total of \$3,711.91.

Permanent partial disability benefits

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that employee sustained a 20% permanent partial disability of the right shoulder as a result of the work injury. This amounts to 46.4 weeks of permanent partial disability at the stipulated rate of \$422.97. We conclude, therefore, that employer is liable for \$19,625.81 in permanent partial disability benefits.

**Award**

We reverse the award of the administrative law judge. Employer is liable for past medical expenses in the amount of \$42,955.03, temporary total disability benefits in the amount of \$3,711.91, and permanent partial disability benefits in the amount of \$19,625.81.

Employee: Elmer T. Bowyer

- 7 -

Employer is not liable to provide future medical treatment.

This award is subject to a lien in favor of Robert Butler, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Gary L. Robbins, issued February 27, 2013, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED  
James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Elmer T. Bowyer

**DISSENTING OPINION**

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the decision of the administrative law judge was correct and should be affirmed.

I disagree with the majority's choice to credit the testimony from Dr. Ralph. This is an occupational disease case premised on employee's theory that his repetitive duties for employer caused him to sustain a gradual onset injury in the form of a full thickness rotator cuff tear in his right shoulder. Employee testified that his duties for employer varied drastically depending on the seasons. It appears from employee's own testimony that he rarely, if ever, engaged in work involving repetitive use of the upper extremities, and that the duties he identified as placing the most stress on his shoulders (driving snow plow trucks and operating riding lawn mowers) were limited to specific times during the year.

Given these facts, it appears to me that the key issue in this case is whether employee's expert is able to provide a credible explanation as to how the varied and non-repetitive nature of employee's job duties could have exposed him to the risk of an injury due to repetitive motion. Setting aside the question whether employee's work was 50% or 75% administrative in nature, it would seem to be incumbent upon employee's expert, Dr. Ralph, to develop a thorough understanding of the specific duties employee engaged in, the frequency of such duties, and whether the duties involved repetitive motion. But Dr. Ralph appears to have been satisfied with imagining or speculating as to the nature of employee's duties:

I mean, I understand what he does. There are certain things that are just universally known. The guy is a maintenance supervisor at a place like that, you have a pretty good idea beforehand as to what he's going to be doing. ... I mean, what I put down, it is what it is. I spoke to [employee] and I got a rough idea of what he was doing.

*Transcript*, page 102, 116.

I must seriously question whether Dr. Ralph possessed the requisite factual background to render his opinions when, by his own admission, he had only a "rough idea" as to employee's duties for employer, and filled in the gaps with his own speculation as to the "universally known" duties of a maintenance supervisor. Notably, Dr. Ralph did not identify any task that involved repetitive use of the upper extremities.

But this is not the only problem with Dr. Ralph's testimony in this matter. At his deposition, and even in his medical records, Dr. Ralph made clear that he views his role in these proceedings not as a mere testifying expert or treating physician, but instead as that of an advocate on behalf of the employee. This appears to be a result of a personal affinity the doctor holds for employee; in Dr. Ralph's own words: "[Employee] is probably the most hardworking, credible person I've ever met, okay." *Transcript*, page 109. Perhaps the most telling example of Dr. Ralph's bias in favor of the employee occurred on cross-examination, when Dr. Ralph refused to answer a question which

Employee: Elmer T. Bowyer

- 2 -

asked him to assume employee's duties may have been different than he originally assumed. Dr. Ralph attempted to justify his refusal to answer, as follows:

Because I wouldn't believe it because I believe [employee] more than I believe you and I believe [employee] more than I believe the employer, and I believe [employee] more than I believe anybody else, okay.

*Transcript, page 117.*

I find Dr. Ralph's testimony in this matter wholly unpersuasive. I believe the administrative law judge correctly weighed the medical evidence and reached the appropriate result. I would affirm the decision of the administrative law judge.

Because the majority has determined otherwise, I respectfully dissent.

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James G. Avery, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Elmer T. Bowyer Injury No. 10-034774  
Dependents: N/A  
Employer: Mineral Area Community College/MACC  
Insurer: MUSIC  
Appearances: Robert W. Butler, attorney for employee.  
Sarah K. Kraft, attorney for the employer-insurer.  
Hearing Date: November 26, 2012 Checked by: GLR/rm

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease? May 6, 2010.
5. State location where accident occurred or occupational disease contracted: St. Francois 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? No.
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 happened or occupational disease contracted: The employee claims that he injured his right shoulder due to the repetitive nature of his job requirements.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Right shoulder was claimed by the employee.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$95.90.
17. Value necessary medical aid not furnished by employer-insurer: The employee claimed medical expenses of \$43,763.03.
18. Employee's average weekly wage: \$950.62.
19. Weekly compensation rate: \$633.74 per week for temporary total and permanent total disability. \$422.97 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: None.
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

## **STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW**

On November 26, 2012, the employee, Elmer T. Bowyer, appeared in person and with his attorney, Robert W. Butler for a hearing for a final award. The employer-insurer was represented at the hearing by their attorney, Sarah K. Kraft. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. Mineral Area Community College was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully insured by MUSIC.
2. On May 6, 2010, Elmer T. Bowyer was an employee of Mineral Area Community College and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage is \$950.62 per week. His rate for temporary total and permanent total disability is \$633.74 per week. His rate for permanent partial disability is \$422.97 per week.
6. The employer-insurer paid \$95.90 in medical aid.
7. The employer-insurer paid \$0 in temporary disability benefits.
8. The employee has no claim for mileage.
9. The employee has no claim for permanent total disability.

### **ISSUES:**

1. Accident/Occupational Disease.
2. Medical Causation.
3. Prior Medical Bills.
4. Future Medical Aid.
5. Temporary Total Disability.
6. Permanent Partial Disability.

### **EXHIBITS:**

The following exhibits were offered and admitted into evidence:

Employees Exhibits:

- A. Deposition of Michael H. Ralph, M.D.
- B. Records from Pro Rehab.
- C. Medical bills.

Employer-insurer Exhibits:

1. Deposition of Michael J. Milne, M.D.
2. Medical report of Michael P. Nogalski, M.D.
3. Job Description.
4. Report of Injury.
5. Records from the Division of Workers' Compensation.
6. Medical records of Rustico Ramos Jr., M.D.
7. Medical records of Frank A. Krewet III, M.D.

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT:**

Elmer T. Bowyer, the employee and Rusty R. Straughan were the only witnesses to personally testify at trial. All other evidence was received in the form of written reports, medical records or deposition testimony.

Mr. Bower was fifty-five years old at the time of the accident/occupational disease on May 6, 2010. He worked as a Maintenance Supervisor for Mineral Area Community College/MACC. MACC is a community college located in Farmington, Missouri. The campus is approximately 250 acres and comprises multiple educational rooms as well as conference centers. The maintenance department was responsible for the maintenance and upkeep of the buildings and grounds in addition to setting up and cleaning up for various events conducted at the college. Some of the specific tasks required were cutting grass, unloading books at the book store, plowing snow in the winter time, leaf removal in the fall, trimming trees, power washing buildings, stripping and waxing floors, painting, cleaning walkways, some gardening and mulching, setting up and tearing down events, driving dump trucks among many other tasks. In general the duties involved everything that was required to maintain a small college campus.

The employee was hired in 1979 as a general maintenance man. He was promoted two years later to Maintenance Supervisor, a position he held for 28 years. He describes that he needed to keep the maintenance men busy, make sure work orders were done, setups and tear-downs were completed and whatever else was needed to keep the college running. He was a working supervisor, and while he did have supervisory duties, about half of his time was spent performing the same work as the general maintenance men. Mr. Bowyer supervised a maintenance crew of eight to ten people. He testified that each day was a different day.

The employee described several tasks which he performed relatively frequently. The first was the cutting of grass. He described that he performed these activities pretty much every day during the spring and summer seasons operating the mower about six hours per day. To operate the mowers he would have his arms at shoulder level maneuvering the levers back and forth in a repetitive manner to steer the mower. This requires the use of his whole arm and shoulder to perform this task.

Another task employee described was driving large dump trucks and trucks for plowing snow. These trucks were all manual transmission. The truck which plowed snow required him to repetitively reach with his right arm to shift gears in addition to maneuvering the plow blade. He indicated that there was a lot a snow that winter (2009-2010) and he would spend at times more than eight hours removing snow. He described that the pain in his right shoulder sharply increased in the early part of 2010 after plowing snow and never really returned to a level he felt was bearable.

Mr. Bowyer also described the set-ups and tear-downs of the events which occurred frequently at the college. Maintenance would have to set-up the stage, chairs and tables. The chairs would stack on top of each other. One would have to lift the chairs off the stack when setting up and place them back on top of the stack when tearing an event down. This would require repetitive use of the arms elevated at the shoulder level or higher to perform this activity. The employee indicated that he performed this activity about one time per week for several hours.

The employee testified that the month of May was particularly hectic for the maintenance crew as they were getting ready for graduations. There were increased activities getting the gym set-up and sweeping and mopping. The mowing and cleaning up of the grounds was particularly intense.

On cross examination, Mr. Bowyer confirmed that he was a maintenance supervisor and held the title of director of general services. He admitted that his job was essentially to keep the eight to ten guys that worked for him busy and that he did work as a maintenance supervisor. He agreed that his job duties included lining up the work orders. He also agreed that when he was doing set-ups or tear-downs that these were done as a group and he would not be doing these alone. He also agreed that he might use the lawn mower approximately twice a week during the weeks it was required. He also admitted that he did not work with the custodians every single day. He estimated he would get out and work with the them about two times a week.

Mr. Straughan, District Manager, testified on behalf of MACC. In his capacity, he oversaw the Maintenance Department. He would meet briefly with Mr. Bowyer every day to go over maintenance operations. It was his estimate that Mr. Bowyer spent about 25% of his time performing maintenance work and the remainder of his time performing supervisory duties. However, he admitted on cross examination that the only time he spent with him was at their daily meetings and observing him in the hall. He testified he was actually with Mr. Bowyer less than an hour per day. He testified that Mr. Bowyer was a good worker who was not the type to stand around when there was work to be done. He testified that Mr. Bowyer was a hard worker that he would rehire.

The employee reported the injury to his right shoulder on May 6, 2010. The report of injury notes that “. . . he does not think a specific event caused the pain, but feels it is the result of recurring use. . .”. When discussing the pain in his right shoulder, the employee testified that it developed over many years and the pain really began bothering him after he was plowing snow during 2010.

MACC sent the employee to see Dr. Krewet on May 10, 2010. Dr. Krewet examined the employee's right shoulder. He reported:

“[t]he patient states for years he has been having right shoulder pain. The patient states that the right shoulder really got worse this year. The patient states that it started after he did a lot of plowing in January. The patient states that it really has never settled down since that point in time. The patient states before that the pain would go away. The patient contributes the plowing to a lot use [sic] of the right arm with shifting and working the plow controls. The patient more recently has had a lot of problems with moving furniture and loading and unloading much.”

In his exam, Dr. Krewet noted substantial crepitus in the area of the AC joint. He noted tenderness in the shoulder area and more tenderness anteriorly. He sent the employee for x-rays which were negative but did show a somewhat narrow AC joint. He stated that “[i]n view of the fact that the patient has been having pain since January and there is really not been any let up since then, the patient will be sent for an MRI of the shoulder.” He was released to return to full duty.

MACC scheduled the employee for an IME with Dr. Milne on June 15, 2010. Dr. Milne took the following history:

“He states he was injured by chronic overuse starting with his employment approximately 10 years ago. He states that he was employed with this company for 30½ years and is currently working full duty. He reports his job description includes snow plowing, lifting furniture daily, and dragging mowers and tractors. He states he had a previous left shoulder injury and cervical spine injury, which were both treated non-operatively. He reports his pain level is currently 10/10 and it is 10/10 at its worst. He has pain in the front, back, inside, outside, deep in the shoulder with stabbing, popping, constant pain, and he notices this all mostly in the evening after work. Nothing seems to make it better and he has tried exercise, Tylenol and Ibuprofen.”

Upon examination Dr. Milne noted mild tenderness about that rotator cuff footprint. He noted full range of motion and minimal weakness in the thumbs in a down position. He was neurologically and neurovascularly intact. He had pain with resisted flexion in the thumbs in the down position.

Dr. Milne diagnosed right shoulder impingement and right shoulder rotator cuff tendinosis. He opined that the “patient's work is likely an aggravating factor in his condition, but not the primary or prevailing factor.” He recommended the patient consider a cortisone injection and some physical therapy to improve his condition. If this did not work he would recommend an MRI of the shoulder. He returned the employee to work at full duty.

Based on Dr. Milne's IME, MACC denied the claim on the shoulder and did not authorize any additional medical treatment on the shoulder.

The employee returned to work and did not receive any additional medical care until May 11, 2011, when he saw Dr. Ralph. The employee went nearly one year before he went to see Dr. Ralph. The employee reported to Dr. Ralph that he continued to have significant problems with his right shoulder. Dr. Ralph noted that he had had treatment previously on his left shoulder including an MRI and cortisone injections into his left shoulder. The employee reported that the left shoulder had improved. The employee reported to Dr. Ralph that the right shoulder started really giving him a problem approximately a year ago, but that he had problems with it prior to that time. Dr. Ralph described that he reported a particular activity of hooking and unhooking a mower was when it bothered him. Dr. Ralph stated that employee's job ". . . is not constantly repetitive, but it is very vigorous with regard to both of his shoulders. . .".

Dr. Ralph's exam noted a markedly positive impingement test on the right. He noted marked crepitus with forward flexion and internal rotation which he observed was particularly noticeable with comparison to the left shoulder. He also noted comparable weakness in the right shoulder with resisted abduction.

Dr. Ralph believed that Mr. Bowyer likely had a rotator cuff tear. He ordered an MRI and told the employee that if there is a full thickness tear then he would recommend surgery. He opined that ". . . I do feel that this is related to his work activity and even under the relatively conservative Missouri law; I consider this to be compensable."

An MRI was performed on May 31, 2011 at Cedar Imaging. It revealed the following:

1. Full thickness tear involving the posterior half of the distal supraspinatus tendon associated with partial tendon retraction. The distal supraspinatus tendon in markedly attenuated in thickness and frayed in appearance.
2. Proximal long head biceps tendinosis without tendon tear or rupture.
3. Mild AC osteoarthritic disease.

Dr. Ralph reviewed the MRI and noted a "very large tear of the rotator cuff". He was concerned that some of the distal portion of the supraspinatus tendon had been substituted with scar tissue. He recommended surgery. He opined that "[t]he patient's work activity is a prevailing factor in this patient developing a rotator cuff tear. This patient has worked at a job of a very vigorous physical nature for 30½ years." Dr. Ralph further stated that "[i]t has clearly been shown in literature that workers that work in more vigorous jobs as it relates to the shoulder have a much higher chance of developing rotator cuff tears."

Surgery was performed on June 7, 2011, at the Frontenac Surgery & Spine Care Center. Dr. Ralph performed an arthroscopic debridement of degenerative tear labrum, arthroscopic debridement of biceps tendonitis, resection of coracoacromial ligament, acromioplasty right shoulder, and repair and reconstruction of chronic massive tear right rotator cuff using both rotator cuff tissue rearrangement as well as Stryker biologically engineered Dermagraft.

Dr. Ralph wanted to give the shoulder maximum time to heal and therefore kept Mr. Bowyer in an abduction splint until July 13, 2011. At that time, he started him on some pulleys which he

was to do at home or at work 10-14 times a day. Mr. Bowyer requested that he be returned to work in an office duty capacity. Dr. Ralph released him to this work on July 18, 2011, answering phones and doing paperwork.

Dr. Ralph reported that the employee was able to return to supervisory capacity without problems until August 29, 2011, when he was diagnosed with tongue cancer. He was to undergo chemotherapy which prompted Dr. Ralph to delay physical therapy. The employee was to continue with his pulleys and range of motion exercises.

MACC sent Dr. Ralph's medical records to Dr. Milne for review and he generated a letter on November 17, 2011. After review of the records he opined that the patient had a right rotator cuff tear. He further opined as follows:

“In light of the patient's given history, there is no specific injury report and therefore I cannot connect his employment to his injury directly, as the patient reported no specific injury to me in my previous Independent Medical Evaluation.”

Dr. Milne further opined as follows:

“It is my feeling based on a reasonable degree of medical certainty that the patient's work activities aggravated his underlying condition, but is not the primary or prevailing cause of his condition.”

Dr. Milne rated Mr. Bowyer's disability at 6% permanent partial disability of the right shoulder.

MACC also scheduled the employee to be evaluated by Dr. Nogalski on December 7, 2012. Dr. Nogalski reported that he saw the patient specifically with respect to a claimed injury of May 6, 2010. He reports a history that employee has been a maintenance supervisor for 32 years. He is a working supervisor and typically works with the men. In the winter employee does most of the snow plowing and does this from 2 am to 4 pm. He also lifts objects on a routine basis. Dr. Nogalski further noted that employee denied any particular one injury. “He states the more he did with the shoulder the worse it got around the spring of 2010. He does admit to having some shoulder problems prior to that time for several years.” He further reports “. . . specifically he was driving a dump-truck and then had a lot of pain in his shoulder.”

Dr. Nogalski reported that the employee's job activities involve multiple tasks. He reported that the employee worked with digging and mowing equipment. He noted mechanical work and estimates working about 30 minutes a day with over the chest level. He indicated that the employee does not recall any one injury event or a distinct pop in his shoulder. Dr. Nogalski diagnoses an aggravation of a pre-existing chronic rotator cuff tear. He opines that “. . . [i]t does not appear that the alleged work done on 5/6/2010 would be the prevailing factor in his need for treatment of the right shoulder, specifically with respect to surgical intervention. He appeared to have a fairly large chronic tear and this tear in fact appears to be fairly significant and longstanding.”

MACC also submitted the job description of the General Services Director – the position held by Mr. Bowyer at MACC. In reviewing the job duties, it is clear that many of Mr. Bowyer's responsibilities were administrative. He was required to meet with the business manager, prepare daily work assignments for his staff members, supervise by insuring that the assignments were completed within a reasonable amount of time, prepare assignments for the weekend, train the employees to establish their job procedures, he was required to complete paperwork when employees failed to meet their prescribed standards and basically identify and prioritize the area of the buildings and grounds that required preventive or corrective attention. In addition to these administrative positions, his job duties did include actively assisting with performing and completing the work assignments and performing additional duties necessary to ensure that their buildings and grounds were adequately maintained.

MACC also submitted certified Division records. These show that the employee was having reported complaints in his right and left shoulders in January 2005. MACC also submitted the medical reports of Dr. Ramos who took a history of bilateral shoulder pain, left worse than right, off and on for the past five (5) years on January 12, 2005.

The employee returned to Dr. Ralph on December 12, 2011, feeling strong enough to complete physical therapy. Dr. Ralph ordered both electrical stimulation and some strengthening exercises. On January 9, 2012, the employee reported he was doing well from the shoulder. Dr. Ralph noted that “[b]ecause this was a neglected tear, the chances of this not being successful or failing in the future is much greater.” A follow up MRI was scheduled.

Dr. Wu performed an MRI on January 16, 2012. Dr. Wu reported an impression of “recurrent tear of the supraspinatus tendon associated with tendon retraction.” Dr. Ralph reviewed the MRI himself and opined that it showed the repair to be intact. He discussed it with the radiologist and pointed out that he moved the insertion sight much more proximally. Dr. Ralph reports that the employee was functioning pretty well, although by no means had a perfect result “. . . considering how bad the tear was and the fact that there was a delay of a year in it.”

Dr. Wu performed a second MRI report in which his impressions were “post-surgical changes in the greater tuberosity and supraspinatus tendon. The supraspinatus tendon in markedly attenuated in thickness and demonstrates a frayed margin but remains inserting at the greater tuberosity as described. No complete tendon retraction.”

Mr. Bowyer saw Dr. Ralph for the last time on February 20, 2012. Dr. Ralph noted that his motion is approaching normal and his strength is improving. The employee was returned to work without restrictions as of February 21, 2012 and released from Dr. Ralph's care.

Dr. Ralph provided a rating in a letter dated April 23, 2012. He reported that the employee has done well in spite of a significant delay in treatment and the large diameter and retraction and chronicity of the repair. He noted that the MRI scan showed the repair to be intact but that the use of a fetal allograft can give a false impression. He reported that at the time of the last visit Mr. Bowyer has a successful repair and does not need further medical, surgical or physical

therapy treatments at that time, but that he is concerned for the future. He provided a rating of 25% permanent partial disability of the right shoulder.

Mr. Bowyer was sent for a follow up MRI with Dr. Milne on May 14, 2012. Dr. Milne's history is ". . . [t]oday he reports no real pain in the right shoulder, but there is generalized soreness. He has no problems with sleeping, but does notice weakness. He is working full duties and denies any injuries from the time we saw him for the Independent Medical Evaluation on 6/15/2010 until the date of surgery. He had no injuries at work and reports his right shoulder symptoms were brought on by the repetitive nature of his job." Dr. Milne opines that the employee had right shoulder impingement, right rotator cuff tendinosis and right shoulder possible rotator cuff tear. Dr. Milne reiterated his opinion that the work activities were not the prevailing factor in the development of the condition.

Dr. Milne was asked some additional questions and prepared a letter dated August 2, 2012, but did not change any of his previous medical opinions.

The employee submitted the deposition testimony of Dr. Ralph taken April 25, 2012. He describes the reason for his opinion regarding causation as follows:

" . . . What happens is the rotator cuff wears down from repetitive activity. The problem is there is a watershed area in the center that has a very poor blood supply. There are two things that can typically happen. One - - both of them are all part of the same process, you wear the cuff down, it becomes weaker. And then it could finally just from repetitive activity, you know, give way and have a full thick tear."

Dr. Ralph further testified that "[i]f this patient, in my opinion, had not been working at this job as he described for 30 years, he would not have been in the state of ill being with regard to his right shoulder that ultimately occurred." Dr. Ralph reiterated his opinion stating:

" . . . The prevailing factor in this case is . . . repetitive activity over a period of 30 years. If this is not . . . work related in the State of Missouri, then virtually any repetitive activity would not be considered work related. Because that's what - - this is, what this is. This is something that occurred over a period of 30 years."

MACC presented the medical opinion and deposition testimony of Dr. Milne. Dr. Milne testified that he is a board certified orthopedic surgeon. He testified that he first saw the employee on June 15, 2010. He took a history from the employee that he thought he was injured by chronic overuse with his employment at MACC. A physical exam revealed right shoulder impingement and right rotator cuff tendinosis. Dr. Milne testified that he felt the employee's work was a likely aggravating factor, but not the prevailing factor in causing his condition. In further explanation, he indicated that his job duties using a stick steer lawn mower below the level of the shoulder would not cause his rotator cuff to tear. Dr. Milne felt that an acute tear would have to have a specific accident such as a trip and fall or slipping on wet grass. He did not understand how driving a lawn mower could tear the rotator cuff. Dr. Milne then explained that at his physical exam in 2010 there was no indication at that time of any full thickness tear of his rotator

cuff. Dr. Milne explained that it was possible that the employee could have developed the rotator cuff tear after he saw the employee in June 2010 and before the MRI was taken eleven months later.

Following review of Dr. Ralph's records and the operative note, Dr. Milne then came to an opinion that the employee suffered a 6% permanent partial disability of his shoulder as a result of the full thickness rotator cuff tear and surgery.

Dr. Milne testified that he then had an opportunity to examine the employee again on May 14, 2012. Dr. Milne noted that the employee reported no real pain in the shoulder but there was some generalized soreness. At that time, he performed another physical examination and noted there was some atrophy in the right supraspinatus trapezial region, but there was no tenderness over the AC joint but some tenderness over the rotator cuff footprint and biceps tendon. Dr. Milne felt that the employee had excellent range of motion with good strength in the right shoulder. He again determined that the employee had 6% permanent partial disability at the level of the right shoulder.

On cross examination, Dr. Milne testified that he had no reason to dispute the diagnoses of Dr. Ralph. He also felt that the treatment that Dr. Ralph performed was reasonable and necessary. With regard to the outcome of the surgery, Dr. Milne testified that he felt the employee had a functional good outcome, but that he felt the repair did not work. To fully explain his point, Dr. Milne testified that he considered the treatment successful but that it was a failed repair since the physical exam revealed atrophy.

On cross examination, Dr. Milne also testified about the employee's job duties. He believed most of the activities were keeping up the grounds and surrounding areas of the junior college. Dr. Milne also indicated that the employee never reported a specific incident to him and that Mr. Bowyer related that it was due to repetitive overuse. Dr. Milne then reiterated that the work activities aggravated his shoulder but were not the prevailing factor in causing the shoulder condition. In further explaining his position, Dr. Milne testified about how if there was an acute specific event, his opinion would be totally different noting that most people know when they tear their rotator cuff. He then explained that somebody who has repetitive trauma to the shoulder would be someone who might work as an overhead worker like a painter or somebody who dry walls ceilings. In further discussing the employee's job, Dr. Milne even indicated that "I may be overestimating the strenuous nature of his job".

During cross examination, Dr. Milne when asked about what he specifically based his aggravation versus prevailing factor causation opinion on and replied ". . . I was relating that specifically to his work injury report where he said he was operating the stick steering type of lawn mower." When asked further about lifting and moving furniture he stated that "again, I believe those things can aggravate it, but I don't believe that they caused his rotator cuff tear."

Lastly Dr. Milne was asked and answered in cross examination as follows:

- “Q: Can a person have a chronic tear where it becomes a chronic overuse over a period of time, it wears down and then there’s some action that just causes it to give way?  
A: Yes.  
Q: And could the activities that he described as having occurred cause some chronic wear and tear on that shoulder, the work activities that he described?  
A: The work activities you described to me today could, but, again, I was basing my opinions on his injury report where he said he was operating a mower and he felt that it came from that.”

On cross examination, Dr. Ralph indicated that he thought there was a delay in the employee’s treatment. He thought it would have to be more than three to four months, but it could be older than that. Dr. Ralph described the employee as a person who is able to work through anything and that allowed him to continue working for another year with his shoulder pathology. Dr. Ralph also admitted that the employee’s job is not constantly repetitive and that there are times when he is doing paperwork. Dr. Ralph admitted that he did not discuss various aspects of the employee’s job with him like how many people he supervised or how much time he worked in an office or how much time he did paperwork. When asked if his opinions on causation would change if the employee’s job duties were different than Dr. Ralph understood, he refused to consider any alternative scenarios. Instead Dr. Ralph said “Because I wouldn’t believe it because I believe Mr. Bowyer more than I believe you and I believe Mr. Bowyer more than I believe the employer and I believe Mr. Bowyer more than I believe anybody else okay.” Dr. Ralph was also asked if the employee was able to return so early after surgery to perform his job duties if perhaps his job was not as vigorous as Dr. Ralph might believe, Dr. Ralph reported that the employee was a good employee who recognizes the importance of being there.

In her proposed findings, counsel for the employer-insurer argued that Dr. Ralph lost credibility due to his bias in favor of the employee and his evasiveness in answering questions. As examples she pointed out that Dr. Ralph was asked if he could identify the types of the employee’s vigorous job duties and he essentially refused to answer. Eventually, Dr. Ralph, after some significant deviation, indicated that the employee’s job duties were somewhere between a lawyer and a hod carrier. She further indicated that instead of answering specific questions about the employee’s activities and how those activities would be the cause of the repetitive trauma of the shoulder, Dr. Ralph deflected by acting so shocked that a different doctor could come to a conclusion that the employee’s supervisory position was not the prevailing factor for his shoulder condition. Eventually, even Dr. Ralph mentioned that some of the employee’s problems are the aging process and are exacerbated by things you are doing. Dr. Ralph makes a point to go on about how the employee had been working there for 30 years and that this slowly happened over 30 years, but the doctor did not provide much in the specifics as to what vigorous activities the employee was doing. It would seem without being able to identify the specifics, that it is not clear what specific repetitive activity he is talking about that has occurred for the past 30 years. Interestingly, on re-direct examination, Dr. Ralph essentially says that “A large tear like that there is - - it occurs, okay, and that separation occurs acutely in my opinion.”, which seems to be at

odds with Dr. Ralph's previous opinion that the employee's problems were chronic and that there was not an acute accident. While he then clears up saying it was worn out over a period of time and finally gave way, Dr. Ralph does suggest that there was an acute specific accident but provides no details as to when this would have occurred.

## **RULINGS OF LAW:**

### **Accident/Occupational Disease**

In a Missouri workers compensation case, the claimant has the sole burden of proving all material elements of his claim. **Meilves v. Morris**, 422 S.W.2d 335 (Mo.Div.2 1968). Pursuant to RSMO 287.800(1), Administrative Law Judges shall construe the provisions of this chapter strictly. The Administrative Law Judge and the Commission are charged with the responsibility of assessing the credibility of the witnesses. **Hawkins v. Emerson**, 676 S.W.2d 872 (Mo. App. 1984). The trier of fact may disbelieve a witness' testimony even if no contradictory or impeaching evidence is introduced. *Id.* The trier of fact may reject the testimony solely on the basis of its lack of credibility. **Cagle v. Regal**, 522 S.W.2d 7 (Mo. App. 1975).

Pursuant to RSMO §287.067, an "occupational disease" is defined as 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. The disease need not 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. RSMO §287.067(1).

Further, 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. RSMO §287.067(2).

An injury due to repetitive trauma is recognized as an occupational disease and is compensable only if the occupational exposure was the prevailing factor in 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. RSMO §287.067(3). Webster's dictionary defines "repetitive" as "happening again and again, repeated many times; containing repetition". It then goes on to define "repetition" as "the act or an instance of repeating or being repeated; a motion or exercise that is repeated and usually counted (Merriam-Webster Dictionary 2012). This definition implies duplication and doing the same thing in the same manner over and over again.

Dr. Milne did find that the employee's work activities were an aggravation of his shoulder condition.

Under the previous standard, the Workers' Compensation law allowed for recovery of benefits if the disability sustained was by the aggravation of a preexisting non-disabling condition or disease caused by a work-related accident even though the accident would not have produced the injury in a person not having the condition. **Kelley v. Banta & Stude Const. Co., Inc.**, 1 S.W.3d 43, 48 (Mo.App.E.D. 1999). However recent case law confirms that the 2005 amendments changed the criteria for when an injury is compensable and under the current statute, "a work injury is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and the disability." **Gordon v. City of Ellsville**, 268 S.W. 3d 454, 459 (Mo.AppE.D. 2008). Thus, in order for the employee to recover additional benefits, he must show that his was the prevailing factor in causing both the resulting medical condition and the disability. It is no longer sufficient to show a direct causal link between the job duties and the aggravated condition. **Id.** at 459.

There is no question that the employee required medical care for his right shoulder. A factual question exists as to what, when and where the employee injured his shoulder so that medical care was required; and then whether the injury was compensable under the law. Potential possibilities are that his shoulder required medical care due to:

- An acute injury that occurred away from the workplace.
- Ordinary, gradual deterioration or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living.
- An injury due to repetitive trauma away from the workplace.
- An acute injury that occurred at the work place.
- An injury due to repetitive trauma at the work place.
- An aggravation of a pre-existing injury.

The parties also dispute how repetitive or how demanding the work duties of the employee actually were. They also disagree as to how much time the employee actually spent performing repetitive strenuous job duties.

In order for the injury to be compensable, the accident/occupational injury must be found to be 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.

The employee alleges that he sustained an injury by occupational disease by working at a repetitive job for thirty years. The employer-insurer maintains that the employee did not establish that his work activities were the prevailing factor in causing his right shoulder condition. The Court agrees with the employer-insurer.

It is clear that the employee reported that he did not have an acute injury at work that caused the injury to his right shoulder. There is no evidence that the employee had an acute injury away from the work place that injured his right shoulder. There also is no evidence as to any non-work place repetitive activities that could have injured the employee's right shoulder. There was some

general reference to gradual deterioration caused by aging that caused the injury to the right shoulder. This only leaves two options of either an injury due to repetitive trauma at the work place or an aggravation of a pre-existing injury.

The decision in this case boils down to an application of the law to the facts with a determination of credibility. The Court finds that the overall testimony of the employee is credible. The Court further finds that the testimony and opinions of Dr. Milne and Dr. Nogalski are more credible than the testimony and opinions of Dr. Ralph.

Dr. Ralph's testimony was that the employee's duties at work were the prevailing factor for his right shoulder injury. Both Drs. Milne and Nogalski opined that the employee's duties at work were not the prevailing factor for the injury to his right shoulder. Both of them further opined that the employee's work was likely an aggravating factor but not the primary or prevailing factor in the employee's condition. Dr. Nogalski specifically diagnosed an aggravation of a pre-existing chronic rotator cuff tear.

Some medical evidence that the Court found compelling in this case was the fact that the employee received medical care to both of his shoulders in 2005. There is no indication as to the specific source of that injury. Maybe it was from the repetitive duties of the employee's job, maybe not. Other than the employee's testimony, this objectively documents that the employee's shoulder was not perfect as of May 6, 2010. He had a pre-existing condition of some kind.

Another factor was that Dr. Nogalski reported that the employee had a large chronic tear that appeared to be fairly significant and longstanding. It is unclear if this was longstanding at the time of Dr. Nogalski's examination or at the time of the employee's claimed injury.

Another factor is that the employee is claiming a significant injury as of May 6, 2010. Yet, when the employer-insurer denied further medical care the employee waited about one year to seek medical care on his own. Arguably the injury was not that significant as the employee waited a long time before pursuing additional medical care. He was working for that interim year with presumably the same job duties that he claims is the source of his right shoulder problems.

Another factor is that when Dr. Milne examined the employee in 2010 he indicated that there was no indication at that time of a full thickness rotator cuff tear. He speculated that the employee developed the rotator cuff tear after June 2010 and before the MRI was taken some time later.

Another factor that affected Dr. Ralph's credibility was that he admitted that the employee's job duties were not constantly repetitive and the fact that he did not discuss the various aspects of the employee's job duties with him. Even Dr. Ralph indicated that that some of the employee's problems are the aging process and are exacerbated by the things you do. In addition, Dr. Ralph's position is that the employee's injury was due to repetitive duties yet he also testified that a large tear like the employee had occurs acutely.

Other factors that are important deal with the activities that the employee performed at work and how strenuous or repetitive they actually were. The employee claims his work is 50%

administrative and 50% working. The employer-insurer says 75% administrative and 25% performing actual labor. Regardless of the split, the employee spent a lot of his time supervising his work crew and at times working with them. Questions have been raised as to the actual repetitive nature of the employee's job duties.

When you consider all of this information together, the employee fails in his efforts to prove all material aspects of his claim. The Court finds that the employee has not offered credible evidence that he sustained an occupational disease arising out of and in the course of his employment. The Court further finds that the employee has not met his burden of proof to show that his occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The credible medical opinion is that the employee may have aggravated a pre-existing condition but that work was not the prevailing or primary factor.

Therefore, based on a consideration of all of the evidence the Court finds that the employee has not proven accident/occupational disease under the provisions of Chapter 287. His claim is denied.

**Medical Causation, Prior Medical Bills, Future Medical Aid, Temporary Total Disability and Permanent Partial Disability.**

The Court has ruled that the employee did not prove that he had an accident/occupational disease that was compensable under the law. In that light all other issues are moot and are not addressed by the Court. As a footnote, if it were determined that the employee's case was compensable, at a minimum, medical causation, prior medical bills and permanent partial disability would be found in his favor.

**ATTORNEY'S FEE:**

There are no attorney fees in this case.

**INTEREST:**

There will be no interest in this case.

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*