

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

Injury No.: 01-015459

Employee: Christopher Crow
Employer: Cassens Transport Company
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)
Date of Accident: February 7, 2001
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 23, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued June 23, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15th day of February 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Christopher Crow

Injury No. 01-015459

Dependents: N/A Before the
Division of Workers'
Employer: Cassens Transport Company **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund (left open) Relations of Missouri
Jefferson City, Missouri
Insurer: Self-Insured
Hearing Date: February 16 & March 18, 2005 Checked by: JHP

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: February 7, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis 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? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Employee slipped and fell while loading his trailer
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right Shoulder
14. Nature and extent of any permanent disability: 20% permanent partial disability of the right shoulder
15. Compensation paid to-date for temporary disability: \$5,742.48
16. Value necessary medical aid paid to date by employer/insurer? \$4,790.68

Employee: Christopher Crow Injury No. 01-015459

17. Value necessary medical aid not furnished by employer/insurer? \$19,261.76
18. Employee's average weekly wages: \$994.60
19. Weekly compensation rate: \$599.96 TTD \$314.26 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$19,261.75

7-6/7 weeks of temporary total disability \$ 4,713.97

46.4 weeks of permanent partial disability from Employer \$14,581.66

22. Second Injury Fund liability: Yes No Open X

TOTAL: \$38,557.38

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:

David G. Hughes

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Christopher Crow	Injury No: 01-015459
Dependents:	N/A	Before the
Employer:	Cassens Transport Company	Division of Workers'
Additional Party:	Second Injury Fund (left open)	Compensation
Insurer:	Self-insured	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: JHP

A hearing in this proceeding was held on February 16, 2005. The record was left open for additional evidence which was admitted into evidence on March 18, 2005. Both parties submitted proposed awards on April 29, 2005. The record comprises 135 pages of medical records and other records and 345 pages of medical and other witness depositions.

STIPULATIONS

The parties stipulated that on or about February 7, 2001:

- 1.the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
- 2.the employer's liability was self-insured;
- 3.the employee's average weekly wage was \$994.60;
- 4.the rate of compensation for temporary total disability was \$599.96 and the rate of compensation for permanent partial disability was \$314.26; and
- 5.the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

- 1.the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
- 2.compensation has been paid in the amount of \$5,742.48 representing 9-4/7 weeks of benefits covering the periods from February 13 to April 4, 2001 and from May 14 to May 29, 2001;
- 3.the employee was temporarily and totally disabled following surgery on April 1, 2004 through May 25, 2004; and
- 4.the employer has paid \$4,790.68 in medical expenses.

ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant's right shoulder impingement syndrome was caused by the work-related accident of February 7, 2001;
2. if the employee's right shoulder impingement syndrome is work-related, whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for the medical bills set forth in employee's Exhibit B;
3. if the employee's right shoulder impingement syndrome is work-related, whether employee is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to any additional temporary total disability compensation following surgery on April 1, 2004; and
4. the nature and extent of any permanent disability sustained by the employee as a result of the work-related injuries of February 7, 2001.

MEDICAL CAUSATION

Employee claims that he developed impingement syndrome with instability of the right shoulder as a result of the work-related accident of February 7, 2001. Employer contends that the employee sustained only rotator cuff tendonitis from the work-related injury and that his impingement syndrome developed as a result of a subsequent undisclosed accident or repetitive overhead activities.

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

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

The quantum of proof is reasonable probability. Davies, *supra* at 749; Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); White v. Henderson Implement Co., 879 S.W.2d 575, 577 (Mo. App. 1994); Fischer at 199; Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983); Griggs at 703. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer at 198.

Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo. App. 1985). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174

(Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986). An administrative law judge may not constitute himself or herself as an expert witness and substitute his or her personal opinion of medical causation of a complicated medical question for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596 (Mo. 1994); Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Eubanks v. Poindexter Mechanical, 901 S.W.2d 246, 249-50 (Mo. App. 1995). However, even uncontradicted medical evidence may be disbelieved. Massey v. Missouri Butcher & Cafe Supply, 890 S.W.2d 761, 763 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486, 490 (Mo. App. 1990).

Findings of Fact

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

Description of Accident

Christopher Crow, employee herein, began working for employer Cassens Transport Company in approximately 1991. He has worked as a car hauler for the duration of his employment. Claimant's job as a car hauler requires him to load motor vehicles onto a two-level trailer and to tighten the vehicles down with a ratchet and chain system. Claimant then drives the car hauler with the motor vehicles to various drop-off locations where he releases and unloads the vehicles using the same ratchet and chain system. (Claimant's Testimony)

On or about February 7, 2001 claimant sustained an injury at a Cassens Transport Depot in Fenton, Missouri while loading a minivan to the top part of his car-hauling trailer. Claimant climbed out of the sliding door of the minivan, which was in the number 4 position on the trailer, slipped, and started to fall to the ground. He grabbed a portion of the trailer with his hands and hung with his right arm above and behind him supporting his weight. (Claimant's Testimony) Claimant noted bruises on his left elbow and left hip and reported the injury to his supervisor. The next day, claimant noted significant right shoulder and right-sided neck pain. Claimant's supervisor Kevin Nelson completed the report of injury. (Claimant's Exhibit A)

Medical Treatment

Employer referred claimant to Concentra Medical Center in Fenton, Missouri where he was evaluated by Dr. Fred Ginsberg on February 13, 2001. Dr. Ginsberg noted that claimant slipped and fell on February 7, 2001 and "caught himself with both arms outstretched but did manage to hit his left elbow and left hip." He noted that claimant subsequently developed progressively increasing pain in his right shoulder and the right side of his neck. (Claimant's Exhibit E) Dr. Ginsberg's examination revealed spasm along the trapezius and the cervical musculature on the right. Additionally, lateral rotation and lateral bending on the right were slightly decreased and there was a resolving hematoma in the area of the greater trochanter of the left hip. Dr. Ginsberg found that claimant's left elbow had slight ecchymosis and that there were two small abrasions. He diagnosed employee with a right acromioclavicular strain, cervical sprain, and left hip and left elbow contusions. Dr. Ginsberg recommended physical therapy three times weekly for two weeks and prescribed Vioxx and Skelaxin. (Claimant's Exhibit E)

Claimant returned to Dr. Ginsberg on February 16, 2001. Employee was still having difficulty elevating his right arm without pain. On physical examination, Dr. Ginsberg noted that he had a painful arc, that the right acromioclavicular joint was exquisitely tender, and that he had full range of motion in his head and neck but with some spasm along the trapezius. He again diagnosed claimant with a right acromioclavicular strain and ordered an MRI of the right shoulder. (Claimant's Exhibit E) Claimant received physical therapy at PRORehab on February 14, 15 and 16. (Claimant's Exhibit G)

The MRI was performed without contrast on February 16, 2001 and was read as negative. (Claimant's Exhibit E) Claimant returned to Dr. Ginsberg's office on February 19, 2001. He complained of severe right shoulder pain. Dr. Ginsberg diagnosed employee with a right shoulder strain and referred him to Dr. Michael Nogalski, an orthopedic surgeon. Dr. Ginsberg kept claimant off work from February 13, 2001 through February 19, 2001. (Claimant's Exhibit E)

Dr. Michael Nogalski examined claimant on February 21, 2001. He noted that employee was a 41 year old driver

who stated that he injured himself on February 7, 2001 when he was getting out of a van, fell, and caught himself with both arms and held himself briefly. Dr. Nogalski's physical examination of the right shoulder revealed a mild positive impingement sign in stage 2 only and increased tenderness with abduction at or below the acromion level. His impression was "right shoulder strain rotator cuff." He injected the shoulder with a mixture of Depo-Medrol and Marcaine and recommended that claimant continue physical therapy. He restricted employee to light duty work with no lifting, pushing or pulling of greater than 20 pounds, and no use of his right arm over the chest level. (Claimant's Exhibit F) As employer did not have light duty, claimant was kept off work. (Claimant's Testimony)

Claimant returned to Dr. Nogalski on March 7, 2001 and reported that the injection had helped for approximately one week but that he continued to experience intermittent dull pains. On physical examination employee had decreased range of motion with pain in abduction and forward flexion and a positive impingement sign in stage 2 only. Dr. Nogalski's impression was right shoulder rotator cuff tendonitis. He recommended continued physical therapy and light duty work with no lifting of greater than 20 pounds and no overhead activities; he told claimant to follow up in three weeks. (Claimant's Exhibit F) As employer again did not have light duty, claimant remained off work. (Claimant's Testimony)

Claimant continued to receive physical therapy three times per week. On March 23 claimant told the therapist that on Wednesday, March 21 he felt a loud "crack" in his shoulder while stretching and bringing his right arm behind his head. There was no initial increase in symptoms. However, over the weekend he experienced an increase in symptoms and they were significantly worse on Monday, March 26. He continued to report increased symptoms through April 2. (Claimant's Exhibit G)

Dr. Nogalski reexamined employee on April 4, 2001. He noted that employee's his right shoulder continued to be sore and that he had pain especially when he lifted out to the side of his body. Claimant also reported more pain in the anterior shoulder than anywhere else with occasional pains that radiated down his right arm; his pain occurred mostly with activities. Dr. Nogalski's physical examination showed full range of motion and forward flexion, abduction only to about 130 degrees and external rotation to 80 degrees. Impingement sign was not conclusively positive in stage 1, but increased at stage 2. He noted tenderness around the posterior shoulder and the medial scapular area and tenderness with passive motion with the elbow below the shoulder and chest level. His impression was right shoulder pain, possible tendonitis with fairly good functional capacity. Dr. Nogalski recommended that claimant return back to full duty, follow up in three weeks, and continue a home exercise program. (Claimant's Exhibit F)

Employer hired Research Consultant's Group, Inc. to conduct video surveillance of the claimant on April 6 and 7, 2001, shortly after Dr. Nogalski had released claimant to full duty work without restrictions. The Friday, April 6, 2001 videotape showed claimant driving a minivan at approximately 8:11 a.m., then talking to his wife at 2:47 p.m., standing behind a minivan at 2:59 p.m., speaking with a male at 4:20 p.m. and leaning over a car door with both arms below shoulder level at 4:26 p.m. Between 4:43 p.m. and 5:00 p.m. claimant, who is right handed, was driving a riding yard mower which he steered mostly with his left hand. He reached down with his right arm to operate some sort of lever. (Employer's Exhibit 11)

The Saturday, April 7, 2001 video surveillance began at 7:49 a.m. At 8:08 a.m. claimant got in a minivan and drove off with a motor boat attached to the rear of his van. A few minutes later he stopped at a gas station. Claimant's wife carried a pack of soda to the van while claimant carried nothing. At 9:17 they arrived at a dock. At 9:27 claimant and his son released the boat into the water. His wife drove off in the van. At 3:04 the video showed claimant and his son riding in the boat and docking. Claimant is shown getting out of the boat, using his left arm to open the van door, backing the van with his left arm on the steering wheel down to the water's edge. The process of getting the boat on the trailer was not visible. The video next showed claimant driving the van and trailer up a slope. At 3:12 p.m. claimant lifted the boat engine cover with his left arm. Claimant was also seen pulling his son forward out of the boat with his right arm. (Employer's Exhibit 11)

Mr. Crow returned to work on April 9, 2001 and performed all of usual duties with increasing pain in his right shoulder. (Claimant's Testimony) Due to persistent right shoulder pain, claimant returned to Dr. Nogalski on May 14, 2001. Claimant indicated that he had been working and was experiencing soreness and increased pain in his right shoulder and that he could not do a push-up. Dr. Nogalski's examination of the right shoulder revealed reproducible pain upon abduction. His impression was right shoulder pain and rotator cuff tendonitis. He felt that claimant had a reproducible finding in abduction which indicated the possibility of rotator cuff tendonitis or impingement. He prescribed additional physical therapy and limited his work activities to light duty for three weeks. Light duty work was to involve no use of the right arm overhead and no pushing or pulling from side to side. (Claimant's Exhibit F)

Employer subsequently sent the video surveillance tape to Dr. Nogalski which he reviewed on May 18, 2001. Dr. Nogalski advised the employer by letter that based on the activities shown in the surveillance tape, he felt that claimant could

return to full duty work and opined that employee did not need any additional medical treatment. (Claimant's Exhibit F)

Claimant subsequently returned to full duty. Because employee continued to experience significant pain and physical difficulties, claimant's attorney requested additional medical treatment for claimant's right shoulder. The request for treatment was denied by employer on July 18, 2001. (Claimant's Exhibit M)

Claimant thereafter sought treatment from Dr. Frank Petkovich, an orthopedic surgeon, who examined him on August 10, 2001. Dr. Petkovich noted that claimant had an injury at work approximately six months earlier and that he complained of pain and aching in his right shoulder. Dr. Petkovich's physical examination revealed somewhat limited cervical spine forward flexion and a normal appearing right shoulder. He diagnosed claimant with a right shoulder rotator cuff strain and tendonitis and injected claimant's right subacromial space with a mixture of Depo-Medol and Marcaine and prescribed Naprosyn. Dr. Petkovich additionally recommended physical therapy one to two times per week. He did not feel that claimant had a surgical problem at that time. (Claimant's Exhibit H)

As Dr. Petkovich recommended physical therapy, claimant's attorney again requested employer to provide medical treatment. The request for treatment was denied on November 15, 2001. (Claimant's Exhibit M) Claimant was unable to obtain physical therapy on his own. (Claimant's Testimony)

Dr. Eli Shuter, a neurologist, examined claimant on February 27, 2002 and reviewed the pertinent treatment records at both examinations. Dr. Shuter testified that he found tenderness over the biceps tendon, visible atrophy of the right supraspinatus and infraspinatus muscles, weakness and pain on movement of the right shoulder in all directions especially internal rotation, and crepitation on internal rotation. He did not find an impingement sign. (Claimant's Exhibit C, Page 10) He reviewed the videotape of April 6 and 7 and did not see any use of claimant's right shoulder that was inconsistent with his diagnosis. (Claimant's Exhibit C, Pages 11-13) Dr. Shuter opined that claimant sustained, as a result of the February 7, 2001 accident, biceps tendonitis, chronic straining injury of the right shoulder as well as an injury of the fifth cervical nerve root or suprascapular nerve resulting in atrophy of the right supraspinatus and infraspinatus muscles, chronic right shoulder pain and weakness of the right shoulder girdle. He recommended additional physical therapy. (Claimant's Exhibit C, Pages 13-14)

During the next 21 months claimant was involved in other legal proceedings and was unable to pay for treatment on his own.

Due to persistent right shoulder pain, Mr. Crow sought treatment by Dr. Dean Lusardi, an orthopedist in Washington, Missouri. Dr. Lusardi examined employee on November 26, 2003. He noted that claimant had an injury on February 7, 2001 when he fell from a truck and caught himself with both of his arms as he fell. He also noted that claimant had an injection which provided relief for a couple of weeks and that he also underwent physical therapy which provided no permanent relief. Claimant informed Dr. Lusardi that his pain was not getting better and that over the preceding six months his right shoulder was actually getting a lot worse, and that he had no function in his right arm overhead and a lot of pain. Dr. Lusardi's examination showed positive impingement at the extreme of passive forward flexion. Dr. Lusardi recommended an MRI with contrast. (Claimant's Exhibit I)

Claimant underwent an arthrogram at Barnes-Jewish West County Hospital on December 9, 2003. It showed right shoulder supraspinatus tendinopathy without evidence of a rotator cuff tear and a partial tear of the intra-articular long head of the biceps. (Claimant's Exhibit J)

When Dr. Lusardi reexamined claimant on December 15, 2003, he noted a positive impingement sign and recommended that claimant see an orthopedic specialist in St. Louis. (Claimant's Exhibit I)

Claimant sought treatment from Dr. Michael Burns, an orthopedic surgeon, who examined him on March 2, 2004. Dr. Burns noted that claimant was a 44 year old car hauler who denied any history of any right shoulder problems until February of 2001 when started to fall from his truck and caught himself with both upper extremities outstretched. Employee reported that he functioned adequately as long as he kept his arm below the shoulder level. His major complaints were at or above the shoulder level. He compensated with his left arm for any overhead activities. Dr. Burns's physical exam revealed essentially full range of motion, but with pain in the extremes of external rotation and abduction. Impingement signs were positive and there was minimal supraspinatus weakness. His biceps signs were negative. After a lengthy discussion with claimant, Dr. Burns recommended arthroscopic surgery because of the recent MRI findings and because claimant had an element of instability. (Claimant's Exhibit K)

Dr. Burns performed an arthroscopic subacromial decompression of the right shoulder on April 1, 2004 for

impingement with bursitis. Although the biceps appeared normal, he found widespread synovitis and irregularity of the subacromial space with a fibrotic coracoacromial ligament, significant bursitis, and irregularity and superficial fraying of the rotator cuff. He removed the fibrous tissue, excised the bursa, and removed some of the acromion in order to decompress the subacromial space. (Claimant's Exhibit L)

Claimant returned to Dr. Burns on April 6, 2004. He noted that employee was doing adequately. Dr. Burns restricted him from all use of his right upper extremity and told him to follow up in two to three weeks. On April 27, 2004 claimant told Dr. Burns that he was doing well. On examination Dr. Burns noted full range of motion and that impingement signs were negative. Dr. Burns examined claimant on May 25, 2004 and noted that he felt at least 75% better, his shoulder was not tender, however he still had very mild restriction in the extremes of external rotation and to a lesser degree internal rotation. Claimant informed Dr. Burns that he was anxious to get back to full duty work. Dr. Burns released him to do so and told him to follow up in six weeks. (Claimant's Exhibit K).

Dr. Burns reexamined Mr. Cole on July 6, 2004. Claimant felt that he might have returned to work too early as the nature of his job, particularly pulling, was aggravating his shoulder. On examination, Dr. Burns found that employee had full range of motion and a negative impingement sign. Dr. Burns prescribed Vioxx and physical therapy. Claimant returned to Dr. Burns on August 17, 2004 and again stated that his shoulder was at least 75% better, except that he noticed some aggravation with overhead work. On examination, there was full range of motion with negative impingement signs. Dr. Burns recommended that he maintain a home exercise program and return in two to three months. Dr. Burns reexamined claimant on October 12, 2004. Employee again stated that he was approximately 75% improved, except for recurrent discomfort with over activity. Dr. Burns's examination revealed full range of motion and negative impingement signs. He recommended that claimant maintain his home exercise program and follow up in approximately three months.

Mr. Crow was last examined by Dr. Burns on January 11, 2005. He told Dr. Burns that there were still times when his right shoulder was symptomatic and that it was aggravated with over activity and certain activities such as reaching or overhead functioning. Dr. Burns's examination showed cautious but full range of motion and a negative impingement sign. He recommended that claimant maintain a home exercise program, noted that claimant could expect symptoms in the future, and told claimant to follow up in four to six months. (Claimant's Exhibit K)

Medical Opinions

Dr. Shuter testified by deposition on behalf of claimant on November 24, 2004. He reexamined claimant on September 14, 2004. He reviewed the intervening treatment records, including Dr. Burns' operative report. Dr. Shuter testified that because contrast material is injected in the shoulder joint capsule during an arthrogram, there is better definition of the shoulder joint and of the tendons and ligaments which surround the joint. (Claimant's Exhibit C, Pages 15-16 & 51) Dr. Shuter opined that claimant sustained, as a result of the February 7, 2001 accident, impingement syndrome of the right shoulder requiring decompressive surgery and an injury to the biceps tendon. It was Dr. Shuter's opinion that these conditions were directly caused by the work-related accident of February 7, 2001. (Claimant's Exhibit C, Pages 20 & 24)

On cross examination Dr. Shuter agreed that Dr. Burns had examined the biceps tendon during his surgery and did not see any tear. Dr. Shuter indicated that the tear may have healed after the second MRI or it may not have been visible during surgery. Dr. Shuter pointed out that he had diagnosed claimant with tendonitis and not a tear of the biceps tendon. (Claimant's Exhibit C, Pages 50-53)

Dr. Michael Burns testified by deposition on behalf of claimant on February 7, 2005. He testified that after his examination and review of the report of claimant's recent MRI, he diagnosed claimant with chronic instability with impingement syndrome. He explained that impingement is a dynamic term which describes what a lay person is familiar with as tendonitis or bursitis. (Claimant's Exhibit D, Pages 13-14 & 25) He described the surgery as cleaning up the space above the shoulder to give the rotator cuff more space to move in a beneficial fashion. He accomplished this by removing the bursa, loosening the ligament and shaving the acromion. (Claimant's Exhibit D, Pages 14-15) Dr. Burns further testified that the injuries which he diagnosed were directly caused by claimant's February 7, 2001 work-related accident was a substantial factor in the cause of his resulting medical conditions. (Claimant's Exhibit D, Page 23)

On cross examination Dr. Burns conceded that while he did not find much in terms of biceps pathology, it may have been there early on. He indicated that it may have healed by the time of the arthroscopy. (Claimant's Exhibit D, Pages 26-28 & 34) He indicated that he did not know whether the biceps problem was due to a traumatic injury or to chronic attrition. (Claimant's Exhibit D, Pages 30-31) He agreed that claimant's repetitive overhead activities may have caused his impingement syndrome. He also conceded that his operative findings are also seen with repetitive overhead activity. (Claimant's Exhibit D, Pages 35 & 39)

On redirect examination Dr. Burns testified that his preoperative diagnosis was consistent with Dr. Nogalski's findings in February, March, April, and May 2001 and that his diagnosis was very consistent with the mechanism of claimant's February 7, 2001 injury. (Claimant's Exhibit D, Pages 45-47) Dr. Burns explained that the pulling up of an outstretched arm resulted in the stretching of the shoulder capsule which lead to and further aggravated his impingement. He added that while impingement can be related to repetitive overhead activity, it does not cause instability. (Claimant's Exhibit D, Pages 47-48) On re-cross examination Dr. Burns explained that he did not surgically repair employee's instability; he relieved the impingement which was causing pain and thereby enabled claimant through physical therapy to recapture the shoulder's stability. (Claimant's Exhibit D, Pages 50-52)

Dr. Clayton Perry, an orthopedic surgeon, testified by deposition on behalf of employer on November 22, 2004. He examined claimant on December 31, 2003 and reviewed the two MRI reports, the medical records of Drs. Nogalski, Petkovich, and Shuter, and the tapes of 4 days of video surveillance, two of which were not admitted into evidence. His examination was fairly benign, except that employee was unable to touch the top of his head with his right hand. He had a negative impingement test and did not have pain over his biceps tendon. Dr. Perry indicated that the recent MRI was interpreted as showing impingement bicipital tendinitis. He concluded that employee's shoulder had deteriorated after the 2001 MRI. Dr. Perry testified that because claimant had a normal MRI shortly after the initial injury and then an abnormal one later on, it was his opinion that any right shoulder pain claimant had was due to an injury or overuse subsequent to February 7, 2001. (Employer's Exhibit 1, Pages 8-9 & 12-13 & depo ex 2)

On cross-examination, Dr. Perry admitted that he did not know about the car hauling business and the requirements of said job nor had he ever seen a video or read any ergonomic reports concerning said job. (Employer's Exhibit 1, Page 21) Dr. Perry also testified that he had no knowledge or experience with regard to the difference between a shoulder MRI with contrast and an MRI without contrast. (Employer's Exhibit 1, Pages 27 & 48) He stated that impingement occurred when there is inflammation, a bone spur or fluid build up which causes a tendon to be squeezed and rub against the bone. He agreed that Dr. Nogalski had found that claimant had a positive impingement sign at stage 2. (Employer's Exhibit 1, Page 31) He agreed that Dr. Nogalski's impression on May 14 was that claimant had right shoulder pain, rotator cuff tendonitis or possible impingement. (Employer's Exhibit 1, Page 41) Dr. Perry further testified that arthroscopic subacromial decompression of the shoulder is performed on individuals with impingements which fail to resolve following six months of conservative treatment. (Employer's Exhibit 1, Page 50) He agreed that Dr. Petkovich did not find a positive impingement sign on his examination of employee. (Employer's Exhibit 1, Page 53)

Dr. Nogalski also testified by deposition on behalf of employer on December 6, 2004. He testified that on April 4, 2001 claimant continued to have pain when he lifted out away from the side and that he had more pain in the front of the shoulder than anywhere else. His pain was mostly associated with activities. Dr. Nogalski explained that those findings were consistent with his diagnosis of tendonitis. He used two tests to test for biceps tendon problem, both of which were negative. He released claimant to full duty because he felt that he had fairly good functional capacity. (Employer's Exhibit 2, Pages 12-13 & 15-16) Dr. Nogalski testified that when claimant returned on May 14, employee told him that he had been working steadily and had experienced increased pain in his shoulder. On examination Mr. Crow had full forward flexion, but pain at 80 degrees of abduction. He did not have any scapular substitution (i.e. lifting up of the shoulder blade to assist with painful abduction). Dr. Nogalski felt that he had rotator cuff tendinitis. Based on Mr. Crow's subjective complaints, Dr. Nogalski recommended a return to light duty and additional physical therapy. (Employer's Exhibit 2, Pages 16-22) Dr. Nogalski testified on cross examination that found a reproducible finding in abduction which indicated the possibility of rotator cuff tendonitis or impingement. (Employer's Exhibit 2, Pages 58-59)

After viewing the videotape surveillance of April 6 and 7, Dr. Nogalski opined on May 18, 2001 that claimant should return to full duty and did not need any further physical therapy. He also testified that he never diagnosed Mr. Crow with any biceps tendonitis or suprascapular nerve injury, nor did he ever see any signs of atrophy during his entire course of treatment. (Employer's Exhibit 2, Pages 24, 26-27 & 72)

On cross-examination Dr. Nogalski agreed that an MRI with contrast provides greater specificity at times with regard to the structures in the shoulder joint. (Employer's Exhibit 2, Pages 46-47) Dr. Nogalski agreed that claimant had a positive impingement sign in stage 2 and that impingement occurs when there is inflammation or fluid build up which causes a tendon to be squeezed and to rub against a bone. (Employer's Exhibit 2, Pages 51-52) He further testified that with impingement syndrome, radiographs often appear normal. (Employer's Exhibit 2, Page 50) He agreed that arthroscopic subacromial decompression of the shoulder is a surgical procedure for individuals with positive impingement signs who do not heal within six months of conservative treatment. (Employer's Exhibit 2, Pages 52-53 & 99-100)

Dr. Nogalski stated that anyone with rotator cuff tendonitis can have a positive stage 2 impingement test. He stated

that both stages 1 and 2 should be positive before a diagnosis of impingement is made. (Employer's Exhibit 2, Page 53) Dr. Nogalski's review of his treatment records showed that May 14 was the first and only time he mentioned impingement as a possible diagnosis for employee's right shoulder. (Employer's Exhibit 2, Pages 53-59)

Dr. Nogalski agreed that the mechanism of injury as described by claimant was consistent with the type of pain and symptoms that claimant had. (Claimant's Exhibit 2, Pages 67-68) He further testified that claimant's subjective symptoms were worse on May 14, 2001 than they were on April 4, 2001 and that employee had several reproducible findings upon examination that suggested that pain occurred when his muscle strength was tested. (Claimant's Exhibit 2, Pages 70-72) He further testified that there was nothing on the April 6 and 7 videotape that was inconsistent with his diagnosis and nothing inconsistent with claimant's work status that he found on April 4, 2001 when he returned claimant to full duty work. (Claimant's Exhibit 2, Pages 75-75) On the other hand Dr. Nogalski stated that the ease of movement show on the videotape was better than anything which he had seen in his office. (Employer's Exhibit 2, Page 83) He further testified that he was aware that at the time the video was taken that claimant had been released to full duty work by him on April 4, 2001 and that the tape was six weeks old when he saw it after examining claimant on May 14, 2001 and that claimant had been back to work full duty for six weeks after the videotape was made. (Employer's Exhibit 2, Page 81) He further agreed that it was possible that claimant could have aggravated his February 7, 2001 injury with regular work activity between April 4, 2001 when Dr. Nogalski released him to full duty and May 14, 2001 when he re-examined claimant and restricted him to light duty. (Employer's Exhibit 2, Pages 88-89)

Additional Findings

Based on the evidence, I find that Dr. Nogalski released claimant from treatment prematurely on May 14, 2001. He did so on the basis of a video surveillance tape which was taken the weekend after claimant was released by Dr. Nogalski to return to work. The videotape did not show claimant performing any activities which were inconsistent with his return to work status. Claimant returned to work the Monday after the surveillance was accomplished. After six weeks of performing his regular duties he developed increased symptoms with the use of his right shoulder. Dr. Nogalski initially decided to return employee to physical therapy and restrict him to light duty. However, when he viewed the April 6-7 videotape, Dr. Nogalski changed his mind and discharged claimant from treatment.

Two months later claimant sought further treatment from Dr. Petkovich who apparently thought that employee's symptoms were real and injected the subacromial space with a steroid mixture and prescribed physical therapy. Employer refused to provide any additional treatment. Claimant was unable to pay for it on his own. Six months later claimant sought further treatment from Dr. Shuter who also recommended further additional physical therapy.

When Mr. Crow was first examined by Dr. Burns, employee gave him a clear description of the mechanism of injury and a history of his treatment. He told Dr. Burns that after the initial period of treatment he continued to function adequately so long as he kept his arm below the shoulder level. He compensated with his left arm for any overhead activities. By the time Dr. Burns examined claimant he had experienced three years of difficulty in using his right arm over the shoulder level. He diagnosed claimant with chronic instability with impingement syndrome in the right shoulder due to the February 7, 2001 accident. Dr. Shuter agreed with the diagnoses by Dr. Burns. ^[1] Neither Dr. Nogalski nor Dr. Perry disputed these diagnoses. Neither of them was asked to discuss whether Dr. Burns' operative findings in the subacromial space were consistent with or inconsistent with the event of February 7, 2001. Dr. Petkovich apparently thought that the subacromial space was the area which was symptomatic as he injected it with a cortisone mixture.

While employee attempted to show that claimant had positive impingement signs from early in 2001 through 2003, the evidence is not clear in this regard. Dr. Nogalski testified that claimant did not have a true positive impingement sign. Neither Dr. Petkovich nor Dr. Shuter found a positive impingement sign. The first physician to find a true positive impingement sign was Dr. Lusardi in November of 2003. Dr. Perry found a negative impingement sign a month later.

Taking into account the credible testimony of employee, the treatment records and the credible testimony of Dr. Burns, the operating surgeon, I find that the work-related accident of February 7, 2001 was a substantial factor in causing claimant to develop chronic instability with impingement syndrome in his right shoulder.

REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement for medical and hospital bills incurred as a result of treatment provided for his right shoulder impingement syndrome. The bills are included in Claimant's Exhibit B and total \$19,261.76.

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

In addition to all other compensation, 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 [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp, 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

If the employer/insurer discontinue treatment even though the employee needs further treatment to cure and relieve the effects of his or her injury, then the employer/insurer will be liable for the entire cost of such additional treatment to the extent the treatment is proved by the employee to be reasonably necessary to cure employee of the effects of the work-related injury. Emert v. Ford Motor Company, 863 S.W.2d 629 (Mo. App. 1993); Wood v. Dierbergs Market, 843 S.W.2d 396 (Mo. App. 1992); see Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. 1995).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

Claimant's Testimony

Claimant identified the bills set forth in Exhibit B and testified that all of said medical and surgical bills were incurred for treatment of his right shoulder which was injured on February 7, 2001. Claimant additionally testified that he had no right shoulder injuries prior to February 7, 2001 nor any additional right shoulder injuries after February 7, 2001.

Medical Opinions

Dr. Shuter reviewed the aforementioned medical bills. He testified that all of said bills were reasonable and fair and that all of said treatment was necessary to treat claimant's injuries from the February 7, 2001 accident. (Claimant's Exhibit C, Pages 27-28)

Dr. Burns testified that the treatment which he provided was for claimant's impingement syndrome. He testified that his treatment including the surgery and office visits were customary and reasonable. (Claimant's Exhibit D, Pages 20-23)

Dr. Perry testified that he was aware that claimant underwent an arthroscopic subacromial decompression of the right shoulder and agreed that this surgical procedure is performed on individuals with positive impingement signs who do not heal after six months of conservative treatment. (Employer's Exhibit 1, Page 50)

Dr. Nogalski agreed that arthroscopic subacromial decompression of the shoulder is a surgical procedure for individuals with positive impingement signs who do not heal within six months of conservative treatment. (Employer's Exhibit 2, Pages 52-53 & 99-100)

Findings

I previously found that claimant developed chronic instability with impingement syndrome in his right shoulder as a result of the February 7, 2001 accident. I previously found that claimant requested employer to provide medical treatment for his injury on several occasions after he was discharged from treatment by Dr. Nogalski.

Based on the testimony of Drs. Shuter and Burns, I further find that claimant's injury required additional medical care and treatment. Claimant sought the previously described medical treatment by Dr. Lusardi, Barnes-Jewish West County Hospital, Dr. Burns, and Creve Coeur Surgical Center. All of the physicians agree that arthroscopic subacromial decompression of the shoulder is a surgical procedure for individuals with positive impingement signs who do not heal within six months of conservative treatment. I find that all of the treatment provided by Dr. Lusardi, Barnes-Jewish West County Hospital, Dr. Burns, and Creve Coeur Surgical Center was reasonable and necessary to cure and relieve claimant's chronic instability with impingement syndrome.

Dr. Lusardi charged \$306.00 for his office visit of November 26 and x-rays taken of employee's shoulder on that day. Barnes-Jewish West County Hospital charged \$3,491.00 for the arthrogram performed on December 9, 2003. Dr. Burns charged \$11,228.00 for the surgery which he performed on April 1, 2004 and for his office examinations of March 2, April 6, July 6 and August 17, 2004. Creve Coeur Surgery charged \$4,236.75 for hospital services on April 1, 2001 in connection with the shoulder arthroscopy. (Claimant's Exhibit B)

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant testified that he received the treatment shown on the bills. Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's impingement syndrome. Drs. Shuter and Burns testified that the charges were fair and reasonable. Employer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$19,261.75 for such treatment were fair and reasonable. Accordingly, I find employer is liable for the foregoing medical expenses totaling \$19,261.75.

TEMPORARY TOTAL DISABILITY

Employee is seeking temporary total disability compensation for the period from April 1 through May 25, 2004.

Section 287.170 Mo. Rev. Stat. (2000) provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 as the "inability to return to any employment and not merely ... [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Un. of Missouri, 822 S.W.2d 504 (Mo. App. 1991); Phelps vs. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. 1991); Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo. App. 1985).

Findings

The parties stipulated that claimant was temporarily and totally disabled following surgery on April 1 through May 25, 2001. As I have previously found that the surgery performed by Dr. Burns was reasonable and necessary to cure and relieve claimant from the effects of the work-related injuries of February 7, 2001, I find that claimant was temporarily and totally disabled from April 1 through May 25, 2004 due to the work-related injuries of February 7, 2001.

PERMANENT DISABILITY

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

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

Claimant's Testimony

Claimant testified that he continues to experience sharp pain over his right shoulder especially with work activities including lifting, pulling the tie down bars (the bar that is placed in a ratchet hole to tighten or load a vehicle and also to release or unload a vehicle). He also testified that he experiences right shoulder pain when shifting his truck. Additionally he testified that he is unable to throw a ball with his son and unable to cast a fishing line. Claimant further testified that because of the persistent difficulties with his right shoulder, he uses his left arm when possible. He testified that his right shoulder becomes aggravated with over activity and that he has difficulty with overhead reaching. Claimant testified that the nature of his work with employer requires him to push, pull, lift and engage in overhead activity; he testified that all of these activities cause pain especially with over exertion.

Medical Opinions

Dr. Shuter reexamined claimant on September 14, 2004. Mr. Crow reported considerable improvement in his shoulder postoperatively; however, with his return to work at the end of May 2004, he experienced worsening of his right shoulder condition particularly when using a ratchet to tighten the vehicles he was transporting. He further testified that claimant develops sharp and aching pain over the lateral aspect of his right glenohumeral joint and deltoid muscle when he externally rotates his right shoulder, when lifting with his right shoulder internally rotated, when pulling the ratchet to tie down bars, and on pushing with his right arm with his elbow flexed. Dr. Shuter also testified that claimant experiences right shoulder pain occasionally when he shifts his truck. Dr. Shuter testified that claimant uses his left arm whenever possible because of the difficulty with his right shoulder. (Claimant's Exhibit C)

On examination of the right shoulder, Dr. Shuter found tenderness over the long head of the biceps tendon and the acromion process; however he no longer found the presence of atrophy. Additionally, Dr. Shuter testified there was no impingement sign, but there was pain and slight weakness of the right shoulder in all directions, especially external rotation and abduction. Dr. Shuter additionally noted crepitation with pain on internal and external rotation and abduction of the right shoulder and less limitation of right shoulder movement than on the prior examination, as abduction, extension, and internal rotation had all improved.

Based on his examination of claimant, employee's reported symptoms, and the medical records, Dr. Shuter opined that claimant had 35% permanent partial disability of the right upper extremity at the shoulder due to the February 7, 2001

injury. (Claimant's Exhibit C).

Dr. Burns opined that he typically assigns 20% physical impairment of the shoulder for instability and impingement syndrome. (Claimant's Exhibit D, Page 44)

Dr. Nogalski opined, based upon the mechanism of injury and considering the symptoms that employee complained of around that time and the duration of those symptoms, that claimant had 2% permanent partial disability of the right upper extremity at the level of the shoulder. He reviewed the first report of Dr. Shuter. (Employer's Exhibit 2, Pages 25-26 & 94 & depo ex 2)

Dr. Perry opined, based on the video surveillance tapes, the two MRIs and his examination of claimant, that the February 7, 2001 injury did not result in any permanent disability to claimant's right shoulder. He felt that employee's current symptoms were due to an injury or overuse subsequent to February 7, 2001. (Employer's Exhibit 1, Pages 12-14)

Findings

Based on all of the evidence I find that claimant sustained 20% permanent partial disability of the right shoulder due to injuries which he sustained from the February 7, 2001 work-related accident.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, David G. Hughes, for necessary legal services rendered to the employee.

Date: _____ Made by: _____

JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secrest
*Director
Division of Workers' Compensation*

[1] While there was some evidence that there may have also been a right shoulder biceps injury, Dr. Burns examined the biceps during his surgery and found it to appear normal.