

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

Injury No.: 01-143256

Employee: Vernon Cypher

Employer: Independent Plumbing and Interior Electric

Insurer: Federated Mutual Insurance

Date of Accident: November 29, 2001

Place and County of Accident: Warrensburg, Johnson 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. We have reviewed the evidence, read the briefs of the parties, heard oral argument, and considered the whole record. Pursuant to section 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated March 17, 2005. The award and decision (decision) of Administrative Law Judge R. Carl Mueller, Jr., is attached hereto for reference. Except as indicated otherwise below, this Commission adopts the Findings of Fact as set forth in the decision.

INTRODUCTION

Employee was working as an electrician for employer on November 29, 2001. On that date, he slipped during the performance of his duties and injured his back. He informed his employer but completed his workday. The following day, at employer's instruction, he sought medical treatment for his back at Western Missouri Medical Center (Medical Center) in Warrensburg, Missouri.

Employee recalled having informed the Medical Center that he was allergic to aspirin and ibuprofen. Nonetheless, personnel at that facility gave him ibuprofen for his back pain. On his way home to West Plains after the Medical Center released him, employee experienced a severe reaction to the ibuprofen. He suffered swelling, difficulty breathing, and hives. He recalled having gotten out of his car, moving to the rear of the vehicle, trying to get the attention of vehicles passing by, urinating on himself, and losing consciousness for an unknown period of time. He recalled lying by the side of the road close to the white line separating the highway from its shoulder and seeing the headlights of on-coming vehicles. Employee believed he was going to die.

Employee received treatment for this reaction on December 1, 2001, at Ozarks Medical Center Urgent Care Clinic. He was given injections and prescriptions for Epinephrine, Benadryl, and Prednisone. Beginning December 2, 2001, employee began experiencing a wide variety of complaints involving his heart, vision, digestion, memory loss, facial tics, penile swelling, and neurological disorders. The best evidence indicates that employee had not suffered from any of these complaints prior to the November 30, 2001, reaction.

Employee's back-related problems are not in dispute. He had fusion surgery in September 2002 and suffers on-going back pain that radiates into his legs and feet. He takes medication for pain and constantly wears a TENS unit. He has been diagnosed with psychological problems (primarily depression) in connection with his back injury. Dr. William S. Logan concluded that employee is 60% permanently partially disabled solely from his back injury and its attendant pain and mood disorders. Dr. Brent Koprivica assigned employee a 50% disability rating to employee's back-related problems.

On the other hand, none of the medical experts or the tests they ordered or administered have found objectively verifiable physical problems related to employee's ibuprofen reaction (other than his initial rash and the difficulties he experienced prior to follow-up treatments beginning December 2, 2001). It is significant, though, that none of the medical experts whose testimony was presented to the administrative law judge believed that employee was fraudulently or deceitfully making up his complaints. Instead, these experts concluded that employee believes he

is suffering from all these unverifiable medical problems.

Dr. James Thompson, Dr. Arifa Salam, Dr. Logan, and Dr. Koprivica concluded that employee suffers from post traumatic stress disorder, panic disorder, chronic anxiety, depression, and fibromyalgia. Consequently, although none of these doctors believed that employee was suffering any physiological problems as the result of his medication reaction, they believed that *he believed* he was suffering from these various maladies. All of these medical experts who specifically considered and addressed employee's psychological problems in addition to his on-going back problems concluded that employee was permanently totally disabled.

The administrative law judge reached the following conclusions: employee sustained a 35% permanent partial disability to his body as a whole solely as a result of his back injury; employee reached maximum medical improvement on June 13, 2003; employee was temporarily totally disabled and entitled to previously unpaid temporary total disability benefits totaling \$2,785.13 for the period February 1, 2002, through March 4, 2002; employer had no liability for employee's emotional disabilities attributable to his medication reaction because they did not arise out of and in the course and scope of his employment by employer; commutation of employee's benefits was not warranted under section 287.530 RSMo since employee did not prove sufficiently "unusual circumstances"; and employee would receive only certain future medical treatment connected with his back injury.

Employee filed an Application for Review (Application) with the Commission. Employee's Application cites error in each of these conclusions, except the administrative law judge's determination concerning temporary total disability benefits totaling \$2,785.13.

After reviewing the entire record, the Commission affirms the findings and legal conclusions of the administrative law judge as to the following issues: employee's maximum medical improvement date; employee was temporarily totally disabled from November 30, 2001, through July 17, 2003, and entitled to previously unpaid temporary total disability benefits totaling \$2,785.13 for the period February 1, 2002, through March 4, 2002; and commutation of employee's benefits is not warranted under section 287.530 since employee did not prove sufficiently "unusual circumstances." As to the remaining issues, the Commission disagrees with the conclusions that the administrative law judge reached and modifies the decision as set forth below.

ARISING OUT OF AND IN COURSE OF EMPLOYMENT

The decision states as follows: "If we assume that all of the psychiatric disability Mr. Cypher exhibits is related to his workers' compensation injury, he is likely permanently and totally disabled." The evidence supports that conclusion. The administrative law judge concluded that employee was not permanently totally disabled, though, because he found that the ibuprofen reaction and its attendant physical, but primarily psychological harm did not arise out of and in the course of his employment. He stated the following:

In this case, Mr. Cypher's exposure to ibuprofen just happened to have occurred at the time he was treating for his back injury. The exposure, however, could have just as easily occurred accidentally at any other time. It is not the role of workers' compensation to insure an employee against all harm that occurs to him when only tangentially related to his employment.

We disagree with this thinking. In Larson's treatise on workers' compensation law, the author explores the range of compensable consequences that can result after the primary injury occurs.

A distinction must be observed between causation rules affecting the primary injury . . . and causation rules that determine how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment. . . . [W]hen the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of "direct and natural results," and of claimant's own conduct as an independent intervening cause.

The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.

The simplest application of this principle is the rule that all the medical consequences and sequelae that flow from the primary injury are compensable.

1. A. Larson, *Larson's Workers' Compensation Law*, section 10.01.

In other subsections of this same chapter, the author looks more specifically at various circumstances that are compensable.

[1] – Compensability of Aggravation by Treatment

It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable. Examples include exacerbation of the claimant's condition, or death, resulting from . . . pain killers, and other medications

When the injury sustained during treatment or examination is not an aggravation of the work-related injury, but injury to another part of the body, courts have also found the injury to be compensable.

[2] – Irrelevance of Fault or Malpractice of Doctor

Fault on the part of physicians . . . , even if it might amount to actionable tortiousness, does not break the chain of causation. . . .

[3] – Irrelevance of Fault of Others Involved in Treatment

Similarly, injuries due to the negligence of persons other than physicians, connected with the process of treatment . . . , are within the compensable range of consequences.

1. A. Larson, *Larson's Workers' Compensation Law*, section 10.09.

In the case at hand, we find no negligence on employee's part that acted as an independent intervening cause for the ibuprofen reaction. Furthermore, as noted in Larson's treatise, the potential negligence of the medical personnel connected with employee's treatment does not break the causation chain. Properly analyzed, employee sought medical care at the Medical Center at employer's instruction and as the direct result of the undisputed primary injury to his back the day before. The medication reaction and the physical and emotional problems that occurred were, thus, the direct and natural result of the compensable primary injury. Therefore, employee's panoply of medical and emotional problems and the total disability they create, together with the primary disabilities, arose out of and in the course of employee's employment.

Missouri courts support our conclusion. In *Lahue v. Missouri State Treasurer*, 820 S.W.2d 561, 562 (Mo. App. W.D. 1991)(citations omitted), the employee fell off a chair and injured her right hip and low back while she was undergoing whirlpool therapy for an ankle injury that occurred during the course of her employment. The court stated as follows:

"The law is well settled, that where a claimant sustains injury arising out of and in the course of her employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body is compensable as a direct and natural result of the primary or original injury." The same rule is recognized in Missouri. Injuries sustained during authorized medical treatment of a prior compensable injury are the natural and probable consequence of the compensable injury and the employer is liable for all resulting disability.

Other jurisdictions faced with similar facts have reached the same conclusion. In *Moretto v. Samaritan Health System*, 198 Ariz. 192, 8 P.3d 380 (Ct. App. 2000), the employee had surgery to his knee for a compensable injury. He then underwent physical therapy. During a therapy session and as a result of the alleged negligence of the physical therapist, the employee fell to the floor and injured his back. Citing Larson's treatise, the court held that an injury is compensable "when it is caused by the negligent treatment of a compensable primary injury." 198 Ariz. at 195, 8 P.3d at 383. It made no difference that the therapist's negligence did not aggravate the primary injury; rather, it caused a new and separate injury. Based on similar facts, the Nebraska court reached the same conclusion. *Smith v. Goodyear Tire & Rubber Co.*, 10 Neb. App. 666, 636 N.W.2d 884 (2001)(physical therapy that injured his knee).

Consequently, employee's conditions resultant from the medication reaction are compensable.

NATURE AND EXTENT OF DISABILITIES

The next issue is whether employee is, as he contends, permanently and totally disabled. Permanent and total disability is defined by section 287.020.7 RSMo as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The Missouri Court of Appeals explained this definition in *Gordon v. Tri-State Motor Transit Company*, 908 S.W.2d 849, 853 (Mo. App. S.D. 1995)(citations omitted):

The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. The test for permanent total disability is whether, given the employee's situation and condition he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. The pivotal question is whether any employer would reasonably be expected to employ the employee in that person's present condition, reasonably expecting the employee to perform the work for which he or she is hired.

Based on the opinions of Drs. Logan and Koprivica, we conclude that employee sustained approximately a 55% permanent partial disability to his body as a whole from his primary back injury alone. We have given less weight to Dr. McQueary's opinion, employee's surgeon, because he was concerned only with employee's physical problems and not with any psychological factors.

Furthermore, all of the medical experts who specifically considered and addressed employee's psychological problems connected with his medication reaction, in addition to his on-going back problems, concluded that employee was permanently and totally disabled. Because we have concluded that employee's physical and psychological disabilities connected with the medication reaction were the natural and probable result of the primary injury, it logically follows that we must conclude that employee became permanently and totally disabled as the natural and probable result of employee's primary injury.

Because there is no evidence that employee had any disability prior to working for employer, we conclude that employer is responsible for permanent and total disability weekly benefits, in the amount of \$628.90, beginning July 18, 2003, and continuing during the balance of employee's life or until modified by law.

PAST MEDICAL CARE

Section 287.140 RSMo sets forth the statutory provisions governing the provision of medical treatment to injured workers. Section 287.140.1 reads, in relevant part, as follows:

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 from the effects of the injury.

Employee testified (and presented supporting medical records and bills) that he incurred the following medical expenses in connection with the treatment he received for the physical and psychological problems stemming from his primary injury and the subsequent medication reaction: (1) \$978.00 from West Plains Imaging; (2) \$847.00 from Southern Missouri Family Medicine; (3) \$6,223.15 from Ozark Medical Center; (4) \$5,322.00 from OMC Clinic (Dr. Salam); and (5) \$2,377.42 from Super D Drug Store (for co-pays). Employer did not dispute the accuracy or reasonableness of these amounts. Employee indicated that he had made demand on employer that it provide this care. The total liability for medical care and treatment is \$15,747.57.

If an employee's testimony is accompanied by the bills for the purchase of the relevant item which the employee

identifies by testimony as being related to and the product of his injury and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the Commission to award past medical expense compensation. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-112 (Mo. banc 1989). In the case before us, employee has satisfied this standard. Thus, we conclude that employer/insurer must pay employee the total amount of \$15,747.57 for past medical care and treatment.

FUTURE MEDICAL EXPENSES

Dr. Koprivica made the following recommendations concerning employee's future needs for medical treatment and care:

[T]he severity of [employee's] psychiatric condition is one that will require indefinite treatment. I would recommend a formal psychological evaluation outlining any recommendations for treatment . . .

In addition, Mr. Cypher has an underlying need for pain management [including use of a TENS unit] in reference to his failed back syndrome. This will be an ongoing, indefinite need as well.

These recommendations are echoed in the on-going recommendations made by Dr. Logan, a psychiatrist who examined employee at employer's request.

Accordingly, we order employer/insurer to provide employee with medical care, as recommended above, as is necessary and reasonable to cure and relieve him from the physical and psychological effects of his work disabilities.

CONCLUSION

Employee is permanently totally disabled. He reached maximum medical improvement on June 13, 2003. Employee was entitled to the temporary total disability payments he received from November 30, 2001, through July 17, 2003. Employer/insurer shall pay employee temporary total disability benefits totaling \$2,785.13 for the previously unpaid weeks from February 1, 2002, through March 4, 2002. Employer/insurer shall pay employee permanent total disability benefits, in the weekly amount of \$628.90, beginning July 18, 2003. Commutation is not warranted.

Employer/insurer shall pay employee \$15,747.57 for past medical care and treatment and must provide future medical care as outlined above.

The compensation awarded to employee shall be subject to a lien in the amount of 25% of all payments ordered, in favor of attorney Randy Alberhasky, for necessary legal services rendered to employee.

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

Given at Jefferson City, State of Missouri, this 21st day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

SEPARATE OPINION FILED

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART

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I have reviewed and given consideration to all of the competent and substantial evidence on the whole record. Based on my review of that evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am persuaded that the Commission majority has, in one critical aspect, erred in its decision. In so doing, it has forced me to write this separate opinion.

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The Commission majority very correctly points out that the administrative law judge wrongly determined that employee's "exposure to ibuprofen occurred in a manner totally unrelated to [his] employment. . . . The exposure . . . could have just as easily occurred accidentally at any other time." Accordingly, I agree with the Commission majority decision to the extent it concluded that employee's medication reaction was the direct and natural result of the compensable primary injury.

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Having said that, I believe the majority erred in the balance of its decision by relying on employee's subjective complaints. It is completely within the Commission's province to make determinations concerning the credibility of witnesses. Each of the medical experts who examined employee reached the same conclusion -- employee is not suffering from any of the myriad of complaints he chooses to attribute to his medication reaction.

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Dr. Gregory Lux, an immunologist and allergist, examined employee shortly after the November 30, 2001, ibuprofen reaction. He determined that employee's on-going complaints were not related to the November 30 incident. In fact, it was his belief that employee's continuing complaints may well have been caused by a recent change in blood pressure medicine. He concluded that employee "appears to want to continue to associate all of his symptoms to his Workman's Compensation claim." (Tr. 382).

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Dr. Koprivica performed Waddell testing on employee. In all five categories of this test, which can help show when a person is magnifying or falsifying complaints, employee tested positive (Tr. 823). Accordingly, even employee's doctor conceded that the test results could mean that employee is being intentionally untruthful in exaggerating his symptoms (Tr. 860).

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Dr. Logan administered employee the MMPI-2 test. Dr. Logan concluded that approximately one-third of employee's responses during this test were exaggerated and were either "carelessly, randomly, or deceitfully" given.

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Yet, despite this evidence, the Commission majority relied on employee's subjective, disproved complaints to award him permanent total benefits and on-going psychological treatments. I conclude that employee is simply not credible. Consequently, I would find employee sustained a permanent partial disability of 55% (based on the opinions of Drs. Koprivica and Logan) to his whole body, based solely on the permanent disabilities associated with his back injury.

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The best evidence shows that employee did suffer an allergic reaction to the ibuprofen he received in treatment of his primary injury. He did seek and receive reasonable treatment for the reaction -- Epinephrine, Benadryl, and Prednisone. He did incur the medical costs associated with that "emergency" treatment (which employee did not even seek until the day after his reaction). This initial type of reaction (which is normally brief in duration) and its attendant expenses were the direct and natural consequences of treatment concerning the primary injury. Employer is liable for those direct expenses; however, it should not be forced to pay more.

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Therefore, I must dissent from the award and decision of the Commission's majority, which awards compensation and treatment to employee based on his on-going, unsubstantiated complaints of permanent total disability.

FINAL AWARD

Employee: Vernon Cypher Injury No: 01-143256

Dependents: N/A

Employer: Independent Plumbing and Interior Electric

Additional Party: N/A

Insurer: Federated Mutual Insurance Company

Hearing Date: January 28, 2005

Briefs Filed: February 22, 2005 Checked by: RCM/rcm

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: November 29, 2001
5. State location where accident occurred or occupational disease was contracted: Warrensburg, Johnson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee injured his back while carrying a spool of wire.
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: Body as a whole
14. Nature and extent of any permanent disability: Thirty-five percent (35%) whole body disability.
15. Compensation paid to-date for temporary disability: \$50,940.90
16. Value necessary medical aid paid to date by Employer? \$119,151.26

17. Value necessary medical aid not furnished by Employer? \$0

18. Employee's average weekly wages: Sufficient for maximum TTD and PPD rate

19. Weekly compensation rate: \$628.90 for TTD/ \$329.42 for PPD

20. Method wages computation: By Stipulation

21. Compensation Payable

Benefits Currently Due:

Medical Expenses

Medical Already Incurred..... \$119,151.26

Less credit for expenses already paid (\$119,151.26)

Total Medical Owing \$0

Temporary Disability

11/30/2001-1/31/2002, 2/1/02-3/4/02, and 3/5/2002-7/17/2002 \$53,726.03

Less credit for benefits already paid (\$50,940.90)

Total TTD Owing \$2,785.13

Permanent Disability

35% whole body disability-of these 85 weeks have accrued (6/13/2003-1/28/2005) \$28,000.70

Total Benefits Currently Due: \$30,785.83

Ongoing Benefits

Medical Care \$0

Temporary Disability \$0

Unaccrued Permanent Partial Disability - \$329.42 paid weekly

from 1/29/2005-2/17/2006 \$18,118.10

Total Ongoing Benefits \$18,118.10

Total Award \$48,903.93

22. Second Injury Fund liability: N/A

23. Future requirements awarded: Future medical care related to Mr. Cypher's back condition only.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

The compensation awarded to Mr. Cypher shall be subject to a twenty-five percent (25%) lien totaling \$7,696.46 for accrued benefits and \$82.36 of each weekly permanent partial disability benefit paid from January 29, 2005 through February 1, 2006 in favor of Randy Alberhasky, Attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1. No fee is awarded on the value of any future medical treatment.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Vernon Cypher Injury No: 01-143256

Dependents: N/A

Employer: Independent Plumbing and Interior Electric

Additional Party: N/A

Insurer: Federated Mutual Insurance Company

Hearing Date: January 28, 2005

Briefs Filed: February 22, 2005

Checked by: RCM/rcm

On January 28, 2005, the employee and employer appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to §287.110. The employee, Mr. Vernon Cypher, appeared in person and with counsel, Randy Alberhasky. The employer, Independent Plumbing and Interior Electric, and its insurer, Federated Mutual Insurance Company, appeared through attorney Daniel Follett. The Second Injury Fund was not a party to the case. The primary issue the parties requested the Division to determine was whether Mr. Cypher suffered any disability and, if so, the nature and extent of his disability? For the reasons noted below, I find that Mr. Cypher sustained thirty-five percent (35%) whole body disability.

STIPULATIONS

The parties stipulated that:

1. On or about November 29, 2001 ("the injury date"), Independent Plumbing was an employer operating subject to Missouri's Workers' Compensation law with its liability fully insured by Federated Mutual Insurance Company;
2. Vernon Cypher was its employee working subject to the law in Warrensburg, Johnson County, Missouri;
3. Mr. Cypher notified the employer of his alleged injury and filed his claim within the time allowed by law;
4. The employer provided Mr. Cypher with medical care costing \$119,151.26;
5. The employer paid temporary total disability compensation to Mr. Cypher totaling \$50,940.90 for November 30, 2001 through January 31, 2002 and from March 5, 2002 through July 17, 2003; and,
6. Mr. Cypher had an average weekly wage sufficient to result in the maximum weekly compensation rate of \$628.90 for permanent/temporary total and \$329.42 for permanent partial disability.

ISSUES

The parties requested the Division to determine:

1. Whether Mr. Cypher is entitled to temporary total disability benefits from February 1, 2002 through March 4, 2002 representing 4 3/7s weeks for compensation totaling \$2,785.13?
2. Whether the Employer must reimburse Mr. Cypher for medical expenses totaling

\$15,747.57?

3. Whether the Employer must provide Mr. Cypher with additional medical care?

4. Whether Mr. Cypher suffered any disability and, if so, the nature and extent of his disability and whether he is permanently and totally disabled? And,

5. Whether the future benefits, if any, due Mr. Cypher should be commuted pursuant to §287.530.1?

FINDINGS

Mr. Cypher and his wife, Peggy, testified on his behalf. Mr. Cypher also presented the following exhibits, all of which were admitted into evidence without objection:

Exhibit A	–	Medical Records
Exhibit B	–	Medical Bills
Exhibit C	–	Deposition, P. Brent Koprivica, MD, 1/12/2004
Exhibit D	–	Letter dated 8/8/2003 from Alberhasky to Follett
Exhibit E	–	Letter dated 8/8/2003 from Follett to Alberhasky
Exhibit F	–	Letter dated 3/18/03 from Alberhasky to Federated

Although the employer did not call any witnesses, it did present the following exhibits, all of which were admitted into evidence without objection:

Exhibit 1	–	Deposition, Frederick G. McQueary, MD, 12/2/04
Exhibit 2	–	Deposition, Vernon Cypher, 2/11/04
Exhibit 3	–	Deposition, Vernon Cypher, 7/23/04

Based on the above exhibits and the testimony of Mr. Cypher and his wife, I make the following findings. Mr. Cypher sustained a work related injury to his low back on or about November 29, 2001. At that time Mr. Cypher was working as an electrician at the Western Missouri Medical Center in Warrensburg, Missouri. As he was stepping off a stair carrying a spool of wire Mr. Cypher slipped on some ice. When Mr. Cypher slipped, all of his weight shifted to his right leg causing his knee to buckle and resulting in low back pain. Despite slipping, Mr. Cypher never fell to the ground. Mr. Cypher did not seek immediate treatment and, in fact, finished his normal work shift that day. Mr. Cypher thought he had pulled a back muscle.

The day after his accident, Mr. Cypher went to the Western Missouri Medical Center emergency room with complaints of back pain. (Exhibit A, p. 276). Mr. Cypher was diagnosed with lumbar strain and told to ice, and then apply heat, to his back four times a day. Mr. Cypher was also given 800 mg ibuprofen to be taken every 6 hours. (A, p. 277) The medical records indicate that claimant had an allergy to aspirin, but do not mention ibuprofen. (A, p. 276) Mr. Cypher testified that he told the doctor at the emergency room that he was allergic to ibuprofen and that he showed him a medic alert bracelet that he was wearing which so indicated. Medical records from all subsequent doctors note a history of allergy to ibuprofen, although nowhere is this confirmed by any tests.

Following his visit to the emergency room in Warrensburg, Mr. Cypher decided to drive back to his home near West Plains. During this drive, Mr. Cypher testified that his throat and eyes swelled, his vision “elongated”, and that he developed a severe headache. Mr. Cypher related these symptoms to a reaction from the ibuprofen. Mr. Cypher pulled over, took some benadryl and described passing out completely. Mr. Cypher testified that he called his wife several times while pulled over. Despite these reactions, Mr. Cypher eventually did drive all the way home to West Plains.

From this point on, Mr. Cypher's received medical treatment for:

1. Physical problems he related to the alleged November 30, 2001 ibuprofen allergic reaction;
2. Psychological problems he related to the alleged November 30, 2001 ibuprofen allergic reaction;
and
3. Physical problems related to the November 29, 2001 back injury.

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Physical Problems Mr. Cypher Relates To The
Alleged November 30, 2001 Ibuprofen Allergic Reaction

Mr. Cypher went to Ozark Medical Center Urgent Care Clinic on December 1, 2001 for complaints he associated with his November 30, 2001 ibuprofen consumption. (Exhibit A, 509) At that time he received two subcutaneous injections of Epinephrine, 50 milligrams of Benadryl IM, and a prescription for oral Prednisone. The next day, Mr. Cypher returned to the emergency room at Ozark Medical Center complaining of chest pains. (A, p. 507-509) A chest X-Ray taken that day was negative and the EKG taken that day was normal. Cardiac enzymes tested that day also were normal. Arterial studies on both upper extremities were later done and proved negative. (A, p. 59) Furthermore, Dr. Kahn did a Dobutamine stress EKG on March 15, 2002, which also was negative. (A, p. 446, 514-516) Finally, still convinced that he had cardiac damage, Mr. Cypher saw Dr. Natello on June 11, 2003. Again, the cardiac workup was normal. (A, p. 517-519)

Mr. Cypher also complained about vision problems that he connected with his ibuprofen use. Mr. Cypher claimed he was having double vision, "elongated" vision, blurring vision, and visual field defects. Ophthalmologist Robert W. Jones, M.D. examined Mr. Cypher four days after the employee's alleged ibuprofen reaction. (A, p. 396) Despite Mr. Cypher's subjective complaints, Dr. Jones ultimately found no signs of any optic or retinal damage and released him from his care. *Id.* Mr. Cypher also allegedly had problems with acid reflux-like symptoms which he related to the ibuprofen use. He was prescribed Prilosec initially but an esophagogastro-duodenoscopy performed by Dr. Bryan demonstrated that Mr. Cypher's esophagus, stomach and duodenum all were perfectly normal. (A, p. 457)

Mr. Cypher was referred to neurologist Clara N. Applegate, M.D. for evaluation because of his facial tics, alleged memory loss, and other neurologic complaints which Mr. Cypher believed were due to his one-time ibuprofen use. (A, 430-438) A January 31, 2002 brain MRI scan also was normal. (A, p. 532) An EEG conducted that same day also was normal. (A, p. 430). Dr. Applegate opined that there was "No evidence of any brain damage . . ." (A, p. 434) Dr. Applegate also concluded that Mr. Cypher's facial tics " . . . are most likely voluntary somatic activity due to anxiety." (A, p. 434, emphasis added)

Mr. Cypher was referred on January 17, 2001 to Gregory K. Lux, M.D. an allergist and immunologist. (A, p. 304) Dr. Lux concluded that Mr. Cypher had an idiopathic mast cell disease. Dr. Lux stated that Mr. Cypher's problems were "not likely attributable to" an isolated exposure to ibuprofen. (A, p. 304, emphasis added) Dr. Lux wrote that: "The family appears to want to continue to associate all of his symptoms to his Workman's [sic] Compensation claim. They do not wish to receive any further care from my office." *Id.*

On September 5, 2003, Dr. P. Brent Koprivica evaluated Mr. Cypher at Mr. Cypher's attorney's request. (Exhibit C, at 77). In addition to complaints related to his back injury, Mr. Cypher indicated that he was still having trouble with his night vision, neck pain, numbness in his face, difficulty urinating, stuttering and other physical problems. In his report, Dr. Koprivica stated, "In my opinion, there is no evidence to suggest that there is permanent physical impairment that arose from the use of ibuprofen." (*Id.* at 92)

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Psychological Problems Mr. Cypher Relates To
The Alleged November 30, 2001 Ibuprofen Allergic Reaction

Mr. Cypher clearly exhibits psychological impairment. Mr. Cypher's primary care physician, who had referred him to various doctors for the testing above, first diagnosed Mr. Cypher with posttraumatic stress disorder ("PTSD"), anxiety and depression on February 15, 2002. (A, p. 33) Dr. Thompson believed that Mr. Cypher's PTSD and fibromyalgia started after his "perceived life threatening event" of using ibuprofen. (A, p. 21, emphasis added) Dr. Thompson initially sought to treat the psychological condition with various medications including Trazodone and Clonazepam.

Mr. Cypher was referred to psychiatrist Arifa Salam, M.D., on February 13, 2003. (A, p. 415) Dr. Salam diagnosed Mr. Cypher with posttraumatic stress disorder and a panic disorder without agoraphobia. (A, p. 416) From that point forward Mr. Cypher generally visited Dr. Salam once per month. A session with a counselor was also scheduled once per month. Despite these visits, Mr. Cypher's psychological condition has remained the same.

Mr. Cypher was referred to William S. Logan, M.D., also a psychiatrist, for a February 24, 2004 evaluation. Mr. Cypher's primary complaints to Dr. Logan were of anxiety and panic attacks. (A, p. 631). Dr. Logan administered the MMPI-2 test. (A, p. 632) Mr. Cypher's responses to items at the end of the questionnaire were exaggerated, making that

portion of the test invalid. The pattern suggested that as the test progressed Mr. Cypher “responded either carelessly, randomly, or deceitfully.” (A, p. 632, emphasis added) The interpretable portion of the test indicated Mr. Cypher had panic disorder with agoraphobia, post traumatic stress disorder, pain disorder associated with both psychological factor and a general medical condition, mood disorder due to back problems with depressive features, and a conversion disorder. (A, p. 633)

Dr. Logan related a portion of Mr. Cypher’s problems to the back injury on November 29, 2001. Those conditions related to the back injury were the pain disorder and mood disorder with depressive features. (A, p. 634) The majority of Mr. Cypher’s problems were related to Mr. Cypher’s alleged exposure to ibuprofen on November 30, 2001. These problems included the PTSD which has led to recurrent panic attacks. Mr. Cypher’s chronic anxiety, which manifests in several non-physiologic neurological symptoms, is due to a conversion disorder. That conversion order is maintained, at least in part, by the possibility of financial gain. (A, p. 635)

Dr. Logan concluded that Mr. Cypher was at maximum medical improvement. He also concluded that Mr. Cypher was unable to work due to a combination of physical and emotional problems. Dr. Logan opined that Mr. Cypher suffered sixty percent (60%) permanent partial disability due to his pain and mood disorders, and eighty percent (80%) permanent partial disability due to his PTSD. (A, p. 635)

Physical Problems Related To The November 29, 2001 Back Injury

Amidst all of Mr. Cypher’s testing for alleged physical reactions to his ibuprofen exposure and psychological treatment, Mr. Cypher did have a significant back injury. The workers’ compensation insurer referred Mr. Cypher to Dr. Frederick McQueary on March 5, 2002. (Exhibit 1 at 59) Dr. McQueary noted a mild diffuse central bulge at L4-5. (*Id.* at 60) Conservative treatment, in the form of epidural injections and physical therapy, was initially prescribed. When conservative treatment failed, Dr. McQueary performed an L4-5 and L5-S1 posterior lumbar fusion on September 4, 2002. (*Id.* at 63)

Dr. McQueary indicated in his records and testified at his deposition that Mr. Cypher’s surgery was successful. (Exhibit 1 at 12:5) There was no evidence that the fusion was not solid. Dr. McQueary provided Mr. Cypher with a TENS unit and released him to return to work. Dr. McQueary rated Mr. Cypher’s injury at 20% whole body disability. (*Id.* at 16:20) Significantly, when Dr. McQueary last examined Mr. Cypher, he did not observe any psychological issues significant enough to note. (*Id.* at 17:15). Dr. McQueary opined that Mr. Cypher would benefit from the use of the TENS unit on a permanent basis as well as ongoing pain medications. (*Id.* at 25:10-26:5).

As noted above, Dr. Koprivica evaluated Mr. Cypher at Mr. Cypher’s attorney’s request. Dr. Koprivica rated that claimant’s back injury at 50% whole body disability. (Exhibit C at 32:15) However, Dr. Koprivica opined that Mr. Cypher was totally disabled because of both his physical impairment and his “psychological responses”, and not from the back injury alone. (*Id.* at 33:1-8). In fact, Dr. Koprivica also agreed that Mr. Cypher’s back treatment was successful. (*Id.* at 48:3-11).

Significantly, Dr. Koprivica diagnosed Mr. Cypher as demonstrating positive Waddell’s Tests in all five categories. Specifically, Dr. Koprivica found that Mr. Cypher:

1. Overreacted to his pain as though he were “trying to win an Oscar to impress upon you how bad” his pain was;
2. Exhibited pain “everywhere” to light touch that Dr. Koprivica applied only regionally;
3. Inappropriately complained in response to *simulated* physical testing;
4. Demonstrated non-anatomical and non-neurological complaints in response to physical testing; and,
5. Displayed disparate test responses to the same tests performed in different ways.

Id. at 25: 3-26:13.

However, Dr. Koprivica chose to ignore these findings simply because he could not conclude that Mr. Cypher was consciously presenting these symptoms. *Id.* at 27:3-15.

RULINGS

In this case, the primary issue is the nature and extent of Mr. Cypher's disability and whether he is permanently and totally disabled. It is clear that Mr. Cypher sustained a work-related injury to his back on November 29, 2001, which was compensable under Missouri law. The Employer paid for treatment related to Mr. Cypher's back injury and authorized surgery by Dr. McQueary. As the primary treating physician, Dr. McQueary rated Mr. Cypher's back injury at 20% whole body disability. Dr. McQueary did not believe the back injury resulted in permanent total disability. Dr. Koprivica, Mr. Cypher's rating physician, rated Mr. Cypher's back injury at 50% whole body disability. He agreed with Dr. McQueary that the back injury alone would not render Mr. Cypher permanently totally disabled and that the surgery was successful. In light of the surgery involved and Mr. Cypher's use of a TENS unit, I find that as a result of the back injury alone Mr. Cypher sustained thirty-five percent (35%) whole body disability. I further find Mr. Cypher's back injury became permanent and that he reached maximum medical improvement for his back injury on June 13, 2003 when Dr. McQueary last examined him.

It also is clear that Mr. Cypher was temporarily and totally disabled as a result of his back injury from November 30, 2001 through July 17, 2003. This includes the period from February 1, 2002 through March 4, 2002 when he did not receive any temporary disability benefits. As such, I find that Mr. Cypher is entitled to unpaid temporary total disability benefits for that latter period of time totaling \$2,785.13.

The more significant issue is what disability - if any - resulted from Mr. Cypher's alleged November 30, 2001 ibuprofen reaction, whether the Employer is responsible for that disability, and whether it combines with the November 29, 2001 physical injury to render Mr. Cypher permanently and totally disabled? Missouri law defines "total disability" as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. *See* MO.REV.STAT. §287.020.7 and Fletcher v. Second Injury Fund, 922 S.W.2d 402, 404 (Mo.App. W.D.1996). The test for permanent and total disability is whether a claimant is able to compete in the open labor market given his or her condition and situation. Messex v. Sachs Elec. Co., 989 S.W.2d 206, 210 (Mo.App. E.D.1999). When Mr. Cypher is disabled by a combination of the work-related event and subsequent health problems unrelated to that event, the employer is not liable for permanent total disability benefits. Walters v. City of St. Louis, 28 S.W.3d 463 (Mo.App. 2000).

If we assume that all of the psychiatric disability Mr. Cypher exhibits is related to his workers compensation injury, he is likely permanently and totally disabled.^[1] In order to receive workers' compensation benefits, however, Mr. Cypher must show that his injury was caused by an accident "arising out of" and "in the course of his employment." *See* MO.REV.STAT. §287.120.1; Mann v. City of Pacific, 860 S.W.2d 12, 15 (Mo.App.1993). As demonstrated in Bear v. Anson Implement, Inc., 976 S.W.2d 553 (Mo.App. 1998), the mere fact that ibuprofen exposure occurred while Mr. Cypher was treating for a workers' compensation injury does not necessarily make the Employer liable for the alleged disability resulting from the ibuprofen use. "Arising out of" the employment relationship requires a "causal connection between the conditions under which the work is required to be performed and the resulting injury." Abel by and Through Abel v. Mike Russell's Standard Serv., 924 S.W.2d 502, 503 (Mo. banc 1996) "An injury occurs 'in the course of employment, if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment.'" Abel, 924 S.W.2d at 503.

In this case, the exposure to ibuprofen occurred in a manner totally unrelated to Mr. Cypher's employment. "It is not sufficient that the employment may simply have furnished an occasion for an injury," Kelley v. Sohio Chem. Co., 392 S.W.2d 255, 257 (Mo. banc 1965), and it is also not sufficient "that the victim's employment caused him to be at the place where it happened." Liebman v. Colonial Baking Co., 391 S.W.2d 948, 952 (Mo.App.1965). *See also* Turpin v. Turpin Elec., Inc., 904 S.W.2d 539, 542 (Mo.App.1995).

"[I]t is the nature of the employee's activity at the time of the injury itself which governs the issue of compensability." Turpin, 904 S.W.2d at 542. "Worker's compensation was never designed to operate as accident insurance with blanket coverage as to any and all accidental injuries wherever and whenever received by an employee." Leslie, 947 S.W.2d at 99. In this case, Mr. Cypher's exposure to ibuprofen just happened to have occurred at the time he was treating for his back injury. The exposure, however, could have just as easily occurred accidentally at any other time. It is not the role of workers' compensation to insure an employee against all harm that occurs to him when only tangentially related to his employment. It may well be that Mr. Cypher has a viable civil court malpractice cause of action, however, that is beyond the jurisdiction of Missouri's Workers' Compensation law.

I find that Mr. Cypher's alleged ibuprofen allergic reaction did not arise out of and in the course and scope of his employment. Thus, no consideration may be given to that alleged event in determining Mr. Cypher's disability. As such, based on the testimony of both Dr. McQueary and Dr. Koprivica, I cannot find Mr. Cypher permanently and totally disabled.

However, even if I had found that Mr. Cypher's ibuprofen use arose out of and in the course and scope of employment, I nonetheless would not have awarded him any disability for his perceived physical and psychological results of such use. The objective diagnostic testing confirms that no actual physical injury resulted from the ibuprofen use. And, the psychological testing does not convince me that Mr. Cypher has sustained any compensable psychological disability. Dr. McQueary testified that he did not observe any psychological issues significant enough to note when he last examined him. And, Dr. Logan noted that Mr. Cypher completed his testing "either carelessly, randomly, or deceitfully."

Since the only outstanding medical bills in this case relate to Mr. Cypher's psychiatric treatment, I find that the Employer is not responsible for these bills. In addition, the Employer is not responsible for providing Mr. Cypher with any future psychiatric treatment. However, the Employer is responsible for providing Mr. Cypher with additional medical care related to his back condition only including maintenance of the TENS unit and pain medications as prescribed by Dr. McQueary.

The final issue to be determined is Mr. Cypher's request that his benefits be commuted pursuant to Section 287.530. In light of the fact that I have found that Mr. Cypher is not permanently and totally disabled, this request is less significant than it otherwise would have been. However, because Mr. Cypher did not reach maximum medical improvement until June 12, 2003, and the total weeks (140) for his permanent partial disability go beyond the date of hearing, I nonetheless will address this issue. Missouri law states, in relevant part, that:

1. The compensation provided in this chapter may be commuted by the division or the commission and redeemed by the payment in whole or in part, by the employer, of a lump sum which shall be fixed by the division or the commission, which sum shall be equal to the commutable value of the future installments which may be due under this chapter, taking account of life contingencies, the payment to be commuted at its present value upon application of either party, with due notice to the other, if it appears that the commutation will be for the best interests of the employee or the dependents of the deceased employee, or that it will avoid undue expense or undue hardship to either party, or that the employee or dependent has removed or is about to remove from the United States or that the employer has sold or otherwise disposed of the greater part of his business or assets.
2. In determining whether the commutation asked for will be for the best interest of the employee or the dependents of the deceased employee, or so that it will avoid undue expense or undue hardship to either party, the division or the commission will constantly bear in mind that it is the intention of this chapter that the compensation payments are in lieu of wages and are to be received by the injured employee or his dependents in the same manner in which wages are ordinarily paid. Therefore, commutation is a departure from the normal method of payment and is to be allowed only when it clearly appears that some unusual circumstances warrant such a departure.

MO.REV.STAT. §287.530.

In this case, Mr. Cypher presented absolutely no evidence of any undue hardship if his benefits were not commuted. Mr. Cypher also failed to present any evidence to the court concerning his life expectancy to support his request for benefit commutation. As stated in §287.530, commutation should be "allowed only when it clearly appears that some unusual circumstances warrant such a departure." (Emphasis added) The record in this case is completely devoid of any unusual circumstances warranting commutation. As such, I find that the record does not support commutation of the award.

In summary, the employer is ordered to pay:

1. Back TTD benefits totaling \$2,785.13;
2. Thirty-five percent (35%) whole body permanent partial disability with the amount due for the eighty-five week period from June 13, 2003 through the January 28, 2005 hearing date (\$28,000.70) being due immediately, with the balance of the benefits to be paid weekly for the fifty-five weeks thereafter; and,
3. Future medical related to Mr. Cypher's back condition only including maintenance of the TENS unit and any and all medications related solely to the back condition as prescribed by Dr. McQueary.

The compensation awarded to Mr. Cypher shall be subject to a twenty-five percent (25%) lien totaling \$7,696.46 for accrued benefits and \$82.36 of each weekly permanent partial disability benefit paid from January 29, 2005 through February 1, 2006 in favor of Randy Alberhasky, Attorney, for reasonable and necessary attorney's fees pursuant to MO.REV.STAT. §287.260.1. No fee is awarded on the value of any future medical treatment.

Date: _____ Made by: _____

R. Carl Mueller, Jr.
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Although it should be noted that Dr. Logan hinted that Mr. Cypher's psychological condition could improve but not "until the litigation process is complete". (A, p. 636).