

**FINAL AWARD ALLOWING COMPENSATION**

(Affirming Amended Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 02-120477

Employee: Stacey Deane  
Employer: Elder Custom Homes  
Insurer: Missouri Employers Mutual Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission affirms the amended award and decision of the administrative law judge dated June 3, 2011, with this supplemental opinion. The Commission adopts the findings, conclusions, decision, and amended award of the administrative law judge to the extent they are not inconsistent with the supplemental opinion set forth below.

**Discussion**

*Employee's argument that employer "waived" its right to direct treatment under § 287.140*

Employee seeks an order from this Commission that will allow him to go to any doctor he chooses and pursue his own future course of treatment at employer's expense. Section 287.140 RSMo provides, in relevant part, as follows:

1. 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. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. ...

...

10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses.

The foregoing language charges employer with the duty to "provide" employee's treatment and gives employer control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). The section also states that an employee is allowed to select his own doctors, but if he does so, he assumes liability for those expenses. An exception to this general rule exists where an employer has notice of an employee's need for treatment but fails to provide it; in such circumstances the courts have held that the employee is entitled to pursue his own

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course of treatment while later pursuing an order from an ALJ or this Commission holding employer liable for the expenses. *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 847-48 (Mo. App. 2007).

Here, employee points to a treatment gap from April through September 2007, during which employer failed to provide prescription medications to employee. This lapse, says employee, constituted a “waiver,” such that employer is thereafter precluded from exercising its right to direct treatment under § 287.140.1. Employee also points to a number of other instances in which he disagreed with employer over the course of his treatment, characterizing the cumulative effect of such instances as evidence that employer had a lack of concern for him.

Employee cites the case of *Balsamo v. Fisher Body Division-General Motors Corp.*, 481 S.W.2d 536 (Mo. App. 1972) as “directly on point.” We believe employee misreads *Balsamo*. Contrary to employee’s brief, in which he recites that the employer in *Balsamo* denied treatment, the employer there actually “refused no medical care, and ... even paid for the doctor and hospital selected by the employee, something not required by the statute.” *Id.* at 538. After acceding to and paying for treatment selected by the employee, however, the employer in *Balsamo* argued that it should not have to pay the employee’s wife to perform nursing services, but instead should be allowed to select a nursing service of its choice. *Id.* The court ruled that the employer’s prior action in voluntarily paying for the employee’s self-directed treatment meant that it had effectively “waived” its right to direct that treatment under the statute, and that employer could not reassert its right to direct treatment after previously having “yielded” that right, with the effect that employer had to pay employee’s wife to perform the nursing services. *Id.* at 538-9.

Here, on the other hand, employer has never yielded its right to direct treatment. To the contrary, this employer has consistently asserted its right to control treatment throughout the pendency of the claim—if it had not, there would hardly have been the history of clashes between employer and employee over the issue of his medical treatment which we see reflected in the record in this case. We conclude *Balsamo* does not fit the facts presented or support employee’s argument.

The other cases addressing an employer’s waiver of the right to direct treatment deal with issues of *past* medical treatment (i.e. where an employer has previously denied and the employee has previously obtained the disputed treatment before seeking an award holding the employer liable for his past medical expenses) and do not support the proposition that employee may obtain an order from this Commission granting him the *prospective* privilege of selecting any doctor or treatment he chooses with employer liable to pay for such expenses. See *Mashburn v. Chevrolet-Kansas City Div. General Motors Corp.*, 397 S.W.2d 23, 31 (Mo. App. 1965); *Hendricks v. Motor Freight Corp.*, 570 S.W.2d 702, 710 (Mo. App. 1978); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 932 (Mo. App. 1992); and *Dudley v. City of Des Peres*, 72 S.W.3d 134, 138 (Mo. App. 2002).

Ultimately, we are not persuaded that § 287.140, nor any of the relevant cases, contemplate the sort of relief employee seeks here. We find the administrative law

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judge's decision to award attorney's fees the appropriate way to address the 2007 lapse in treatment. We deny employee's request for an order finding that employer waived its right to direct employee's medical treatment under § 287.140.1. We further deny employee's request for an order allowing him to select his own doctors and treatments at employer's expense.

Past medical expenses

Where the parties dispute whether a particular past medical expense comes within the employer's obligation under § 287.140, the burden of proof falls on employee for each claimed past medical expense to provide 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989). Here, the administrative law judge granted employee's request for past medical expenses to the extent of awarding the cost of employee's spinal cord stimulator. In his brief, employee argues the administrative law judge failed to award certain expenses relating to physical therapy and pre and post-operative care related to the surgery to implant the spinal cord stimulator. Unfortunately, in his brief and at oral arguments in this matter, employee failed to provide citations to the record that would permit us to review the bills or treatment records or any other evidence establishing the amount of the claimed expenses. Employer, in its brief, suggests that employee failed to put the bills in evidence.

In a letter to this Commission received on January 26, 2012 (after the date of oral arguments in this matter), employee directs us to "pages 002109—002321 in the transcript" where we will find "the medical bills." These pages correspond to employee's Exhibits G and H. In other words, employee has directed us to the exhibits containing all of his medical bills and all of his pharmacy records.

As for Exhibit H (the pharmacy records), it is unclear why employee is now directing us to this exhibit on his claim for past medical expenses, as employee's counsel agreed, at trial, that employee is not claiming any expenses from his Exhibit H. *Transcript*, page 72. What is clear is that employee has failed to provide citations to the specific bills in issue. Employee also fails to provide citations to the testimony identifying the bills, and fails to provide citations to the records of the treatments giving rise to the bills. Apparently, employee asks us to comb the entire exhibit containing his medical bills, as well as the entire exhibit containing his pharmacy records, while comparing each bill to his treatment record (which we are asked to search for the relevant information, employee having failed to provide citations), in order to determine which bills constitute the amounts employee says that employer failed to pay in connection with his spinal cord stimulator surgery. It is unclear how employee expects us, after completing this task, to determine the actual amount of his liability on the bills.

It appears to us that employee invites this Commission to make his case for him when he asks us (at minimum) to search over 200 pages of medical bills and 1500 pages of medical treatment records for the evidence to support his arguments, and where he fails to provide citations to any evidence that would allow us even to begin to interpret the bills themselves, which include numerous handwritten notations from an unknown

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person, and which are far from self-explanatory as to who paid for the treatments and in what amount. We must decline employee's invitation in order to avoid becoming an advocate for either party.

Ultimately, we must conclude employee failed to meet his burden of proving he is entitled to any additional past medical expenses beyond those awarded by the administrative law judge.

#### Future medical treatment

Employer argues the administrative law judge failed to resolve whether employee is entitled to a number of specific future medical treatments he is now requesting. These include treatment for his shoulders, annual visits to Craig Institute, the appointment of a nurse care manager, psychiatric care, home nursing care, a fitness program and equipment, and a front-load washer and dryer.

The problem with employee's argument is that, in their stipulations at the outset of the hearing, the parties did not ask the administrative law judge to determine whether any such specific treatments flow from the work injury. The parties, rather, stipulated that employer is liable for future medical treatment. *Transcript*, page 6. At that point, the issue of future medical treatment was effectively decided, because we are not permitted to address issues beyond those the parties specifically identify as in dispute. *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705 (Mo. App. 2001).

Under § 287.140, employer remains liable for any and all future medical treatments and accommodations that employee may reasonably require in order to cure and relieve from the effects of his work injury. To the extent employee is asking us to "enforce" his award of future medical care against employer as to specific disputed treatments, this Commission is not the forum for such a dispute, because we lack the authority to enforce an award of compensation. *Carr v. N. Kan. City Bev. Co.*, 49 S.W.3d 205, 207 (Mo. App. 2001).

In sum, where the parties stipulated that employer is liable for future medical treatment and did not place in issue the question whether any of the specific medical treatments identified by employee flow from the work injury, we must conclude that the administrative law judge did not err in failing to order employer to provide any of the specific requested treatments or accommodations.

#### **Conclusion**

The Commission supplements the amended award and decision of the administrative law judge with our own analysis herein.

The amended award and decision of Administrative Law Judge Hannelore D. Fischer issued June 3, 2011, is affirmed and is attached hereto and incorporated herein to the extent it is not inconsistent with this supplemental opinion.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 16<sup>th</sup> day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AMENDED AWARD

Employee: Stacey Deane

Injury No. 02-120477

Dependents:

Employer: Elder Custom Homes

Additional Party: N/A

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: January 12, 2011 and February 22, 2011

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: HDF/scb

### 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: October 7, 2002.
5. State location where accident occurred or occupational disease was contracted: Camden 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:  
See award.
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: Low back.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$190,164.18.
16. Value necessary medical aid paid to date by employer/insurer? \$550,230.32.
17. Value necessary medical aid not furnished by employer/insurer? \$25,316.49.

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18. Employee's average weekly wages: \$661.60.
19. Weekly compensation rate: \$441.07.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable: Continuing permanent and total disability benefits;  
\$2,882.40 in attorney fees for April 1, 2007 through September 30, 2007
22. Second Injury Fund liability:
23. Future Requirements Awarded: Medical treatment, medical services.

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 benefits paid from the date of injury because initially this was a disputed case with no benefits being paid so that all past payments have been procured by the services of said attorney and shall also include future permanent total disability benefits as stipulated to by the parties. All payments hereunder shall be in favor of the following attorney for necessary legal services rendered to the claimant: Truman Allen (with exception of April 1, 2007, through September 30, 2007, which is the responsibility of the employer/insurer.)

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## **FINDINGS OF FACT and RULINGS OF LAW:**

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Dependents:

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Elder Custom Homes

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: N/A

Insurer: January 12, 2011 and February 22, 2011

Checked by: HDF/scb

### **ISSUES DECIDED**

The above referenced workers' compensation claim was heard before the undersigned administrative law judge on January 12, 2011 and February 22, 2011. Memoranda were submitted by March 28, 2011.

The parties stipulated that on or about October 7, 2002, the claimant, Stacey Deane, was in the employment of Elder Custom Homes and sustained an injury by accident arising out of and in the course of employment. The employer was operating under the provisions of Missouri's workers' compensation law; workers' compensation liability was insured by Missouri Employers Mutual Insurance Company. The employer had timely notice of the injury. A claim for compensation was timely filed. The claimant's average weekly wage was \$661.60; the appropriate compensation rate is \$441.07 per week for all benefits.

Temporary disability benefits have been paid to the claimant to date in the amount of \$190,164.18. Medical aid has been provided in the amount of \$550,230.32.

The parties stipulated that the claimant is permanently and totally disabled and that the employer/insurer is liable for future medical treatment.

The issues to be resolved by hearing include 1) the liability of the employer/insurer for attorney's fees and costs, 2) the liability of the employer/insurer for past medical bills, and 3) whether the employer/insurer has waived its right to select the treating physicians by failing to provide adequate medical care.

### **FACTS**

Stacey Deane was 49 years old as of the date of hearing. Mr. Deane was involved in home construction for Elder Custom Homes on October 7, 2002, when he fell from a temporary

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platform onto concrete. As a result, Mr. Deane is now paraplegic, cannot walk and is wheelchair dependent. Mr. Deane was initially treated at the University of Missouri Health Center, then Rusk Rehabilitation, both in Columbia, Missouri. From November 27, 2002, through January 18, 2003, Mr. Deane was at Craig Hospital in Colorado. Since his treatment at Craig Hospital, Mr. Deane treated with the following physicians:

- Dr. Crockett from January 31, 2003 through April 28, 2005
- Dr. LaMonda from April 28, 2005 forward
- Dr. Wolkowitz pain management in September and August of 2006
- Dr. Coyle from June 8, 2005 through August 30, 2005 for hardware removal from Mr. Deane's back
- Dr. Crockett from April 19, 2006 through November 27, 2006 spinal cord specialist treatment terminated due to Mr. Deane's abusive behavior toward staff
- Dr. Milne as urology referral from Dr. Crockett
- Dr. Evenson as pain management referral from Dr. Crockett
- Dr. Graham insurer referral for pain management October 16, 2006 through November 27, 2006.
- Dr. Robbins as family physician in 2005 and 2006
- Burrell Behavioral Health August 2006 and November 2007 psychological care Medicare paid balance for copays due
- Dr. Markway as psychological for evaluation of Dr. Graham's treatment April 27, 2007
- Dr. Volarich 2003 and June 2007
- Dr. Halfaker evaluation for need for further psychological evaluation January 1, 2004 through May 26, 2004, June 5, 2006 and July 10, 2007
- Dr. Heligman medical review October 14, 2008
- Craig Hospital January 28-31, 2008 reevaluation

The issues raised by Mr. Deane with regard to his claim of inadequate medical care include Dr. Graham's refusal to provide appropriate care in 2006; the failure of the employer/insurer to provide neurontin in the past; failure of the employer/insurer to provide Mr. Deane with a handi-cap accessible place to live; appropriate accommodations for living, including the shower chair recommended by the Craig Hospital; the failure of the employer/insurer to provide a spine stimulator and a pain pump; the failure of the employer/insurer to provide sterile catheters in the past; a cleaning service, including laundry service; home health care; an artificial sphincter; modified transportation and physical therapy.

The employer/insurer raised Mr. Deane's alcohol consumption, misuse of prescription narcotic medication, lack of cooperation with several of their authorized treating physicians, and lack of medical necessity for the pain pump and the spinal cord stimulator as defenses to the allegations of inadequate medical care.

Mr. Deane was provided a handicapped accessible van, which he sold after two years. Since then Mr. Deane has had several smaller cars with hand controls. Mr. Deane mentioned the purchase of a Camry as his next vehicle. Mr. Deane put about 20,000 miles a year on his van.

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Mr. Deane had a spinal cord stimulator put in his thoracic spine at the University of Missouri on June 30 and July 7, 2010, through Medicare. Mr. Deane testified that he had Medicare billed for the spinal cord stimulator. Dr. Wolkowitz initially recommended the spinal cord stimulator; Dr. LaMonda also recommended the spinal cord stimulator. The employer/insurer sent Mr. Deane to Dr. Heligman who opined that a spinal cord stimulator was inappropriate for Mr. Deane while he was using alcohol and misusing his prescription medication. The spinal cord stimulator was paid for through Medicare. The amount sought by Mr. Deane for reimbursement of Medicare for the spinal cord stimulator implant is \$25,316.49.

Mr. Deane testified that he was not getting his prescription medications paid for through the workers' compensation insurer in 2007, and that he had trouble paying for them himself. The employer/insurer acknowledged in its brief that there was a lapse in prescription coverage from April through September of 2007.

The notes of adjusters for the employer/insurer are in evidence and document many of the issues raised by both the claimant and the employer/insurer. Certainly complaints by doctors of Mr. Deane's repeated alcohol use (September 20, 2006 note cites Ginny from Dr. Robbins' office complaining of Mr. Deane's smelling of alcohol) as well as failure to attentively care for Mr. Deane's needs (July 12, 2006 Mr. Deane's wheelchair in disrepair; July 27, 2006 referral to wheelchair clinic; September 19, 2006 bids on wheelchair and wheelchair ordered) are documented in the notes of the adjusters responsible for Mr. Deane's case. There is a complete absence of notes for the period of January 2, 2007 through September 24, 2007.

Dr. Gary LaMonda, an internal medicine specialist, wrote a letter to Mr. Deane's attorney on February 19, 2008, expressing his concerns regarding Mr. Deane's care and "the lack of attention from workman's compensation to provide him with these needs." Dr. LaMonda stated in part that Mr. Deane "lives alone and has assistance from no one." Dr. LaMonda cited Mr. Deane's "wasting of the lower extremities"; pain in the upper extremities, shoulders, and neck from the use of a manual wheelchair and transfers from that chair; falls in the bathroom from trying to use the toilet; and severe right lower extremity pain and need for a pain pump assessment. Dr. LaMonda cited the following "minimal" needs: wheelchair ramp, bedside commode, washer and dryer, home health/safety evaluation, home health for medication assistance and physical therapy, assistance in cleaning his home, an electric wheelchair, a local (Columbia) pain assessment, including a pain pump, psychiatric care for depression, and an appropriate toilet seat.

Dr. LaMonda's records reflect the implant of a thoracic spinal cord stimulator in mid 2010; Dr. LaMonda's records continue to document Mr. Deane's pain and use of narcotic pain medications prescribed by Dr. LaMonda.

Dr. Barbara Markway, a psychologist, evaluated Mr. Deane on one occasion at the request of his attorney. Dr. Markway noted that Mr. Deane said that he did not receive his medications through his workers' compensation carrier after he refused treatment with Dr. Graham. Dr. Markway criticized Dr. Graham's use of a psychometric test, the SCL-90-R, without being "tested in local context before being accepted as valid." Dr. Markway felt that Mr. Deane was not exaggerating his physical complaints. Dr. Markway made four recommendations: 1) treatment from a primary care specialist and a pain management specialist, 2) counseling for addiction, loneliness and

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depression, 3) continued attendance at Alcoholics Anonymous and Narcotics Anonymous meetings and 4) coverage of medications through workers' compensation. Dr. Markway acknowledged that it was her understanding that in April of 2007 Mr. Deane had entered an alcohol rehabilitation facility in Audrain County because he had been "drinking heavily" since his breakup with his girlfriend and he was "tapering off his narcotic use of oxycodone."

Dr. Trull, clinical psychologist and professor of psychological sciences, stated in his deposition that Dr. Graham's use of the SCL-90-R test results was inappropriate because it was not "followed up by additional observation, interview, or further testing" and the psychological test scores were not interpreted "considering a respondent's context or current situation."

Dr. Shane Bennoch, M.D., testified by deposition regarding his life care plan for Mr. Deane. Dr. Bennoch was critical of Dr. Graham's abrupt discontinuation of Mr. Deane's narcotic medication, while recognizing that the alcohol use in conjunction with the use of Oxycontin is potentially dangerous.

Mr. Deane was seen by Dr. Halfaker at the request of the employer/insurer on several occasions, the last of which was on July 10, 2007. Dr. Halfaker found Mr. Deane to suffer from depression, "multifactorial in origin with some of it being attributable to the struggles he has had with his disability to his spinal cord and some (sic) which is due to the poor decisions he has made most likely due to the influence of personality related pathology." Dr. Halfaker went on to state that he believed it would be reasonable to address aspects of Mr. Deane's depression through removal of stress associated with the spinal cord injury. Dr. Halfaker recommended additional spinal cord injury treatment in the form of specialized medical care at Rusk Rehabilitation Center under the direction of a physical medicine rehabilitation physician and another physician to direct prescription medications and to carry out the directions of specialty physicians. Dr. Halfaker felt that a medical determination needed to be made regarding the need for materials such as catheters and gloves for a bowel program. Dr. Halfaker went on to say that Mr. Deane noted to him that he was not getting spinal cord injury treatment and was only taking about half of the prescribed medication.

Dr. John Graham, M.D., pain management specialist, evaluated Mr. Deane on October 16, November 2, November 16, and November 27, 2006. Dr. Graham opined that Mr. Deane was taking too much narcotic medication and that narcotic medication was not appropriate for his chronic pain. Dr. Graham stated that Mr. Deane could be "weaned off of" his narcotic medication by simply stopping it at the dose at which he was taking it. Specifically with regard to the Oxycontin that Mr. Deane was taking, Dr. Graham stated that alcohol was not recommended in conjunction with the use of Oxycontin. Dr. Graham testified that Mr. Deane told him that he did not see the use of alcohol in conjunction with the Oxycontin as an issue. Dr. Graham also discussed his refusal to perform an L4-5 nerve block on Mr. Deane on November 2, 2006, because Mr. Deane appeared to be under the influence of alcohol on the day of the planned procedure.

University of Missouri Healthcare records document the implantation of a spinal cord stimulator on June 30 and July 7, 2010. Dr. Norregaard performed the procedure; Dr. Norregaard's notes reflect his knowledge of Mr. Deane's use of prescription narcotics.

**APPLICABLE LAW**

RSMo, Section 287.140. 1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. Where the requirements are furnished by a public hospital or other institution, payment therefor shall be made to the proper authorities. Regardless of whether the health care provider is selected by the employer or is selected by the employee at the employee's expense, the health care provider shall have the affirmative duty to communicate fully with the employee regarding the nature of the employee's injury and recommended treatment exclusive of any evaluation for a permanent disability rating. Failure to perform such duty to communicate shall constitute a disciplinary violation by the provider subject to the provisions of chapter 620. When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses; except that an injured employee who resides outside the state of Missouri and who is employed by an employer located in Missouri shall have the option of selecting the location of services provided in this section either at a location within one hundred miles of the injured employee's residence, place of injury or place of hire by the employer. The choice of provider within the location selected shall continue to be made by the employer. In case of a medical examination if a dispute arises as to what expenses shall be paid by the employer, the matter shall be presented to the legal advisor, the administrative law judge or the commission, who shall set the sum to be paid and same shall be paid by the employer prior to the medical examination. In no event, however, shall the employer or its insurer be required to pay transportation costs for a greater distance than two hundred fifty miles each way from place of treatment.

RSMo, Section 287.560. 287.560. The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. Any party shall be entitled to process to compel the attendance of witnesses and the production of books and papers, and at his own cost to take and use depositions in like manner as in civil cases in the circuit court, except that depositions may be recorded by electronic means. The party electing to record a deposition by electronic means shall be responsible for the preparation and proper certification of the transcript and for maintaining a copy of the tape or other medium on which the deposition was recorded for the use of the division or any party upon request. Copies of the transcript shall be provided to all parties at a cost approved by the division. Subpoena shall extend to all parts of the state, and may be served as in civil actions in the circuit court, but the costs of the service shall be as in other civil actions. Each witness shall receive the fees and mileage prescribed by law in civil cases, but the same shall not be allowed as costs to the party in whose behalf the witness was summoned unless the persons before whom the hearing is had shall certify that the testimony of the witness was necessary. All costs under this section shall be approved by the division and paid out of the state treasury from the fund for the support of the Missouri division

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of workers' compensation; provided, however, that if the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them. The division or the commission may permit a claimant to prosecute a claim as a poor person as provided by law in civil cases.

When employer has notice that claimant needs medical treatment, or demand is made on employer to furnish medical treatment and employer refuses or neglects to provide needed treatment, that employer is held liable for medical treatment procured by employee. Hawkins v. Emerson Electric, 676 S.W. 2d 872 (S.D. 1984)

Modifications to a van to accommodate the loading and unloading of a wheelchair used by a paraplegic claimant as well as the cost of a new van beyond the cost of an average midsize automobile of the same year as the van qualify as medical treatment. Mickey v. City Wide Maintenance, 966 S.W.2d 144 (W.D. 1999)

### **AWARD**

The claimant, Stacey Deane, has sustained his burden of proof that he is entitled to attorneys fees where the employer/insurer has failed on numerous occasions to provide Mr. Deane with medications, sterile catheters, home cleaning services, a spinal cord stimulator, and home modifications, among other medical necessities or services. While Mr. Deane has not been an accommodating claimant, that in no way relieves the employer/insurer of its obligation to provide appropriate services. Had the employer/insurer been appropriately monitoring Mr. Deane's care, there would not have been the egregious lapse in services displayed in this case. Most egregious is the failure to provide prescription medications from April through September of 2007. Therefore, attorney's fees in the amount of 25 percent of the amount of temporary total or permanent total disability benefits for the period of April through September, 2007, inclusively, are awarded. Other costs in this case are not awarded where it is the failure of both parties to communicate which has exacerbated the lapse in services.

Mr. Deane has sustained his burden of proof that the employer/insurer is liable for the cost of the spinal cord stimulator. Several of Mr. Deane's treating physicians opined that Mr. Deane was in need of a spinal cord stimulator. It is a non-treating physician hired by the employer/insurer to review Mr. Deane's case who opined against Mr. Deane's spinal cord stimulator implant. The fact that Medicare was billed for the spinal cord stimulator is a reflection of the failure of the employer/insurer to provide this medically necessary device for Mr. Deane and in no way relieves the employer/insurer of its obligation to pay. Mr. Deane has failed to sustain his burden of proof that the employer/insurer is liable for additional past medical expenses where I am unable to discern from the bills submitted the amounts claimed as the responsibility of the employer/insurer.

Mr. Deane has failed to sustain his burden of proof that he is entitled to select his medical care. First, the majority of the treating physicians selected by the employer/insurer have been appropriate for Mr. Deane's care and have been acceptable to Mr. Deane; the lack of services

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recommended by treating physicians has been far more egregious than the selection of physicians by the employer/insurer. Secondly, Mr. Deane has alienated some of the very physicians whom he accepted as appropriate through his own unacceptable behavior. There is absolutely an equally difficult track record on the part of the employer/insurer and Mr. Deane with regard to unacceptable behavior when it comes to physician selection or relationship, respectively. Finally, the relationship between Mr. Deane and the employer/insurer will continue to be a lifelong relationship, since regardless of the physician treating Mr. Deane, the payment will be at the hands of the employer/insurer. Therefore it is my hope that both parties can work together to establish appropriate physician care for Mr. Deane with physicians in whom Mr. Deane has confidence.

With regard to specific items raised at the hearing I find as follows:

Van---the employer/insurer is responsible for modification costs of another vehicle with existing hand controls unless these are no longer appropriate for use due to normal wear and tear in which case they will need to be replaced. Mr. Deane has not indicated that he requires the use of a van where his vehicle of choice over the past years has been a sedan. Moreover, Mr. Deane sold the van originally provided by the employer/insurer and replaced it with a sedan and there has been no evidence that Mr. Deane's condition has changed since the switch in vehicles was made. However, should Mr. Deane's condition change to the point where a van is medically necessary, modifications as well as the cost of a new van beyond the cost of an average midsize automobile of the same year as the van will be the responsibility of the employer/insurer.

Home modification---the employer/insurer is liable for the cost of home modification once Mr. Deane finds a place that is susceptible to appropriate modifications.

Home Cleaning---the employer/insurer is liable for the cost of a home cleaning service to keep Mr. Deane's living environment clean and sanitary. Included in the cleaning service is a laundry service until such time as Mr. Deane is able to do his own laundry.

Physical therapy---the employer/insurer are liable for physical therapy for Mr. Deane as recommended by Dr. LaMonda.

The other issues raised have either been addressed or there was inadequate evidence to substantiate an order in this award.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

HANNELORE D. FISCHER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*