

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

Injury No.: 07-134607

Employee: Joseph Duever
Employer: All Outdoors Inc.
Insurer: Guarantee Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 27, 2011, as supplemented and clarified herein.

Discussion

Future medical expenses

We agree that employee met his burden of proving employer is liable for his future medical expenses. The administrative law judge, however, appears to have awarded a specific course of treatment "as outlined by Dr. Thomas." *Award*, page 8. Such an award is not contemplated by § 287.140.1 RSMo, which provides, in relevant part, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Where the employee's burden of proof is met, the statute makes clear that employee is entitled to that treatment which "may reasonably be required ... to cure and relieve from the effects of the injury." *Id.* We are not called upon to mandate what specific treatment or procedures will reasonably be required, as such an award would make no account for the ongoing or transitory nature of various medical conditions, and would involve the impossible task of predicting what will "reasonably be required" in an unknown future. For these reasons, we consider it inappropriate to bind an award of future medical expenses to a specific course of treatment or specific medical provider.

Accordingly, we do not adopt the administrative law judge's comments linking employee's award of future medical treatment to any specific treatments or procedures outlined by Dr. Thomas, but rather award employee his future medical expenses

Employee: Joseph Duever

- 2 -

pursuant to § 287.140, for that treatment which may reasonably be required to cure and relieve from the effects of his work injury of February 19, 2007.

Award

The award and decision of Administrative Law Judge Linda J. Wenman, issued January 27, 2011, as supplemented and clarified herein, 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 14th day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

AWARD

Employee: Joseph Duever Injury No.: 07-134607
Dependents: N/A Before the
Employer: All Outdoors Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Guarantee Insurance Company Jefferson City, Missouri
Hearing Date: October 25, 2010 Checked by: LJW

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 19, 2007
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO
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: While returning to his office after conducting a safety meeting, Employee slipped and fell on a patch of ice.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Left shoulder
14. Nature and extent of any permanent disability: 35% overall permanent partial disability (PPD) referable to left shoulder, 10% preexisting this injury and 25% PPD related to the February 19, 2007 injury.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Joseph Duever

Injury No.: 07-134607

- 17. Value necessary medical aid not furnished by employer/insurer? \$31,233.57
- 18. Employee's average weekly wages: \$598.33
- 19. Weekly compensation rate: \$398.89 / \$376.55
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$31,233.57
58 weeks of permanent partial disability from Employer	\$21,839.90

22. Second Injury Fund liability: No

TOTAL: \$53,073.47

23. Future requirements awarded: Yes

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 in favor of the following attorney for necessary legal services rendered to the claimant: Robert Arb

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Joseph Duever	Injury No.: 07-134607
Dependents:	N/A	Before the
Employer:	All Outdoors Inc.	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
		Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
Insurer:	Guarantee Insurance Company	Checked by: LJW

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on October 25, 2010. Post-trial briefs were submitted by November 22, 2010. Attorney Robert Arb represented Joseph Duever (Claimant). Employer is insured by Guarantee Insurance Company, and represented by Attorney John Kafoury. Assistant Attorney General Da-Niel Cunningham represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident; arising out of and in the course and scope of employment; liability for past medical expenses; future medical care; and liability of Employer and SIF for permanent partial disability (PPD) benefits. Hearing venue is correct, and jurisdiction properly lies with the Missouri Division of Workers' Compensation.

Claimant offered Exhibits A-I, and Employer offered Exhibit 1. All exhibits were admitted without objection. Any objections not expressly ruled on in this award are overruled. All markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is 58 years old, and is the founder, owner and operator of Employer's business. Employer's business conducts landscape construction and maintenance, garden design, and during the winter months, snow removal. When performing snow removal, Employer's workers plow snow, shovel snow, and provide de-icing. Claimant's equipment (trucks, trailers, etc.) when not in use, were parked onsite in parking spaces designated for his use, as specified under the terms of his lease. Prior to February 19, 2007, Claimant performed all forms of work expected of his crews.

2. On February 19, 2007, Claimant arrived at his office at approximately 3 a.m., and performed office work until his crews arrived. Once his crews arrived, Claimant proceeded outside to his parked equipment and held a safety meeting to discuss wiring issues and the importance of maintaining tail-lights on company trailers. At the end of the meeting, Claimant demonstrated to an employee how to properly wire a trailer. When he finished, Claimant began walking back to his office and he slipped on a patch of ice falling on his left shoulder and hitting his head. Claimant believes he may have briefly lost consciousness. Several of his employees came over to assist him, and once up, Claimant proceeded to his office. When he arrived in his office, Claimant noticed he was having difficulty moving his left arm, but he continued with his normal workday. The next day, Claimant kept an appointment with his endocrinologist, Dr. Oiknine, but made no mention to Dr. Oiknine of the fall.¹ When Claimant continued to experience difficulty with his left arm, he consulted a family friend who recommended Claimant see Dr. Thomas, an orthopedist.

3. Dr. Thomas first examined Claimant on March 6, 2007, and initially diagnosed possible left shoulder post-traumatic bursitis, but ordered an MRI due to Claimant's level of complaints. The MRI demonstrated full thickness tears of both the supraspinatus and infraspinatus tendons with musculotendinous retraction and moderate atrophy, along with a likely tear of the subscapularis tendon; fluid in the glenohumeral joint and subacromial-subdeltoid bursa. Dr. Thomas recommended surgical repair due the subscapularis tear, but indicated he would also repair the supraspinatus tendon during the procedure. On March 26, 2007, Dr. Thomas performed a left shoulder subacromial decompression with arthroscopic supraspinatus repair, and an open subscapularis repair with biceps tenodesis. During the procedure, Dr. Thomas noted an area of grade III chondromalacia on the anterior aspect of the humeral head.

4. By May 10, 2007, Claimant was engaged in post-operative physical therapy, and told Dr. Thomas he was unable to do any lifting with his left arm. Dr. Thomas noted "Joe is clearly a hard charging individual," and opined Claimant was doing extremely well, but should not feel "normal" at this stage in his recovery. On October 2, 2007, Claimant complained of pain over the outer aspect of his left arm when pushing himself off the ground, which his job duties required multiple times per day. Dr. Thomas encouraged Claimant to continue his exercise routine, offered Claimant a cortisone injection that was declined, and discussed the use of anti-inflammatory medication. Dr. Thomas encouraged Claimant to contact him if his symptoms persisted.

5. As of hearing Claimant complained of: stabbing left shoulder pain; stiffness in his shoulder that requires icing; waking during the night due to pain; the need to tape his arm to his shoulder to limit his pain; can only shovel 40% of snow that he used to shovel; and he can only accomplish 60% of the physical activity he used to perform. Claimant testified that prior to his injury, he was very physically active, and experienced no hospitalizations due to his diabetes. When presented with medical bills incurred as a result of the February 19, 2007 fall, Claimant identified the bills.

6. On February 11, 2010, Dr. Poetz examined Claimant at his request. Upon examination, Dr. Poetz noted the following abnormal findings: bilateral shoulder crepitus with range of motion;

¹ Claimant is an adult onset diabetic, and currently takes oral medication to control his glucose levels.

decreased range of motion with external rotation of the left humeral head, decreased left arm abduction; and decreased left arm muscle strength (3/5). Dr. Poetz diagnosed left shoulder supraspinatus and subscapularis tears due to the February 19, 2007 injury (primary injury) with surgical repair; preexisting left shoulder degenerative joint disease, exacerbated by the primary injury; preexisting diabetes; and preexisting hypertension. Dr. Poetz opined Claimant's medical care provided to treat the primary injury was medically necessary, and the billings related to the primary injury were reasonable and customary. In the future, Dr. Poetz opined Claimant may require non-steroidal anti-inflammatory medication, a steroid injection, repeat MRI, or surgical intervention if indicated. Dr. Poetz rated the primary injury at 40% PPD referable to Claimant's left shoulder. Dr. Poetz rated Claimant's preexisting conditions as 5% PPD referable to the left shoulder; 15% BAW PPD referable to Claimant's diabetes; and 10% BAW PPD referable to Claimant's hypertension. Dr. Poetz opined the combination of Claimant's primary injury and his preexisting conditions, and the total disability was greater than the simple sum of the separate components. Dr. Poetz testified in deposition Claimant's rated conditions were a hindrance or obstacle to employment or re-employment. Dr. Poetz testified neither Claimant nor Claimant's medical records indicated he had missed time from work due to his diabetes, or that his diabetes interfered with his ability to perform work or activities of daily living.

7. Dr. King, an orthopedist, examined Claimant at the request of Employer on October 12, 2010. Upon examination Dr. King noted the following: passive left shoulder range of motion to within ten degrees of his opposite shoulder in the plane of the scapula; internal rotation within two spinal levels behind his back; very poor effort during strength testing activities; an intact neurovascular exam; and the ability to perform abdominal compression and lift-off.² Dr. King also obtained left shoulder x-rays, which he opined demonstrated mild signs of glenohumeral degeneration. Dr. King reviewed Claimant's pre-surgical MRI report, and concluded the full thickness tears of the supraspinatus and infraspinatus tendons were chronic tears and unrelated to the primary injury due to the evidence of cuff contraction and atrophy. However, Dr. King opined the February 19, 2007, fall was the prevailing factor in causing the tear of Claimant's left subscapularis tendon. Further, Dr. King opined Claimant's current complaints of discomfort and any need for future medical care were related to preexisting degenerative shoulder disease, not the primary injury, a position supported by the degeneration present in Claimant's MRI and at surgery, and the lack of physical findings noted when Claimant's subscapularis muscle was tested. Dr. King rated Claimant's primary injury at 5% PPD referable to the left shoulder and preexisting disability at 10% PPD referable to the left shoulder. Upon cross-examination, Dr. King acknowledged Dr. Thomas had offered Claimant a cortisone injection and had discussed the use of anti-inflammatory medication. Dr. King conceded that surgical shoulders can worsen over time.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I find the following:

² According to Dr. King, abdominal compression and lift-off testing are the two tests performed to specifically look at the functioning of the subscapularis muscle.

Issues relating to accident & arising out of and course and scope of employment

Claimant bears the burden of establishing the essential elements of his claim. Included in the essential elements, is establishing accident, arising out of employment, and being in the course and scope of his employment when the injury occurred. The Missouri Workers' Compensation law was amended during the 2005 legislative session. Included in the 2005 amendments to Chapter 287, was the express intent of the legislature rejecting and abrogating established case law that had defined "accident," "arising out of," and "in the course of employment," and changing statutory construction to strict construction. *Pile v. Lake Regional Health System*, 321 S.W.3d 463 (Mo.App. 2010) (citations omitted)

Section 287.020.2 RSMo., 2005,³ now provides: The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3(1), provides: In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

Section 287.020.3(2), provides in part: an injury shall be deemed to arise out of and in the course of employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.

Employer first argues Claimant failed to demonstrate an accident occurred because he was not a credible witness, as he did not seek medical care on the day of injury, he failed to notify the physician he saw the next day about the injury, and at trial he could not immediately identify by direct recall or from a list presented by counsel the names of the workers who witnessed the accident. First, research has failed to uncover any provision in the amended Missouri Workers' Compensation Law requiring an injured worker to seek immediate medical care. Claimant may have been an injured worker, but he was also a businessman with a business to run, and deciding when to seek medical treatment was his decision. Second, while it is true Claimant saw a physician the day after the injury, the physician Claimant saw was an "endocrinologist and diabetes specialist" who treated Claimant for his diabetes and conditions related to diabetes, Dr. Oiknine was not a "primary physician" or "general practitioner." Nor was Dr. Oiknine an orthopedist, and Claimant, when convinced he needed treatment, sought the appropriate physician services of an orthopedic surgeon. The fact that Claimant did not report

³ Unless otherwise indicated all further references are to RSMo Supp.2005.

this injury to a diabetic specialist does not make him a less truthful witness. Finally, Claimant's inability to immediately pick out the names of workers who witnessed the injury was explained by Claimant during questioning when he indicated many of his employees are seasonal workers, and he would need to look at his "records"⁴ before providing the correct names. I find Claimant testified in a very straight forward and honest manner, and I find Claimant's testimony to be credible. I further find Claimant has met his burden to establish accident.

Employer next argues Claimant does not meet his burden to establish the injury arose out of and in the course and scope of his employment as Claimant's fall was not a hazard or risk unrelated to employment to which workers equally exposed to in normal non-employment life. *Section 287.020.3(2)(b)*⁵ A two step analysis is required when considering application of this subsection. As the Court stated in *Pile*:

The first step is to determine whether the hazard or risk is related or unrelated to the employment. Where the activity giving rise to the accident and injury is integral to the performance of a worker's job, the risk of the activity is related to employment. In such a case, there is a clear nexus between the work and the injury. Where the work nexus is clear, there is no need to consider whether the worker would have been equally exposed to the risk in normal non-employment life. *Id.*

Here there is a clear nexus between the work and the injury. Claimant's business required that he work in all types of weather conditions. On the date of injury, the weather was cold and a refreezing of surfaces had occurred. In order to keep the public and his employees safe, Claimant conducted a safety meeting and demonstration of the proper way to wire tail lights, conducted outdoors at the site where his business vehicles were kept. It was a business necessity to hold that meeting outside, and but for needing to conduct this safety meeting, Claimant would have remained in his office. The activity that gave rise to Claimant's accident and injury was integral to his performance as a responsible supervisor. I find Claimant was in the course and scope of his employment when the February 19, 2007 injury occurred.

Finally, Employer argues that §287.020.5 prevents Claimant's claim from being compensable as Claimant's accident/injury occurred on a parking lot not owned or controlled by Employer. Employer cites *Hager v. Syberg's Westport*, 304 S.W.3d 771 (Mo.App. 2010) as its controlling authority. The *Hager* case is clearly distinguishable on its facts, in *Hager* an employee had clocked out and was proceeding to his car when he slipped and fell on ice. In the instant case, at the time of injury Claimant was still "on the clock," his workday had not ended, his workday had begun hours before, and he was walking back to his office to continue working when the injury occurred. Claimant was already in the course and scope of his employment when the injury occurred. In the instant case, where Claimant fell didn't matter, what does matter is Claimant fell due to *some condition of his employment* (emphasis supplied). *Miller v. Missouri Highway and Transportation Commission*, 287 S.W.3d 671 (Mo.banc 2009). The extension of premises doctrine and application of §287.020.5 is not relevant in the instant case.

⁴ Although there was no calcification of this answer at trial, one would assume Claimant was referring to his business records.

⁵ Employer appears to concede, and I agree, the medical evidence supports a finding that Claimant's fall was the prevailing factor in causing Claimant's injury.

Issues related to past medical expenses

Section 287.140.1 RSMo., provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employer paid no medical benefits to date. Claimant sought reimbursement of medical expenses in the amount of \$31,233.57. Itemized listings of the charges were issued by the medical providers, supported by the appropriate medical records and Claimant's testimony. Employer did not challenge the reasonableness or necessity of the treatment provided. Claimant's injury is compensable, and he met his burden of evidence. Accordingly, I find Employer liable for \$31,233.57 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Issues related to future medical care

Claimant requests future medical care from Employer in regard to his left shoulder injury. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled on other grounds). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

Dr. Poetz opined Claimant will require an array of possible future medical care, up to and including the potential for further surgery. Dr. King opined Claimant will not require any future medical care as current clinical testing of his subscapularis tendon is normal. Both Dr. Poetz and Dr. King examined Claimant on one occasion. The physician in the best position to comment upon Claimant's future medical needs, while not deposed, did indirectly comment upon the need in his last progress note. On October 2, 2007, Dr. Thomas offered Claimant a steroid injection and discussed the use of anti-inflammatory medication. Based on the evidence presented, I find Claimant is entitled to receive future medical care as outlined by Dr. Thomas. Employer shall leave medical open to provide examinations, diagnostic testing, and pain management in the form of cortisone injections and any anti-inflammatory medication that a board certified orthopedic surgeon may prescribe. Employer shall retain the right to select the board certified orthopedic surgeon if in compliance with the provisions outlined above.

Issues related to Employer's liability for PPD benefits

A permanent partial disability award is intended to cover claimant's permanent limitations due to a work related injury and any restrictions his limitations may impose on employment opportunities. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641,646 (Mo.App. 1991). Two medical experts provided ratings. Dr. Poetz rated Claimant's overall left shoulder disability at 45%, with 5% preexisting the primary injury. Dr. King rated Claimant's overall left shoulder disability at 15%, with 10% preexisting the primary injury. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983) (overruled on other grounds). Based on the testimony and evidence presented, I find Claimant's overall left shoulder disability to be 35% PPD, with 10% preexisting and 25% PPD due to the primary injury for which Employer is liable.

Issues related to SIF liability for PPD benefits

Section 287.220.1 RSMo., provides SIF is implicated in all cases of permanent partial disability where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the pre-existing disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and preexisting conditions must produce additional disability greater than the simple sum of the conditions.

Claimant's rated preexisting conditions are his left shoulder, diabetes, and hypertension. Dr. Poetz and Dr. King provided preexisting ratings for Claimant's left shoulder. Dr. Poetz provided preexisting rating for Claimant's diabetes and hypertension. With respect to the degree of permanent partial disability, a determination of the specific amount of percentage of disability is within the special province of the finder of fact. *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App.1983) (overruled on other grounds). I find none of Claimant's preexisting conditions meet the statutory threshold needed to trigger SIF liability, and as a result Claimant's SIF claim fails.

CONCLUSION

Claimant's work at Employer was the prevailing factor in causing injury to his left shoulder. Claimant is entitled to past medical expenses and future medical care. Employer shall pay PPD benefits as outlined in this award. SIF has no liability in this claim. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation