

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 09-021258

Employee: Jamie L. Embrey
Employer: Johnson Controls
Insurer: Self-Insured
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 for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated March 9, 2010.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Robert B. Miner, issued March 9, 2010, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 29th day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Jamie L. Embrey

Injury No.: 09-021258

Employer: Johnson Controls

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: Johnson Controls (self-insured)

Hearing Date: December 8, 2009

Checked by: RBM

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: March 9, 2009.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan 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 hit a board with a thirty pound mallet causing an injury to his low back.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Low back.
14. Compensation paid to-date for temporary disability: None.
15. Value necessary medical aid paid to date by employer/insurer? None.
16. Value necessary medical aid not furnished by employer/insurer? Not determined.
17. Employee's average weekly wages: \$1,000.00.
18. Weekly compensation rate: \$666.67 for temporary total disability and \$404.66 for permanent partial disability.
19. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Temporary total disability from Employer/Insurer: (a) Temporary total disability benefits from May 20, 2009 through December 8, 2009, the date of hearing in this case, or 28 6/7 weeks at the rate of \$666.67 per week, the amount of \$19,238.19; (b) In addition, Employer/Insurer is to pay Employee temporary total disability benefits at the rate of \$666.67 per week from December 9, 2009 until Employee has reached maximum medical improvement, or as otherwise provided in Section 287.170, RSMo.

Medical aid: Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Employee from the effects of his March 9, 2009 work injury, including the treatment recommended by Dr. James Stuckmeyer, in accordance with Section 287.140, RSMo.

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Michael H. Stang.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jamie L. Embrey

Injury No.: 09-021258

Employer: Johnson Controls

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: Johnson Controls (self-insured)

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PRELIMINARIES

A non-Section 287.203 temporary hearing was held in this case on Employee's claim against Employer on December 8, 2009 in St. Joseph, Missouri. Employee, Jamie L. Embrey, appeared in person and by her attorney, Michael H. Stang. Self-insured Employer, Johnson Controls, appeared by its attorney, Mark R. Bates. The Second Injury Fund is a party to this case but was not represented at the hearing since Employee was only seeking temporary benefits from Employer at this hearing, and the parties agreed to bifurcate the Second Injury Fund claim. Michael H. Stang requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-trial briefs would be due on January 6, 2010.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about March 9, 2009, Jamie L. Embrey ("Claimant") was an employee of Johnson Controls ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about March 9, 2009, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was duly self-insured under the provisions of said Law.
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.

5. The average weekly wage was \$1,000.00, and the rate of compensation for temporary total disability is \$666.67 per week and the rate of compensation for permanent partial disability is \$404.66 per week.

6. No compensation has been paid by Employer for temporary disability.

7. No medical aid has been paid or furnished by Employer.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about March 9, 2009, Claimant sustained an injury by accident arising out of and in the course of his employment for Employer.

2. Whether Claimant's current condition is medically causally related to the alleged work injury of March 9, 2009.

3. Employer's liability, if any, for additional medical aid. Claimant is seeking additional medical treatment from Dr. Terrance Pratt.

4. Employer's liability, if any, for past temporary total disability benefits from May 20, 2009, and for future temporary total disability benefits.

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

Exhibit A—Medical report of Dr. James Stuckmeyer dated May 11, 2009, with Dr. Stuckmeyer's Curriculum Vitae

Exhibit B-- Medical report of Dr. James Stuckmeyer dated May 11, 2009, with medical records

Employer offered Exhibit 1, deposition of Dr. James Stuckmeyer taken on June 26, 2009 which was admitted subject to any objections contained in the deposition. Any objections contained in Exhibit 1 are overruled unless otherwise noted.

The briefs of the attorneys have been considered.

Findings of Fact

Summary of the Evidence

Claimant testified he was working for Employer on March 9, 2009 as a frame operator. Claimant had the same job at Employer for ten years.

Claimant testified that on March 9, 2009, he felt like he was having a heart attack immediately after he hit a board with a thirty pound mallet. He had a burning sensation in his chest that would not go away. He stood and felt the pain in his chest. He reported the pain to his supervisor, Pat Ezell. Pat Ezell took him to the Heartland Emergency Room later that night. Claimant said he had never had problems like that before. He testified he thought he was having a heart attack. He was asked about a Heartland record noting he was complaining of chest problems when moving about the forklift. He said he discussed hitting the hammer when he was at the hospital, but not in much detail.

Claimant was admitted to the hospital on March 9, 2009. He said doctors identified some back pain. Heart and chest tests were negative. He did not have a heart attack. He was released later that day to full duty.

Claimant said his chest pains were gone when he left the hospital. He thought he took one or two days off work after March 9, and then returned to work full duty. He saw Dr. Aref Zaman on March 12. He told Dr. Zaman what happened, and that he had symptoms going down to his low back. He had no other accidents between March 9 and March 12. He was asked about Dr. Zaman's records not mentioning the hammer incident. He said he did discuss swinging the hammer with Dr. Zaman.

Claimant said he thought that his swinging the mallet was the cause of his back pain.

Claimant acknowledged he had had back problems prior to March 9, 2009. He had strained his back in 1987 and had missed six weeks of work. He vaguely recalled hurting himself in 1997. In 2000, he twisted and injured his low back. He was not treated. He missed two days of work. He slipped and fell in 2005 and felt symptoms in his back. He said he was not treated. He missed a couple of days of work. Claimant said he had not had an MRI before March 2009. He said all of his prior injuries had resolved.

Claimant said he returned to work full duty after his January 2005 injury, which was his most significant injury. He had no treatment for his back after that in 2005, 2006, 2007 or 2008. On March 8, 2009, his back felt fine. He had no stiffness, pain, or loss in range of motion at that time.

Claimant was asked about Dr. Zaman's record of March 12, 2009 that noted he had had back pain constant for twelve years and worse in the last four years. Claimant said he told Dr. Zaman that every now and then he had a flare-up, and then it would go away. He said he had flare-ups off and on for twelve years. He said he had no back treatment from January 2005 until March 9, 2009.

Claimant returned to full duty work after March 12, 2009. He had no restrictions from his doctor. He said he could not function 100%. His production was down.

Claimant's last day of work was May 4, 2009. His back was bothering him a lot then. He called HR and asked to be put on medical leave. He told them he could not do his work. Claimant met with his attorney Mike Stang on March 25, 2009.

Claimant had not seen a doctor for therapy or treatment from March 12, 2009 to May 4, 2009. He was not under a doctor's orders to stop working on May 4, 2009.

Claimant said Dr. Zaman gave him restrictions on May 20, 2009 for his FMLA. It was hard for him to sit or stand a very long period. His job at Employer required repetitive standing. Employer did not accommodate Dr. Zaman's restrictions. He has received no money from Employer since he left work.

Claimant saw Dr. Stuckmeyer on May 26. Dr. Stuckmeyer recommended a pain management referral. Claimant testified he had also gone to the emergency room one time after he stopped working because he was on the floor and could not get up. He was treated and released. Claimant has seen a neurologist, Dr. Belleville. He has had physical therapy twice at the Spine and Sports. He submitted those bills to group insurance.

Claimant testified on cross-examination that he went to work at 10:30 p.m. on March 9, 2009, and the accident happened about 3:00 a.m. He was scheduled to work until 6:30 a.m. He called a nurse at the emergency room about 4:00 a.m. and went there shortly thereafter. He was asked about the emergency room records that noted chest pains and sharp stabbing pain. He said the pain was mostly by his heart and moved down to his low back.

Claimant acknowledged that in his June 26, 2009 deposition, he testified he was swinging a mallet, and that was part of his usual activity. He acknowledged testifying in his deposition that his pain was only in his left upper chest, and in no other part of the body. He testified at the hearing on December 8, 2009 that the pain went to his low back as well.

Claimant acknowledged that he testified in his deposition that he had chest pain when he was getting on and off the forklift. He acknowledged that he testified in his deposition that he did not report any back pain then.

Claimant said he still has a lot of lower back pain. He is limited in walking. He does not want to lift because he does not want to make things worse. Claimant testified he is asking the Administrative Law Judge for a pain management referral.

The Administrative Law Judge notes that Claimant did not stand or appear to be in pain during the hearing that lasted approximately one hour.

I find this testimony of Claimant to be credible unless noted otherwise in this Award.

Exhibit B contains Dr. Stuckmeyer's May 11, 2009 report and treatment records of Heartland Occupational Medicine, Dr. David Cathcart, Med Clinic, Dr. Aref Zaman, and Heartland Health.

Heartland's Emergency Room Report in Exhibit B dated March 9, 2009 pertaining to Claimant sets forth the following history of present illness:

This is a 46-year-old male who comes in from Johnson Industries where he builds batteries. He has the same job he has had for the last 7 years, no change. He said he has been getting these chest pains tonight that when he moves about, bends forward, gets on and off the forklift from time to time, gets this sharp, stabbing pain. He has no pain in between times and it does not radiate any place. Also when he gets this pain, it goes from front to back and tends to come out of his spine. He has had, again, no shortness of breath, cough, cold, flu symptoms, nausea, vomiting, diarrhea.

A physical examination was performed on March 9, 2009. Claimant was noted to have no reproducible pain and full range of motion of all extremities. Chest x-rays on lateral view of thoracic spine showed some anterior wedging and multiple spurs that looked like hawk bills coming out of that area. Diagnoses were musculoskeletal pain and elevated blood pressure. The diagnoses were stated to be: "1. Noncardiac chest pain. 2. Mild early hypertension. 3. Back pain radiating as states above."

Exhibit B includes Dr. Aref Zaman's March 12, 2009 note pertaining to Claimant. The history of present illness states in part:

PT is a 46 y/o male who complaints [*sic*] of lower back pain, constant since twelve years, worsening in the last 4 yrs when he fell on ice, 5/10 currently, dull, radiates anteriorly down til the mid shins, no aggravating factors, alleviated by heat, a/w numbness or tingling. PT says that recently he had some chest pain and had to go the ER where an x-ray and an EKG were neg and he was sent home on Lisinpril 5 mg po qday b/c Hdn. PT says that he was also told that he has spurs in his backbone because of which he has the back pain.

Dr. Zaman's assessment on March 12, 2009 was: "Lower back pain, obesity, Lumbago, nicotine dependence." Claimant was prescribed Naproxen and Flexeril. The report notes that a lumbar x-ray done showed some disc space narrowing at L5.

A Heartland MRI Lumbar Report in Exhibit B dated March 24, 2009 pertaining to Claimant notes the indication was low back pain, bilateral leg pain. The impression notes: "1. Small to moderately-sized central disc protrusion at L3-4 without evidence of nerve root compression. 2. Moderately-sized, broad-based central disc protrusion at L4-5. There is disc space narrowing at L4-5 with degenerative changes of vertebral body in place."

Exhibit B includes Dr. Aref Zaman's Certification of Healthcare Provider form dated May 20, 2009. Dr. Zaman's type of practice is noted to be "family medicine." The form notes Claimant has lower back pain. The "date condition commenced" is noted to be: "Exact date unknown." The form notes MRI showed disc herniation. The part of the form dealing with "Return to Work Information" asks, "Can employee perform all essential functions of job including overtime?" The box marked "Other" is checked, followed by "Explanation of limitations"—"it will be hard for patient to sit or stand for long." The form notes, in response to question: "Full time (may include overtime) return to work expected on," the response, "cannot predict now. Neurosurgery to decide."

Exhibit B includes a September 8, 2009 letter of Dr. Amy Belville of Heartland Neurosurgery pertaining to Claimant. Claimant reported he was working and swinging a mallet when he had acute onset of pain which involved his back and chest. He complained of pain in his low back going to his thighs, and numbness and tingling. His pain is worse with bending. Dr. Belville examined Claimant and examined his March 24, 2009 MRI. Dr. Belville's report discusses the MRI and states:

There is evidence of disk desiccation noted at multiple levels including L4-L5, L3-L4, and L2-L3. It is worse at L3-L4 with some loss of disk height and significant end-plate changes in the vertebral bodies. There is bulging at L3-L4 which does maybe cause a little bit of neural foraminal narrowing on the right. There is also a disk bulge

at L4-L5. This causes a little bit of neural foraminal narrowing on the left. There is facet arthropathy noted as well at multiple levels.

Dr. Belville's report addresses recommendations and states in part:

At this point he has quite a bit of degenerative changes, worse at L4-L5. He also has a little bit of neural foraminal narrowing which may be contributing to some of his thigh symptoms although his symptoms do not completely fit with these locations. Because of this I recommend conservative treatment first. He was given a prescription for physical therapy. We also discussed epidural steroid injections. We also discussed that most of his changes in his back are all degenerative and would not have occurred with his injury.

Dr. Belville's Impression was degenerative disc disease in the lumbar spine, low back pain, lumbar spondylosis, and tobacco use. She recommended conservative treatment first including physical therapy.

Exhibit B contains records of Spine and Sport Physical Therapy pertaining to Claimant. A Spine and Sport record dated September 22, 2009 documents Claimant's visit there. The history of injuries states Claimant reported pain of 6/10 with pain and tingling down bilateral leg. Physical therapy was initiated.

Past Medical Treatment

The medical records in Exhibit B document that Claimant has had complaints and treatment relating to his low back on several occasions before March 9, 2009.

The Heartland records in Exhibit B include an Emergency Room report dated April 8, 1992. Claimant presented with chief complaints of stomach, back and chest pain. He was diagnosed with gastritis and lumbar strain.

The Med Clinic records in Exhibit B include a note dated June 18, 1992 documenting complaint of right lower leg being numb. He was assessed with lumbosacral strain with disc syndrome and treated conservatively.

The Heartland records include an Emergency Department record dated July 9, 1993 documenting a low back strain following a motor vehicle accident. An X-ray of the lumbar spine was negative.

The Heartland records in Exhibit B include an Emergency Department record dated February 20, 1994. Claimant presented with chief complaint of motor vehicle

accident, low back pain. A lumbar spine x-ray was negative for fracture. The Clinical Impression was lumbar muscle strain, secondary to motor vehicle accident. Claimant was placed on Naproxen and Flexeril.

Exhibit B includes the records of Med Clinic dated March 4, 1997. Claimant reported for evaluation of low back injury. He was assessed with acute lumbar strain and was noted to start on medication. The records note he followed there on March 7, 1997 and on March 24, 1997, when he was released to full work.

Dr. Cathcart's records in Exhibit B include a note dated October 16, 2000. Claimant presented with a chief complaint of back strain. The record notes he twisted his back the day before at work. Claimant was diagnosed with lumbosacral strain with shift deformity and was given restrictions. Claimant followed with Dr. Cathcart on October 18, 2000 and on October 23, 2000, at which time he was released with no long term disability.

The records in Exhibit B include Dr. Cathcart's November 2, 2000 note documenting a chief complaint of back strain. The record notes Claimant had a recurrence of his back spasms. The impression was lumbosacral strain with shift deformity to the right, consistent with tear of the annulus of the disc." Physical therapy was started, with medication.

The records in Exhibit B include a report of Dr. David Cathcart dated November 9, 2000 documenting a chief complaint of back strain. Claimant had been doing his regular job and was able to work. The impression was lumbosacral strain with shift deformity-resolving, and leg length discrepancy, anatomic. Dr. Cathcart recommended half-inch shoe orthotics.

The Heartland records in Exhibit B include a History and Physical/Discharge Summary dated May 1, 2003. Claimant presented with chest pain and shortness of breath. The impression was noted to be atypical chest pain.

Exhibit B includes an Emergency Room Record dated January 12, 2005 pertaining to Claimant. He presented with a chief complaint of back pain after falling the night before on ice. The Clinical Impression was "lumbar strain." Naproxen and Flexeril were prescribed. Lumbar x-rays taken January 12, 2005 documented impression of no acute abnormalities of the lumbar spine, "mild-to-moderate degenerative changes."

The treatment records in Exhibit B include a report of Dr. David Cathcart dated January 17, 2005 in which Claimant presented with chief complaint of back strain. The record notes Claimant fell on January 11, 2005, strained his back, and went to the

emergency room. He was diagnosed with lumbosacral strain. Dr. Cathcart released Claimant to full duty work on January 21, 2005.

Evaluation of Dr. James Stuckmeyer

Exhibit A is the medical report of Dr. James A. Stuckmeyer addressed to Claimant's attorney dated May 11, 2009 pertaining to Claimant, and Dr. Stuckmeyer's Curriculum Vitae. The Curriculum Vitae notes Dr. Stuckmeyer was board certified by the American Board of Orthopedic Surgeons in 1989. His CV notes no hospital affiliations after 1995.

Dr. Stuckmeyer evaluated Claimant on May 6, 2009 and reviewed records of Heartland Occupational Medicine, Dr. David Cathcart, Dr. Aref Zaman, and Heartland Health. Claimant reported to Dr. Stuckmeyer he was swinging a thirty pound mallet, struck a board, and developed symptoms of lower back pain and chest pain. Dr. Stuckmeyer's report discusses the medical records of Heartland Regional Medical Center, Dr. Kesl, Dr. Zaman, and an MRI dated March 24, 2009.

Claimant complained to Dr. Stuckmeyer of ongoing symptoms of lower back pain with radiating pain in the right, as well as, left leg and symptoms of numbness and tingling in the left leg. Claimant admitted to long-standing problems with lower back pain. Dr. Stuckmeyer's report discusses Claimant's past treatment records pertaining to the back from 1992 through 2005. Dr. Stuckmeyer performed a physical examination. Claimant had lumbosacral tenderness. He had full flexion, extension, side-bending lateral rotation. Straight leg testing was negative.

Dr. Stuckmeyer's report sets forth the following conclusions:

In summary, it is the opinion of this examiner, based on the patient's history, that as a direct, proximate, and prevailing factor of the accident of March 9, 2009, Mr. Embrey sustained a recurrent injury to his lumbar spine with a development of radicular symptoms into both the right and left lower extremity. The post-injury MRI scan does reveal evidence of disk pathology at L3-L4 and L4-L5.

From an orthopedic standpoint, I do not feel that Mr. Embrey has reached maximum medical improvement. I would recommend referral to a pain management group for consideration of epidural injections. If the epidural injections are unsuccessful in alleviating Mr. Embrey's back and leg complaints, the next consideration would be neurosurgical consultation or orthopedic spine consultation.

Dr. Stuckmeyer stated his opinions, statements and conclusions were within a reasonable degree of medical certainty.

Exhibit 1 is the deposition of Dr. James Stuckmeyer taken on September 21, 2009. Dr. Stuckmeyer agreed that there was no history of Claimant linking the onset of his complaints to an incident swinging a hammer in the history given in the March 9, 2009 Heartland record. The x-ray of the thoracic spine showed some degenerative changes. Claimant was not evaluated for lower back pain diagnostically. Claimant was not provided treatment for lower back pain.

Dr. Stuckmeyer agreed there were no comments in the Heartland records demonstrating Claimant sustained an acute injury that day. He agreed that when Claimant saw Dr. Zaman, his primary care physician, on March 12, 2009, the history did not contain any mention of Claimant sustaining an actual injury on March 9, 2009. He agreed that the history was that Claimant was having constant low back pain for twelve years, worsening in the last four years after he fell on some ice. He agreed the MRI scan ordered shortly thereafter was interpreted as showing some abnormalities in the discs at L3-4 and L4-5. He agreed that the review of the MRI scan did not give him a date or an age of those findings. He agreed that based upon Dr. Zaman's examination, there was nothing in that examination to suggest that there was evidence of an acute injury occurring within the last three or four days or a week.

Dr. Stuckmeyer agreed there was nothing in Dr. Zaman's notes or records to suggest that there was anything inconsistent with his findings being associated with a history of Claimant having low back pain constant for twelve years, worsening the last four years when he fell on ice, based on the history Claimant provided of having low back pain.

Dr. Stuckmeyer testified he examined Claimant on May 6, 2009. He agreed that examination was objectively normal. The only finding was tenderness in the lumbar spine.

Dr. Stuckmeyer testified Claimant had a history of complaints leading up to approximately January 2005, and Claimant indicated they had essentially resolved every time. He was not aware of any MRIs showing any potential preexisting damage. The damage in the MRI was mechanically consistent with the mechanism of injury as described by Claimant.

Dr. Stuckmeyer was asked the following questions and gave the following answers in his deposition (pp. 21-23):

Q. This would be a claimant who obviously is in some manner of pain enough to send him to the hospital, is that a fair statement?

A. Yeah. I think it's fair to state he was at work and he developed symptoms which he thought was a heart attack. Well, most people are going to be a little bit nervous about that, so they seek treatment in the emergency department, and the emergency records clearly state that the gentleman was at work and he was assessed as having musculoskeletal pain, back pain. Three days go by and now it's localized into his lumbar spine.

Q. Is that unusual, I guess --

A. No.

Q. -- to have somebody have an acute injury and make more kind of diffuse anatomical complaints that ultimately wind up becoming more focused as time goes on?

A. It's not uncommon especially when you consider the mechanism of injury. You know, this gentleman, he informed me that he was swinging a 30 pound mallet, struck a board and he stated that he developed symptoms of lower back pain, confirmed three days after the injury and chest pain confirmed the day of the injury, so I mean it kind of fits. I mean it does fit.

Q. That mechanism of injury of striking a board with a hammer, is it possible that that resulted in some manner of reverberation that he felt in other areas of his body?

A. I think it's fair to state that with that mechanism of injury could easily cause pain in the thoracolumbar spine, and as I stated he's seen for what apparently is thoracic back pain in the emergency department. He's diagnosed as having a musculoskeletal problem, so it's not chest pain. It's musculoskeletal, orthopedic, and then three days later it's localized down to the lower back.

Dr. Stuckmeyer did not address Claimant's ability to work in his report or deposition. He did not conclude that Claimant was unable to work. He did not provide any work restrictions for Claimant.

The Administrative Law Judge takes administrative notice that Claimant's Claim for Compensation in this case was filed on March 31, 2009 and Employer's Answer in this case was filed on April 21, 2009. Claimant's Claim alleges a date of accident of March 9, 2009. The Claim alleges injury to the low back. The claim describes how the injury occurred by stating: "Employee, while in the course and scope of his employment, hit a board with a 30 lb. hammer." The claim makes demand for medical aid and attention to cure and relieve employee from the effects of his work related injuries pursuant to Section 287.140, RSMO and demand for temporary total disability benefits pursuant to 287.160 and .170. Employer's Answer denies these allegations in the Claim and denies the occurrence of an accidental injury arising out of and in the course of employment.

The parties stipulated that on or about March 9, 2009, Claimant was an employee of Employer and was working under the provisions of the Missouri Workers' Compensation Law, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was duly self-insured under the provisions of said Law, and Employer had notice of Claimant's alleged injury.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the medical reports and records, the deposition of Dr. Stuckmeyer, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Did Claimant sustain an injury by accident or occupational disease arising out of and in the course of his employment for Employer, and if so, was his injury medically causally related to an accident or occupational disease arising out of and in the course of employment?

Section 287.800, RSMo¹ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

¹ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo 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, RSMo provides in part:

3. (1) 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.

(2) An injury shall be deemed to arise out of and in the course of the 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 nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Section 287.120.1, RSMo provides in part: "Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person."

Section 287.030.2, RSMo provides: "2. Any reference to the employer shall also include his or her insurer or group self-insurer."

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo.banc 2003)²; *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996). The purpose of the workers' compensation act is "to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment." *Schoemehl v. Treasurer of State*, 217 S.W.3d 900, 901 (Mo. banc 2007).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997); *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means

² Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

The court in *Hager v. Syberg's Westport*, 2010 WL 623685, 3 (Mo.App. E.D. 2010) states at 4:

As part of the 2005 amendments, the Legislature 'revised [Section 287.020.3(2)] to narrow the scope of those injuries that will be deemed to arise out of and in the course of employment.' *Miller v. Missouri Highway and Transp. Com'n*, 287 S.W.3d 671, 673 (Mo. banc 2009). Under the current version of Section 287.020.3(2), an injury 'is compensable *only* if the accident was the prevailing factor in causing both the resulting medical condition and disability.' *Johnson*, 281 S.W.3d at 891; *see also Missouri Alliance for Retired Ams. v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670, 684 (Mo. banc 2009). Furthermore, Section 287.800 requires this Court to strictly construe Section 287.020.3. *Gordon v. City of Ellisville*, 268 S.W.3d 454, 459 (Mo.App.E.D.2008).

The court in *Bivins v. St. John's Regional Health Center*, 272 SW3d 446 (Mo.App. 2009) states at 449:

The burden rests upon the employee to show some direct causal connection between the injury and the employment. An award of compensation may be at issue if the injury were a rational consequence of some hazard connected with the employment. However, the employment must in some way expose the employee to an unusual risk or injury from such agency which is not shared by the general public. The injury must have been a rational consequence of that hazard to which the employee has been exposed and which exists because of and is part of the employment. It is not sufficient that the employment may simply furnish an indication for an injury for some unconnected source.

See also Miller v. Missouri Highway and Transp. Com'n, 287 S.W.3d 671 (Mo. 2009), where the Missouri Supreme Court states at 674: “An injury will not be deemed to arise out of employment if it merely happened to occur while working but work was not a prevailing factor. . . .”

Based on all of the evidence and the application of the Missouri Workers' Compensation Law, I find that Claimant has met his burden to prove that he sustained a compensable injury by accident in the course of his employment for Employer on March 9, 2009, and that his accident was the prevailing factor in causing his low back injury, and the resulting disability, and the need for additional medical treatment. I find that Dr. Stuckmeyer's conclusions are credible, persuasive, and uncontroverted, and prove the probability that Claimant sustained an accident in Claimant's workplace while employed by Employer and that the accident was the prevailing factor in causing his low back injury, disability, and need for medical treatment. These findings and conclusions are supported by the following.

Claimant testified that when he struck a board with the thirty pound mallet he felt pain and a burning sensation in his chest and thought he was having a heart attack. I believe Claimant's testimony and find it to be true. Claimant testified that he discussed hitting the hammer at the hospital and also when he visited Dr. Zaman on March 12, 2009. I believe Claimant's testimony despite that history not being in the records. I find that despite the history of Claimant having pain while striking a board with a mallet not being contained in the Heartland record or Dr. Zaman's record, Claimant nevertheless sustained an injury to his back at work on March 9, 2009.

Claimant was noted on March 9, 2009 at Heartland to have been diagnosed with back pain. Dr. Zaman's March 12, 2009 record notes that Claimant had dull radiating pain that radiated anteriorly to his mid shins. Dr. Zaman assessed lower back pain on March 12, 2009.

The March 24, 2009 lumbar MRI includes impressions of small to moderately sized central disc protrusion at L3-4 without evidence of nerve root compression and moderately-sized broad-based central disc protrusion at L4-5.

Dr. Stuckmeyer concluded that Claimant sustained an accident when he was swinging a thirty pound mallet and struck a board on March 9, 2009. He stated that “As a direct, proximate, and prevailing factor of the accident of March 9, 2009, Mr. Embrey sustained a recurrent injury to his lumbar spine with a development of radicular symptoms into both the right and left lower extremity.” I find Dr. Stuckmeyer’s opinion to be credible.

Dr. Stuckmeyer noted that the post-injury MRI revealed evidence of disc pathology at L3-L4 and L4-L5. He testified he was aware of no MRIs showing any potential preexisting damage. He testified that the damage noted in the 2009 MRI was mechanically consistent with the mechanism of injury described by Claimant. He noted Claimant developed symptoms of lower back pain three days after March 9, 2009, and that the mechanism of Claimant’s injury could easily cause pain in the thoracolumbar spine that then three days later localized down at the lower back. I find this opinion to be credible.

Employer offered no report or deposition of another medical expert to controvert Dr. Stuckmeyer’s opinions.

I find it significant that there is no evidence in the record that Claimant received any treatment for low back complaints between January 21, 2005 and March 9, 2009. I find it also significant that Claimant worked as a frame operator for Employer for ten years prior to the March 9, 2009 incident. The records in evidence indicate that the only time that Claimant missed work because of any back injury prior to March 9, 2009 during that ten year period was for approximately one week in October 2000, and for up to approximately ten days between January 11, 2005 and January 21, 2005, when Claimant was released to full duty work.

Employer argues Claimant’s injury came from a hazard or risk unrelated to his employment. Employer argues that the claim should be denied because of Claimant’s long-standing lower back problems and because the treatment records of Heartland and Dr. Zaman do not include a reference to Claimant swinging the thirty pound mallet when he felt pain. I find Claimant’s prior back injuries had resolved before his March 9, 2009 injury.

I find that Claimant’s injury did not come from a hazard or risk unrelated to his employment. Employer cites *Johnson v. Indiana Western Express, Inc.*, 281 S.W.3d 885 (Mo.App. 2009). I find that the *Johnson* case is distinguishable from the facts at hand. I

find that in the case at hand, Claimant has proven that the work accident was the prevailing factor in causing Claimant's medical condition, disability, and need for treatment. I find that Claimant has proven that there was a distinct accident that caused a need for treatment, and that his condition does not simply represent an aggravation of a preexisting condition.

I find that Claimant's employment by Employer on March 9, 2009 exposed him to an unusual risk or injury which was not shared by the general public, and that his injury was a rational consequence of a hazard to which he had been exposed and which existed because of and as part of his employment.

I find that Claimant had an unexpected traumatic event or unusual strain that was identifiable by time and place of occurrence when he struck the board with a thirty pound mallet on March 9, 2009 at work, that produced at the time objective symptoms of an injury, the pain and burning sensation in his chest, which was caused by a specific event during a single work shift. I find Claimant had a compensable accident on March 9, 2009 as defined by Section 287.020.2. I further find that Claimant's accident was the prevailing factor in causing the resulting medical condition and disability, and also need for additional medical treatment.

I find that Claimant had an injury by accident which arose out of and in the course of his employment for Employer on March 9, 2009 and that Claimant's accident was the prevailing factor in causing the resulting medical condition and disability, and also the need for additional medical treatment.

Liability for temporary total disability

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 909 (Mo.App. 2008); *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985). An injured employee is not required, however, to be completely inactive or inert in order to be totally

disabled. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. 1995); *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Cardwell*, 249 S.W.3d at 909; *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is “whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition.” *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant’s employability on the open market includes the anticipated length of time until claimant’s condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant’s condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant requests an award for past and future temporary total disability benefits. Claimant testified he returned to work after March 12, 2009, but he could not function 100%. He stopped work on May 4, 2009 because his back was bothering him a lot. He was not under a doctor’s orders to stop work on May 4, 2009. Claimant testified he still has a lot of lower back pain. He is limited in walking. He does not want to lift because he does not want to make things worse. He testified he has not worked since May 4, 2009. I find this testimony to be credible.

Claimant was not working at the time of the December 8, 2009 hearing, and had not worked from May 4, 2009 through the date of the hearing. Dr. Zaman provided work limitations for Claimant on May 20, 2009 on a Certification of Health Care Provider form. That form notes: “fax to Herm Bauer.” Dr. Zaman noted it would be hard for Claimant to sit or stand for very long. I find that opinion credible. Dr. Zaman’s Certification form notes he could not predict when Claimant could return to full time work, and noted neurosurgery was to decide. Claimant testified Employer did not accommodate Dr. Zaman’s restrictions. No evidence was offered that Employer has offered Claimant accommodated or light duty work. I find Employer did not offer Claimant accommodated or light duty work after May 4, 2009.

Dr. Zaman has not released Claimant to return to work. Dr. Belville did not address Claimant’s ability to work, or his return to work status when she saw him on

September 8, 2009. Her report does not note that she released Claimant to return to work. Employer has not brought Claimant back to work.

Based upon the foregoing, I find that Claimant has proven that as a result of his low back injury at Employer on March 9, 2009, he has not been able to return to work, has been temporarily and totally disabled, and is entitled to temporary total benefits, from May 20, 2009 up to the date of hearing on December 8, 2009, and ongoing, until he reaches maximum medical improvement, or is able to compete in the open labor market for employment, or until 400 weeks of temporary disability benefits have been paid, or until Claimant's death, whichever first occurs, pursuant to Section 287.170, RSMo. The temporary total disability payments shall be paid at the rate of \$666.67 per week.

I therefore order Employer/Insurer to pay Claimant temporary total disability benefits from May 20, 2009 through December 8, 2009, the date of the temporary hearing in this case, which is 28 6/7 weeks, at the rate of \$666.67 per week, which amounts to \$19,238.19 for the period May 20, 2009 through December 8, 2009.

In addition, I order Employer/Insurer to pay Claimant temporary total disability benefits at the rate of \$666.67 per week from December 9, 2009 until Claimant has reached maximum medical improvement, or as otherwise provided in Section 287.170, RSMo.

Liability for additional medical aid

Claimant is requesting an award of additional medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). Claimant needs to prove that work was the prevailing factor in causing his injury and disability. *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo.App. 2008).

While Employer has the right to name the treating physician, he or she may waive that right by failing or neglecting to provide necessary medical aid. *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 822 (Mo.App. 1995); *Emert v. Ford Motor Company*, 863 S.W.2d 629, 631 (Mo.App. 1993); *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984). Where the employer with notice of an injury refuses or neglects to provide necessary medical care, Claimant may make his own selection and have the cost assessed against the employer. *Herring*, 914 S.W.2d at 822.

I have previously found that Claimant sustained an injury to his low back arising out of and in the course of his employment for Employer which resulted from an accident, and that the accident was the prevailing factor in causing his injury, and his resulting disability.

Claimant continues to have pain in his low back and lower extremities. Claimant testified he is asking the Administrative Law Judge for a pain management referral. Dr. Stuckmeyer recommended referral to a pain management group for consideration of epidural injections. Claimant has not had a pain management referral recommended by Dr. Stuckmeyer. Dr. Belville noted on September 8, 2009 that Claimant complained of pain in his low back going to his thighs, and numbness and tingling. She noted his pain was worse with bending. She recommended conservative treatment first and gave a prescription for physical therapy. She discussed epidural steroid injections, but her report does not indicate they were provided. Claimant had physical therapy on September 22, 2009. Claimant reported pain of 6/10 and tingling down both legs when he had physical therapy on September 22, 2009.

No evidence was offered that epidurals have been provided or that Claimant has been referred to a pain management group. I find the opinion of Dr. Stuckmeyer that Claimant be referred to a pain management group for consideration of epidural injections to be credible. I find that Claimant's accident at work on May 9, 2009 is the prevailing factor in the need for that additional medical treatment for Claimant.

Based upon the foregoing, I find that Claimant continues to suffer from pain in his low back, and pain and numbness in his lower extremities as a result of his March 9, 2009 work injury. I find that Claimant is in need of further medical treatment to cure and relieve his symptoms resulting from that injury. I also find Employer/Insurer has failed to provide necessary medical care to Claimant and has waived the right to select the treating physician. Claimant may select the treating physician and have the cost assessed against Employer/Insurer. *Herring*, 914 S.W.2d at 822.

Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his March 9, 2009 work injury, including the treatment recommended by Dr. James Stuckmeyer, in accordance with Section 287.140, RSMo.

Attorney's fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). Claimant's attorney did not offer a written fee agreement in evidence at the

hearing. However, during the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney, Michael H. Stang, is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: Michael H. Stang.

This award is temporary or partial in nature, is subject to further order, and the proceedings are hereby continued and kept open until a final award can be made.

Made by: /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation

This award is dated and attested to this 9th day of March, 2010.

/s/ Naomi Pearson

Naomi Pearson

Division of Workers' Compensation