

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

Injury No. 12-106438

Employee: Tonya L. Fattig
Employer: Johnson Controls Battery Group, Inc.
Insurer: Insurance Company of North America

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by § 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 § 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated September 15, 2014.

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 § 287.510 RSMo.

The award and decision of Administrative Law Judge Robert B. Miner, issued September 15, 2014, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Tonya L. Fattig

Injury No.: 12-106438

Employer: Johnson Controls Battery Group, Inc.

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Additional Party: None

Insurer: Insurance Company of North America, c/o
Underwriters Safety and Claims

Hearing Date: July 10, 2014

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: Cumulative to April 13, 2012.
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 repetitively handled books of plates when she injured her neck and left upper extremity.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Neck and left upper extremity.
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: \$958.57.
18. Weekly compensation rate: \$639.05 for temporary total disability and \$425.19 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 October 24, 2013 through July 10, 2014, the date of the hearing in this case, or 37 1/7 weeks at the rate of \$639.05 per week, in the amount of \$23,736.14; (b) In addition, Employer/Insurer is to pay Employee temporary total disability benefits at the rate of \$639.05 per week from July 11, 2014 until Employee has reached maximum medical improvement, or as otherwise provided in Section 287.170, RSMo.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of her April 13, 2012 work injury, 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: Mark E. Kelly.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tonya L. Fattig

Injury No.: 12-106438

Employer: Johnson Controls Battery Group, Inc.

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Additional Party: None

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Underwriters Safety and Claims

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PRELIMINARIES

A non-section 287.203, RSMo hardship hearing was held in this case on Employee's claim against Employer on July 10, 2014 in St. Joseph, Missouri. Employee, Tonya L. Fattig, appeared in person and by her attorney, Mark E. Kelly. Employer, Johnson Controls Battery Group, Inc., and Insurer, Insurance Company of North America, c/o Underwriters Safety and Claims, appeared by their attorney, Mark R. Bates. The Second Injury Fund is not a party in this case. Mark E. Kelly requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-trial briefs would be due on August 1, 2014.

STIPULATIONS

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

1. On or about cumulative to April 13, 2012, Tonya L. Fattig ("Claimant") was an employee of Johnson Controls Battery Group, Inc. ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about cumulative to April 13, 2012, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Insurance Company of North America, c/o Underwriters Safety and Claims ("Insurer").
3. Claimant's Claim for Compensation was filed within the time allowed by law.

4. The average weekly wage was \$958.57, the rate of compensation for temporary total disability is \$639.05 per week, and the rate of compensation for permanent partial disability is \$425.19 per week.

7. No compensation has been paid by Employer or Insurer for temporary disability.

8. No medical aid has been paid or furnished by Employer or Insurer.

9. The issues of Employer's liability for past medical expenses, including past medical mileage expenses, Employer's liability for past temporary total disability benefits prior to October 24, 2013, and Employer's liability for permanent partial disability benefits were not to be determined in connection with the July 10, 2014 hearing.

10. Claimant has not worked for Employer since October 23, 2013.

ISSUES

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

1. Did Claimant sustain an injury by occupational disease arising out of and in the course of her employment for Employer on or about cumulative to April 13, 2012?

2. Did Claimant provide notice of her alleged injury to Employer as required by law?

3. What is Employer's liability, if any, for additional medical aid?

4. What is Employer's liability, if any, for past temporary total disability benefits from October 24, 2013, and what is Employer's liability, if any, for future temporary total disability benefits?

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

A—February 17, 2014, Medical report & CV of Dr. William Hopkins

B—Medical records of St. Joseph Pain Center/Dr. Vincent Johnson

C—Medical records of Carondelet Orthopedics/Dr. Greg Van den Berghe

D—Medical records of Chiropractic Healing & Restoration, LLC

- E—April 13, 2012, Medical Leave Request
- F—April 25, 2013, Leave of Absence Status Report
- G—May 16, 2012, Leave of Absence Status Report
- H—June 12, 2012, Leave of Absence Status Report
- I—June 27, 2012, Leave of Absence Status Report
- J—July 5, 2012, Leave of Absence Status Report
- K—July 27, 2012, Leave of Absence Status Report
- L—July 30, 2012, Leave of Absence Status Report
- M—August 13, 2012, Medical Leave Request
- N—August 13, 2012, Leave of Absence Status Report
- O—November 13, 2012, Medical Leave Request
- P—November 14, 2012, Leave of Absence Status Report
- Q—January 2, 2013, Leave of Absence Status Report
- R—July 11, 2013, Medical Leave Request
- S—July 15, 2013, Leave of Absence Status Report
- T—August 28, 2013, Leave of Absence Status Report
- U—Mileage Statement
- V—Exhibit List

Employer offered the following exhibits which were admitted in evidence without objection:

- 1—3rd Step Answer dated 11-4-13

2—3rd Step Answer dated 11-20-13

3—Medical report Dr. Thomas DiStefano dated April 10, 2014

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

Employer's counsel advised that an examination had been scheduled for Claimant to see Dr. Lingenfelter on August 11, 2014. Claimant's counsel advised that in the event an Award is entered directing Employer to provide additional medical treatment, Claimant is agreeable to having Dr. Lingenfelter provide additional treatment.

Employee's Post Trial Brief and Proposed Decision of Employer/Insurer have been considered.

Findings of Fact

Claimant was born on January 25, 1975. She graduated from Benton High School in St. Joseph in 1994. She had about one year of college at Missouri Western. She has no college degree.

Claimant started working for Employer in March 2007. Employer makes batteries from start to finish. Claimant has done production work for Employer since March 2010. She has worked in the Battery Group. She ran a decoupler stacker. She worked as a loader from 2010 until October 2013.

Claimant worked the C plate line. Lead plates moved on a conveyor. Claimant stood directly in front of the conveyor. She put plates on pallets. The pallets were behind her. She moved the plates to her left. The work was fast and constant. Plates were in books that were about 6 to 8 inches long and about 3 to 4 inches thick. The books of plates weigh between 30 and 40 pounds.

Claimant picked up the books of plates coming down the conveyor and put them on a pallet behind her. At times Claimant put plates on pallets that were at floor level. Sometimes she placed them at a higher level. She put some plates on pallets a little above her shoulder height. Claimant used a lift table. She stacked plates, 25 plates per layer, 25 to 30 layers high. She put up at least 1,000 books of plates per day.

Claimant also worked on the COS line. When a worker worked on the COS line, the worker took plates onto the line and put them into a machine. The plates were not

placed on a pallet. They were put in a gondola. COS line workers worked with 20 to 30 pound plates. There were some 5 pound weights, but rarely on the COS line.

Claimant got two breaks during the day, including lunch. She started work at 7:00 a.m. and took her first break between 9:00 a.m. and 10:30 a.m. She took her second break between 11:00 a.m. and 1:30 p.m. The second break was considered lunch. An eight-hour shift ended at 3:00 p.m. Claimant worked after 3:00 p.m. until she was injured.

Claimant was paid hourly and incentive. Her pay was based in part on the number of plates that she put out. She was paid extra based on the number produced.

Claimant's hourly pay was around \$15.00 from 2010 to 2013. She earned between \$20.00 and \$25.00 per hour with incentives, including overtime. She worked eight to twelve hours per day, five to six days per week. She sometimes worked seven days per week from 2010 to April 13, 2012.

Claimant began to have left shoulder problems around April 13, 2012. She had no pain before that in her left shoulder. She had had prior pains in her back.

Claimant had not missed work before April 13, 2012 due to her left shoulder. No doctor had told her that her left shoulder problems were related to work before April 13, 2012.

Claimant went to work on April 13, 2012 at 7:00 a.m. She had pain in her neck and left shoulder. She had a constant stabbing pain in her neck and left arm and throbbing and numbness down her left arm. She went to the COS office and told her supervisor, Jim Newman, that she was in a lot of pain in her neck and left shoulder due to her job. A company plant supervisor, Connie Armstad, was present when she reported her injury on April 13, 2012. Mr. Newman told Claimant to go to the Company nurse, Greg Kline.

Claimant went to Mr. Kline on April 13, 2012 and reported her injury to him. She told Mr. Kline she had a stabbing burning ache in her neck and left shoulder. He told her it was due to lifting and that she needed to rest and go off line. Claimant was in a lot of pain and told Mr. Kline about 20 minutes later that she needed to see a doctor. Mr. Kline told Claimant that she should see her primary care doctor. Mr. Kline did not offer to give her an accident report at that time.

Claimant's pain on April 13, 2012 started as an ache. She had ached days before. When she went to work on April 13, 2012, her pain was intense. She had not done

anything away from work to cause pain. She was not in outdoor sports or athletics. She had not done lifting or anything repetitive at home.

Claimant saw Dr. Turner on April 13, 2012. He gave her pain medication and a shot in her shoulder.

Claimant saw a chiropractor on April 14, 2012. An MRI was scheduled for her on April 16, 2012. Dr. Turner referred Claimant to a specialist.

Exhibit E is an Application for Family Medical Leave dated April 13, 2012. Claimant got that form from Herm Bauer, the head of Employer's HR. She took the form to the doctor's office.

Mr. Bauer approved her FMLA form on April 19, 2012. Dr. Sharma signed the form. Dr. Sharma is with Dr. Turner. Claimant handed the form to Herm Bauer on April 19, 2012.

Claimant was off work from April 13 through April 19, 2012.

Dr. Turner referred Claimant to Dr. Dotson, a specialist at Heartland who deals with the back, neck and shoulder. Dr. Dotson gave her two injections in her left shoulder. The injections did not resolve her pain. They helped only a little. Claimant was then referred to Dr. Vincent Johnson in Kansas City.

Claimant first saw Dr. Johnson on June 22, 2012. Dr. Johnson administered many injections in her neck and left shoulder. Dr. Johnson prescribed muscle relaxers, pain medication, including Percocet, inflammatories, and depression medicine.

Claimant saw Dr. Johnson monthly from June 2012 through November 2012. She also saw Dr. Johnson in January, March, June, September and December 2013. She got slips from him that say she could not work.

Dr. Johnson referred Claimant to Dr. Van den Berghe at Carondelet in Overland Park, Kansas. Dr. Van den Berghe ordered an MRI at State Line on November 27, 2012. Dr. Van den Berghe recommended light duty and home exercises. Claimant had MRIs in her neck and left shoulder. Employer did not allow Claimant to be on light duty.

Claimant acknowledged that Dr. Van den Berghe's November 2012 and December 2012 records and his 2013 records to March 2013 include notes that state she could return to work without restrictions. She said Dr. Van den Berghe was against that, but she told him that she wanted to work. She was a single parent. Dr. Van den Berghe did not give her restrictions after March 2013.

Claimant missed time from work because of flare-ups, pain, numbness, and inability to do her job. There were times when Claimant was late for work.

Claimant identified Leave of Absence Status Reports in evidence, including the August 13, 2012 report. They bear Greg Kline's signature. Claimant took notes to Greg Kline or Herm Bauer after her visits to Dr. Van den Berghe. They note she had pain in her left shoulder and neck. She had no other medical conditions.

Claimant stated that Herm Bauer checked the "not work-related" box in Exhibit E, her Application for FMLA. She was not sure if that box was filled out when she signed the form.

Claimant does not believe that she can work. Her doctors, Dr. Turner, Dr. Sharma, and Dr. Johnson, have told her not to work and have told her she cannot work.

Exhibit U accurately reflects her mileage for doctors visits. Exhibit U shows a total of 2,154 miles for medical mileage visits.

Employer was never paid any medical expense. Employer has not paid the medical mileage.

Employer never directed Claimant's medical treatment. Employer never offered medical treatment for Claimant's injury. They always told her it was her responsibility to go to the doctor.

Claimant was terminated on October 24, 2013 because of calling in after 6:00 o'clock. Claimant was five minutes late when she reported to work on October 24, 2013. Her power had gone off the night before due to a storm. She was terminated because she was late. She was terminated for violation of the call-in rule. There were late reports to work on September 21, 2012, February 11, 2013, April 11, 2013. She was only given 3 to 4 late reports per year.

Claimant last worked on October 23, 2013. She went in to work on October 24, 2013 but did not work that day. She was terminated on October 24, 2013.

Employer knew Claimant's circumstances. The last time she was late before she was terminated, she had been in pain all night and had gone to the Emergency Room. She took the Emergency Room form to Herm Bauer.

Claimant had been up all night in constant pain another time that she was late. She told Herm Bauer the reason she was late was related to her injury and that she was in

pain. Claimant had been suspended even though she had taken Employer slips. Claimant got a warning on September 21 for a call-in.

Claimant filed a Grievance. Exhibit 1 is a Decision regarding the Grievance.

Claimant worked full-time until October 13, 2013, unless she had been off on medical or FMLA leave. Claimant used FMLA for her injury.

Exhibit E is an informed consent document. It bears her signature. She stated clerical filled out the form. She just signed it.

Exhibit M is an April 13, 2012 Leave of Absence form. She did not fill that out. Claimant missed work from July 17 through July 27 and from August 2 and August 3 and from August 6 through August 10 due to her left shoulder and her neck.

Exhibit O is a Leave Request dated November 13, 2012. She signed Exhibit O. She did not complete the other pages – Herm Bauer did. That was for medical leave, not family medical leave.

Claimant's medical leave of absence was approved by Herm Bauer on July 13, 2013 and was effective July 1, 2013. It was completed by her family doctor. She had left shoulder pain. She could not complete her full job duties.

Claimant has read Dr. DiStefano's report. She had talked to him. He had recommended surgery.

The August 13, 2012 Leave of Absence report, Exhibit N, states she had to be off work for pain. She went to the doctor. If she had to be off work more than 3 days, she needed a report from the doctor stating that she could not work.

Prior to March 2007, Claimant worked in production at Friskies until they closed in 2002. After that she worked at Amerisource. Following that, she worked at Smurfit until she began working for Employer.

Prior to Claimant's alleged April 2012 injury in this case, she had no prior claims for permanent disability.

Claimant's condition has worsened since April 2012. She can hardly use her left arm. She has complaints in her neck, left shoulder, left arm, left ring finger, and left small finger. She has pain and burning in her left shoulder. She has pain in her neck and pain and numbness in her left arm. She cannot lift her left arm and can hardly use her left

arm. She has difficulty turning her head. She is under active medical treatment. She last saw Dr. Johnson two months prior to the July 10, 2014 hearing.

Claimant requests medical treatment. She also requests temporary disability benefits while she was off work from October 22, 2013.

I find Claimant is a credible witness.

Medical Evidence

Treatment Records

Medical records in Exhibit B note Claimant was initially seen on June 22, 2012 by Dr. Vincent Johnson at the St. Joseph Medical Center Pain Management Group for pain in her left shoulder, which was exacerbated by movement and received some benefit from rest. Claimant reported she worked at a manufacturing job performing repetitive lifting 5 to 20 pounds doing twisting type of motion. She also reported she had performed this job for approximately six years without incident, but developed pain prior to his examination in the left shoulder, which had become problematic.

Dr. Johnson's June 22, 2012 record notes Claimant felt aching and burning sensation in her shoulder, for which she had tried Naprosyn and other over-the-counter anti-inflammatories, chiropractic care, physical therapy, had a trigger point injection, which all provided short-term relief. She was also taking Percocet three to four times a day, which she began four months prior.

Dr. Johnson's June 22, 2012 record notes he reviewed an MRI of the cervical spine from April 16, 2012 that showed mild disk desiccation with no focal disk protrusion, extrusion, or central canal neuroforaminal stenosis. Dr. Johnson's diagnosis was myofascial pain syndrome with possible neuropathic component in the left shoulder. He continued Claimant on Percocet and prescribed Relafen and Neurontin. He also indicated there was consideration for interventional therapy including cervical epidural injection versus a shoulder injection or trigger point injections.

Claimant returned to Dr. Johnson on July 20, 2012. She had been using the medications and the Neurontin had been titrated to target dose. Her pain remained in the left neck, shoulder and side, described as constant, aching, burning and stabbing, and exacerbated with movement, and relief with rest and medication. His diagnosis remained symptomatic myofascial pain. He provided trigger point injections in the left trapezius, splenius capitis, and thoracic paravertebral muscles.

Dr. Johnson saw Claimant again on August 9, 2012. She was still suffering pain in left shoulder. She had subjective weakness in her arm. Dr. Johnson performed a physical examination of Claimant. His assessment was symptomatic myofascial pain, carpal tunnel syndrome, and neuropathic pain. Dr. Johnson recommended an EMG of the left upper extremity for the diagnosis of carpal tunnel syndrome. He also referred her to physical therapy for a TENS unit for back spasm and myofascial pain, and he continued her on prescription medications.

Dr. Johnson saw Claimant next on September 13, 2012. He noted he was recommending an EMG of the cervical spine for possible component of cervical spondylosis. Claimant returned on October 11, 2012, and Dr. Johnson provided her a left shoulder joint injection and trigger point injections.

Claimant returned to Dr. Johnson on November 12, 2012. He noted the history of treatment and increasing pain in the left shoulder. He noted she had a “pop” in her left shoulder at work doing twisting type activity on November 6, 2012. He felt she was symptomatic for a rotator cuff tear on the left shoulder, myofascial pain, cervical spondylosis and degenerative joint disease. He continued her on pain medication and recommended a referral to Dr. Greg Van den Berghe for diagnostic testing of the left shoulder.

An MRI of the left shoulder was performed on November 27, 2012 (Exhibit C). The Impression states: “1. There is subtle contrast imbibitions and contour irregularity of the superior labrum without displaced labral tear, on the basis of a type I SLAP lesion. 2. Mild tendinosis of the supraspinatus and subscapular.

Dr. Van den Berghe at Carondelet Orthopedics provided a glenohumeral joint injection on December 3, 2012. (Exhibit C). He noted Claimant had a significant amount of AC joint discomfort and she elected an injection as well as intra-articular injection to see if she has improvement. He noted he had reviewed outside films and the “MRI arthrogram of left shoulder at Stateline on 11/27 revealed type 1 SLAP teat [*sic*], mild tendinosis of the supraspinatus and subscap.”

Dr. Van den Berghe noted on December 3, 2012 that Claimant’s pain appeared to be out of proportion to what he would expect based on her MRI findings. He directed Claimant to return to Dr. Johnson to see if there was further care or treatment of the neck, which could be initiated. He reported if she did not receive relief from the injections, he would consider an arthroscopic distal clavicle excision and labral debridement. He felt her rotator cuff appeared intact.

Claimant returned to Dr. Van den Berghe on December 24, 2012. She reported there was significant relief from the injection. He diagnosed her as suffering a rotator

cuff tear. He recommended physical therapy to improve range of motion and also directed her to return to Dr. Johnson. Dr. Van den Berghe's notes indicate Claimant had requested a release to return to work without any shoulder restrictions, which he reported was not unreasonable. He released her to return to work without restrictions on December 24, 2012.

Claimant was seen by Dr. Van den Berghe on March 4, 2013. She reported her shoulder pain had improved with injection, physical therapy, and following through the pain clinic. He noted she had significant pain in the left shoulder since shoveling snow five days before when she felt a pop. Dr. Van den Berghe provided a further injection in the shoulder and encouraged her to perform shoulder and neck rehab exercises. He directed her to Dr. Johnson for medication management.

Dr. Van den Berghe's Return to Work Form noted to have been electronically signed on March 4, 2013 at 1:18 PM, states: "Return to work on 03-06-2013, WITH restrictions."

Dr. Van den Berghe's Return to Work Form noted to have been electronically signed on March 4, 2013 at 1:21 PM, states: "Return to work on 03-06-2013, without restrictions."

Dr. Johnson saw Claimant on March 28, 2013. He treated her for myofascial pain, complex medication management and chronic pain syndrome. He noted on examination her pain was primarily in the left neck and shoulder. His diagnosis remained symptomatic myofascial pain requiring complex medication management. He provided trigger point injections and continued Claimant on Oxycodone, Tizanidine, Cymbalta, and Relafen. He reported there was a urine screen collected on September 13, 2012, that was positive for Oxycodone with no aberrant findings.

Dr. Johnson saw Claimant on June 14, 2013. She reported her left shoulder and neck had been exacerbated recently. She noted "the pain was constant, burning, aching, stabbing hard to move her head due to some stiffness, rates the pain 9/10 presently." His diagnosis remained chronic pain syndrome and complex medication management with myofascial pain. He continued her on the Percocet, Cymbalta, and Relafen and administered trigger point injections.

Claimant returned to Dr. Johnson on September 16, 2013, for chronic pain management. Dr. Johnson's note states she continued to have pain radiating into her shoulder exacerbated with activity. He continued her on pain medications. Dr. Johnson's diagnosis remained the same on December 5, 2013, and her prescription medications remained the same.

Evaluation of Dr. James Hopkins

Dr. James Hopkins evaluated Claimant on February 17, 2014. His Curriculum Vitae in Exhibit A notes he was Board Certified by the American Board of Orthopaedic Surgeons in 1970. He is licensed to practice in Missouri and Kansas.

Dr. Hopkins' February 17, 2014 report addressed to Claimant's attorney in Exhibit A describes the History of Present Illness. It notes Claimant has continued difficulties that include pain and burning in her left shoulder that limits her motion, pain into her arm with numbness and tingling in her hand, a weak grip, pain and stiffness and burning in her neck.

Dr. Hopkins report states in part at page 2:

She indicates additionally that the pain will occasionally radiate into her upper back.

Subsequent to her injury, she can sit 30 minutes at a time, stand and walk an hour. She has nighttime pain lying down as well as pain attempting to walk or run or body motions such as stooping, bending, or squatting and also lifting and carrying. Her left upper extremity impairs her ability to grasp and grab, push and pull, or reach and she has give-away sensations within her left arm.

This interferes with her activities of daily living and she has pain on sleeping as well as cooking or cleaning her house and in a work situation, she has difficulty with standing or walking for a period of time as well as turning and lifting.

Dr. Hopkins' report summarizes the records he reviewed. The report notes he performed a physical examination of Claimant. His report notes decreased range of motion of the cervical spine with local pain and pain into the left shoulder. He notes Claimant indicated brachial plexus compression reproduced neuropathic symptoms into her left arm. She had decreased grip strength.

Dr. Hopkins' February 17, 2014 report states in part at pages 6-7:

Summary and Conclusions

Based on the information available to me, I believe that as a result of a series of repetitive injuries to Ms. Fattig's cervical spine and left upper extremity starting in 2009 and culminating on or about April 20,

2012 that she sustained injuries to her cervical spine with chronic pain. In addition she sustained injuries to her left shoulder including a labral tear with supraspinatus and subscapular tendinopathy with a minimal amount of preexisting left acromioclavicular joint disease not uncommon for a working female, particularly in her type of occupation. Based on this, I believe that the repetitive injuries culminating on or about April 20, 2012 is the direct and prevailing factor of injuries to her cervical spine and left shoulder and left carpal tunnel, that I have described requiring her treatment through the present time. And the additional medical treatment I have outlined.

I believe that Ms. Fattig needs additional medical evaluation and treatment. She is not at maximum medical improvement.

Her physical examination indicates a left brachial plexopathy with the possibility of a concomitant left carpal tunnel entrapment. Her cervical examination does elicit some neuropathic symptoms into her left arm but in positions, which would normally cause traction on her brachial plexus without creating symptoms by cervical positioning that *would be causative of a cervical radiculopathy*. I would recommend an electromyographic examination of her left upper extremity to see if additional information can be gained; although EMGs are not always accurate in discerning cervical radiculopathy or a brachial plexopathy.

I believe a separate evaluation by an upper extremity orthopedist should be considered to determine whether additional treatment such as surgical intervention in her left shoulder would be appropriate.

I believe, that she needs consultation with a spine surgeon who will hopefully recommend cervical x-rays including flexion and extension views to rule out the possibility of instability in association with an MRI of her cervical spine to see if her chronic cervical pain can be ameliorated. Additional physical therapy, epidural steroids, or facet injection would appear to be a reasonable consideration based on her present complaints and findings.

I believe that Ms. Fattig was unable to perform her work activities as a direct and prevailing result of her work-incurred injuries on the date that she left her employment in October of 2013, and she remains temporarily and totally disabled.

This evaluation is based on information available to me as well as my training and experience as a board certified orthopedic surgeon (see curriculum vitae).

The statements I have made have been within reasonable medical certainty unless otherwise indicated.

I certify this report is pursuant to Missouri Law.

Evaluation of Dr. Thomas DiStefano

Dr. Thomas DiStefano evaluated Claimant on April 10, 2014. Dr. DiStefano's April 10, 2014 report (Exhibit 3) notes he is a Board Certified Orthopedic Surgeon. His report addressed to Underwriters Safety and Claims describes the History of Present Illness and Claimant's current complaints. Her chief complaint was pain in the left shoulder, 8/10, described as sharp, stabbing, and throbbing. She also complained of numbness in her long, ring and small fingers.

Dr. DiStefano's report states in part at page 2:

Current complaints

Ms. Fattig states she continues to have pain in her neck and left shoulder. In fact, she states the pain is worse and it has made gripping difficult. She states she is unable to put her hair up by herself and requires assistance. She states she is unable to move her arm up all the way or behind her head or back. She complains of popping, clicking, grinding, difficulty with overhead activities, difficulty with sleeping.

Specific Body Movements that Cause Pain

She states that any movement causes her pain.

Dr. DiStefano's report summarizes the records he reviewed. His report notes Claimant loaded plates onto a pallet and did approximately 1,000 plates per hour when she worked for Employer from 2008 until October 2013. His report notes he performed a physical examination of Claimant and the results of the examination are noted.

Dr. DiStefano's April 10, 2014 report states in part at page 9:

Summary and Conclusions

Diagnosis: In terms of diagnosis, I feel that she has a left shoulder subluxator with superior labrum anterior posterior tear, adhesive capsulitis, degenerative joint disease acromioclavicular joint, impingement syndrome.

Causation: In terms of causation, patient reported no previous injury or treatment by a physician to her left shoulder. She states she had no specific injury. She states she developed pain from repetitive work and sought treatment on her own. Her physical examination and MRI are consistent with left shoulder subluxator, superior labrum anterior posterior tear, adhesive capsulitis, degenerative joint disease acromioclavicular joint, impingement syndrome. As she did not have a mechanism of injury at work, I do not feel that her work at Johnson Controls or the injury reported of April 30, 2012, is the prevailing cause of her current condition of her shoulder.

Treatment recommendations: In terms of treatment recommendations, as she has now failed long term conservative treatment I would recommend surgical treatment of left shoulder arthroscopy, possible repair and debridement of any damaged structures, subacromial decompression, open distal clavicle excision, possible superior labrum anterior posterior repair. She would follow with CPM machine for four weeks, physical therapy and duty work. Regular duty work would be expected at approximately 12 weeks post op, with anticipated MMI at approximately 14 to 16 weeks post op.

I state my opinion with a reasonable degree of medical certainty.

Rulings of Law

Based on a comprehensive review of the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law.

1. Did Claimant sustain an injury by occupational disease arising out of and in the course of her employment for Employer on or about cumulative to April 13, 2012?

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

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*

without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

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.

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).

(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 287.067.1, RSMo provides:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo provides:

2. An injury by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3, RSMo provides:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.063.1 provides:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 228 (Mo.banc 2003)²; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987).

²Several 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.

In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 2012 WL 1931223 (Mo. banc 2012) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950).

"In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim." *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990).

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 testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 907 (Mo.App. 2008), citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

8 CSR 50–2.010(14) states in part, “Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.” Such stipulations “are controlling and conclusive, and the courts are bound to enforce them.” *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 2012 WL 1319428 (Mo.App. 2012) (citing *Boyer v. Nat'l Express Co.*, 29 S.W.3d 700, 705 (Mo.App. 2001)).

Claimant described her repetitive work activities as a loader for Employer before her April 13, 2012 injury. Claimant repetitively and continuously handled books of battery plates that weighed between 20 to 40 pounds from 2010 in her work for Employer before having complaints of neck and upper extremity pain on April 13, 2012. She gripped, lifted, and moved plates. The work was fast and constant. Her pay was based in part on the number of plates that she put out. She was paid extra based on the number produced. She worked eight to twelve hours per day, five to six days per week. She sometimes worked seven days per week, during the period 2010 to April 13, 2012.

On April 13, 2012, Claimant had a constant stabbing pain in her neck and left arm. She had throbbing and numbness down her arm. Employer did not offer to provide treatment for Claimant's injury. She obtained treatment on her own that is described earlier in this Award, including epidural injections and medication. She has been diagnosed with a left rotator cuff tear.

It is Dr. Hopkins' opinion that the repetitive injuries culminating on or about April 20, 2012 sustained by Claimant is the direct and prevailing factor of injuries to her cervical spine and left shoulder and left carpal tunnel. I find this opinion is credible and persuasive.

It is Dr. DiStefano's opinion that Claimant's work at Employer or the injury reported of April 30, 2012, is not the prevailing cause of her current condition of her shoulder because she stated she had no specific injury and she did not have a mechanism of injury at work. I find this opinion is not credible or persuasive. Dr. DiStefano noted Claimant did state she developed pain from repetitive work. However, he did not address whether Claimant's injury could have developed from or been caused by her repetitive work as opposed to a specific injury.

I find the opinions of Dr. Hopkins are more persuasive than the opinions of Dr. DiStefano regarding the cause of Claimant's left upper extremity injury.

I believe and find that Claimant's occupational exposure and repetitive work activities for Employer was the prevailing factor in causing injury to her neck and left upper extremity.

I find that the credible evidence establishes that Claimant sustained an injury to her neck and left upper extremity which resulted from repeated and constant exposure to hazards she encountered in Employer's workplace.

I find and conclude that Claimant has met her burden to prove that her repetitive work for Employer was the prevailing factor in causing an injury to her neck and left upper extremity. I find and conclude Claimant's April 13, 2012 occupational disease was the prevailing factor in causing injury to her neck and left upper extremity, the need for medical treatment for the injury, and disability. I find that Claimant was exposed to a risk that was greater than and different from that which affects the public generally.

Based on the competent and substantial evidence, I find and conclude that Claimant sustained a compensable injury to her neck and left upper extremity by occupational disease arising out of and in the course of her employment on or about cumulative to April 13, 2012 in this case.

2. Did Claimant provide notice of her alleged injury to Employer as required by law?

Section 287.420, RSMo provides:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature

of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice. No proceedings for compensation for any occupational disease or repetitive trauma under this chapter shall be maintained unless written notice of the time, place, and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the diagnosis of the condition unless the employee can prove the employer was not prejudiced by failure to receive the notice.

The Court in *Allcorn v. Tap Enterprises, Inc.*, 77 S.W.3d 823 (Mo.App. 2009) in discussing this statute states at 829-30:

Strictly construing this sentence, we find that “the condition” is referring to the previously stated “occupational disease or repetitive trauma.” Therefore, the question then becomes, at what point is an occupational disease or repetitive trauma diagnosed? Looking to the plain, obvious, and natural import of the language, it follows that a person cannot be diagnosed with an “occupational disease or repetitive trauma” until a diagnostician makes a causal connection between the underlying medical condition and some work-related activity or exposure. See section 287.067 (defining the term occupational disease to mean, as relevant to this appeal, “an identifiable disease arising with or without human fault out of and in the course of the employment.”). Here, as found by the Commission, the first time that Claimant was diagnosed with “the condition” of an occupational disease or repetitive trauma was September 25, 2006. This diagnosis, therefore, triggered the notice requirement of section 287.420.

We now turn to the question as to whether the initial Claim for Compensation satisfied the requirements of section 287.420 so as to constitute notice to Employer. The time for giving notice is “no later than thirty days after the diagnosis of the condition.” Section 287.420. The initial claim filed on June 15, 2006, in relation to the diagnosis of the condition on September 25, 2006, met this requirement. This is so because the statute does not require that the notice be given after the diagnosis, but only that it be given “*no later than* thirty days after the diagnosis of the condition.” *Id.* (emphasis added).

The Court in *Aramark Educational Services, Inc. v. Faulkner*, 408 S.W.3d 271 (Mo.App. 2013) states at 275-76:

Generally, pursuant to Section 287.808, the employer has the burden of establishing any affirmative defense, which includes statutory notice of injury under Section 288.420. Section 287.808; see also *Snow v. Hicks Bros. Chevrolet Inc.*, 480 S.W.2d 97, 100 (Mo.App.1972). However, once the employer establishes lack of written notice or lack of timely written notice as required by Section 287.420, the burden shifts back to the claimant. See *Allcorn v. Tap Enter., Inc.*, 277 S.W.3d 823, 831 (Mo.App.S.D.2009) (“The final sentence of Section 287.420 saves a failed attempt at notice”). At that point, the claimant must establish that his or her failure to give notice or timely written notice did not prejudice the employer. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo.App.E.D.2000).^{FN3} A claimant can prove lack of prejudice in one of two ways.

FN3. The “good cause” excuse for failure to provide timely notice was eliminated by the legislature in 2005 by S.B. 130 (2005). See S.B. 130 (2005); Compare Section 287.420 (2013) with Section 287.420 (2004).

[7] First, if the claimant proffers substantial evidence that the employer had “actual knowledge” of the injury, there is no need for written notice. *Hall v. G.W. Fiberglass, Inc.*, 873 S.W.2d 297, 298 (Mo.App.E.D.1994). This option has been coined as the “prima facie” showing of no prejudice. *Willis v. Jewish Hosp.*, 854 S.W.2d 82, 85 (Mo.App.E.D.1993). Accordingly, if the employer admits or the claimant proffers substantial evidence demonstrating that the employer had “actual knowledge of the accident *at the time* *276 *it occurred* it has been held that employer could not have been prejudiced by a failure to receive the statutory written notice, and compensation has been allowed.” *Klopstein v. Schroll House Moving Co.*, 425 S.W.2d 498, 503 (Mo.App.1968) (emphasis added). Consequently, “if a claimant makes a prima facie showing of no prejudice, the burden [again] shifts to the employer to show prejudice.” *Hannick v. Kelly Temp. Serv.*, 855 S.W.2d 497, 499 (Mo.App.E.D.1993).

The Court in *Aramark*, continues at 408 S.W.3d 277-78:

. . . before determining whether an injury is compensable under worker's compensation, the employer must receive timely notification of the injury or a claimant must prove an employer was not prejudiced by an untimely notification of the injury. *See* Section 287.420 (“No proceedings for compensation for any accident under this chapter shall be maintained unless ...”); *see also Fowler v. Monarch Plastics*, 684 S.W.2d 429, 431 (Mo.App. E.D.1984) (“Without timely notice to the employer of injury to an employee, the wheels of the process involving workmen's compensation do not grind.”). Resultantly, notification of the accident is a condition precedent to an award under worker's compensation. *See Orth v. Stoebner & Permann Const., Inc.*, 724 N.W.2d 586, 597 (S.D.2006) (“Notification of an injury, either written or by way of actual knowledge, is ‘a condition precedent*278 to compensation.’ ”); *Burke v. Indus. Comm'n*, 368 Ill. 554, 15 N.E.2d 305, 307 (1938) (notice of the injury within thirty days is a condition precedent to the right to maintain a proceeding under the statute).

See also, Sell v. Ozarks Medical Center, 333 S.W.3d 498, 511-12 (Mo.App. 2011).

Claimant went to work on April 13, 2012 at 7:00 a.m. She had pain in her neck and left shoulder. She went to the COS office and told her supervisor, Jim Newman, that she was in a lot of pain in her neck and left shoulder due to her job. Mr. Newman told her to go to the Company nurse, Greg Kline. A company plant supervisor, Connie Armstad, was present when she reported her injury on April 13, 2012. She was sent to Mr. Kline and she reported her injury to him. Claimant told Greg Kline about her stabbing burning ache in her neck and left shoulder. Mr. Kline told her it was due to lifting and that she needed to rest and go off line. Mr. Kline did not offer to give her an accident report at that time.

Claimant saw her family doctor, Dr. Ameer Shams, who completed a Johnson Controls “Medical Leave” request. The form was admitted as Exhibit E. It shows a signature by the doctor on April 19, 2012, and shows it was approved by Herm Bauer, the head of Employer’s H.R., on “4/19/12.” The form notes Claimant was having “neck and shoulder pain.” It also notes that Claimant operated “heavy machinery.”

Claimant’s testimony as to notice to her supervisor and the plant medical department is not refuted. Her testimony of the timeframe she told her supervisor she was having neck and shoulder pain is consistent with the leave request.

I find Employer had actual timely notice of Claimant’s claim at the time it occurred.

I find and conclude Claimant gave notice of her April 13, 2012 injury to Employer as required by law.

3. *What is Employer's liability, if any, 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." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under Section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Farmer*, 257 S.W.3d at 197; *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. 2006). Once it is determined that there has been a compensable accident, a

claimant need only prove that the need for treatment and medication flow from the work injury. *Id*; *Tillotson*, 47 S.W.3d 519.

The court in *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 2011 WL 2313691 (Mo.App. 2011) states at 524:

To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required. *Id*.

The court in *Tillotson* also states at 525:

In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

The July 10, 2014 hearing was held in part to consider Claimant’s allegation that she needs additional medical treatment for conditions allegedly caused by the injury she sustained on April 13, 2012.

Claimant has complaints in her neck, left shoulder, left arm, left ring finger, and left small finger. She has pain and burning in her left shoulder. She has pain in her neck and pain and numbness in her left arm. She cannot lift her left arm and can hardly use her left arm. She has difficulty turning her head. Her condition has worsened since April 2012. She is under active medical treatment.

Dr. Van den Berghe noted on December 3, 2012 that he had reviewed outside films and the MRI arthrogram of left shoulder on November 27, 2012 revealed type 1 SLAP tear and mild tendinosis of the supraspinatus and subscapular. Dr. Van den Berghe diagnosed Claimant on December 24, 2012 as suffering a rotator cuff tear.

It is Dr. Hopkins’ opinion that the repetitive injuries Claimant sustained culminating on or about April 20, 2012 is the direct and prevailing factor of her injuries requiring her treatment through the present time and the additional medical treatment he

has described earlier in this Award. It is Dr. Hopkins' opinion that Claimant needs additional medical evaluation and treatment and that she is not at maximum medical improvement. I find these opinions are credible and persuasive.

Dr. DiStefano diagnosed a left shoulder subluxator with superior labrum anterior posterior tear, adhesive capsulitis, degenerative joint disease acromioclavicular joint, impingement syndrome. He recommends additional treatment including left shoulder surgery, followed with CPM machine and physical therapy. I find Dr. DiStefano's opinion that Claimant needs additional treatment for her left shoulder injury is credible and persuasive.

Based on competent and substantial evidence and the application of the Missouri Workers' Compensation Law, I find Claimant will need additional medical aid to cure and relieve her from the effects of her April 13, 2012 compensable injury.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of her April 13, 2012 injury, in accordance with section 287.140, RSMo.

4. What is Employer's liability, if any, for past temporary total disability benefits from October 24, 2013, and what is Employer's liability, if any, for future temporary total disability benefits?

Claimant requests an award for past and future temporary total disability benefits. 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. *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).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *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. The ability to perform some work is not the test for temporary total disability, but rather, 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). “This standard is applied to temporary total disability, as well as permanent total disability. Contrary to the findings of the Commission, this does not mean that an employer is forced to either make light duty available to a claimant or pay temporary total disability benefits simply because the claimant remains under active medical care and there is a reasonable expectation that the employee's functional level might improve. An employer is only obligated for said benefits if the employee could not compete on the open market for employment.” *Cooper*, 955 S.W.2d at 575.

The fact that a claimant was capable of, but did not seek, sporadic or light duty work, would not in itself disqualify the claimant from receiving temporary total disability benefits. 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 575-76. 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.

A “ ‘claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability.’ ” *Stevens v. Citizens Mem. Healthcare Found.*, 244 S.W.3d 234, 238 (Mo.App.2008) (quoting *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003)); *Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296, 309 (Mo.App. 2012).

Claimant has complaints in her neck, left shoulder, left arm, left ring finger, and left small finger. She has pain and burning in her left shoulder. She has pain in her neck and pain and numbness in her left arm. She cannot lift her left arm and can hardly use her left arm. She has difficulty turning her head. She is under active medical treatment. She last saw Dr. Johnson two months prior to the July 10, 2014 hearing.

Claimant does not believe that she can work. Her doctors, Dr. Turner, Dr. Sharma, and Dr. Johnson, have told her not to work and have told her she cannot work.

Dr. Hopkins noted that when he saw Claimant on February 17, 2014, she had “continued difficulties that include pain and burning in her left shoulder that limits her

motion, pain into her arm with numbness and tingling in her hand, a weak grip, pain and stiffness and burning in her neck.” He also noted her “left upper extremity impairs her ability to grasp and grab, push and pull, or reach and she has give-away sensations within her left arm.”

Dr. Hopkins believes Claimant needs additional medical treatment and that she is not at maximum medical improvement. It is Dr. Hopkins’ opinion that Claimant was unable to perform her work activities as a direct and prevailing result of her work-incurred injuries on the date that she left her employment in October of 2013, and she remains temporarily and totally disabled. I find these opinions are credible and persuasive.

Dr. DiStefano noted that on April 10, 2014, Claimant’s chief complaint was pain in the left shoulder, 8/10, described as sharp, stabbing, and throbbing, and numbness in her long, ring and small fingers. He noted she continues to have pain in her neck and left shoulder, and that she states the pain is worse and has made gripping difficult. He noted she states she is unable to move her arm up all the way or behind her head or back, and she complains of popping, clicking, grinding, difficulty with overhead activities, and difficulty with sleeping. He noted Claimant had now failed long term conservative treatment and he recommended surgical treatment of left shoulder. Dr. DiStefano did not address whether Claimant is totally disabled.

I find Claimant’s description of her limitations and complaints to be credible.

I find and conclude Claimant remained under active medical care, and has not worked, since October 24, 2013. I also find and conclude that there was a reasonable expectation that Claimant’s functional level might improve since October 24, 2013. I also find and conclude Claimant has received no temporary total disability benefits since October 24, 2013.

Based upon the competent and substantial evidence and the application of the Workers’ Compensation Law, I find and conclude that as a result of the April 13, 2012 compensable injury Claimant sustained while working for Employer, Claimant has not been able to return to work, she could not compete on the open market for employment, no Employer would have been reasonably expected to hire her, and she has been temporarily and totally disabled, since October 24, 2013. I find and conclude Claimant is entitled to temporary total disability benefits from October 24, 2013 through July 10, 2014, the date of the hearing in this case, or 37 1/7 weeks at the agreed weekly temporary total disability rate of \$639.05 per week, in the amount of \$23,736.14.

I award the sum of \$23,736.14 favor of Claimant against Employer for past temporary total disability benefits for the period October 24, 2013 through July 10, 2014.

In addition, I order Employer to pay Claimant temporary total disability benefits at the rate of \$639.05 per week from July 11, 2014 until Claimant has reached maximum medical improvement, or as otherwise provided in Section 287.170, RSMo.

Attorneys 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). 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 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: Mark E. Kelly.

The parties stipulated the issues of Employer's liability for past medical expenses, including past medical mileage expenses, Employer's liability for past temporary total disability benefits prior to October 23, 2013, and Employer's liability for permanent partial disability benefits were not to be determined in connection with the July 10, 2014 hearing, and those issues have not been determined.

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.

Made by: /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation

