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

Injury No.: 06-013976

Employee: Carl Greer

Employer: Sysco Food Services of St. Louis, LLC

Insurer: New Hampshire Insurance Company

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to resolve the following issues: (1) medical causation; (2) liability for past medical expenses; (3) future medical care; (4) temporary disability; (5) permanent disability; (6) Second Injury Fund liability; (7) penalties for safety violations; and (8) date of maximum medical improvement.

The administrative law judge rendered the following findings and conclusions: (1) employer's objection to the causation and future medical opinions from Dr. Johnson are without merit; (2) employee met his burden of proving that the February 2006 accident was the prevailing factor causing a resulting medical condition and disability; (3) employee is entitled to $49,475.14 in past medical expenses; (4) employee is entitled to future medical care furnished by the employer; (5) employee is not entitled to any additional temporary total disability benefits; (6) employee sustained a 27.5% permanent partial disability of his left foot as a result of the primary injury; (7) the Second Injury Fund is liable for 40.6275 weeks of permanent partial disability benefits; and (8) employer is entitled under § 287.120.5 RSMo to a 25% reduction in all benefits awarded to employee from the employer.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in limiting future medical treatment by not including a future tendon transfer and pain management; (2) in denying employee's claim for additional temporary total disability benefits; (3) in finding employee sustained only 27.5% permanent partial disability of his left foot as a result of the primary injury; (4) in denying employee's claim for permanent total disability benefits; (5) in imposing a 25% safety penalty against employee's recovery; and (6) in applying the 25% safety penalty to amounts representing past medical treatment awarded and paid for by employer.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in admitting Dr. Johnson's opinions on causation; (2) in awarding past medical expenses incurred after employee reached maximum

medical improvement; (3) in awarding future medical expenses; (4) in not reducing employee's benefits by 50% and in not providing employer a credit in connection with the safety penalty for benefits already paid.

For the reasons stated below, we modify the award of the administrative law judge referable to the issues of: (1) temporary total disability; (2) past medical expenses; and (3) reduction of employee's compensation under § 287.120.5 RSMo.

Discussion

Temporary total disability

While the administrative law judge awarded employee's expenses for a left foot surgery performed by Drs. Johnson and MacKinnon on June 22, 2010, he also denied employee's claim for additional temporary total disability benefits based on a finding that employee reached maximum medical improvement on April 23, 2007. This was despite uncontested testimony from employer's expert Dr. Schmidt that one would lose time from work after the type of surgery performed by Drs. Johnson and MacKinnon. In reaching this result, the administrative law judge relied on case law suggesting that "[t]emporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress." *Pruett v. Fed. Mogul Corp.*, 365 S.W.3d 296, 308 (Mo. App. 2012).

The phrase "maximum medical improvement" is not found in § 287.170 RSMo, the section authorizing an award of temporary total disability benefits, nor is that phrase defined or found anywhere in Chapter 287. Of course, the concept of maximum medical improvement is helpful to the extent it permits the fact-finder to identify the point at which the question of permanent disability becomes ripe for determination. See *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008). But in a case such as this one where the employee's condition does not appreciably improve (or even worsens) despite further surgeries, applying a per se rule that temporary total disability benefits cannot be awarded after the date of maximum medical improvement works an absurd result. This is especially true here, where such a rule would require us to ignore the uncontested expert medical testimony on the issue.

When we consider the admonition under § 287.800 RSMo that we are to strictly construe the provisions of the Missouri Workers' Compensation Law, we find nothing in the actual language of Chapter 287 that would preclude an award of temporary total disability benefits to cover an employee's healing period and inability to work following surgery simply because the employee does not ultimately experience any additional medical improvement from the surgery. With that said, we are not persuaded by employee's argument that he was unable to compete for work in the open labor market from the date of his release by employer's authorized physicians in April 2007 all the way up until his release by Dr. Johnson following the June 2010 surgery. This is because employee has failed to direct us to any evidence that would support such a finding. Rather, employee advances testimony from his experts Dr. Berkin and Mr. Dolan, who each opined that employee ultimately was permanently and totally disabled, but who did not specifically speak to the time period between April 2007 and June 2010. We, like the administrative law judge, are not persuaded by those ultimate opinions from Dr. Berkin and Mr. Dolan.

We discern no basis on this record, however, for disregarding the uncontested expert testimony from Dr. Schmidt that one would be expected to lose a significant amount of time from work following the surgery performed by Drs. Johnson and MacKinnon. We credit, therefore, Dr. Schmidt's opinion on this point, and conclude that employee was temporarily and totally disabled from the date of surgery on June 22, 2010, to the date Dr. Johnson released him on February 4, 2011. We conclude employer is liable for 32 and 3/7 weeks of temporary total disability benefits at the stipulated rate of $583.23, for a total of $18,913.32.

Past medical expenses
The administrative law judge determined that employee met his burden of proving his entitlement under § 287.140 RSMo to his past medical expenses; we agree. The administrative law judge, however, did not award employee's past medical expenses incurred with certain providers based on a finding that the billing statements were not included in the exhibits. Specifically, the administrative law judge found that employee failed to provide bills from the following providers: Missouri Baptist Medical Center, Scott Radiological Group, Inc., and Forest Park Emergency Physicians. See *Award*, page 14.

Employee, in his brief, provided specific page citations to the bills in question, and after a review of the record, we were able to locate them. For unknown reasons, these bills (along with corresponding affidavits certifying the bills) appear in Employee's Exhibit Z rather than in the exhibits containing the associated medical records; the administrative law judge's confusion on this point is thus wholly understandable.

Because the bills were in fact received in evidence, and because we agree with the administrative law judge's determination that employee is entitled to his past medical expenses, we must modify the administrative law judge's award on this point. We conclude that, in addition to the amount of $49,475.14 awarded by the administrative law judge, employee is entitled to his past medical expenses incurred with Missouri Baptist Medical Center in the amount of $1039.04, Scott Radiological Group, Inc., in the amount of $96.00, and Forest Park Emergency Physicians, in the amount of $365.00, for an additional total of $1,500.04.

Safety penalty under § 287.120.5 RSMo
The courts have enumerated the following four elements that the employer must prove in order to justify a reduction of compensation under § 287.120.5:

> 1. [T]hat the employer adopted a reasonable rule for the safety of employees;
>
> 2. that the injury was caused by the failure of the employee to obey the safety rule;
>
> 3. that the employee had actual knowledge of the rule; and
>
> 4. that prior to the injury the employer had made a reasonable effort to cause his or her employees to obey the safety rule.

Carver v. Delta Innovative Servs., 379 S.W.3d 865, 869 (Mo. App. 2012).

At issue is employer's rule requiring employees traveling in equipment to keep all body parts within the running lines of the equipment. The administrative law judge found that employee had actual knowledge of this rule based on employee's testimony that he received a written copy of the rule in an employer document entitled "SYSCO Safe Preferred Work Methods." Implicit in the administrative law judge's analysis is the premise that receipt of a written policy necessarily confers actual knowledge of the application or meaning of such policy. We disagree with this premise and with the administrative law judge's finding that employee had actual knowledge of the rule for the following reasons.

The document entitled "SYSCO Safe Preferred Work Methods" provides various rules applicable to warehouse employees. The rules are divided into sections with titles such as "Operator and Equipment Pre-Trip," "Traveling," and "Turning." The rule in question is listed under the section entitled "Traveling." As one would expect, this section includes rules that speak to the circumstance of an employee operating equipment that is traveling from one place to another. Examples include rules proscribing excess speeds of travel, a prohibition against passengers riding on equipment, and instructions as to who has the "right-of-way" in various situations. See *Transcript*, page 2568.

It is undisputed that at the time employee sustained his injury, his forklift was not in motion, but was stationary. Employee testified that he was aware of the rule requiring him to keep all body parts inside the running lines of his forklift, but that he believed this rule only applied when the forklift was in motion. Employee explained that he came to this belief based on the rule's use of the word "traveling." Employer asks us to find this testimony lacking credibility based on employee's signing a counseling form presented to him on March 7, 2006. We are not persuaded for a number of reasons. First, the counseling form, on its face, does not contain any specific admission by employee that he was aware that the rule applied when his forklift was stationary; rather, it simply provides a supervisor's personal opinion that employee's injury could have been prevented if he had followed the rule. Second, we are reluctant to confer much significance to a counseling form presented to employee in the days following a serious and disabling work injury; as employee credibly explained, he wasn't really thinking about pointing out to his supervisor an ambiguity in employer's work rule at the time. Employee's testimony suggests (and we so find) that on March 7, 2006, employee was more concerned about receiving authorized treatment for his serious and disabling work injury than quibbling with his supervisor over the meaning of employer's work rule.

Third, and most importantly, employee's signature on the counseling form does nothing to relieve the inherent and inescapable contradiction in employer's asking us to fault an employee whose forklift was stationary for violating a rule which, by its own language, applies to employees who are "traveling" in equipment. "Traveling" means "to move, advance, or undergo transmission from one place to another" or "to move in a given direction or path or through a given distance." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2433 (2002). We find employee's testimony that he believed a rule regarding "traveling" was inapplicable while his forklift was stationary to be eminently reasonable and ultimately credible. We find that employee was not aware that the rule requiring him to keep all body parts within the running lines of his forklift applied to him while his forklift was stationary.

At best, employer has proven that employee engaged in a momentary, inadvertent, technical violation of an unclear rule, the application of which he was not actually aware of

at the time of the occurrence of the work injury. Because employee's actual knowledge of the rule is a necessary element under § 287.120.5, we find that employer has failed to meet its burden of proving employee's compensation should be reduced.

We conclude that employee's injuries did not result from his failure to obey a reasonable work rule of the employer of which he had actual knowledge. Accordingly, we modify the administrative law judge's award on this point. Employee's compensation is not subject to any reduction under § 287.120.5.

Conclusion

We modify the award of the administrative law judge as to the issues of (1) temporary total disability; (2) past medical expenses; and (3) reduction of employee's compensation under § 287.120.5 RSMo.

Employee is entitled to, and employer is hereby ordered to pay, $18,913.32 in additional temporary total disability benefits.

Employee is entitled to, and employer is hereby ordered to pay, $1,500.04 in past medical expenses in addition to the $49,475.14 awarded by the administrative law judge, for a total of $50,975.18.

Employee's compensation is not subject to any reduction under § 287.120.5 RSMo. Consequently, employer is not entitled to the credit of $16,133.67 determined by the administrative law judge.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued July 5, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 28th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
John J. Larsen, Jr., Chairman

_____
James G. Avery, Jr., Member

_____
Curtis E. Chick, Jr., Member

Attest:

_____
Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Carl Greer

Injury No.: 06-013976

Dependents: N/A

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Sysco Food Services of St. Louis, LLC

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Company

Hearing Date: May 7, 2013

Checked by: EJK/kr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: February 23, 2006
5. State location where accident occurred or occupational disease was contracted: St. Charles 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:
    The employee, a forklift operator, suffered a left foot injury while scanning a pallet.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left foot
14. Nature and extent of any permanent disability: 27 ½% permanent partial disability to the left foot
15. Compensation paid to-date for temporary disability: $30,494.60
16. Value necessary medical aid paid to date by employer/insurer: $34,176.93

17. Value necessary medical aid not furnished by employer/insurer? $51,392.80

18. Employee's average weekly wages: $874.85

19. Weekly compensation rate: $583.23/$365.08

20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	$49,475.14
41.25 weeks of permanent partial disability from Employer	$15,059.55
Credit for Safety Rule Violation	($16,133.67)

22. Second Injury Fund liability: Yes

40.6275 weeks of permanent partial disability from Second Injury Fund	$14,832.29
TOTAL:	$63,233.31

23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ray B. Marglous, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Carl Greer	Injury No.: 06-013976
Dependents:	N/A	Before the **Division of Workers' Compensation** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employer:	Sysco Food Services of St. Louis, LLC	
Additional Party:	Second Injury Fund	
Insurer:	New Hampshire Insurance Company	Checked by: EJK/kr

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, a forklift operator, injured his left foot when his foot was crushed between two forklifts while scanning a pallet. The issues for determination are (1) Medical causation, (2) Liability for past medical expenses, (3) Future medical care, (4) Temporary Disability, (5) Permanent disability, (6) Second Injury Fund liability, (7) Penalties for safety violations for employer and employee pursuant to section 287.120, and (9) Date of maximum medical improvement. The evidence compels an award for the claimant for medical expenses, future medical care, and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Shawn L. Berkin, D.O., Jeffrey Johnson, M.D., and J. Stephen Dolan, public records from the Missouri Division of Workers' Compensation, and voluminous medical records. Barry Flakes testified at the hearing, and the employer otherwise offered depositions of the claimant and Gary Schmidt, M.D., employment records relating to the SYSCO Safe Preferred Work Methods, records relating to the employer's investigation of claimant's accident, surveillance videos of the claimant, and medical records. The Second Injury Fund offered a deposition of Terry Cordray.

All objections not previously sustained are overruled as waived, except for the employer's objection to some of the testimony of Jeffrey Johnson, M.D. based on section 287.210.3, which objection is ruled on herein. Jurisdiction in the forum is authorized under sections 287.110, 287.450, and 287.640 RSMo, as amended, because the accident occurred in Missouri.

SUMMARY OF FACTS

On February 23, 2006, this now 53 year old claimant, a forklift operator, was trying to scan a pallet while standing on a forklift inside the freezer in the employer's warehouse. He leaned forward to scan the pallet, which caused his left leg to extend outside the running lines of the forklift. At that point a co-employee drove another forklift into the freezer. The co-employee's forklift grabbed the claimant's left foot and crushed his left foot between the forklifts. The claimant went by ambulance to Barnes St. Peters Hospital. X-rays were taken and the claimant was placed in a cast.

On February 28, 2006, five days after the accident, the claimant went to Dr. Blair, who initially diagnosed a crush injury to his left ankle and a medial malleolar fracture. See Exhibit 22. Dr. Blair later ruled out the medial malleolar fracture as related to the February 23, 2006, accident. After he ruled out the medial malleolar fracture, Dr. Blair continued to diagnose a healing crush injury. See Exhibit 22. Dr. Blair ordered two MRIs. The first MRI, performed on June 20, 2006, revealed moderate to severe posterior tibial tendonitis and some scar tissue, but it did not show any fractures or other injuries. See Exhibit 22. The second MRI, performed on October 2, 2006, was essentially normal according to Dr. Blair. See Exhibits 22 and 23. The claimant showed improvement over the next couple months. His range of motion improved and his swelling went down. See Exhibit 22.

On August 17, 2006, the claimant participated in a functional capacity evaluation that showed he could work at the heavy demand level. See Exhibit 24. The claimant returned to work for several months. See Exhibit 27. The claimant had another functional capacity evaluation on October 24, 2006 that showed he could work at the medium demand level. See Exhibit 25.

On February 5, 2007, Dr. Blair noted some tenderness over the claimant's tarsal tunnel and sent him for an EMG and nerve conduction test to rule out tarsal tunnel syndrome. See Exhibit 22. The claimant could not get through the nerve conduction test, but he completed the EMG, and Dr. Blair opined that the EMG appeared to be normal. See Exhibit 22. Dr. Blair released the claimant to ful duty on March 19, 2007. See Exhibit 22. The claimant went to Dr. Blair for the last time on April 23, 2007, at which point Dr. Blair released the claimant at maximum medical improvement and opined that the claimant suffered a 5% permanent partial disability of his left ankle associated with pain and somewhat limited range of motion. See Exhibit 22.

The claimant testified that he was still having problems with his left foot, so he sought treatment on his own and went to pain management specialist Dr. John Graham. Dr. Graham gave the claimant a psychological test that showed dramatic elevations on every scale tested. See Exhibit 27. These dramatic elevations led Dr. Graham to conclude that the claimant had a strong likelihood of functional overlay. See Exhibit 27. Dr. Graham opined that patients like the claimant with functional overlay will often have subjective complaints out of proportion to objective findings. See Exhibit 27. Dr. Graham also opined that these patients have subjective complaints that are often recalcitrant to treatment. See Exhibit 27. For these reasons, Dr. Graham concluded that he had nothing to offer from a pain management standpoint and he did not recommend surgery or any other invasive treatment. See Exhibit 27.

On June 22, 2010, Dr. Johnson and Dr. Mackinnon performed a tarsal tunnel release, tendon lengthening, removal of cutaneous neuromas, and internal neurolysis.

The claimant attempted to return to work for this employer on several occasions after the February 2006 accidental injury, but he testified he was not able to perform his job duties so he left the employer in 2007. The claimant testified he has pain in his left foot on a daily basis. According to the claimant, he cannot stand or sit for long periods of time because of that pain. The claimant testified that any activity involving his left foot causes that foot to swell. He does not think he can work a physical 40 hour per week job because of his foot. The claimant testified

he could not even lie in his bed "last year," but he testified that has improved. He testified that his balance has been greatly affected and that he uses a cane for balance. The claimant testified that on a typical day he gets up and fixes breakfast. After breakfast he sits on his porch and then watches television. After that he lies down and goes to sleep.

Video surveillance demonstrates the claimant does not use his cane all the time. The video surveillance also demonstrates that the claimant is able to walk up and down stairs without much difficulty, lean forward and put pressure on his left foot, and drive a truck. The video surveillance also demonstrates that the claimant can stand on a sidewalk for more than 20 minutes without having to sit down.

The claimant is a high school graduate who worked for this employer from 1989 to 2007 as an order picker and then a forklift operator. The claimant's job history before working for this employer includes working as a messenger, a dishwasher, a security guard, an order picker, a warehouse worker, and a printer's helper. See Exhibit C. The claimant testified at his deposition that he has taken a computer class as well as 2 months of electronics courses at Ranken Tech. The claimant testified he has completed about 10 applications for prospective employers, but he has not had any interviews. The claimant is currently receiving Social Security Disability benefits.

Pre-existing Conditions

The claimant sustained several injuries that gave him problems doing his job before the February 2006 accident. On August 3, 1993, the claimant fell out of a picker that was 12 feet in the air and sustained a bulging disc in his cervical spine. The claimant testified that he has had headaches since that neck injury. See claimant deposition, pages 61-62. Even after the claimant was done treating for the neck injury he continued to miss about one day per month due to ongoing headaches. See claimant deposition, page 63. The claimant's neck pain was an 8 on a scale of 1 to 10, and his neck pain was still an 8 even after the February 2006 accidental injury. The claimant settled his workers' compensation claim with his employer on the basis of a 20% permanent partial disability to his neck. See Exhibit X. On April 9, 1995, the claimant sustained a lower lumbar spine sprain or strain and missed work about once every two months due to low back pain. See claimant deposition, pages 64-65. The claimant's low back pain was an 8 on a scale of 1 to 10, and he testified his low back pain continued to be an 8 even after the February 2006 accident. The claimant settled his workers' compensation claim with his employer on the basis of a 6% permanent partial disability to his low back. See Exhibit X. On January 15, 1999, the claimant injured his neck and right shoulder and had rotator cuff surgery. He testified that his right arm never regained full strength and that has had very limited ability to do anything overhead with his right arm since his injury in 1999. See Exhibit 28, p. 5. The claimant testified his right shoulder pain was an 8 on a scale of 1 to 10 after the February 2006 accident. See claimant deposition, page 68. The claimant settled his workers' compensation claim with his employer on the basis of a 30% permanent partial disability to his right shoulder and a 5% permanent partial disability to his neck. See Exhibit X. The claimant testified all of these injuries that he sustained prior to the February 2006 accidental injury were a hindrance and obstacle to his job.

Dr. Berkin

Dr. Berkin, a family practitioner, examined the claimant on August 8, 2007, January 22, 2009, and April 30, 2011, reviewed the claimant's medical records, and obtained a medical history from the claimant. On August 8, 2007, Dr. Berkin diagnosed a crush injury to the left foot, a fracture of the medial malleolus of the left ankle, plantar fasciitis of the left foot, and tendonitis involving the posterior tibial tendon and the Achilles tendon of the left foot. See Dr. Berkin, pages 20-21. Dr. Berkin's diagnosis of a medial malleolus fracture was based on an X-ray that was taken on February 28, 2006, but he did not personally review those X-rays. See Dr. Berkin, pages 54-55. Dr. Berkin opined that those conditions were the direct result of the February 2006 accident. See Dr. Berkin, page 21. Based on those diagnoses, the claimant's condition and problems and the physical examination, Dr. Berkin opined that the claimant had a 30% permanent partial disability of the left lower extremity at the level of the ankle. See Dr. Berkin, page 21. Dr. Berkin also attributed a 35% permanent partial disability due to the claimant's prior neck injury, a 20% permanent partial disability due to the claimant's prior back injury, a 35% permanent partial disability at the level of the shoulder due to the claimant's prior shoulder injury, and a 10% permanent partial disability at the level of the metatarsal phalangeal joint due to the claimant's unrelated injury to the big toe on his right foot. See Dr. Berkin, page 22.

Dr. Berkin examined the claimant again on January 22, 2009. See Dr. Berkin, page 24. The claimant's symptoms were a little more severe. See Dr. Berkin, page 31. At this visit the claimant had additional X-rays and an MRI scan of the left foot. See Dr. Berkin, page 26. The MRI showed a medial malleolus fracture that had not healed and it showed marked tendinopathy of the distal posterior tibial tendon. See Dr. Berkin, pages 26-27. The claimant had also undergone electrodiagnostic studies that revealed findings consistent with tarsal tunnel syndrome. See Dr. Berkin, page 27. Dr. Berkin diagnosed left tarsal tunnel syndrome, and he opined that condition was from the February 2006 accident. See Dr. Berkin, page 32. Dr. Berkin opined that the claimant had a 45% permanent partial disability at the level of the left ankle because the claimant's condition was "clearly worse." See Dr. Berkin, page 35.

Dr. Berkin examined the claimant for the last time on March 30, 2011. See Dr. Berkin, page 38. Dr. Berkin had learned that Dr. Mackinnon and Dr. Johnson performed surgery on the claimant's leg for the tarsal tunnel syndrome. See Dr. Berkin, page 39. Based on Dr. Berkin's review of the medical records, Dr. Berkin concluded that those surgeons released the posterior tibial nerve, removed a neuroma, and lengthened the tibial tendon. Dr. Berkin, pages 41-43. Dr. Berkin testified the lengthening of the tibial tendon was proximally caused by the February 2006 accident. Dr. Berkin, page 43. Dr. Berkin's opinion was that his symptoms were about the same from the prior visit. Dr. Berkin, page 43.

Dr. Berkin issued a report from the March 30, 2011 visit on August 1, 2011, opining that the claimant suffered a 60% permanent partial disability to the left foot and placed restrictions to avoid excessive squatting, kneeling, stooping, turning, twisting, lifting, and climbing, standing on feet longer than 20 to 30 minutes at a time, climbing ladders, stairs, working at heights above ground level, walking on uneven surfaces, lifting with right arm extended from his body, and excessive lifting or working with his right arm above shoulder level. Dr. Berkin further restricted the claimant to lifting 20 to 25 pounds occasionally and 15 pounds frequently and he opined that

the claimant should pace himself and take frequent breaks. Dr. Berkin testified that his restrictions were based on a combination of the February 2006 foot injury and his prior neck, back, shoulder, and toe injury. Dr. Berkin, pages 48-49.

Dr. Berkin also opined that the claimant is permanently and totally disabled based on all of his injuries, not just the February 2006 foot injury:

> Q. Is your opinion as to permanent and total disability and unable to compete in the open labor market which you had expressed many times earlier there in this deposition, correct?
> A. Yeah.
> Q. Is that based solely on the injury to the foot?
> A. No.
> Q. And what is that opinion based on, sir?
> A. It's based on the foot disability and the disability imposed by the previous back problem, the neck problem, his previous shoulder problem.
> Q. So it's a combination of all of the injuries?
> A. That is correct. See Dr. Berkin deposition, pages 49-50.
>
> Q. If you look at [the claimant's] February 23rd, 2006 injury alone, in and of itself without regard to any preexisting medical condition, can you form an opinion as to whether or not [the claimant] is employable in the open labor market?
> A. I think that if you looked at just that particular condition, you know, he might be able to do something if he didn't have any problems with his shoulders, if he didn't have any neck problem or herniated disc, if he hadn't had any back problems maybe, you know, without those additional burdens I think that his chances of employment would be a lot higher. See Dr. Berkin deposition, pages 95-96.

With respect to the claimant's surgery, Dr. Berkin opined that he did not have a good result from the surgery, that the surgery did not make him any better, and that the claimant's functioning was not any better after the surgery. See Dr. Berkin deposition, pages 79-81. Dr. Berkin testified the claimant was worse when he saw him in 2011 than when he saw him in 2009 before surgery. See Dr. Berkin deposition, page 81.

Dr. Johnson

Dr. Johnson, a board certified orthopedic surgeon with subspecialty training in foot and ankle surgery, examined and treated the claimant's left foot injury including a tarsal tunnel release and tendon lengthening on June 22, 2010. See Dr. Johnson deposition, pages 6-7. Dr. Johnson's operative note indicates that the posterior tibial tendon was thickened and that the posterior tibial tendon itself was scarred distally. See Exhibit S. Dr. Johnson debrided the tibial tendon to remove some of the thickness and then opened the tendon sheaths and lengthened the tendons. See Exhibit S. At that point, Dr. Mackinnon performed procedures on both the saphenous nerve and the internal neurolysis of the tibial nerve. See Exhibit S. Dr. Johnson was not in the operating room when Dr. Mackinnon performed her surgical procedures, and he did

not observe any damage to the nerves in the claimant's foot. See Exhibit S, and Dr. Johnson deposition (part 2), page 61.

Dr. Johnson last examined the claimant post-operatively on December 12, 2011. The claimant's pain was definitely improved from what it was pre-operatively. See Dr. Johnson deposition (part 2), page 51, Exhibit S. The claimant could bring his left ankle into about the neutral position passively and actively. See Dr. Johnson deposition (part 2), page 51, Exhibit S. The claimant was able to do a single leg stand on his left leg during the examination on December 12, 2011. See Dr. Johnson deposition (part 2), page 52, Exhibit S. The claimant had 5 out of 5 strength except for the posterior tibula, and he had more than 4 out of 5 strength in the posterior tibula. See Dr. Johnson deposition (part 2), pages 52-53, Exhibit S.

Dr. Johnson, a board certified orthopedic surgeon with subspecialty training in foot and ankle surgery and member of the faculty of Washington University School of Medicine, examined the claimant on December 4, 2009, and the claimant complained of pain on the inner aspect of his ankle, chronic nighttime pain that wakes him up, numbness and tingling, and he walks on the edge of the foot. See Dr. Johnson Deposition (Part I), page 14. He took Percocet for pain. See Dr. Johnson Deposition (Part I), page 14. The exam revealed a hypersensitivity to the area of the crush injury and Dr. Johnson noted a fixed deformity that was unable to be corrected manually. See Dr. Johnson Deposition (Part I), pages 15, 16. He testified internal damage limited the claimant’s ability to correct the deformity. See Dr. Johnson Deposition (Part I), page 16.

At the initial examination, Dr. Johnson opined that the claimant developed tarsal tunnel from trauma such as a crush injury. See Dr. Johnson Deposition (Part I), page 17. He noted limited range of motion. See Dr. Johnson Deposition (Part I), page 18. Based on the history given by the claimant and his examination, he diagnosed post-traumatic changes to the nerve on the inner aspect of the ankle and tarsal tunnel. See Dr. Johnson Deposition (Part I), pages 18, 19. He diagnosed a crushing injury to the nerve and mild ankylosis and equinovarus of the left leg which was the fixed deformity described. See Dr. Johnson Deposition (Part I), page 19.

Dr. Johnson recommended an EMG and consultation with a colleague for the nerve-related problems. See Dr. Johnson Deposition (Part I), page 23. He prescribed medication. See Dr. Johnson Deposition (Part I), page 23. Tarsal tunnel release was recommended along with surgery to straighten the foot. See Dr. Johnson Deposition (Part I), pages 23, 24. The goal for the surgery was to reduce his pain and deformity. See Dr. Johnson Deposition (Part I), page 26.

On June 22, 2010, He performed the surgery and observed that the posterior tibial tendon was contracted and scarred along the medial aspect of the foot. See Dr. Johnson Deposition (Part I), pages 26-28. He observed scarring and thickening of the epineurium of the tibial nerve, meaning the lining around the nerve was scarred and thickened. See Dr. Johnson Deposition (Part I), page 28. Dr. Johnson testified that the claimant’s complaints of nerve pain were consistent with what was visually seen. See Dr. Johnson Deposition (Part I), page 28. Scarring and adhesions explained Greer’s inability to bring his foot to neutral. See Dr. Johnson Deposition (Part I), page 28. These are objective, not subjective, findings. See Dr. Johnson Deposition (Part I), page 28. He testified what he found inside the foot correlated to the claimant’s complaints. See Dr. Johnson Deposition (Part I), page 30. Dr. Mackinnon operated on the saphenous nerve. See Dr. Johnson Deposition (Part I), page 30.

Dr. Johnson testified damage seen in the foot, with reasonable medical certainty, could be caused by trauma. See Dr. Johnson Deposition (Part I), page 31. Surgery did not make the foot look normal but it improved its positioning. See Dr. Johnson Deposition (Part I), pages 31, 32. The varus position returned and he opined Greer was a candidate for a tendon transfer. See Dr. Johnson Deposition (Part I), pages 32, 33. He recommended pain management. See Dr. Johnson Deposition (Part I), page 33. Dr. Johnson opined pain would be long term and based on the time since the injury the varus position would likely not improve. See Dr. Johnson Deposition (Part I), pages 38, 39. Dr. Johnson recommended aggressive passive and active range of motion exercises. See Dr. Johnson Deposition (Part II), pages 16, 20. He opined the crush injury of February 23, 2006 was the prevailing factor in the diagnosis and treatment he provided. See Dr. Johnson Deposition (Part I), pages at 41.

With regard to the varus position Dr. Johnson testified contracture can occur after surgery. See Dr. Johnson Deposition (Part II), pages 21, 22. The goal of exercises was to keep the foot in neutral position. See Dr. Johnson Deposition (Part II), page 23. Dr. Johnson testified that many of his goals were met from surgery but he was not pain free and his foot contracted back after surgery. See Dr. Johnson Deposition (Part II), pages 44 – 45. Dr. Johnson testified that he observed changes around the nerve which made it obvious to him there was an injury to the nerve. See Dr. Johnson Deposition (Part II), page 61. He opened the nerve sheath and observed it was thickened over the tibial nerve and he attributed this to the injury. See Dr. Johnson Deposition (Part II), page 63.

Dr. Schmidt

Dr. Schmidt, a board certified orthopedic surgeon who has specialized in foot and ankle for more than 15 years, examined the claimant on February 21, 2008 and May 2, 2011, reviewed the claimant's medical records, and obtained a medical history from the claimant. See Dr. Schmidt deposition, pages 4-5. Dr. Schmidt opined that the claimant suffered a 5% permanent partial disability of the left foot. See Exhibits 2, 3, 4, 5, 6, and 8. Dr. Schmidt agreed with Dr. Blair's opinion that claimant was at maximum medical improvement as of April 23, 2007, and he also opined that the surgery performed by Dr. Johnson and Dr. Mackinnon was not reasonably necessary, and that further surgical intervention would have a predictably poor result. See Dr. Schmidt deposition, page 20. Even after examining the claimant after surgery and reviewing the operative report, Dr. Schmidt's opinions did not change. See Dr. Schmidt deposition, pages 9-10. Dr. Schmidt testified that based on his review of the operative report and other medical records, the surgery performed by Dr. Mackinnon and Dr. Johnson had a predictably poor result based on the claimant's continued complaints of nerve pain post-operatively. See Dr. Schmidt deposition, pages 16-17.

J. Stephen Dolan

J. Stephen Dolan, a certified rehabilitation counselor, evaluated the claimant on June 16, 2011 and testified that prior to the February 2006 accidental injury, the claimant had limitations that prevented him from doing many types of jobs that he otherwise could have done. See Dolan deposition, page 31. Mr. Dolan concluded that based on the claimant's education, work experience, academic skills, work skills, and Dr. Berkin's permanent restrictions, including the

restrictions that were related to the injuries the claimant sustained before the February 2006 accidental injury, the claimant is unable to perform any employment for which a reasonably stable market exists. See Dolan deposition, pages 39-44. However, when asked about employability for his left foot injury alone, he testified that if the claimant had to leave his foot elevated for several hours a day that alone would render him unemployable in the open labor market. See Dolan deposition, pages 33, 34.

Terry Cordray

Terry Cordray, a certified rehabilitation counselor, performed a vocational assessment based on the claimant's medical records and testified that the claimant cannot perform his past work as a forklift operator, pallet jack operator, standing forklift operator, or order picker, but opined that the claimant maintains the capacity to work and earn wages in the competitive labor market. See Cordray deposition, page 19. Mr. Cordray opined that based upon the restrictions of Dr. Berkin, the claimant cannot perform his past job as a forklift operator, pallet jack operator, standing forklift operator, and order picker. On the other hand, Mr. Cordray found that based upon Dr. Berkin's restrictions, the claimant would be capable of performing other jobs such as a cashier at a parking garage, surveillance system monitor at large office buildings, hospitals and department stores, collections clerks and telemarketers and that there are other jobs in significant numbers in the labor market that are sedentary in strength demand and do not require lifting over 15 pounds frequently, 20-25 pounds occasionally, that do not require lifting with his right arm extended from the body, or excessive lifting or working with his right arm above shoulder level. Mr. Cordray opined that these jobs do not require in excess of high school education. Mr. Cordray opined that these jobs would not require standing for more than 20-30 minutes at a time, would not require climbing ladders or stairs, working at heights above ground, or walking on uneven surfaces. Mr. Cordray opined that based upon a review of the objective medical evidence, the claimant maintains capacity to work fulltime in the labor market and is not totally disabled. (SIF Exhibit I). Mr. Cordray opined that these sedentary jobs listed are not exertional, and that the claimant would not need to assume the restrictions of Dr. Berkin of #9 of taking frequent breaks to avoid exacerbation of the claimant's symptoms. Mr. Cordray opined that the claimant is employable and "placeable" in the labor market at unskilled lower paying jobs that are sedentary and require no more than a high school education, and that these jobs do exist in significant numbers in the metropolitan St. Louis labor market. (SIF Exhibit I).

Mr. Cordray testified that walking with a cane is a significant barrier to being hired in any job and is a huge red flag. See Cordray deposition, page 28. Mr. Cordray testified that if a person walks in with a cane and asks for a job application, they are sabotaging their application if they do not need to use a cane. See Cordray deposition, page 28. Mr. Cordray testified that if the claimant can walk without a cane it would be significant because the cane would be an unnecessary barrier for the claimant to include that if he does not need it. See Cordray deposition, page 28. Mr. Cordray testified that if he took into consideration the claimant's subjective complaint of needing to lie down and elevate his feet, the claimant would be unemployable. See Cordray deposition, page 45. Mr. Cordray testified that based on the objective evidence, the physical therapists, and the occupational therapists, the claimant's subjective complaints are not congruent. See Cordray deposition, page 51-52. Mr. Cordray testified that he is not offering opinions of employability on the claimant's subjective complaints because there is an abundance of objective medical evidence to rely on that comes from doctors,

physical therapists, and occupational therapists, who have all either treated or examined the claimant over the course of his injury recovery. See Cordray deposition, pages 52-53. Mr. Cordray testified that he had better objective evidence than utilizing the subjective complaints of the claimant. See Cordray deposition, page 53.

SEVEN DAY RULE OBJECTION TO DR. JOHNSON'S TESTIMONY

Section 287.210.3, RSMo 2000, commonly known as "the seven day rule", provides:

> The testimony of any physician who treated or examined the injured employee shall be admissible in evidence in any proceedings for compensation under this chapter, but only if the medical report of the physician has been made available to all parties as in this section provided. Immediately upon receipt of notice from the division or the commission setting a date for hearing of a case in which the nature and extent of an employee's disability is to be determined, the parties or their attorneys shall arrange, without charge or costs, each to the other, for an exchange of all medical reports, including those made both by treating and examining physician or physicians, to the end that the parties may be commonly informed of all medical findings and opinions. The exchange of medical reports shall be made at least seven days before the date set for the hearing and failure of any party to comply may be grounds for asking for and receiving a continuance, upon proper showing by the party to whom the medical records were not furnished. If any party fails or refuses to furnish the opposing party with the medical records of the treating or examining physician at least seven days before such physician's deposition or personal testimony at the hearing as in this section provided, upon the objection of the party who was not provided with the medical report, the physician shall not be permitted to testify at that hearing or by medical deposition.

The purpose of Section 287.210.3 is "that the parties may be commonly informed of all medical findings and opinions at least seven days prior to a hearing at which any party attempts to place such evidence before the trier of fact …." Weinbauer v. Grey Eagle Distributors, 661 S.W.2d 652, 655 (Mo. App. E.D. 1984) quoting Johnson v. Park N Shop, 446 S.W.2d 182 (Mo. App. E.D. 1969) (internal quotations omitted). With regard to the purpose of the seven day rule, the Eastern District Court of Appeals said "[i]t requires all medical opinions to be disclosed seven days prior to hearing, including those of examining or treating physicians. 'Including' does not mean 'limited to.' The purpose of this disclosure is specifically set out by the legislature and contemplates full disclosure of all medical evidence to be used at the hearing." Johnson, 446 S.W.2d at 655-56. It matters not that the doctor whose opinion is sought is a treating doctor or examining doctor with respect to the accident and injury at issue. Id. at 655. Simply put, no treating or examining physician can testify at a deposition or hearing unless the medical report of that physician has been provided to the adversary party at least seven days before the deposition or hearing.

"The report required to be given to adversary parties in workers' compensation cases must include the patient's history, complaints, details of the findings of any and all laboratory, X-ray and all other technical examinations, diagnosis, prognosis, nature of disability, if any, and an estimate of the percentage of permanent partial disability, if any. A report that is incomplete warrants disallowance of the doctor's testimony about the excluded matter although the doctor is allowed to testify as to matters included in the report." Lane v. Schreiber Foods, Inc., 93 S.W.2d

616, 619 (Mo. App. S.D. 1995) (internal quotations and citations omitted); citing Johnson v. Park N Shop, 446 S.W.2d 182, 187 (Mo. App. E.D. 1969). A party may request a continuance to obtain all medical reports, but the Eastern District Court of Appeals has said "[t]he failure to provide a report also permits the objecting party to prevent the testimony of the treating or examining physician who failed to submit the report. An examination of the entire section here involved leads us to hold that the legislative intent was to require all medical reports to be exchanged and failure to do so permits exclusion of the testimony of the doctor." Johnson, 446 S.W.2d at 656.

Dr. Johnson opined that the claimant's injuries were caused by the February 2006 accident. The employer objected to Dr. Johnson's testimony in that regard based on the seven day rule. The employer reiterated that objection at the hearing. On both occasions, the employer asserted that the claimant had not produced a medical report, medical records, or any other document in which Dr. Johnson had stated his opinion that the claimant's injuries were caused by the February 2006 accident. Notably, Dr. Johnson testified at his deposition that nowhere in his records does he state that the February 2006 accident was the prevailing factor that was the cause of the claimant's injuries. See Dr. Johnson deposition, pages 42-44. When asked if he used the terminology "prevailing factor" in any way in his records Dr. Johnson testified "Oh, of course not. So this is a legal term that is not germane to medical records. So this is the sort of thing that it would be unusual, unless one were asked to make a statement such as that." See Dr. Johnson deposition, page 43.

The issues raised by the objection were a failure to include a permanent partial disability and a failure to include causation in the report. No place in the statute is causation or future medical treatment mentioned. When interpreting a statute, a court must interpret the words used in their plain and ordinary meaning as it is presumed the legislature did not enact meaningless provisions. Carver v. Delta Innovative Services, 379 S.W.3d 865 (Mo. App. W.D. 2012). A strict construction statue presumes nothing that is not expressed. Robinson v. Hooker, 323 S.W.3d 418 (Mo. App. 2010) (citations omitted). As such an objection to the causation and future medical opinions of Dr. Johnson are without merit, as strict construction of the statute does not require causation or future medical opinions to be in a report or records. The one thing required that was not included in the report, percentage of disability and inclusion of a permanent partial disability, is irrelevant as no questions were asked of the physician on this subject matter.

MEDICAL CAUSATION

The claimant bears the burden of proving that his injury was medically causally related to the accident. Irving v. Missouri State Treasurer, 35 S.W.3d 441, 445 (Mo. App. W.D. 2000). The claimant has the burden to prove that the accident "was the prevailing factor in causing both the resulting medical condition and disability." Hornbeck v. Spectra Painting, Inc., 370 S.W.3d 624, 632 (Mo. 2012); Armstrong v. Tetra Pak, Inc., 391 S.W.3d 466, *11 (Mo. App. S.D. 2012). The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the medical condition and disability. Id. at 633. In order to prove a medical causation relationship between the alleged accident and medical condition, the claimant in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. W.D. 1991). So the claimant's burden of proof is to prove through competent medical testimony

that the February 2006 accident was the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 23, 2007, the date on which the claimant's treating doctor found the claimant to have reached MMI. See Hornbeck, 370 S.W.3d at 633.

The claimant offered the testimony of Dr. Johnson and Dr. Berkin to prove medical causation. In addition, Dr. Blair and Dr. Schmidt opined that the claimant suffered a soft tissue injury as a result of the February 2006 accident and that the claimant suffered permanent partial disability as a result of the occurrence. Based on the foregoing, the claimant met his burden of proof through competent medical testimony that the February 2006 accident was the prevailing factor causing a resulting medical condition and disability.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

> The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

> We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident,

a claimant need only prove that the need for treatment and medicate on flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

The claimant offered the following medical bills with supporting medical records:

Barnes Jewish Hospital, Ex. B	$25,314.27
Washington University, Ex. B	$18,775.00
Foot and Ankle Center, Ex. L, Z	$ 584.09
Dr. Yadava and Performance Rehabilitation, Ex. M	$ 2,326.25
Dr. Boris Khariton, Ex. N	$ 691.00
Forest Park Hospital, Ex. O	$ 1,344.53
Dr. Graham, Ex. P	$ 440.00
Total	$49,475.14

In his brief, the claimant also claimed that he incurred expenses as follows, but no billing statements were found in the exhibits:

Missouri Baptist, Ex. J	$ 964.04
Scott Radiological	$ 64.00
E.R. physician bills	$ 365.00
Total	$ 1,393.04

Based on the weight of the credible evidence, the claimant met his burden of proving that he sustained a work-related injury to his left foot as a result of the February 2006 accident and that the medical care flowed from the accident. The claimant is awarded $49,475.14 for past medical expenses.

FUTURE MEDICAL EXPENSES

Pursuant to section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

In this case, Dr. Berkin prescribed “treatment recommendations” in his report consisting of eight exertional restrictions and use of “nonsteroidal anti-inflammatory medication and analgesics for control of his left foot pain and ankle pain” in his report and testified during his deposition that further treatment would not improve the claimant's condition and did not “require

ongoing examination or observation by a physician." See Dr. Berkin deposition, pages 82-83. Dr. Berkin speculated that the claimant might need a fusion in the future if his symptoms get worse, but he did not recommend a fusion at the time of the deposition, five years after the occurrence. See Dr. Berkin deposition, page 83. Dr. Blair and Dr. Schmidt opined that the claimant was at maximum medical improvement as of April 23, 2007. Dr. Schmidt opined in his report and testified at his depositions that he did not recommend any further treatment. See Exhibits 2, 3, 4, 5, 6, and 8. Dr. Johnson testified that the only additional treatment he could provide to the claimant was a tendon transfer. See Dr. Johnson deposition (part 2), pages 47-48. However, Dr. Johnson testified that he was not enthusiastic that a tendon transfer would really provide the claimant "with any significant functional benefit." See Dr. Johnson deposition (part 2), page 48. Dr. Johnson examined the claimant on December 12, 2011, and opined:

> I again discussed with him that I think most of his pain is neurogenic. Therefore, I think focusing on that pain for now is a better opinion than any type of additional surgery. Since he was not able to afford Lyrica or the Lidoderm patch, and because he has had adverse reaction to Neuronitin, I don't really have much to offer him at this time. I recommended that he have a formal pain management consultation with a … pain management center [in] hopes that they may be able to provide some options for treatment. See Dr. Johnson deposition, medical record dated December 12, 2011.

Apparently, the claimant consulted Dr. Berkin relative to the pain, who opined that the claimant should be treated with "nonsteroidal anti-inflammatory medication and analgesics for control of his left foot pain and ankle pain" that did not "require ongoing examination or observation by a physician." See Dr. Berkin deposition, pages 82-83. Based on the weight of the evidence, the claimant has failed to meet his burden to prove that there is any future surgical treatment reasonably required to cure and relieve the effects of the February 2006 accidental injury. However, the medical authorities in this case appear to consistently recommend "non-steroidal anti-inflammatory medication and analgesics for control of his left foot pain and ankle pain" that does not "require ongoing examination or observation by a physician." Our Labor and Industrial Relations Commission has consistently held that it is error to limit treatment to those procedures specifically recommended by the medical providers and experts in the course of the hearing:

> We agree with the Administrative Law Judge that employee met his burden on the issue of future medical treatment. We disagree, however, with the Administrative Law Judge's decision to limit employee's future medical award to "pain management relative to his low back condition." Section 287.140.1 RSMo provides, as follows:
>
> > In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

> Where the employee's burden of proof is met, the foregoing language makes clear that employee is entitled to that treatment which "may reasonably be required" to "cure and relieve from the effects of the injury." Generally, in the context of a future medical award, we are not called upon to determine (or set limitations upon) the specific treatment or procedures that will reasonably be required, as such an award would make no account for the ongoing or transitory nature of various medical conditions, and would involve the impossible task of predicting what will "reasonably be required" in an unknown future. (Of course, the parties may place in issue the question whether a certain treatment flows from the injury, but this is not the case here). For these reasons, we consider it inappropriate to bind employee's award of future medical expenses to a specific course of treatment or specific medical provider.
>
> Accordingly, we modify the Administrative Law Judge's award of future medical treatment. We conclude that employee is entitled to receive (and employer is obligated to provide) that medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required to cure and relieve from the effects of the January 28, 2008, injury. Steven Reichardt, Slip Op., Case No. 08-008879, (Mo. Labor & Indust. Relat. Comm. November 10, 2011).

See also Beverlie Leonard, Slip Op. Case No. 09-014034, (Mo. Labor & Indust. Relat. Comm. March 5, 2012); Jackie Hampton, Slip Op., Case No. 05-067328, (Mo. Labor & Indust. Relat. Comm. February 24, 2012). Based on this guidance and the consistency of the medial evidence, the claimant "is entitled to receive (and employer is obligated to provide) that medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required to cure and relieve from the effects" of his left foot injury in 2006.

TEMPORARY TOTAL DISABILITY

The purpose of a temporary total disability award is to cover the claimant's healing period. Pruett v. Fed. Mogul Corp., 365 S.W.3d 296, 308 (Mo. App. S.D. 2012). "Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress." Id. (internal quotations omitted).

Dr. Blair released the claimant to full duty on March 19, 2007. See Exhibit 22. The claimant went to Dr. Blair for the last time on April 23, 2007, at which point Dr. Blair released claimant at maximum medical improvement and opined that the claimant suffered a 5% permanent partial disability of his left ankle associated with pain and somewhat limited range of motion. See Exhibit 22. On August 8, 2007, Dr. Berkin examined the claimant and opined that the claimant's disability was permanent and offered treatment recommendations consisting of restrictions and consumption of non-steroidal anti-inflammatory medication for pain relief. Dr. Berkin followed the claimant's progress in the years after his additional surgeries and concluded that the claimant's condition did not improve after further surgical procedures. To the contrary, he opined that the claimant's condition deteriorated substantially after each procedure. Clearly, no medical provider had any contention that the claimant's condition would improve after April

23, 2007, and the claimant's condition did not improve thereafter, although additional treatment may have been necessary to avoid further deterioration.

The evidence is overwhelming that the claimant achieved maximum medical improvement as of April 23, 2007, and the claimant is not entitled to any temporary total disability benefits after that date. Since parties stipulated that the employer paid all temporary total disability benefits from the date of the accidental injury until April 23, 2007, the claimant is not entitled to an award of additional temporary total disability benefits.

PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. Permanent partial disability is awarded to compensate a claimant for lost earnings. Smith v. Donco Const., 182 S.W.3d 693, 699 (Mo. App. S.D. 2006) (quoting Rana v. Landstar TLC, 46 S.W.3d 614 (Mo. App. W.D. 2001), overruled in part by Hampton v. Big Boy Steel Erection, 121 S.W.3d 220, 225 (Mo. Banc 2003)). The claimant has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. (internal quotations omitted). Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo. App. S.D. 1997). The test for permanent total disability is the claimant's ability to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the claimant in his present physical condition. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 48 (Mo. App. W.D. 2007).

A review of the entire record of evidence plainly demonstrates the claimant is not permanently and totally disabled as a result of the February 2006 accidental injury alone. While Mr. Dolan opined that the claimant is unable to perform any employment for which a reasonably stable market exists, his opinion in that regard is based entirely on Dr. Berkin's restrictions. See Exhibit 28, p. 10; Exhibit C, pages 39-44. Dr. Berkin's restrictions, in turn, are based on the February 2006 accidental injury in addition to the claimant's prior neck, back, shoulder, and toe injuries. Exhibit A, pages 48-49. Therefore, Mr. Dolan's testimony does not prove the claimant is permanently and totally disabled as a result of the February 2006 injury alone. Dr. Berkin also testified that the claimant is permanently and totally disabled based on all of his injuries, not just the February 2006 foot injury. Mr. Cordray opined that the claimant is not permanently and totally disabled because of the February 2006 foot injury or his prior injuries. In addition, the surveillance video showing the claimant walking, climbing stairs, leaning on his left foot, standing, and driving cast doubt on the claimant's credibility. The credible evidence demonstrates that the claimant is not entitled to permanent and total disability benefits against the employer as a result of the February 2006 accidental injury.

There is conflicting evidence in the record regarding the extent of the claimant's permanent partial disability. Dr. Blair and Dr. Schmidt opined that the claimant suffered a 5% permanent partial disability of the foot from the February 2006 accidental injury. Dr. Berkin, on

the other hand, first opined that the claimant suffered a 30% permanent partial disability, then he opined that it was a 45% disability, and he finally opined that the claimant suffered a 60% permanent partial disability of the left ankle. Based on the entire record, including the forensic medical opinions of Dr. Berkin, Dr. Blair, and Dr. Schmidt, the claimant's testimony, the medical records, and surveillance evidence, the claimant sustained a 27 ½% permanent partial disability to the left foot from the 2006 accident.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

> 1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
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> 2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
>
> 3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
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> 4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
>
> 5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).
>
> 6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

> The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the

> absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability."

2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;

3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and

4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joultzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991).

Based on the entire record, the claimant suffered a compensable work related injury in 2006 resulting in a 27 ½% permanent partial disability to the left foot (41.25 weeks). At the time the last injury was sustained, the claimant had a 25% pre-existing permanent partial disability to the cervical spine (100 weeks), a 15% pre-existing permanent partial disability to the lumbar

spine (60 weeks), and a 30% pre-existing permanent partial disability to the right shoulder (69.6 weeks). The permanent partial disability from the last injury combines with the pre-existing permanent partial disability to create an overall disability that exceeds the simple sum of the permanent partial disabilities by 15%.

The credible evidence establishes that the last injury, combined with the pre-existing permanent partial disabilities, causes greater overall disability than the independent sum of the disabilities. The claimant testified credibly about significant ongoing complaints associated with these injuries. The claimant changed how he performs many activities due to the combination of the problems.

The claimant argued in his brief that he is permanently and totally disabled:

> This Court heard from Mr. Dolan, a vocational rehabilitation expert who opined Claimant is unemployable in the open labor market. Most important, however, is the fact both Cordray and Dolan opined if Greer needed to keep his leg elevated or lay down during the day due to his left foot injury this alone would cause him to be unemployable in the open labor market. Based on the totality of the evidence, and the fact this Court should note Greer walks with a cane and needs to keep his leg elevated and lay down during the day the Court should find Claimant P.T.D. …. Although pre-existing injuries were a hindrance and obstacle to employment and employability, based on the evidence this sole reason Claimant is unable to compete for work in the open labor market is the primary injury alone. …
>
> Based on Greer's credible testimony, the testimony of the experts, and the medical records the Court should find these injuries combine to have a synergistic effect and that these injuries are a hindrance and obstacle to Greer's employability in the open labor market. Further, the vocational experts and Greer detail the impact of these disabilities impacted on his ability to work and maintain employment. It is clear these injuries result in an inability to perform work as they impact his ability to lift, stoop, bend, and kneel. He had no transferable skills. The substantial and competent evidence proves Greer cannot maintain employment in the open labor market full-time, 40 hours per week. See claimant brief.

It appears that the claimant's position is based on the claimant's subjective complaints and limitations that are not well documented in the record apart from the claimant's testimony. The claimant testified that he needs to lie down and elevate his leg throughout the day, yet no medical doctor placed this restriction on the claimant. Dr. Berkin examined the claimant on three occasions and never restricted the claimant to be able to lie down and elevate his leg throughout the day. None of the claimant's treating doctors so restricted the claimant. Moreover, the claimant demonstrated capabilities beyond his reported limitations and subjective complaints. For example, the claimant testified that he needed to use a cane to move around. Yet, on the surveillance videos, the claimant was never seen using a cane and appeared to ambulate fine without a cane. The claimant was also capable of carrying bags and walking to the car without any assistance. The claimant stood for periods of time without any assistance as

well. Clearly, the claimant is physically capable of doing more than what he testified to at the hearing. Also, the claimant never reported to his treating physician, Dr. Johnson, that he had to lie down and keep his foot elevated for significant periods of time. Consequently, the claimant's subjective complaints should be viewed as suspect, reflecting poorly on the claimant's credibility. Based on the greater weight of the evidence and the objective medical evidence, the claimant is employable in the open labor market.

Looking to the forensic vocational evidence, Mr. Cordray found that even within Dr. Berkin's restrictions, the claimant would be employable and placeable in the open labor market in jobs such as a cashier at a parking garage, surveillance system monitor at large office buildings, hospitals and department stores, collections clerks and telemarketers. See SIF Exhibit I.

Although Mr. Dolan found the claimant permanently and totally disabled, he clearly took into consideration the claimant's subjective complaint of lying down and elevating his leg when forming his opinions and therefore is against the great weight of the credible evidence and the objective medical evidence in this case. For instance, Mr. Dolan opined that the claimant had good enough reading, spelling, and math ability to be able to do unskilled and semi skilled jobs. See Dolan deposition, page 28. Yet, Mr. Dolan eliminates the claimant from unskilled or semi-skilled jobs because he has to lie down too much of the time. See Dolan deposition, pages 48-49. Furthermore, Mr. Dolan testified that the claimant's pain level that requires him to be lying down for significant parts of the day is the restriction that prevents the claimant from performing a sit down or sedentary job. See Dolan deposition, pages 56-57. Mr. Dolan also assumed that the claimant had a restriction to "rest", meaning the claimant should be allowed to lie down. However, Dr. Berkin never placed such a restriction for the claimant to be able to "rest" and only restricts the claimant to take frequent breaks if required to perform exertional activities for an extended period of time. These assumptions are against the great weight of the credible evidence and the objective medical evidence in this case.

Based on the greater weight of the credible evidence and the objective medical evidence in this case, the claimant is employable in the open labor market given his age, education, relevant past vocational history, and his medical restrictions. Notwithstanding, the claimant has proven his entitlement to additional permanent partial disability benefits from the Second Injury Fund. The Second Injury Fund bears liability for 40.6275 weeks of permanent partial disability benefits.

PENALTIES

Section 287.120.4 provides: Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent. Moreland v. Eagle Picher Techs, LLC, 362 S.W.3d 491, 506 (Mo.App. S.D. 2012) (internal quotations omitted). There is no evidence in the record of any state statute or any lawful order of the division or the commission that the employer allegedly violated, nor is there any evidence in the record that the employer violated any such statute or order. Therefore, the claimant has failed to prove he is entitled to an award of penalties under section 287.120.4, RSMo Supp. 2005.

REDUCTION IN BENEFITS

The employer has the burden to prove the following four elements before the claimant's award can be reduced under section 287.120.5: (1) employer adopted a reasonable rule for the safety of employees; (2) claimant's injury was caused by the failure of employee to obey the safety rule; (3) claimant had actual knowledge of the rule; and (5) prior to the injury employer made a reasonable effort to cause employees to obey the rule. Carver v. Delta Innovative Servs., 379 S.W.3d 865, 869 (Mo. App. 2012).

The employer introduced the SYSCO Safe Preferred Work Methods. See Exhibit 11. Mr. Flakes testified on behalf of the employer that the employer adopted the SYSCO Safe Preferred Work Methods for the safety of its employees. SYSCO Safe Preferred Work Method number three under traveling requires employees to "[k]eep all body parts inside the running lines of equipment." See Exhibit 11.

Mr. Flakes testified the claimant violated SYSCO Safe Preferred Work Method number three under traveling when he extended his leg beyond the running lines of the fork lift. Mr. Flakes also testified the claimant caused his injury by extending his leg beyond the running lines of the forklift. Mr. Flakes' reasonable opinion was that the claimant would not have injured his left foot if he had kept his left leg and left foot within the running lines of his forklift. The claimant testified he did not think preferred work method number three applied when the forklift was not in motion, but Mr. Flakes' testimony in this regard is more persuasive. Mr. Flakes' testimony is corroborated by the undisputed fact that the claimant signed a counseling report dated March 7, 2006 that says the February 2006 accident "could have been prevented if the following preferred work methods for safety would have been followed. Under traveling #3 keep all body parts within the running lines of the equipment." See Exhibit 14. The claimant admitted that he did not have to sign the counseling report, and he had no reasonable explanation as to why he signed the counseling report stating that he was in violation of Preferred Work Method number three under traveling at the time of the accident if he did not think he was in violation of that reasonable safety rule.

The claimant admitted that he received a copy of the SYSCO Safe Preferred Work Methods and that he was familiar with Preferred Work Method number three under traveling. Based on the claimant's unequivocal testimony, it is undisputed that the claimant had actual knowledge of SYSCO Safe Preferred Work Method number three under traveling requiring him to keep all body parts inside the running lines of his forklift.

There is also no dispute that the employer made a reasonable effort to cause employees to obey Preferred Work Method number three under traveling. The employer introduced Hazardous Work Assessments. See Exhibit 12. Mr. Flakes testified the employer would use these Hazardous Work Assessments to ensure that all employees, including the claimant, obeyed all of the Preferred Work Methods. The claimant admitted that the employer took reasonable steps to cause him and other employees to obey the Preferred Work Methods.

Based on the foregoing, the employer has met its burden to prove that it is entitled to a reduction in the claimant's benefits pursuant to section 287.120.5. The employer is entitled to a reduction of 25% of all benefits awarded to the claimant from the employer.

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Made by: /s/EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation