

TEMPORARY AWARD ALLOWING COMPENSATION

Injury No.: 08-083316

Employee: James Gulotta

Employer: Alstom Power/APCOM

Insurer: Ace American Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this temporary award and decision modifying and supplementing 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.

Discussion

Employee pursues two alternative theories of injury and filed two claims in order to advance them. Herein, employee alleges injury by accident on July 31, 2008. In employee's claim designated Injury No. 08-082772, which was heard together with this matter, employee alleges injury by occupational disease through October 13, 2008, his last day working for employer.

The administrative law judge found, in his temporary award issued in this matter, that employee "sustained a compensable injury occurring on July 31, 2008, or an occupational disease through his last date of employment of October 12, 2008." *Award*, page 10. This finding suggests the administrative law judge avoided an affirmative finding as to whether employee sustained injury by accident or occupational disease. This uncertainty is compounded by the administrative law judge's failure to state which doctors he found most credible on the issue of medical causation of employee's injuries.

In seeming contradiction, the administrative law judge rendered the following finding in his award issued in Injury No. 08-082772: "the more convincing and credible evidence leads me to conclude the Claimant suffered an accidental injury on or about July 31, 2008." *Award, Injury No. 08-082772*, page 11. We take it from this finding that, despite his comments in the temporary award in this matter suggesting employee met his burden of proving he suffered injury by accident or occupational disease, the administrative law judge ultimately believed employee sustained an injury by accident.

In any event, we are convinced that employee sustained an injury by accident, and affirm the result that employee is entitled to compensation herein. But in order to address the above-identified ambiguities and correct other errors contained in the administrative law judge's temporary award, we issue the following supplemental findings and modifications.

Medical causation – low back and psychiatric injuries

The parties presented conflicting testimony from medical experts on the issue of medical causation of employee's low back and psychiatric injuries. Although the

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administrative law judge quoted certain segments of the medical testimony and seems to have found that Dr. Fevurly was not credible, the administrative law judge ultimately failed to make an affirmative credibility finding, so it is unclear which expert opinions formed the basis of his implied findings on the issue of medical causation.

After careful consideration, we find Dr. Amundson most credible on the issue of causation of employee's low back injury, specifically the disc herniation at L5-S1. We credit Dr. Amundson's opinion that employee's injuries resulted from the specific accident at work, although as the administrative law judge noted, Dr. Amundson identified the wrong date (June 30 rather than July 31) for this event. We find that this trivial discrepancy does not affect the credibility of Dr. Amundson's ultimate opinions. In particular, we find Dr. Amundson more credible than Dr. Fevurly, whose opinion that employee could not have herniated a disc through repetitive heavy lifting combined with bending into awkward positions strikes us as completely unconvincing. We also find Dr. Amundson's theory of injury more credible than that advanced by Dr. Koprivica, who identified a cumulative trauma injury or occupational disease. We do find credible, however, Dr. Koprivica's testimony regarding causation of employee's psychiatric complaints. Finally, we credit Dr. Amundson's testimony that the left-sided herniation at L5-S1 following employee's first surgery was a continuation of the initial work injury.

Having rendered the foregoing credibility determinations, we turn now to the statutory analysis. Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, as follows:

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.

We have credited employee's expert Dr. Amundson on the issue of causation of employee's low back injury. We find the accident on July 31, 2008, was the prevailing factor causing employee the medical condition of a lumbar disc herniation at L5-S1 with severe low back pain and radiculopathy, and resultant temporary total disability. We have credited Dr. Koprivica on the issue of causation of employee's psychiatric injury. We find the accident on July 31, 2008, was the prevailing factor causing employee to sustain psychiatric injury and resultant temporary total disability.

Notice

As a preliminary matter, we note the administrative law judge's suggestion or implied finding that employer waived its affirmative defense of notice by failing to identify it in its Answer to employee's Claim for Compensation. We disagree. We find instructive the case of *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo. App. 1991), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). In *Lawson*, the court held that the employer waived the defense of notice where it filed an answer which was silent with regard to notice, and thereafter failed to identify an issue with respect to notice at a hearing before an administrative law judge. *Id.* at 125. Here, employer filed an Answer that did not identify notice as an affirmative defense, but

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at the hearing, the administrative law judge recited that the parties were disputing the issue of notice. *Transcript*, page 5. The parties then added other issues and employee's counsel informed the administrative law judge that employee was requesting a temporary award. During this exchange, employee made no objection to including notice as an issue, and the record reveals that both parties thereafter presented evidence pertinent to the issue of notice. Employee does not now claim that he was surprised by employer's contesting the issue of notice at the hearing, or that he was prejudiced as a result. Given all of these circumstances, we find *Lawson* distinguishable, and we conclude that the issue of notice is properly before us and that employer did not waive its affirmative defense.

The administrative law judge failed to render any affirmative conclusion as to whether employee provided written notice to employer satisfying each element of the statute, and if not, whether employer was prejudiced by failure to receive the notice. The administrative law judge also appears to have improperly analyzed the notice requirements pertinent to an occupational disease, when he discussed the findings of a diagnostician linking employee's back injury to his work. As a result of these errors and ambiguities, the requisite statutory analysis remains to be accomplished. We turn now to that analysis.

Section 287.420 RSMo sets forth the notice required by injured employees and provides, in pertinent part, as follows:

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.

We find that employee provided notice of his work injury to employer on August 4, 2008, when he informed Victor Wilson, his supervisor, that he'd suffered an accident and hurt his back at work on July 31, 2008. We find that, also on August 4, 2008, employee spoke to employer's safety steward, James King, and filled out a First Aid Report providing his name and the date, location, and nature of his injury. Employee even submitted to a urinalysis on that date.

But because the First Aid Report does not include employee's address, and given that neither party has identified any other written notice from employee to employer within thirty days after the accident, it appears that employee failed to provide a written notice that strictly satisfied each of the elements of the statute. See *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 830 (Mo. App. 2009). Thus, the question is whether employee demonstrated that employer was not prejudiced by failure to receive the notice. "The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred." *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000) (citations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003).

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We have found that on August 4, 2008, employee told his supervisor, Victor Wilson, as well as employer's safety steward, James King, that he hurt his low back on or about July 31, 2008. "Notice or knowledge is imputed to the employer when it is given to a supervisory employee." *Dunn v. Hussman Corp.*, 892 S.W.2d 676, 681 (Mo. App. 1994) (citation omitted). We conclude that employer had actual knowledge of employee's work injury. Because employer had actual knowledge of employee's work injury, the burden shifts to employer to demonstrate that it was prejudiced by employee's failure to provide written notice. *Sell v. Ozarks Med. Ctr.*, 333 S.W.3d 498, 511 (Mo. App. 2011). After a thorough review of the record, we are convinced that employer failed to meet that burden.

The record reveals that employer had an opportunity to provide medical treatment to minimize employee's back injury and to investigate the circumstances of the accident as soon as employee reported the back injury on August 4, 2008, a mere four days after it occurred. It appears that employer first took advantage of that opportunity in October 2008, when it sent employee to Dr. Tentori, who released employee for full-duty work even while noting his herniated disc at L5-S1 and his pain levels of 7-9 out of 10. Thereafter, employer denied further medical care for employee and told him he was on his own. At any time, employer could have changed course and exercised its right to direct medical treatment, and certainly cannot now reasonably claim to have been hampered in its ability to investigate the circumstances of the accident merely because employee's written notice omitted his address.

We conclude that employer was not prejudiced by employee's failure to provide written notice meeting each of the requirements under § 287.420. We conclude that employee's claim is not barred by that section.

Medical treatment

We agree with the administrative law judge that employee's experts are more credible on the question and that employee met his burden of proving that employer is obligated to provide him with medical treatment for his physical and psychiatric work injuries. However, the administrative law judge went a step further and found that employer "abandoned the ability to direct medical care" and ordered Dr. Amundson as employee's authorized treating physician. See *Award*, page 13. Employer argues that the administrative law judge was without authority to order employer to pay for treatment directed by employee's chosen medical provider. Section 287.140 RSMo governs our analysis and provides, in pertinent part, as follows:

1. In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense. ...

...

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

The foregoing language charges employer with the duty to provide employee's medical treatment and gives employer control over the selection of a medical provider. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). The section also states that an employee is allowed to select his own doctors, but if he does so, he assumes liability for those expenses. An exception to this general rule exists where an employer has notice of an employee's need for treatment but fails to provide it; in such circumstances the courts have held that the employee is entitled to direct his own course of treatment while later pursuing an order from an administrative law judge or this Commission holding employer liable for the expenses. See, e.g., *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 847-48 (Mo. App. 2007).

It appears the administrative law judge was under the impression that employer's denial of this claim amounted to a waiver of the statutory right to direct medical treatment. Case law supports the notion that an employer may waive its right to direct treatment by acceding to and paying for an employee's self-directed course of medical treatment, see *Balsamo v. Fisher Body Division-General Motors Corp.*, 481 S.W.2d 536 (Mo. App. 1972), but that is not the situation before us. Instead, given our conclusion that employee suffered compensable physical and psychiatric injuries, employer is now obligated to provide employee's medical care, and is entitled under the statute to direct such care, which includes the right to select authorized providers. Accordingly, we modify the award of the administrative law judge and disclaim the finding that employer "abandoned" its right to direct treatment and we vacate the order that Dr. Amundson must provide or direct employee's treatment. Instead, we conclude employer is obligated under § 287.140 to provide any and all treatments that may reasonably be required to cure and relieve the effects of employee's physical and psychiatric injuries.

Of course, if employer fails to authorize a needed treatment or otherwise fails to comply with its obligations under § 287.140, employee has the right to request a hearing on the matter, or to obtain the needed treatment and thereafter litigate the issue of medical expenses at a final hearing. The parties are reminded that employer has an "absolute and unqualified statutory duty" to provide employee with any and all medical treatment that gives comfort or relief from his injuries. *Martin*, 220 S.W.3d at 847.

Temporary total disability benefits

Employer argues that the administrative law judge's award of temporary total disability benefits is erroneous because employee testified he claimed and received some unemployment compensation, but failed to specifically identify when he did so. We disagree for reasons more fully explained below. But we agree with the employer that the administrative law judge's analysis on this issue is vague and in need of some clarification and modification.

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Once again, it is unclear to us which of the experts the administrative law judge found to be credible, as he lumped his analysis on the issue of temporary total disability together with some comments about medical causation, future medical treatment, and ultimately rendered no pertinent findings or conclusions on the issue except to find that employee is not at maximum medical improvement. See *Award*, pages 11-13. As best we can determine, the administrative law judge awarded temporary total disability benefits during the following three intervals: from October 13, 2008, employee's last day of work for employer, through April 27, 2009, employee's release after his first surgery; from September 6, 2009, through September 9, 2009, the duration of employee's psychiatric hospitalization; and from January 20, 2010, employee's last day of work for J. E Dunn, through October 21, 2011, a date with no readily apparent significance.

In any event, we credit Dr. Koprivica on the issue whether employee was temporarily and totally disabled as a result of his work injuries. We affirm the award of temporary total disability benefits from October 13, 2008, through April 27, 2009, and September 6, 2009, through September 9, 2009, as Dr. Koprivica's testimony supports a finding employee was temporarily and totally disabled as a result of the work injury during each of these time periods. We find, however, that employee is not entitled to temporary total disability benefits from January 20, 2010, through October 21, 2011, but instead from January 20, 2010, through December 1, 2010, the day after employee's second surgery. We so find because the testimony from Dr. Koprivica only supports an award of temporary total disability benefits up through employee's second surgery, and because employee has not directed us to any other evidence that shows he was temporarily and totally disabled after that date. As a result, an ongoing award of temporary total disability benefits after December 1, 2010, is not supported at this time. We modify the award of the administrative law judge accordingly. Of course, employee will have an opportunity to prove his entitlement to temporary total disability benefits after December 1, 2010, at a final hearing in this matter.

We turn now to employer's argument regarding employee's testimony that he received unemployment compensation. Employer is correct that even though we have found employee met his burden of proving that he was temporarily and totally disabled during the time periods identified above, employee is disqualified under § 287.170.3 RSMo from the receipt of temporary total disability benefits (and employer is entitled to a credit) for any periods during which employee claimed and received unemployment benefits. But the burden of proving entitlement to such a credit was employer's under § 287.808 RSMo, which provides, in pertinent part:

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.

Employee met his burden of proving his entitlement to compensation in the form of temporary total disability benefits; employer's argument that it does not have to pay those benefits during certain time periods takes the form of a defense based on a factual proposition. Given the evidence presented for our review, we conclude employer failed to meet its burden of proving any time period during which employee claimed and received unemployment compensation. Of course, employer will have an

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opportunity to prove its entitlement to a specific credit at a final hearing if it develops the evidence in this regard.

Travel expenses

On a finding that neither employee's residence nor his place of employment were located in Kansas City, where employee received his necessary medical treatment, the administrative law judge ordered employer to pay employee's travel expenses. Employer argues that the administrative law judge erred in calculating employee's travel expenses from employee's residence, rather than employer's place of business. Section 287.140.1 RSMo governs our analysis and provides, in pertinent part, as follows:

When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principal place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses.

We are required to strictly construe Chapter 287. See § 287.800 RSMo. We conclude that employer's argument finds no support in the language of the statute. Rather, the statute provides that where an employee is required to submit to necessary medical treatment at a place outside the local or metropolitan area from employee's principal place of employment, the employer is liable to pay employee's necessary and reasonable expenses. The statute tells us when employer's liability for travel expenses is triggered but does not provide any guidance as to how those expenses should be calculated. "A strict construction of a statute presumes nothing that is not expressed." *Robinson v. Hooker*, 323 S.W.3d 418, 423 (Mo. App. 2010). Employer's argument asks us to assume something that is not stated within the foregoing provision and thereby runs directly contrary to the mandate of strict construction.

We agree with the administrative law judge's finding that employee's principal place of employment, Weston, Missouri, is not within the local or metropolitan area of Kansas City, Missouri. The only other question remaining under the statute is whether employee was "required" to seek treatment in Kansas City.

Employee lives in LaCygne, Kansas. Employer fails to direct us to evidence that would demonstrate employee had reasonable treatment options available to him in LaCygne. The record reveals employee sought treatment with Kansas City doctors based on a referral from the practitioners at LaCygne Family Care. The nature of employee's injury would certainly suggest he was justified in seeking the expertise of lumbar spine specialists and psychiatrists in a major metropolitan area such as Kansas City, rather than limit himself to the treatment options available in the town of LaCygne.

In any event, employer merely disagrees with the choice to calculate travel expenses from employee's residence to his medical providers, and has not specifically challenged the administrative law judge's implied findings as to whether employee was required to seek treatment in Kansas City. Finding no merit in employer's argument, we discern no

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reason to disturb the award. Accordingly, we conclude employer is liable for employee's travel expenses as awarded by the administrative law judge.

Costs under § 287.560 RSMo

The administrative law judge made the following conclusion: "I further find, pursuant to 287.560, based on the foregoing, that the defense in this matter has proceeded without reasonable grounds." *Award*, page 14. We vacate this finding, because it exceeded the administrative law judge's jurisdiction where the parties did not identify the question of costs under § 287.560 RSMo as an issue at the hearing. See *Boyer v. Nat'l Express Co.*, 49 S.W.3d 700, 705-06 (Mo. App. 2001). Of course, the parties remain free to present evidence pertinent to the issue of costs under § 287.560 at a final hearing in this matter, provided the parties identify the issue as one for the administrative law judge's determination.

Award

We supplement the findings and conclusions of the administrative law judge on the issues of notice, medical causation, and employee's travel expenses. We modify the award of the administrative law judge on the issues of medical care, temporary total disability, and costs under § 287.560 RSMo.

In all other respects, we affirm the award of the administrative law judge.

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

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

The award and decision of Administrative Law Judge Mark S. Siedlik, issued January 3, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 13th day of November 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

TEMPORARY AWARD

Employee: James Gulotta Injury Nos. 08-083316
Dependents: N/A
Employers: Alstom Power/APCOM
Insurers: Ace American Insurance Company
Additional Party: None
Hearing Date: September 8, 2011 Checked by: MSS/cy

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 2877? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 31, 2008 or October 13, 2008
5. State location where accident occurred or occupational disease was contracted: Weston, Platte 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 was carrying heavy planks up stairs and twisted in an awkward position feeling immediate pain in low back, or employee was handling heavy materials six days a week, ten hours per day for over a year which involved awkward positions, tight spaces, which resulted in a series of many micro-traumas causing injury to his low back.
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: Body as a whole referable to low back.

14. Nature and extent of any permanent disability: To be determined.
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? Unknown.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: \$1,345.00
19. Compensation rate: \$772.53 temporary and total disability and \$404.66 for permanent partial disability.
20. Method wages computation: Paid by the hour. Section 287.250.4.

COMPENSATION PAYABLE

21. Amount of compensation payable: \$92,041.42 (834 days of TTD x \$110.36 per day through October 21, 2011 and continuing). Subject to set off for receipt of unemployment compensation. Mileage \$1,805.00 (3,800 x .475).
22. Second Injury Fund liability: N/A
(Subject to credit for weeks Claimant applied for and received unemployment compensation).
23. Future requirements awarded: Medical treatment.

TOTAL: \$93,846.42

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Gulotta Injury Nos. 08-083316
Dependents: N/A
Employers: Alstom Power/APCOM
Insurers: Ace American Insurance Company
Additional Party: None
Hearing Date: September 8, 2011 Checked by: MSS/cy

On the 8th day of September, 2011, the Employee and Employer appeared for a Hardship Hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The Employee, James Gulotta, appeared in person and with counsel, Daniel L. Doyle. The Employer appeared through counsel, Bart Eisfelder. The Second Injury Fund is not a party to this action. The primary issue the parties requested the Division to determine was whether or not Mr. Gulotta suffered an accident arising out of and in the course of employment and whether or not the accident was the prevailing factor to necessitate medical treatment. I find that Mr. Gulotta sustained a compensable accident on July 31, 2008, or as a result of a series of traumas up and including his last day of work, October 13, 2008, and he is entitled to medical treatment.

STIPULATIONS

1. The parties stipulate that at all times relevant herein, Alstom Power was an Employer operating subject to Missouri Workers' Compensation law with its liability fully insured through Ace American Insurance Company;
2. At all times relevant herein, Claimant James Gulotta, was its Employee working subject to the law in Weston, Platte County, Missouri;
3. The average weekly wage for Claimant was \$1,345.00. The compensation rate for TTD is \$772.53 and for permanency \$404.66.

ISSUES

1. The parties requested the Division to determine whether the Claimant sustained an accident on July 31, 2008, or an occupational disease ending on October 13, 2008, arising out of and in the course of the employment and injury numbers 08-083316 (as pled "last week of July 2008") or 08-082772, each and every day worked through October 13, 2008;

2. Whether the injury was the prevailing factor in causing the resulting medical condition and disability;
3. Whether the Claimant is entitled temporary total disability from October 13, 2008 until May 4, 2009 and January 20, 2010 to the present date and continuing, subject to a credit for weeks in which unemployment compensation was received;
4. Whether the Claimant is entitled to 3,800 in mileage reimbursement.

FINDINGS

Claimant testified on his own behalf and presented the following exhibits, all of which were admitted without objection:

<i>Claimant's Exhibit A-</i>	<i>Formal Claim No. 08-082772</i>
<i>Claimant's Exhibit B-</i>	<i>Formal Claim No. 08-083316</i>
<i>Claimant's Exhibit C-</i>	<i>Carpenter Chiropractic Records</i>
<i>Claimant's Exhibit D-</i>	<i>Fulk Chiropractic Records</i>
<i>Claimant's Exhibit E-</i>	<i>Respondent's Response to Claimant's Request for Statements</i>
<i>Claimant's Exhibit F-</i>	<i>Neurosurgery Assoc., Dr. Striebinger Records</i>
<i>Claimant's Exhibit G-</i>	<i>Dr. Koprivica Reports and 60 Day Letter</i>
<i>Claimant's Exhibit H-</i>	<i>Complete set of Dr. Koprivica Reports</i>
<i>Claimant's Exhibit I-</i>	<i>Complete set of KU Medical Center Records</i>
<i>Claimant's Exhibit J-</i>	<i>Dr. Amundson 60 Day Letter Inclusive of Records Reviewed by Dr. Amundson</i>
<i>Claimant's Exhibit K-</i>	<i>St. Luke's/Cushing Records Regarding In-Patient Hospitalization and Treatment</i>

The Employer/Insurer did not present any live testimony. However, the Employer/Insurer presented the following Exhibits, all of which were admitted without objection.

<i>Employer/Insurer's Exhibit 1-</i>	<i>November 17 Deposition of Victor Wilson</i>
<i>Employer/Insurer's Exhibit 2-</i>	<i>July 15, 2009 Deposition of Victor Wilson</i>
<i>Employer/Insurer's Exhibit 3-</i>	<i>September 2, 2011 Deposition of Chris Fevurly, M.D.</i>
<i>Employer/Insurer's Exhibit 4-</i>	<i>Employment Records of Harsco</i>
<i>Employer/Insurer's Exhibit 5-</i>	<i>Employment information Medical Authorization Initial Treatment Form from KCP&L IATAN 2</i>

Based on the above Exhibits and testimony of the witnesses, the Court makes the following findings:

James Gulotta. The Claimant, James Gulotta (Gulotta or Claimant), testified that he resides in LaCygne, Kansas. He stated that he was employed by the Employer, Alstom Power, beginning in June, 2006. He states that he worked as a laborer and scaffolding builder at the Iatan Power Plant until October 13, 2008 when he was terminated due to physical restrictions.

Mr. Gulotta testified that he was the first laborer hired for the job and that eventually there were 65 laborers working on the power plant at its peak. Mr. Gulotta said that he was a very good worker, worked very hard, a fact that is supported by the testimony of his supervisor, Vic Wilson, who testified by deposition on behalf of the Employer in this matter. Mr. Wilson testified that the Claimant was a hard worker, one of his best hands, and not a slouch. (Employer's Exhibit 2, page 26, line 14-15 and page 27, lines 8-17).

The Claimant testified that his daily duties involved twisting, bending and lifting weights up to 150 pounds, including 24-foot aluminum joints, testimony supported by his supervisor (Employer's Exhibit 2, page 22, lines 22-24). He testified that the job site was understaffed and he would have to at times walk up to eight stories carrying weights of up to 100 – 150 pounds by himself. He said that there was an elevator at the job site, but the bulky nature of the material that he carried usually was not suitable for the elevator. He had to use the stairs or pull the material up on a rope.

The Claimant testified that on July 31, 2008, he was carrying planking up the stairs and had to twist in an awkward manner and he felt a sharp pain in his back. The Claimant testified that he felt aches and pains every day and he carried Ibuprofen on his person, as did every other worker on the job site. The Claimant believed that on July 31, the pain would go away as his other aches and pains had responded in the past, but when he arrived home on the evening of July 31, he collapsed when he got out of the car. He testified that he took off work the next day, August 1, and went to see chiropractor, Dr. Fulk, who told him to take off Saturday, August 2, which he normally would have worked, to see how he was feeling. By Monday morning, August 4, the Claimant's symptoms persisted, so he reported the injury first thing Monday morning to his supervisor and was directed to the safety department for KCP&L where a urine test was administered and an incident report was filled out. (Claimant's Exhibit E, page 3).

In reviewing Employer's Exhibit 2, the July 15, 2009 deposition of Victor Wilson (which was taken a year after the injury), I do take note that Mr. Wilson testified that James Gulotta told him that he had an injury to a disc in his lower back. (Wilson depo. page 6, lines 12-15). Victor Wilson also stated that Mr. Gulotta told him that he wasn't in any particular accident or injury, but it was just wear and tear on his body. (Wilson depo. page 6, lines 23-25, page 7, line 1). However, later in Mr. Wilson's deposition, he made it clear that this conversation occurred while Mr. Gulotta was missing work at the Iatan Power Plant, (Wilson depo. page 17, lines 7-11). In other words, post July 31, 2008.

I also take note that supervisor Wilson also testified that, when he was hired to work at the Iatan Power Plant, he needed two men to start off with, so his first calls were to James Gulotta and another man named Jessie. (Employer's Exhibit 1, page 8, lines 23-25, page 9, line 1). Victor Wilson also took note that Mr. Gulotta did not miss any work or lose any time from work due to back problems or complaints while working for the LaCygne Power Plant, (Employer's Exhibit 2, page 14, lines 15-20), and he had no recollection of him being off work for any extended period of time for any reason. (Employer's Exhibit 2, page 15, lines 5-8). He did not recall Mr. Gulotta seeking any medical treatment for low back pain while working at the LaCygne Power Plant for Patton (Harsco). (Employer's Exhibit 2, page 15, lines 15-20). Apparently, Mr. Gulotta did have a thoracic injury regarding an incident with a piece of plywood. It was caught in the wind while working for Harsco, however in reviewing the

applicable records, no time off from work was required, nor treatment and the diagnosis was a thoracic strain with return to regular duty on the same date. (Employer's Exhibit 4, pages 21-23).

I also take note that supervisor Wilson also admitted to having aches and pains from time to time at work and maybe even discussing those aches and pains with Mr. Gulotta. (Employer's Exhibit 2, page 16, lines 14-23). In fact, supervisor Wilson testified that many of the 60 men working for him complained from time to time about aches and pains. (Employer's Exhibit 2, page 18, lines 2-9). Supervisor Wilson clarifies all remarks regarding descriptions of back pain with Mr. Gulotta as having occurred at the Iatan Power Plant, not the Patton (Harsco) Construction job at LaCygne, Kansas. (Employer's Exhibit 2, page 17, lines 7-11). Supervisor Wilson also vouched for Mr. Gulotta's credibility (Employer's Exhibit 2, page 19, lines 7-9) and agreed that physical, demanding, heavy lifting was involved in the job. (Employer's Exhibit, page 19, lines 19-22). Supervisor Wilson stated that he certainly wouldn't expect Mr. Gulotta to fake an injury and that he was very dependable and showed up for work. (Employer's Exhibit 2, page 27, lines 11-17).

Mr. Gulotta testified that he did not miss work prior to July 31, 2008 and when he brought in the chiropractor's slip on August 4, the supervisor told him to go talk to the safety people, which he did, as evidenced by the incident report dated 8/4/2008, (Claimant's Exhibit F, page 11). I also note that the Claimant's entire work history at Alstom was admitted into evidence and did not indicate any missed days of work, other than the days he visited a chiropractor, which were described at the hearing, (Claimant's Exhibit E, pages 54-78).

It was determined by the Employer that the Claimant saw a chiropractor on July 10, (Dr. Carpenter), and another chiropractor, (Dr. Fulk), on July 30, the day before the alleged date of injury. It appears from a couple of notes in the employment records that the Claimant was denied all benefits under the Act because he had seen chiropractors and because he failed to report the injury and had no signs of injury, (Exhibit E, pages 35 and 38), even though there is a first aid report dated August 4, 2008 wherein the plank carrying episode is described in detail. (Exhibit E, page 3).

The Claimant continued to work for the Employer, undergoing an MRI on August 15, 2008, which indicated that he had a herniated disc at L4-5, and then an 8 x 8 x 10 mm fragment was encroaching on a nerve. (Exhibit F, page 26). The stated purpose for the MRI was *bilateral* leg pain.

The Claimant continued to work until October 12, 2008 when he treated on his own with his personal physician, Dr. Ramirez, who prescribed lifting restrictions. (Exhibit F, page 43). When Mr. Gulotta provided those restrictions to his Employer, he was sent to Dr. Tentori, the plant physician. Dr. Tentori reviewed the MRI records and determined that, although Claimant was released to full duty by to Dr. Tentori, because of the Dr. Ramirez restrictions, Mr. Gulotta could no longer work for Alstom Power. He was terminated as of that date.

According to the testimony, Mr. Gulotta did receive unemployment for a period of time, but nothing in the record has been provided as to the periods he received unemployment.

Pursuant to his own insurance, Mr. Gulotta treated with Dr. Striebinger, and underwent a L5-S1 lumbar disc fragment excision and laminectomy on January 12, 2009. He was followed by Dr. Striebinger until his release April 15, 2009. (Claimant's Exhibit F, page 12 and 15).

On January 21, 2009, Dr. Striebinger saw Mr. Gulotta in follow up, prescribed Darvocet for pain and took notice that Mr. Gulotta was having urinary symptoms that had not improved. (Dr. Striebinger had also noted the change in his urinary control prior to surgery). (Claimant's Exhibit F, page 13).

Claimant returned to see Dr. Striebinger March 12, 2009, but Dr. Striebinger did not generate an office note pursuant to the visit. Instead, a note was written to Dr. Justesen, which referenced the full release as of April 15.

In an effort to pursue medical treatment pursuant to workers' compensation laws of the State of Missouri, Mr. Gulotta went to see Dr. P. Brent Koprivica on March 18, 2009, (Claimant's Exhibit H, pages 24-35). Dr. Koprivica determined that Mr. Gulotta was not at Maximum Medical Improvement, that he had been temporarily and totally disabled since October 13, 2008 and that he had not reached MMI. Dr. Koprivica also took note that the Claimant's urinary issues had not cleared up and that he was "getting some left sided lower back pain." Dr. Koprivica noted that the Claimant told him that he had discussed the left sided complaints with Dr. Striebinger, presumably on the March 12 office visit, but was told that his left sided complaints were muscular in nature and part of the post-operative process in healing from the right sided surgery. It is also noted that the Claimant was experiencing, in addition to numbness in his right leg, pain in his left leg on October 13, 2008, his last day employed with Alstom Power. (Exhibit E, page 4).

On May 4, 2009, Mr. Gulotta began working for J.E. Dunn Construction, according to his testimony, in a light-duty capacity. The Claimant testified that his duties at J.E. Dunn consisted mostly of cleaning up job sites, picking up trash, etc., but the left sided complaints that intensified after the initial Dr. Striebinger surgery, continued while working for J.E. Dunn, necessitating a return visit to Dr. Striebinger. On a June 16, 2009 visit, Dr. Striebinger noticed that he was having spasms on the left side and that his back was definitely tighter on the left, than on the right. He was prescribed muscle relaxer, pain pills and light duty. That was the last time the Claimant saw Dr. Striebinger. According to the Claimant, he did not have the funds to pay the deductibles. He also testified that he did not receive physical therapy after his initial surgery by Dr. Striebinger, once again secondary to lack of funds.

The Claimant continued to work in light duty capacity for J.E. Dunn Construction until he was laid off on January 19, 2010. The Claimant has not worked since that time.

It is also noted that on September 6, 2009, the Claimant became an in-patient at Cushing Memorial Hospital. Under the nurse's observations on the date that he was admitted, it was noted that his stressors are his recent surgery and financial and health issues. The records also make note of financial stressors due to his back surgery and his bills falling behind and depression. (Exhibit K, pages 21, 31, 41 and 50).

On October 9, 2009, the Claimant saw Dr. Mays and was prescribed medication, which he takes to this day. Dr. Mays is his current treating psychiatrist with treatment ongoing.

Due to continued symptoms of back pain emanating from the left side, the Claimant went to see Dr. Burton on July 20, 2010. Dr. Burton examined the Claimant, ordered a new MRI and injections and offered the Claimant a fusion. The Claimant chose to get a second opinion and went to see Dr. Amundson on November 5, 2010. Dr. Amundson performed a left L-5 laminectomy, partial facetectomy, foraminotomy and disc excision on November 30, 2010. Post-surgery, the Claimant has had a couple of epidural injections with treatment continuing, however, solely due to financial constraints, no further treatment is forthcoming.

MEDICAL EVIDENCE

Three physicians have examined and evaluated the Claimant. Dr. P. Brent Koprivica issued three reports dated March 18, 2009, November 11, 2010 and November 16, 2010; Dr. Glen Amundson issuing a report dated June 27, 2011 and; Dr. Chris Fevurly issuing reports dated June 30, 2010, February 16, 2011 and March 5, 2011. All three physicians agree that the treatment that Mr. Gulotta has received beginning in December 2008 with Dr. Striebinger, as well as the treatment and injections offered by KU Medical Center, and the surgery by Dr. Amundson, are all reasonable and related in an attempt to cure and/or relieve the effects of a herniated disc. However, both Drs. Koprivica and Amundson believe that work was the prevailing factor in causing the herniated disc, Dr. Amundson indicating that a traumatic injury occurred on July 31, 2008, and Dr. Koprivica believes that the injury was a result of his work activities up until his last day of work in October 2008. (Dr. Amundson incorrectly notes the date of alleged accident as June 30, 2008. The correct date is July 31, 2008). Dr. Fevurly testified that he does not believe that either the incident of July 31, 2008, nor the overall employment at Alstom Power was the prevailing factor causing both the resulting medical condition and disability.

Dr. Koprivica. Dr. Koprivica initially saw the Claimant on March 18, 2009 at the request of the Claimant's attorney. Dr. Koprivica noted the existence of the chiropractic records of Dr. Carpenter and Dr. Fulk and reviewed the medical records up to that date, including Dr. Striebinger's records. Dr. Koprivica took note of the left sided lower back pain and urinary dribbling. After performing a complete physical exam and reviewing the rest of the medical records, he noted

“in my opinion, Mr. Gulotta had suffered injury each and every day working as a construction laborer with progressions of symptoms until the event on or about July 30, 2008, or July 31, 2008, when his injury was reported. I would be clear that he was suffering injury prior to that date, historically, but it was after July 31, 2008 that his symptoms would not resolve with rest. Further, Mr. Gulotta continued to suffer exposures to the same risk with further injury each and every day worked up until his last exposure date of October 13, 2008. (Claimant's Exhibit H, page 33).

Dr. Koprivica noted the Claimant had been temporarily and totally disabled since October 13, 2008 and had not reached the point of maximum medical improvement. Dr. Koprivica made note that

work reconditioning ordered by Dr. Striebinger had not occurred and that the Claimant could not be deemed to be at maximum medical improvement until at least that medical treatment occurred, (Claimant's Exhibit H, page 34).

Dr. Koprivica also noted in his November 11, 2010 report, (Claimant's Exhibit H, page 22) that the medical treatment at Cushing Memorial Hospital also is directly related to the Claimant's injury at Alstom Power. Having taken note the prior history of anxiety before the work-related injury, Dr. Koprivica stated the following:

“However, it is the overwhelming physically disabling pain and the other psychological stresses associated with his inability to perform his work that I believe were the prevailing factor that has necessitated the care and treatment he has received since his hospitalization at Cushing Memorial Hospital on September 6, 2009.”

I also note that this testimony is un-contradicted. (*Angus v. Second Injury Fund*, 328 S.W.3d 294).

Dr. Amundson. Dr. Amundson took over the treatment of Mr. Gulotta in November 2010. He took note that the Claimant had complained of left leg pain consistent with a left S-1 radiculopathy that was confirmed by MRI.

Dr. Amundson took note of the series of epidurals that occurred at KU Medical Center which resulted in significant relief of residual leg symptoms but did not last. Dr. Amundson made note that the Claimant had re-herniated the same level to the left and required surgery on 11-30-10 to relieve his symptoms. Dr. Amundson opined that these symptoms (left leg pain) represented repeat failure of the L5-S1 disc, the disc that was originally injured on June 30 (July 31), 2008 in the normal course of his employment.

Dr. Fevurly. Dr. Fevurly believed that the Claimant could not have herniated a disc at work regardless of how heavy the lifting was at work and, therefore, the prevailing factor in Claimant's injury was not his employment. However, Dr. Fevurly did agree with Drs. Koprivica and Amundson that the treatment that the Claimant has received thus far was reasonable and necessary to relieve the symptoms of the herniated disc.

Question: Regardless of the cause of this disc, do you believe that all the treatments that you have reviewed have been reasonable and necessary to relieve the symptoms of this disc problem?

Answer: Yeah, I do think it was reasonable. If he failed treatment-conservative treatment-for radiculitis that you could do disc decompressions and that is the two surgeries that he had were reportedly done for that reason. I would have been a little bit reluctant to do the second surgery, honestly, because he did so poorly after the first and that is because of the potential problems from surgery and what I believe to be likely poor outcome from the second surgery. (Fevurly deposition, page 103, lines 13-25).

Question: But all this treatment has been reasonable and necessary to alleviate the symptoms from the protruding disc that is identified in the August 15, 2008 MRI?

Answer: Right. I think what he had done for his disc was reasonable.

Question: And you also mention that you think it was a good thing that he didn't go with what Burton was suggesting, correct?

Answer: That's also based on a lot of scientific research. Fusions not really helpful in the work comp setting for back pain or radiculopathy. In fact, three states have done extensive reviews with their outcomes with fusions and to say that they have been bad is probably being overly optimistic.

Question: The bottom line is you agree with his switching from Burton to Amundson as far as the surgery that was being offered?

Answer: Yeah. I think that the lesson base of surgery was likely-if you are going to do surgery-was likely to benefit as the more aggressive surgery. (Fevurly depo. page 104, line 23 and page 105, line 19).

Also in discussing the left leg symptoms, the following took place:

Question: And you talk about the new onset of left leg symptoms in that same paragraph. (Referring to paragraph 9 of Dr. Amundson's June 30, 2010 report). Once again, those occurred prior to work at J.E. Dunn. Is that correct?

Answer: Right. Within three to six weeks of the first surgery. (Fevurly depo. page 106, line 14-19).

CONCLUSIONS

I find and believe from the evidence that the Claimant has sustained a compensable injury occurring on July 31, 2008, or an occupational disease through his last date of employment of October 12, 2008.

I find that, although the Claimant first began treatment on July 10, 2008 with Chiropractor Carpenter, no specific diagnosis was available at that time and Mr. Gulotta truly believed that symptoms were day-to-day aches and pains related to his work, not a work-related injury. I believe that Mr. Gulotta realized for the first time that he had a work-related accident on August 1, when he visited Chiropractor Fulk. This was his testimony and I believe it to be credible.

I also believe that Mr. Gulotta was exposed to a hazard of employment, which he would not have been equally exposed outside of and unrelated to his employment and non-employment life. I find that his job required him to lift very heavy materials, carry them distances, sometimes eight stories high and

in very awkward positions. I find that his employment at Alstom required lots of bending. I make note that although Mr. Gulotta's supervisor, Vic Wilson, testified that Mr. Gulotta missed a lot of work, That testimony is not supported in the records and it appears that supervisor Wilson was confused as to the period of time before the July 31, 2008 incident and afterwards. I do take note that Mr. Wilson's deposition was taken almost a year after the July 31, 2008 incident occurred. It does appear Mr. Gulotta did miss a lot of work, but it was after the accident date of July 31, 2008. It would be incongruous to think otherwise, given the fact that supervisor Wilson described Mr. Gulotta in such glowing terms as a worker.

NOTICE

I take specific note of Claimant's Exhibit A, the Answer for Compensation, which specifically admits that the Claimant was involved in an accident or work-related injury arising out of and in the course of employment on or about the last week of July 2008.

I also find that, even had the Employer not admitted a notice of a traumatic accident, that notice was afforded on August 4, 2008, which was within 30 days of July 10, 2008, the date Dr. Fevurly believes that the symptoms of a herniated disc first occurred.

MILEAGE

The Claimant has requested 3,800 miles driven from his home to various providers in the Kansas City metropolitan area. 287.140 R.S.Mo 2005 states that:

“When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the employee's principle place of employment, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses.”

Based on the testimony, Mr. Gulotta, at all times pertinent to this case, has lived in LaCygne, Kansas and his employment location, which incidentally was his location of injury, was located in Weston, Missouri, Platte County. Because neither of those locations are in the metropolitan area of Kansas City where all of the medical treatment occurred, I believe that all the mileage requested should be reimbursed. It is as follows: 3,800 miles. The mileage reimbursement rate on the date of injury is 47.5 cents per mile.

TEMPORARY TOTAL DISABILITY AND FUTURE MEDICAL TREATMENT

Both Drs. Koprivica and Amundson, who examined the Claimant, reported that he was not at maximum medical improvement. Dr. Koprivica, in his report of November 13, 2010, found that Mr. Gulotta was not at maximum medical improvement and that the original surgery planned for November 30, 2010 was related and was necessary to cure and/or relieve the effects of the original injury. In an addendum dated November 16, 2010, Dr. Koprivica also believed that the Claimant needed an evaluation by a urologist and that care and treatment should be necessitated. Dr. Koprivica related the need for such treatment back to the original injury, which occurred working for Alstom Power.

Dr. Amundson also believes that Mr. Gulotta is not at MMI and that he may require an epidural injection, back strengthening, rehab program, and a trial of medication. He also recommended a urology follow up.

Dr. Fevurly also opined about specific treatment that the Claimant should undergo for his urinary symptoms. (Page 114, lines 11-18).

Answer: They should do a thing where they actually do cystometrics, which is where they can determine the tone of the bladder and the bladder sphincter. The sphincter that closes and shuts off your urine flow, they can actually measure the tone of that to determine whether there's a neurological deficit there. So I don't think that exists, but don't think he has a neurogenic bladder.

Dr. Fevurly's reports make it clear that, in his opinion, degenerative disc disease is genetic and is not caused by heavy labor. Dr. Fevurly quotes reports by Videman and Battie, specifically a study of twins, that is admitted into evidence as an exhibit to Dr. Fevurly's deposition, (Employer's Exhibit 3). Although Dr. Fevurly admits that Mr. Gulotta had a very unusual heavy lifting job, (Fevurly depo. page 89, lines 25 and 90, lines 1-2), his job consisted of extreme lifting, (page 90, lines 9-11 and page 92, lines 13-16).

However, Dr. Fevurly believed "lifting is not a risk factor for the development of degenerative disc disease or the development of disc protrusions, (Page 84, lines 17-21). Dr. Fevurly believed that degenerative disc disease was based on genetics. However, he found that Mr. Gulotta's family history for genetic problems was unremarkable, which upon cross-examination was explained to mean that his six siblings did not have back problems. (Page 100, lines 23-25).

As to when the fragment actually started pressing on the nerve, this exchange took place during Dr. Fevurly's deposition:

Question: And we do agree that when the disc-when that fragment started pressing on the nerve, that is when he started seeking treatment. Is that correct?

Answer: That's what he said, yes.

Question: And you don't have any reason to dispute that?

Answer: Right, it happened July 10, 2008, according to his records and according to him. (Fevurly depo. page 110, lines 17-22).

But, based on the studies cited by Dr. Fevurly, he did not believe that heavy work could have anything to do with a disc herniating. This was brought out in the following exchange:

Question: And in your opinion, even though he was working 60 hours a week in very heavy labor, that didn't have anything to do with the disc herniating either?

Answer: Right, that is true. (Fevurly depo. page 111, para. 24, line 24, para. 25, line 3).

It appears that Dr. Fevurly has relied heavily on studies that, in his opinion, stand for the proposition that discs cannot be herniated while working heavy labor-intensive jobs. However, pursuant to cross-examination, Dr. Fevurly stated that *Arthritis Today* magazine was a peer reviewed journal. A specific article in *Arthritis Today* magazine, dated May 21, 2010, which was admitted into evidence without objection, was an interview by Dr. Michelle Battie, one of the researchers who Dr. Fevurly has relied heavily upon in his opinions. However, the statements by Dr. Battie in the article appear to completely contradict Dr. Fevurly's conclusions that heavy labor cannot cause discs to herniation. The specific quote from Dr. Battie was "Battie says their findings only hold true with physical loading up to a certain limit. They (Battie and Videman) say it is an entirely different situation when it comes to unusual or extreme heavy lifting."

Also admitted into evidence, was a study by the National Institute for Occupational Safety and Health, (Fevurly depo. Exhibit 2) which stated "there is strong evidence that low-back disorders are associated with work-related lifting and forceful movements."

Although published in July 1997, it is interesting to note that Battie and Videman contributed to the findings. (See Exhibit 3, the list of contributors to the study, (Dr. Fevurly's depo., Employer's Exhibit 3).

Based on the opinions of Drs. Koprivica, Amundson and Fevurly, I find that Claimant has demonstrated a reasonable probability that future medical treatment is necessary by reason of his work-related injury. *ABB Power T&D Co. v. Kempker*, 236 S.W.3d 43, Mo. App. W.D. 2007).

I find that all of the medical treatment to date has been reasonable and necessary and related to the work-related injury of July 31, 2008, or repetitive injuries up until his last date of employment, October 12, 2008. I do not believe Claimant has achieved maximum medical improvement.

I direct the Employer to provide the Claimant with medical treatment, including but not limited to epidural injections, pain management, medications and physical therapy for his back complaints, as ordered by a board certified spine surgeon authorized by the Employer as a treatment provider. I also order the Employer to designate a physician who is certified in pain management to examine the Claimant and to develop a treatment plan if necessary. I also direct the appointment of a board certified psychiatrist to examine the Claimant and develop a treatment plan if necessary. (*Poole v. City of St. Louis*, 328 S.W.3d 277).

I find that the Claimant's in-patient hospitalization at Cushing Hospital was a direct result of the denial of this claim and order that treatment be provided as necessary to cure and/or relieve the effects of the injury and denial of the claim.

I further find that the Employer has abandoned the ability to direct medical care pursuant to 287.140, and I order Dr. Glen Amundson to be the authorized treating physician.

I further find, pursuant to 287.560, based on the foregoing, that the defense in this matter has proceeded without reasonable grounds.

I find Claimant's attorney, Daniel L. Doyle, is entitled to attorney's fees at 25% of sums recovered and to be recovered from this proceeding.

This award being temporary in nature is to be remanded to the open docket for final termination as some time as the parties are ready to present for final award.

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation