

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

Injury No.: 05-067328

Employee: Jackie Hampton
Employer: Champion Precast, Inc.
Insurer: St. Paul Travelers/Travelers Insurance

The above-entitled 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 final award and decision modifying the April 26, 2011, 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

Future medical treatment

Employee argues the administrative law judge erred in failing to award future medical care related to his compensable work injuries. We agree. The administrative law judge determined that employee sustained compensable low back and cervical spine injuries, but found that he is not entitled to over-the-counter pain medications, because employee probably took pain medicine before the work injury for low back pain related to a preexisting condition. Section 287.140.1 RSMo provides, in relevant part, as follows:

In addition to all other compensation, 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.

The foregoing section makes clear that where employee sustains a compensable injury, he is entitled to any and all medical treatment that may reasonably be required to cure and relieve from the effects of the injury. Here, employee suffered a significant cervical spine injury resulting in a 30% permanent partial disability of his body as a whole, and also suffered aggravation of his preexisting low back pain condition. Employee continues to suffer pain and discomfort as a result of these injuries. Dr. Meyers, in the context of a series of questions about his recommendations regarding employee's work injuries, credibly opined that employee should continue to take over-the-counter analgesics on an as-needed basis. Employee credibly testified that he takes Advil when his neck bothers him. Employee met his burden with this evidence.

Employee may well have taken over-the-counter pain medicine before the work injury for his low back. But our courts have consistently held that "an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury." *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d

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49, 52 (Mo. App. 2008). Accordingly, the question is not whether employee may have taken over-the-counter pain medications before this work injury, nor whether taking those medications now might relieve symptoms referable to a non-work-related condition. The only question is whether employee established a need for future medical care that “flows from the accident.” *Id.* at 54. We are convinced employee has shown that here.

We modify the award of the administrative law judge. Pursuant to § 287.140.1 RSMo, employee is entitled to that future medical treatment which may reasonably be required to cure and relieve from the effects of his low back and cervical spine injuries.

Award

We modify the award of the administrative law judge. Employee is entitled to that future medical treatment which may reasonably be required to cure and relieve from the effects of his low back and cervical spine injuries.

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 Edwin J. Kohner, issued April 26, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 24th day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

SEPARATE OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Jackie Hampton

SEPARATE OPINION

(Concurring in Part and Dissenting in Part)

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I agree with the majority that employee met his burden on the issue of future medical care, and therefore I concur in the majority's decision to so modify the award; however, I am convinced that the administrative law judge also erred in failing to award compensation related to employee's hernia injuries sustained in the work injury, and I am convinced that the administrative law judge's award of permanent partial disability benefits referable to the low back is inadequate considering the seriousness of employee's injury and ongoing complaints.

On May 21, 2005, a steel door weighing between 250 and 300 pounds fell on employee while he knelt underneath it to pick up some tools. Employee felt sore all over his body following this accident and pursued authorized medical treatment through employer's workers' compensation doctors. Those doctors discovered a herniated disc in employee's cervical spine as well as a disc protrusion at L5-S1, and took employee off work. Employee testified he also had pain in his belly following the accident, but it appears from the medical records that treatment was focused on employee's orthopedic injuries. Employee was off work from June 2005 until December 23, 2005. When he returned to work and began to engage in more activity, employee noticed the pain in his abdomen getting worse, and finally noticed bulges in his abdomen while undergoing physical therapy for his low back in March 2006. Employee saw Dr. Easterday, who diagnosed a ventral and an umbilical hernia. Dr. Follwell performed surgical repairs of both hernias on May 25, 2006, and discharged employee to return to work on July 1, 2006.

The administrative law judge denied compensation for employee's hernia injuries on a finding that they were not medically causally related to the May 2005 accident. The administrative law judge's finding hinges on the rationale that, if the hernias were caused by that accident, employee would have complained about them sooner. This analysis ignores the facts of the case. First of all, employee credibly testified that his stomach felt sore immediately after the May 2005 accident. Second, employee was off work for about six months following the work injury. During that time period, he wasn't doing any lifting or otherwise exerting himself in such a way as to cause the pain or tightness in his abdomen to flare up. When he did return to activity, employee noticed that something wasn't right in his abdomen, and sought treatment, at which point the doctors discovered the hernias.

Dr. Pruettt opined that the mechanics of the May 2005 accident are consistent with causing employee's hernias, and testified that if that accident is not the cause, he could not identify another one. Dr. Meyers credibly opined that the May 2005 accident was a substantial factor causing employee to sustain the hernias. I would credit Drs. Pruettt and Meyers and find that the May 2005 accident caused employee to sustain the two hernias. I would award benefits consistent with what I believe to be a 5% permanent partial disability of the body as a whole referable to each of the hernias, as well as

Employee: Jackie Hampton

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employee's past medical expenses referable to the hernias, including the surgery performed by Dr. Follwell, temporary total disability benefits for employee's lost time before and after the surgery, and those future medical treatments which may reasonably be required in light of the hernia injuries.

As I noted above, I also disagree with the administrative law judge's decision to award benefits consistent with a finding of only 5% permanent partial disability of the body as a whole referable to the low back. This finding unduly minimizes the terrible injury employee suffered in this case. Employee credibly testified he heard or felt a "crunch" in his spine when the door fell on him, and that his low back was "killing him" thereafter. Post-accident diagnostic studies revealed a focal disc protrusion at L5-S1. The administrative law judge focused on the opinions from employer's workers' compensation doctors, including Dr. Chabot, who said employee just suffered a strain. I find Dr. Chabot wholly lacking in credibility. The administrative law judge also makes much of the fact employee suffered some low back complaints before May 2005. But employee credibly testified that his low back pain had resolved before the work accident. Dr. Meyers rated employee's low back disability attributable to the May 2005 accident at 30% permanent partial disability of the body as a whole. I find employee sustained at least a 20% permanent partial disability of the body as a whole referable to the low back and would award benefits commensurate with this finding.

In sum, I agree with the majority's decision to modify the award to find employee entitled to his future medical expenses. But, insofar as the majority has determined that employee is not entitled to compensation for his hernia injuries, and that he only suffered 5% permanent partial disability referable to his low back injury, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee: Jackie Hampton

Injury No.: 05-067328

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: Champion Precast, Inc.

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: N/A

Insurer: St. Paul Travelers

Hearing Date: February 3, 2011

Checked by: EJK/lsn

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: May 21, 2005
5. State location where accident occurred or occupational disease was contracted: Lincoln 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 lead person for a concrete manufacturer, suffered a cervical spine disc injury while building a metal mold for a concrete product.
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: Cervical spine, lumbar spine
14. Nature and extent of any permanent disability: 30% permanent partial disability to the cervical spine and 5% permanent partial disability to the lumbar spine
15. Compensation paid to-date for temporary disability: \$7,614.52
15. Value necessary medical aid paid to date by employer/insurer: \$43,759.27

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$850.56
- 19. Weekly compensation rate: \$354.05/\$354.05
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

100 weeks of permanent partial disability from Employer	\$35,405.00
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22. Second Injury Fund liability: No

TOTAL:	\$35,405.00
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23. Future requirements awarded: None

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: C. Dennis Barbour, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Hampton
Dependents: N/A
Employer: Champion Precast, Inc.
Additional Party: N/A
Insurer: St. Paul Travelers

Injury No.: 05-067328
Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a lead person for a concrete manufacturer, suffered a cervical spine disc injury while building a steel mold for a concrete product. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Future medical care, (4) Temporary Disability, and (5) Permanent disability. The evidence compels an award for the claimant for permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Jerry R. Meyers, M.D., David Easterday, D.O., Robert Orell, M.D., and J. Stephen Dolan, and voluminous medical records and medical bills. The defense offered depositions of the claimant and Daniel I. Kitchens, M.D., Richard F. Howard, M.D., John S. Pruett, M.D., David Easterday, D.O., Robert Orell, M.D., Jerry R. Meyers, M.D., J. Stephen Dolan, Donna K. Abram, and James M. England, and voluminous medical records from Barnes Hospital.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This 46 year old claimant graduated from Reynolds County R-2 High School in 1983, but achieved no other technical or vocational training or any other formal education. He was employed by this employer from 1996 to January 16, 2007, as a lead man concrete laborer performing a variety of tasks, including working with concrete molds that involved building cages for molds, pouring molds, stripping molds, welding molds, shoveling concrete, using jackhammers and air chisels to remove concrete away from hinges and latches on molds, putting inserts in molds, tighten and loosen bolts and drive a forklift. The claimant testified he worked with objects on a daily basis ranging from 20 to 150 pounds. He worked with his hands all day long. He worked approximately 48 to 55 hours per week, including a half day on Saturdays.

On Saturday, May 21, 2005, the claimant was building a mold for a pill box which was a concrete product to be used at the airport to encase landing lights, which required securing an 8

foot by 3 ½ foot steel door weighing 250 to 300 pounds to one side of the mold containing the pill box. There were 4 sides to the mold each containing a steel door. See Exhibits I, J, K, L and M. The claimant positioned the steel door in the upright position using a scotch pole as a brace, and knelt down in front of the steel door to pick up an electric drill. When he knelt down to pick up the drill, he heard the scotch pole come loose and hit the concrete floor. Simultaneously, the steel door came loose from the mold and fell on the claimant. The claimant tried to block the door from hitting him with his right hand but the door fell over on his right hand, arm, shoulder and head knocking him to the floor and pinning him down. A co-worker helped remove the steel door.

He testified that when the steel door fell and struck the claimant, he experienced a crunching feeling in his neck and felt pain instantly in his neck down his right shoulder, between his shoulders, down his right arm into his right hand, in his low back and down his right leg. He testified that he also had pain in his abdomen. He reported the accident to the assistant plant manager John Ohmes on Monday, May 23, 2005. John Ohmes advised him to keep the employer posted of whether or not he needs medical treatment. His symptoms worsened over the next month and the claimant told another manager, Steve Perotti, who then advised him to seek medical treatment.

He first sought medical treatment for his injuries from Dr. Easterday on June 29, 2005, reporting pain from the shoulder blade down the arm, in the low back, and was limping on his right leg. See Exhibit C-17. He reported that the leg was achy and sometimes falls asleep. Dr. Easterday referred him to an orthopedic surgeon, Dr. Orell. See Exhibit C-20.

On June 30, 2005, Dr. Orell examined the claimant for low back pain with sciatica down the right leg, and neck pain with right arm radiculopathy. See Exhibit F- 20. Dr. Orell opined that the neck and right arm pain corresponded to the C7 dermatome radiating down the right arm with myositis and that the claimant had sciatica down the right S1 dermatome. He recommended a nerve conduction study of the upper extremities and an MRI of the cervical spine. See Exhibit F- 20.

On July 5, 2005, a nerve conduction study revealed electrodiagnostic evidence consistent with bilateral carpal tunnel syndrome, worse on the right side. See Exhibit F- 21. On July 5, 2005, an MRI of the neck revealed a C5-6 disc bulge with mild foraminal narrowing, a C6-7 disc complex with bilateral foraminal narrowing more pronounced on the right than the left, and a C7-T1 vertebral body spurring with mild bilateral foraminal narrowing. See Exhibit F- 21.

On August 19, 2005, the claimant went to Dr. Chabot, an orthopedic surgeon, who examined the claimant and opined that the claimant suffered from a herniated disc in the neck, cervical radiculopathy, cervical disc degeneration, back pain and sciatica and ordered an MRI of the low back to rule out any disc herniation, a cervical epidural steroid injection to moderate his neck complaints, prescribed additional medication, and released him to limited work duties with no lifting more than 10-15 pounds and gave him a return appointment. See Exhibit F-16.

On August 25, 2005, a lumbar spine MRI revealed a central focal discogenic protrusion at L5-S1, facet changes at L4-5, and otherwise satisfactory appearance of the lumbar spine. See Exhibit 6. On August 25, 2005, the claimant reported that the epidural injection in the neck only

provided a few hours of relief. Dr. Chabot's physical examination revealed findings consistent with a C6 and C7 radiculopathy. Dr. Chabot opined that the MRI of the low back did not reveal any clear evidence of a disc herniation. His impression was a low back strain with neuritis, and he recommended further conservative measures to address the low back pain. Due to the lack of improvement with conservative measures concerning the neck, the claimant opted to proceed with a cervical fusion. With regard to the carpal tunnel syndrome, Dr. Chabot opined that the condition was not work-related, but recommended that the claimant undergo a right carpal tunnel release at the time that he undergoes the cervical fusion. See Exhibit F-16. On September 19, 2005, Dr. Chabot performed an anterior cervical fusion from C5-6 and C6-7 with cervical plating and a right carpal tunnel release. See Exhibit F-16. The claimant received physical therapy.

On December 21, 2005, Dr. Chabot ordered cervical spine x-rays which revealed possible incomplete incorporation of the interbody implants. Dr. Chabot instructed him to use a bone stimulator, and returned him to regular duties on December 22, 2005. See Exhibit F-16.

The claimant returned to work on December 23, 2005, and he testified that the cervical surgery helped some of his right arm pain. He testified that from his return to work until he last worked for this employer on January 16, 2007, he had neck pain and headaches and he received help from fellow employees to perform heavy job tasks such as lifting and shoveling.

The claimant testified that his right hand grip was weaker after the carpal tunnel surgery, and he still experienced numbness and tingling. On February 2, 2006, Dr. Howard examined the claimant's left hand for numbness. See Exhibit 2. Dr. Howard reviewed the physical requirements of the claimant's job description, which included climbing, standing or bending for long periods of time, lifting up to 120 pounds and repetitive lifting of 94 pounds, and operation of a tractor, forklift and front loaders. See Exhibit 2. Dr. Howard concluded that the claimant required a left carpal tunnel release but the condition was not work related, because the claimant had a fairly physical job for his 10 years of employment and did not develop symptoms until the last year of employment as opposed to his first year of employment. See Dr. Howard, deposition, page 11. The claimant testified that Dr. Howard did not do anything further for him.

The claimant returned to Dr. Chabot on March 15, 2006, and reported that his neck and upper extremity condition had improved since the surgery. See Exhibit F-16. However, his low back condition had deteriorated. He reported that his back pain worsens after two hours at work and is exacerbated with bending and twisting and radiates into the left lower extremity. See Exhibit F-16. The examination revealed decreased sensation involving the left anterior thigh and left first dorsal web space. The deep tendon reflexes were symmetric. He had bilateral hamstring tightness. Dr. Chabot opined that the claimant had reached MMI regarding the neck condition but recommended physical therapy and Naprosyn for the low back. See Exhibit F-16.

The claimant returned to Dr. Chabot on April 7, 2006, with persistent back pain radiating from the left buttock into the left proximal leg to the knee region aggravated with more vigorous activities. The diagnosis was sacroiliitis, lumbosacral strain, and back pain. The claimant underwent two injections of cortisone and physical therapy. On May 18, 2006, a lumbar spine MRI revealed mild diffuse facet arthropathy without stenosis but no evidence of disc herniation. See Exhibit 6. On May 17, 2006, Dr. Chabot opined that the claimant had reached MMI

regarding the back pain and recommended a second opinion from Dr. Wayne, a physiatrist. See Exhibit F-16.

On May 24, 2006, Dr. Wayne examined the claimant and the claimant reported low back pain, particularly with lifting, bending and with prolonged sitting and standing, but the physical examination of the low back was essentially normal. Dr. Wayne diagnosed a low back sprain/strain injury to the low back, opined that no further diagnostic testing or treatment was indicated, and discharged him at MMI. See Exhibit F-16.

On August 21, 2006, Dr. Chabot also opined that the claimant had suffered a low back sprain with no permanent disability and no need for further treatment or studies. He opined that the claimant could return to regular work duties. See Exhibit F-16. The claimant testified that during this time he felt pressure in his low back and pain down his legs.

The claimant testified that when he returned to "regular duty" on December 23, 2005, he did not engage in as vigorous activity as he did prior to the work injury. For example, if significant lifting was required, he would assign the job to other employees or seek assistance. On May 2, 2006, he went to Dr. Easterday, complaining of upper abdomen pain present since January 2006 and that was aggravated with lifting, pulling, and pushing. He testified that he thought the upper abdomen complaints were associated with the May 2005 incident and became more apparent when he returned to work in December 2005. Dr. Easterday's diagnosis was abdominal hernias and referred the claimant to Dr. Follwell for treatment. See Exhibit F-17.

Dr. Follwell examined the claimant on May 4, 2006, and found a bulge above the umbilicus with increased pain on activity. On May 25, 2006, Dr. Follwell performed laparoscopic repair of ventral and umbilical hernias. He discharged the claimant on June 22, 2006, to full activity effective July 1, 2006. See Exhibit F-15. The claimant claims temporary total disability benefits from May 25, 2006 to June 30, 2006, 5 1/7 weeks.

During this time, the claimant testified that he began to develop "dizzy spells". This was ultimately considered to be related to his tooth and the infection associated with it. Nonetheless, he went to Dr. Easterday complaining of "lightheadedness and indigestion." On July 5, 2006, an MRA of the brain revealed no definite pathology. (An MRA, magnetic resonance angiography, is an MRI that has contrast with it to see the blood vessels. See Dr. Easterday deposition, page 13.) On July 18, 2006, the claimant's wife spoke with Dr. Easterday's office and advised him that on June 29, 2006, the claimant had three teeth extracted. His symptoms of vertigo and lightheadedness soon subsided. He was instructed to return to the office if those symptoms persisted. See Exhibit F-17.

On August 3, 2006, the claimant returned to Dr. Orell complaining of left hand numbness, tingling, and pain waking him at night. Dr. Orell diagnosed left carpal tunnel and recommended surgery. See Exhibit F-20.

After the May 21, 2005, work accident, the claimant had low back pain with "sciatica" symptoms into the right lower extremity, and then he complained to Dr. Chabot on March 15, 2006, of radiating symptoms into the left lower extremity. See Exhibit 8. He testified that before September 11, 2006, his low back and leg symptoms were constant and painful. Oftentimes, he

would “misstep” with the foot. On September 11, 2006, he reported that he had been operating the forklift and began to have low back pain so he decided to stop the forklift, exit the operator’s chair, and loosen up. As he stepped off the forklift he misstepped and jarred his back. He testified that his left foot missed the forklift footstep and that his left foot struck the concrete floor. He testified he did not strike his low back on anything, and he did not fall. Immediately after the accident his left leg felt like it was on fire for 30 minutes. He reported the accident to his employer. The employer treated the incident as a “continuation” of the May 21, 2005, injury, and refused to extend medical treatment.

On September 14, 2006, the claimant went to Dr. Orell complaining of low back pain radiating down the left leg with left leg sciatica along the S1 dermatome and left sacroiliac joint somatic dysfunction. He received a lumbar support and medication for pain control. See Exhibit F- 20.

He returned to Dr. Orell on October 26, 2006, with low back sciatica. On October 27, 2006, an MRI of the low back revealed a posterior disc bulge with a small central disc protrusion at L5-S1. See Exhibit F- 20. On December 14, 2006, Dr. Orell referred him to Dr. Allen at Pain Management who suggested that the claimant not undergo further steroid injections, but proceed with surgical treatments. See Exhibit F- 18.

On January 17, 2007, Dr. Orell performed a prone laminotomy L5-S1 interspace on the left and excision of nucleus pulposus L5-S1 interspace. The pre-operative and post-operative diagnosis was herniated nucleus pulposus L5-S1 interspace on the left. The claimant returned to Dr. Orell on January 31, 2007, and reported that his low back pain and left sciatica had improved, although he still had occasional numbness in his left foot. See Exhibit F- 20.

On February 20, 2007, the claimant underwent left carpal tunnel surgery and returned to Dr. Orell earlier than scheduled. On March 12, 2007, the claimant fell off his porch, but x-ray and clinical exams revealed no significant pathologies. On March 30, 2007, Dr. Orell sent this employer a letter, “I do not feel that he can return to his previous job due to physical disability and I feel that he should apply for Social Security disability benefits.” Dr. Orell discharged the claimant on April 5, 2007. See Exhibit F-20.

On September 8, 2009, Dr. Orell referred the claimant to Dr. Krishnan for pain management. See Exhibit F-19. The claimant received pain management, including epidural injections, until January 20, 2010, when Dr. Krishnan surgically placed a permanent dorsal column stimulator implant in his lumbar spine. Dr. Krishnan’s pre- and post-operative diagnoses were “Failed back surgery and post-laminectomy syndrome”. See Exhibit F-19. The claimant testified that from his lumbar surgery on January 17, 2007, until the stimulator was implanted in his low back, his low back pain got continuously worse. After the stimulator was implanted, he controlled his symptoms daily utilizing the stimulator.

The claimant testified that his neck pain is constant, with pain between his shoulder blades and frequent headaches. He has pressure in his low back and his right foot falls asleep. His right and left hands are numb, ache and his grip is weak. He feels a pulling pain in his abdomen when he squats down. The claimant takes Reglan for headaches 2 to 3 times per week and uses his dorsal column stimulator implant 2 to 4 times per day. Dr. Easterday prescribes his

medications. When he has pain throughout the day in his back or has headaches from his neck pain, he will take Reglan and use the stimulator, and lay down for 2 to 3 hours. The claimant can sit and ride in a vehicle 15 to 30 minutes. He can lift 30 to 35 pounds. Excessive lifting causes pain between his shoulder blades, down his right arm, and low back pain. He has trouble walking and with balance, particularly when he steps down sometimes his right leg gives out. He has trouble looking down because of his neck and has to take Reglan. The claimant has difficulty sleeping with pain in his neck and down his right arm. He has to re-position himself constantly and he sleeps one to one and half hours at a time.

The claimant testified that he cannot work because of the pain in his neck, right arm, and low back. He cannot sit and stand all day long, and does not believe he would be a dependable employee. Before May 21, 2005 the claimant had not received any medical treatment to his neck, low back, hands, arms, or abdomen. On March 1, 2005, the claimant reported to Lincoln County Medical Center that he had pain in his elbows, shoulders, knees, and back. See Exhibit F-9. He testified that he had fallen a year prior to that visit and wanted to get checked out. He testified those symptoms resolved before the May 21, 2005, work-related accident. He testified that he had multiple x-rays performed on March 5, 2005 at Lincoln County Medical Center, and had them done because his mother had passed away from bone cancer 8 to 10 months before that date, and he wanted to be checked out because he had been working a lot of overtime and had been experiencing pain in his shoulders, knees and muscle spasms. The x-rays were negative. See Exhibit F-9. The claimant had no medically imposed restrictions before May 21, 2005.

The claimant identified the medical bills he received for treatment of his low back, hands, and hernia injuries. See Exhibit G.

John Ohmes

John Ohmes, the employer's plant coordinator, testified that this employer has 42 full time employees. The claimant was a team leader responsible for daily production and had 1 to 2 employees underneath him. He did pouring into a mixer and molds. The claimant spent 2 hours in the morning stripping molds and drove a forklift 6 hours a day. On some days, the claimant would use handheld power tools and some days not at all. The mold that the claimant was working on was an older mold. Mr. Ohmes confirmed the claimant worked with heavy weights, used 8 pound jackhammers, and used stick vibrators to mix concrete. The forklifts do not have shock absorbers, and the operator feels vibrations on uneven surfaces.

Mr. Ohmes testified that the claimant did return to work for the employer on December 23, 2005, to the same Lead-man / Team Lead position as he had prior to the May 21, 2005, work injury and worked full duty from December 23, 2005, – September 11, 2006. Mr. Ohmes testified that the claimant got his work done and was never written up for not getting his work done during this time frame and never required any special accommodations such as lying down due to headaches following the May 21, 2005, work injury. Mr. Ohmes testified that the claimant had a history of headaches prior to the May 21, 2005, work injury and that the claimant called in sick due to headaches 3 – 4 times a year before the May 21, 2005, work injury. Mr. Ohmes testified that the claimant resigned from Champion Precast in April 2007.

Dr. Meyers

Dr. Meyers, a general surgeon, evaluated the claimant on August 28, 2007, after taking a medical history, reviewing medical records, and examining the claimant. See Dr. Meyers' deposition, page 8. Dr. Meyers testified that the claimant walked with a slight limp and was bent forward at the waist complaining of low back pain and posterior neck pain. His vital signs were normal. He showed a reduction in rotation, flexion, and extension. There was mild tenderness in the back or posterior part of the neck. The abdomen showed healed incisions without evidence of any recurrent hernia formation. The back showed a healed laminectomy incision with no swelling, tenderness to palpation. See Dr. Meyers' deposition, pages 21-22. He had a significant decrease in rotation, lateral bending, flexion, and extension of 30 degrees. See Dr. Meyers' deposition, page 21, Deposition Exhibit B, page 4. The right shoulder showed a small loss of abduction; but otherwise the range of motion seemed good and no pain. The left lower extremity demonstrated normal reflexes with intact sensation. There was some lower back pain with straight leg extension and flexion. There was no muscle wasting or decrease in strength. The hand showed healed incision with minimal tears and reduced grip strength bilaterally, to full range of motion in both wrists. There were no abnormalities with fine motor function bilaterally. See Dr. Meyers' deposition, pages 21-22.

Dr. Meyers opined that the claimant was permanently and totally disabled. See Dr. Meyers' deposition, page 22. He opined that the May 21, 2005, accident was the prevailing factor causing the injuries to the claimant's neck, abdominal hernia, and lumbar spine. See Dr. Meyers' deposition, page 22. He assigned restrictions to the neck including avoiding heavy lifting, repetitive lifting, bending, rotation, and remaining in a fixed position, such as with prolonged standing and sitting. He should avoid any repetitive squats. He needs to take frequent breaks and be allowed to lie down due to his headaches. See Dr. Meyers' deposition, pages 22, 23. He recommended continued use of over-the-counter analgesics on an as needed basis. See Dr. Meyers' deposition, page 23. He opined that the claimant sustained a 50% permanent partial disability of the body as a whole due to the cervical fusion with plating and 5% permanent partial disability of the body as a whole for each hernia for a total of 10% permanent partial disability of the body as a whole. See Dr. Meyers' deposition, page 23.

Dr. Meyers opined that the September 11, 2006, accident was the prevailing factor causing the need for surgery of the claimant's low back, because the claimant experienced low back and left leg symptoms as a result of the 2005 accident. See Dr. Meyers' deposition, page 24. "This was a significant and I think a prevailing factor in causing the misstep and slip when he was on the forklift in September." See Dr. Meyers' deposition, page 24. Dr. Meyers testified the accident of September 11, 2006 was the prevailing factor in having him undergo lumbar surgery for the ruptured disc. See Dr. Meyers' deposition, page 24. Dr. Meyers agreed that assuming the September 11, 2006 accident was an accident as defined by Missouri law that it came into play in causing the need for some medical treatment and in causing some disability as a result of that medical treatment. See Dr. Meyers' deposition, pages 24, 25. Dr. Meyers opined that the claimant sustained a 30% permanent partial disability of the body as a whole for the low back condition. See Dr. Meyers' deposition, page 25. He opined that the claimant suffered a 25% permanent partial disability to his low back from the May 21, 2005 accident and 5%

permanent partial disability to his low back from the September 11, 2006 accident. See Dr. Meyers' deposition, page 25. Dr. Meyers assigned restrictions to the low back including avoiding any repetitive or heavy lifting, squatting, bending, twisting, climbing stairs, prolonged standing or sitting. He needs to freely move and alternate positions between sitting, standing, and walking. See Dr. Meyers' deposition, page 25.

Concerning the claimant's bilateral carpal tunnel syndrome, Dr. Meyers opined that the claimant's work with jackhammers and the vibrating tools were a prevailing factor causing the bilateral carpal tunnel syndrome and the subsequent need for surgery. See Dr. Meyers' deposition, page 26. He opined that the claimant suffered a 30% permanent partial disability to the right hand and a 25% permanent partial disability to the left hand. See Dr. Meyers' deposition, page 26. He assigned restrictions to the hands consisting of avoiding any activity that requires repetitive pulling, pushing, twisting, fine motor skills, avoid exposure to vibrating machinery, as well as heavy lifting. See Dr. Meyers' deposition, page 26.

Dr. Meyers opined that the claimant's disabilities from the 2005 and 2006 occurrences are an obstacle to his employment, and that he is permanently and totally disabled. See Dr. Meyers' deposition, page 27. The claimant's disabilities from these occurrences synergistically combine with one another, and that the claimant's overall disability from those disabilities is greater than the simple sum of the individual disabilities. See Dr. Meyers' deposition, page 27. He opined that the claimant could not compete in the open labor market but would defer to a vocational expert. See Dr. Meyers' deposition, page 27. Dr. Meyers testified within a reasonable degree of medical certainty that the 2006 event was the plain aggravation or an exacerbation of the condition he already had from the 2005 back injury. See Dr. Meyers' deposition, pages 35-36.

Dr. Orell

Dr. Orell, a board certified orthopedic surgeon, examined the claimant for a right shoulder injury in 2002. He examined the claimant on June 30, 2005, and ordered a cervical spine MRI and a nerve conduction study. X-rays of the cervical spine revealed arthritic changes. The patient was complaining of radicular pain, pain down his right arm. He performed the claimant's lumbar laminotomy on January 17, 2007, and a left carpal tunnel release on February 20, 2007. See Exhibit 10.

Dr. Orell testified, "I feel that when someone's trapped under a 300 pound door and has to, you know, twist to try to extricate himself from this weight, that that can cause bulging or herniation of disc material. I believe that that initial injury was a substantial factor in causing his back pain, and that it weakened his low back to the point where the injury on 9-11-06, where he slipped on an already numb lower extremity was a prevailing factor in his need for surgical intervention. He did not respond to conservative therapy after that." Dr. Orell opined that the 2005 accident was a substantial factor causing low back pain and left lower extremity numbness and decreased sensation and was directly attributable to the May 21, 2005 accident. See Dr. Orell deposition, pages 12-17.

Dr. Orell testified that the herniated low back disc into the interspace is consistent with holding up a 250 to 300 pound door and twisting. See Dr. Orell deposition, page 24. Dr. Orell

testified, "I feel that the initial injury back in 2005 did weaken his low back. I mean, there was evidence on at least one prior MRI that he did have a herniated disc, and I feel that he had been suffering from decreased sensation and weakness to his left leg since that time. And this second slip just exacerbated his preexisting condition in his low back to the point where it would not respond to conservative therapy and needed surgical intervention." See Dr. Orell deposition, page 24. He opined that the September 11, 2006, incident was a prevailing factor causing the bulging disc or a change in the size of the bulging disc and the herniated disc, "Yes, I feel absent any other trauma, that was the prevailing factor in increasing the pathology in his low back to the point where he needed surgical intervention." See Dr. Orell deposition, pages 24, 25. He testified that the September 2006 accident was the primary and prevailing factor causing the claimant's bulging disc, herniated disc, need for surgery, and his disability. See Dr. Orell deposition, pages 25, 26.

On March 30, 2007, Dr. Orell wrote a letter to this employer at the claimant's request opining that the claimant could not return to his previous job duties, and that he should apply for Social Security disability benefits. Dr. Orell testified, "Evidently, I had communication with Mr. Hampton where he requested that I write this letter stating that he did not feel that he could return to his job duties." Dr. Orell said in the letter, "he had the neck surgery, he had back surgery, carpal tunnel surgery, and that I didn't feel that he was progressing satisfactorily where he could return to work after the normal three months time frame." He did not have a specific time frame to return him to work, because the claimant had decided at that point that he was going to apply for disability benefits. He testified that he did not put any restrictions on the claimant, because he didn't send him back to work. Dr. Orell stated in his letter of August 20, 2009, if there were vocational rehabilitation available, then that would be something to pursue. See Dr. Orell deposition, pages 43-46.

On April 30, 2007, Dr. Orell opined that the claimant cannot kneel, squat, crawl, or bend repetitively due to his low back pain and weakness. See Dr. Orell deposition, pages 50, 51. He opined that the claimant cannot return to his prior employment. See Dr. Orell deposition, pages 51, 52.

Dr. Orell used the term, the straw that broke the camel's back and testified, "Well, I feel that these injuries were additive. I felt that his back was weakened by the initial injury and that something that was, that may have not been substantial enough to cause the total injury could certainly exacerbate this weakness in his back and hence the term, the straw that broke the camel's back, it wasn't something, it wasn't a large trauma, but it was just the last straw that caused his back problems." He testified that it was a significant force to consider it a primary factor in causing the herniation. See Dr. Orell deposition, pages 52, 53. He opined that the claimant had mild preexisting joint disease, but the history of the two incidents led to a pressure on the nerve root requiring surgery. See Dr. Orell deposition, page 40.

Dr. Easterday

Dr. Easterday testified that the claimant visited the Troy Family Practice on March 1, 2005, for shoulder, elbow, and back pain. See Dr. Easterday deposition, page 8. He also reported that his hands would go numb intermittently. See Dr. Easterday deposition, pages 8, 9. On June 29, 2005, the claimant reported arm pain from the shoulder blade down the back of the

arm and a limp on the right that was affecting the right leg that was achy and fell asleep. Dr. Easterday referred him to an orthopedic surgeon, Dr. Orell. See Dr. Easterday deposition, pages 9, 10. In May 2006, the claimant returned to Dr. Easterday for abdominal pain with a bulging in his upper abdomen. See Dr. Easterday deposition, page 10. Dr. Easterday diagnosed a midline abdominal hernia. See Dr. Easterday deposition, page 11. While the claimant attributed the condition to the May 2005 accident, Dr. Easterday could not determine a causative factor for the hernia. See Dr. Easterday deposition, page 11. In March 2007, the claimant reported neck pain, anxiety, and reported that he had had a short period of time where he was not able to speak. See Dr. Easterday deposition, page 11. All tests were all negative. See Dr. Easterday deposition, page 12. In June 2007, the claimant reported headaches, neck pain, and back pain. See Dr. Easterday deposition, page 12. Activities that made it worse were any position, standing, sitting, lying, or an increase in his level of stress. See Dr. Easterday deposition, page 12. On October 4, 2007, the claimant returned with neck, back, right arm, and bilateral leg pain. See Dr. Easterday deposition, page 12. On January 4, 2008, the claimant returned with bilateral leg pain, low back pain, and neck pain. See Dr. Easterday deposition, page 12. He returned on October 7, 2008 as he was having ongoing headaches, dizziness, and pain in his legs as well. See Dr. Easterday deposition, page 13. Dr. Easterday scheduled MRA's of the neck and head which were essentially negative. See Dr. Easterday deposition, page 12. Dr. Easterday continues to treat the claimant for headaches, stiffness, pain with activity, that "can be a complication even after" cervical fusion surgery of that magnitude. See Dr. Easterday deposition, page 13.

Dr. Howard

On February 2, 2006, Dr. Howard, a board certified orthopedic surgeon specializing in hand, elbow and upper extremities, examined the claimant and reviewed his medical records, a job description and a work history. See Dr. Howard deposition, pages 7, 8. X-rays of the left hand and left elbow at the exam were normal. See Dr. Howard deposition, page 10. Dr. Howard diagnosed left carpal tunnel syndrome and opined that his carpal tunnel syndrome was not work related. See Dr. Howard deposition, page 10. He opined that the etiology was idiopathic. See Dr. Howard deposition, page 11. He opined that a carpal tunnel release was indicated. See Dr. Howard deposition, page 12. Dr. Howard opined that the claimant's job was highly varied. See Dr. Howard deposition, pages 10, 11. Dr. Howard testified that the claimant provided him with a history of using jackhammers at work but not an excessive amount of time. See Dr. Howard deposition, page 9. Dr. Howard testified that the claimant has worked for the employer for ten years and if work was the cause of his problem, the problems would have developed in the first year or so of employment. See Dr. Howard deposition, page 11. Dr. Howard testified that as a general rule a study looking at cause-effect relationship, two years is generally considered a fair standard of measure. See Dr. Howard deposition, page 15. Dr. Howard opined that the fact that the claimant worked at the job for almost a decade before becoming symptomatic is clear evidence that there is not a relationship between his work and carpal tunnel. See Dr. Howard deposition, page 11. In regard to the right hand, Dr Howard found a normal exam and opined that the claimant was at maximum medical improvement. See Dr. Howard deposition, page 24.

Dr. Pruett

Dr. Pruett, a general surgeon, examined the claimant on December 2, 2009 and opined, "Well, based on what [the claimant] told me, I felt that you could trace that back to his injury, his

original injury in May of 2005.” Based upon the medical records, he opined, “It's concerning to me that it's not better documented by the physicians that he saw. The story that he gives me is consistent, but I can't document that based on the doctors' factual reports. It makes me less convinced. ... It certainly muddies the water considerably.” See Dr. Pruett deposition, pages 17, 18. He also testified that all of his opinions were based on a reasonable degree of medical certainty. See Dr. Pruett deposition, page 18.

Dr. Kitchens

On November 19, 2008, Dr. Daniel Kitchens, a board certified neurological surgeon, took a medical history, reviewed medical records, and performed a clinical examination. Dr. Kitchens opined, “That he had an injury to his cervical spine, a disc herniation at C5-6 and C6-7 that was a result of the work incident of May 21st of 2005. That he had surgery performed by Dr. Chabot which was necessary for this work injury. That he had degenerative disc disease of his lumbar spine, lower back pain. And that the work incident of May 21st was not the prevailing factor in the cause of his lumbar disc degeneration or chronic back pain.” See Dr. Kitchens’ deposition, pages 5-9. He opined that the claimant’s degenerative disc disease was the prevailing factor causing his low back pain, and the claimant’s work injuries on May 21, 2005, and September 11, 2006, were not the prevailing factors causing his lumbar spine condition and low back pain. See Dr. Kitchens’ deposition, page 10.

Based on his history he reports that he had back pain prior to the work incident of May 21st, 2005. His workup after the work incident, including the MRI of his lumbar spine, revealed degenerative changes at the lower lumbar spine and disc bulging of his lumbar spine. He then had another MRI on October 27th of 2006 and the MRI report revealed L5-S1 mild posterior disc bulging, with a small central disc protrusion. No other focal abnormalities were seen. Negative for neural foraminal or spinal stenosis of the lumbar spine. These findings are consistent, suggestive of degenerative disc disease of his lumbar spine. There is no objective information or data on the MRI of an acute injury to his lumbar spine, such as an acute disc herniation or nerve root impingement. See Dr. Kitchen’s deposition, pages 10, 11.

He opined that the claimant requires no additional medical treatment, that he has attained maximum medical improvement, that he is able to work and return to work full duty, and that he is not permanently and totally disabled. See Dr. Kitchens’ deposition, page 11. He opined that the claimant sustained a 10 percent permanent partial disability related to his cervical disc herniation, which is as a result of the May 21, 2005 work injury, but he did not believe that the claimant sustained any permanent partial disability to his lumbar spine from the May 2005 or September 2006 work injuries. See Dr. Kitchens’ deposition, pages 11, 12. He testified, “I did not see evidence of an acute injury to his lumbar spine. Specifically, he had two MRIs after the May 21st, 2005 work injury and neither MRI showed evidence of an acute disc herniation or nerve root compression.” See Dr. Kitchens’ deposition, page 12.

He testified that degenerative disc disease may be present but not be symptomatic and that trauma can aggravate underlying degenerative disc disease. See Dr. Kitchens’ deposition, page 23. Degenerative disc disease “would be symptomatic at some point”, but it’s speculative

as to when. See Dr. Kitchens' deposition, page 23. Dr. Kitchens testified he was familiar with carpal tunnel syndrome. He confirmed the use of power tools is commonly associated with carpal tunnel syndrome. See Dr. Kitchens' deposition, page 36.

J. Stephen Dolan

J. Stephen Dolan, a vocational expert, evaluated the claimant on February 6, 2009, and opined that the claimant does not have the academic skills for non physical type jobs. Mr. Dolan opined that the neck injury precludes him from heavy or repetitive lifting. Mr. Dolan opined that the restriction eliminates every job Mr. Hampton has ever done. Mr. Dolan listed the claimant's neck restrictions. Mr. Dolan opined that Dr. Meyers' restrictions for the neck injury would, by themselves, preclude employment. Mr. Dolan opined that Dr. Meyers' restrictions were obviously not entirely accurate since the claimant worked in his regular job for a considerable period of time after his neck surgery and before the September 11, 2006 back injury.

Mr. Dolan reported the ramifications of the low back injury restrictions and the bilateral wrist restrictions. Mr. Dolan opined that the accumulation of his injuries and limitations prevents the claimant from engaging in gainful employment. Mr. Dolan testified that the accumulation of injuries and limitations that prevent him from gainful employment is a combination of his neck condition, low back condition, bilateral wrist condition and his other limitations together that make him unemployable in the open labor market. See Dolan deposition, page 29.

Mr. Dolan testified at his deposition that the claimant told him when he returned to work following his cervical surgery, he did have some difficulties. See Dolan deposition, page 27. Mr. Dolan stated that Mr. Hampton told him that other employees were helping him with the heavy lifting or anything else he was having trouble with. See Dolan deposition, page 27. He testified that although the claimant had some difficulties, he was still able to work for the employer. See Dolan deposition, pages 27, 28. Mr. Dolan testified that the claimant is permanently and totally disabled right now but it is always possible that people will get better. See Dolan deposition, page 23.

Donna K. Abram

Donna K. Abram, a vocational counselor, met with the claimant, performed a vocational assessment and opined that the claimant is still employable and could be placed in position in the open labor market. With a strong diligent effort he should be able to locate a job.

Ms. Abram opined that the claimant was not permanently and totally disabled. See Dolan deposition, page 20. Ms. Abram testified that if the claimant were deemed to be permanently and totally disabled, then it would be due to the combination of his neck, low back, hands, legs and all of the conditions that he listed to her. See Abram deposition, pages 19, 20.

Ms. Abram opined that if the claimant needs to lie down during a normal workday two to three times a week for more than an hour at a time each time, that it would certainly be a barrier to finding full-time employment. If they're looking for a full time capacity, she testified, "I think that would be very difficult to find anybody who could do that, or would be willing to

accommodate them.” Ms. Abram opined that it’s very doubtful there are any jobs that the claimant would be qualified for based on his age, education, transferable skills where an employer would allow him to lie down during the workday multiple times. See Abram deposition, pages 45, 48.

Ms. Abram testified that one of Dr. Meyers’ restrictions concerning the neck was for the claimant to lie down if he gets a bad headache. Taking into consideration the claimant's age, education, transferable skills, and work experience, along with his May 21, 2005, injury and its sequelae, which includes the need to take frequent breaks and lie down because of his headaches, that in and of itself would render him unemployable in the open labor market, and she testified, “If you're looking at those factors I think that there are some serious doubts as to whether or not he would be able to find an employer in this labor market who would be willing to hire him. Whether or not that would have been the same when the doctor made that statement, and I am trying to get the date, in 2008, I don't think it would have been as significant a barrier as it is today.” See Abram deposition, page 49. In response to whether or not an employer would be willing to hire the claimant with his age, education, transferable skills, and work experience, and the need to lie down for more than an hour at a time two to three times a week, and she testified, “I think that there are -- that that would be doubtful, but I can't state a hundred percent yes or no.” See Abram deposition, page 49.

James M. England

On September 8, 2010, James M. England performed a vocational rehabilitation evaluation based on his review of all the medical records, vocational reports of Ms. Abram and Mr. Dolan along with the claimant’s deposition. Mr. England concluded that based upon the restrictions of the treating doctors there would be some alternative work activity which the claimant could perform. Mr. England opined that based on Dr. Kitchens’ opinion he could return to what he had done in the past. Based on Dr. Orell’s restrictions there would still be some potential entry-level service employment positions such as retail sales, cashiering, courier work, security positions, etc. that he could perform. Mr. England opined that only if one assumes Dr. Meyers’ finding and restrictions would one conclude the claimant is unemployable. Mr. England referenced the specific restriction from Dr. Meyers that if the claimant needed to take frequent breaks and lie down because of headaches, this would preclude his ability to maintain any type of employment in the open labor market.

MEDICAL CAUSATION

“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job.” Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). “Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission.” Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, “[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” § 287.020.2. On the other hand, “[a]n injury is not compensable merely because work was a triggering or precipitating factor.” Id. “Awards for injuries ‘triggered’ or ‘precipitated’ by work are nonetheless proper *if* the employee shows the work is a ‘substantial factor’ in the cause of the

injury.” “Thus, in determining whether a given injury is compensable, a ‘work related accident can be both a triggering event and a substantial factor.’ Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ’s personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge’s opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant testified that he injured his neck at work while preparing a steel mold for a concrete product. The medical evidence shows that he suffered a cervical disc injury that was surgically repaired. The forensic experts clearly related this condition and the resulting disability to the work related accident. The claimant has established that the injury is compensable and this issue must be ruled in favor of the claimant.

PERMANENT DISABILITY

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).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to Section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in Section 287.190.1. "Permanent partial disability" is defined in Section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he

Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Cervical Spine

Dr. Meyers opined that the claimant suffered a 50% permanent partial disability to his cervical spine from the accident. Dr. Kitchens opined that the claimant suffered a 10% permanent partial disability to his cervical spine from the accident. Dr. Chabot opined that the claimant suffered an 11% permanent partial disability to his cervical spine from the accident. Based on the entire record, the claimant is awarded a 30% permanent partial disability to his cervical spine from the accident.

Hernias

The claimant alleges that he suffered abdominal pain right after the accident and that he sustained ventral and umbilical hernias from the accident. The first medical treatment that the claimant pursued for his abdominal pain was on May 2, 2006, from Dr. Easterday. See Exhibit 8. At this exam, the claimant gave Dr. Easterday a history that the first complaints of abdominal pain started in January 2006. See Exhibit 8. Dr. Easterday testified that the claimant gave him a history that the first abdominal or hernia type complaints were not until January 2006. See Dr. Easterly deposition, page 19. Dr. Pruett testified that "as a general rule, one would expect to see or hear of either pain in the area or a bulge in the first week or two." See Dr. Pruett deposition, page 15.

Dr. Orell examined the claimant on June 30, 2005, and his detailed medical records disclose no abdominal pain at that time. Dr. Chabot examined the claimant on several occasions between the accident and May 2006, and his medical records disclose no abdominal pain.

Dr. Pruett examined the claimant on December 2, 2009, and testified that he traced the hernia back to the original injury in May 2005 based upon the history provided by the claimant at the examination. See Dr. Pruett deposition, page 17. Dr. Pruett testified that the claimant had provided him a history that he had notified Dr. Orell on June 20, 2005, of his abdominal pain. See Dr. Pruett deposition, page 11. Dr. Pruett testified that the claimant told him that he notified Dr. Chabot in July or August 2005 of abdominal pain and Dr. Easterday in June 2005. See Dr. Pruett deposition, page 11. Based on a review of the medical records of Dr. Orell, Dr. Chabot and Dr. Easterday, he found no mention of abdominal pain in any of those reports. See Dr. Pruett deposition, page 16. Dr. Pruett testified that now that he reviewed the medical records of Dr. Orell, Dr. Chabot and Dr. Easterday he was less convinced regarding his causation opinion. See Dr. Pruett deposition, page 17. In regard to the issue of causation, Dr. Pruett stated that this "certainly muddies the water considerably." See Dr. Pruett deposition, page 18.

Although the claimant testified that he had abdominal pain immediately after the 2005 accident at work, the medical records show that he reported to Dr. Easterday that his abdominal pain did not start until January 2006. Dr. Pruett testified that the claimant gave him a history of telling Dr. Orell, Dr. Chabot, and Dr. Easterday about his abdominal complaints but none of these records show any such complaints. The first documented medical treatment for his hernias is almost a year out from the alleged injury, where he stated that his first abdominal pain symptoms were not until almost seven months from the alleged injury. Based on Dr. Pruett's testimony, abdominal pain relating to a hernia occurs within a week or two after an accident, the hernias in this case developed well after the accident and were not a product of the work related accident. Therefore, no medical or disability benefits are awarded for the claimant's hernias.

Low Back

The claimant also alleges that he sustained a low back injury from the May 2005 accident causing a low back condition ultimately requiring surgery.

The claimant testified that he had no back pain or medical treatment for his low back before the May 2005 accident. He also testified that he had some aches and pains to his neck, low back, shoulders, elbows, and knees for a few weeks before the accident. However, less than two months before the accident, he consulted Troy Family Practice Clinic for low back pain considered severe with a medical history of a fall one year before the visit. See Exhibit 8. The medical provider ordered x-rays. On March 1, 2005, x-rays revealed minimal degenerative disc disease at L3-4 with minimal disc space narrowing and osteophyte formation, but no acute lumbar spine fracture. See Exhibit 15. The history on the report shows a history of low back pain, thoracic pain, bilateral shoulder pain, bilateral knee pain following a fall. See Exhibit 15. The claimant's testimony was inconsistent with the history on the x-ray reports. In a June 30, 2005, consultation with Dr. Orell, the claimant reported that he had had low back pain for two years. See Exhibit 9. The claimant responded that his back pain had resolved prior to the May 2005 work injury.

On August 25, 2005, an MRI revealed evidence of mild disc desiccation, but no clear evidence of a disc herniation. See Exhibit 5. Dr. Chabot reviewed the MRI and found the MRI revealed evidence of mild disc desiccation, but no clear evidence of a disc herniation. See Exhibit 5. On May 17, 2006, a second MRI revealed no evidence of a disc herniation, stenosis, or obvious abnormality involving the lower lumbar spine. See Exhibit 5. Dr. Chabot found the degenerative changes consistent with the claimant's age. See Exhibit 5. Dr. Chabot found the claimant had attained maximum medical improvement for his back condition. See Exhibit 5.

Dr. Wayne, a physiatrist, examined the claimant on May 24, 2006, and opined that the claimant's clinical findings on examination were more stable than his subjective complaints. See Exhibit 5. Dr. Wayne reviewed the two MRI films and found no significant difference between those MRI scans. See Exhibit 5. Dr. Wayne opined that those MRI scans showed some degenerative changes at the facet joints, but no evidence of stenosis or any evidence of disc herniation. See Exhibit 5. Dr. Wayne opined that the claimant was at MMI regarding his back and there was no need for any follow up. See Exhibit 5.

On August 21, 2006, Dr. Chabot opined that the claimant did not sustain any permanent partial disability to his low back. See Exhibit 5. Dr. Chabot stated that Mr. Hampton did not require any additional medical treatment and he could work his regular work duties. See Exhibit 5.

Dr. Meyers, a general surgeon, opined that the claimant was permanently and totally disabled. See Dr. Meyers' deposition, page 22. He opined that the May 21, 2005, accident was the prevailing factor causing the injuries to the claimant's neck, abdominal hernia, and lumbar spine. See Dr. Meyers' deposition, page 22. He assigned restrictions to the neck including avoiding heavy lifting, repetitive lifting, bending, rotation, and remaining in a fixed position, such as with prolonged standing and sitting. He should avoid any repetitive squats. He needs to take frequent breaks and be allowed to lie down due to his headaches. See Dr. Meyers' deposition, pages 22, 23. He recommended continued use of over-the-counter analgesics on an as needed basis. See Dr. Meyers' deposition, page 23. He opined that the claimant sustained a 50% permanent partial disability of the body as a whole due to the cervical fusion with plating and 5% permanent partial disability of the body as a whole for each hernia for a total of 10% permanent partial disability of the body as a whole. See Dr. Meyers' deposition, page 23.

Dr. Meyers opined that the September 11, 2006, accident was the prevailing factor causing the need for surgery of the claimant's low back, because the claimant experienced low back and left leg symptoms as a result of the 2005 accident. See Dr. Meyers' deposition, page 24. "This was a significant and I think a prevailing factor in causing the misstep and slip when he was on the forklift in September." See Dr. Meyers' deposition, page 24. Dr. Meyers testified the accident of September 11, 2006 was the prevailing factor in having him undergo lumbar surgery for the ruptured disc. See Dr. Meyers' deposition, page 24. Dr. Meyers agreed that assuming the September 11, 2006 accident was an accident as defined by Missouri law that it came into play in causing the need for some medical treatment and in causing some disability as a result of that medical treatment. See Dr. Meyers' deposition, pages 24, 25. Dr. Meyers opined that the claimant sustained a 30% permanent partial disability of the body as a whole for the low back condition. See Dr. Meyer's deposition, page 25. He opined that the claimant suffered a 25% permanent partial disability to his low back from the May 21, 2005 accident and 5%

permanent partial disability to his low back from the September 11, 2006 accident. See Dr. Meyers' deposition, page 25. Dr. Meyers assigned restrictions to the low back including avoiding any repetitive or heavy lifting, squatting, bending, twisting, climbing stairs, prolonged standing or sitting. He needs to freely move and alternate positions between sitting, standing, and walking. See Dr. Meyers' deposition, page 25.

Dr. Meyers' reports and testimony do not discuss the March 1, 2005, report from Troy Family Practice documenting severe, constant back pain, bilateral shoulder, elbow, knee pain for a year from a fall. See Exhibit 8. His medical history did not address the claimant's preexisting history of back pain or sciatica before the May 2005 accident.

Dr. Kitchens, a board certified neurosurgeon, opined that the August 2005 lumbar MRI documents degenerative changes, discogenic protrusion at L5-S1 and facet changes at L4-L5 not associated with an acute injury. See Dr. Kitchens' deposition, pages 36- 37. Dr. Kitchens opined that the May 2005 accident did not cause his lumbar disc degeneration or chronic back pain. Dr. Kitchens testified that based upon the claimant's preexisting back pain, his work up and lumbar MRI, the May 2005 and September 2006 occurrences did not cause his low back condition and need for surgery. See Dr. Kitchens' deposition, pages 10. Dr. Kitchens testified that the need for the discectomy at L5-S1 was a result of the claimant's pre-existing degenerative disc disease and degenerative disc bulging at L5-S1. Dr. Kitchens testified that he found no objective information or data on the MRI of an acute injury to the lumbar spine such as a disc herniation or nerve root impingement. See Dr. Kitchens' deposition, page 11. Dr. Kitchens testified that the claimant did not sustain any permanent partial disability to his lumbar spine from the May 2005 and September 2006 occurrences. See Dr. Kitchens' deposition, page 12.

Dr. Orell, the treating orthopedic surgeon, testified that the degenerative joint disease is a normal process that people go through. See Dr. Orell deposition, page 29. He testified that people that work a job that is physically demanding will have more degenerative joint disease than others. See Dr. Orell deposition, page 30.

Dr. Orell testified, "I feel that when someone's trapped under a 300 pound door and has to, you know, twist to try to extricate himself from this weight, that that can cause bulging or herniation of disc material. I believe that that initial injury was a substantial factor in causing his back pain, and that it weakened his low back to the point where the injury on 9-11-06, where he slipped on an already numb lower extremity was a prevailing factor in his need for surgical intervention. He did not respond to conservative therapy after that." Dr. Orell opined that the 2005 accident was a substantial factor causing low back pain and left lower extremity numbness and decreased sensation and was directly attributable to the May 21, 2005 accident. See Dr. Orell deposition, pages 12-17.

Dr. Orell testified that the herniated low back disc into the interspace is consistent with holding up a 250 to 300 pound door and twisting. See Dr. Orell deposition, page 24. Dr. Orell testified, "I feel that the initial injury back in 2005 did weaken his low back. I mean, there was evidence on at least one prior MRI that he did have a herniated disc, and I feel that he had been suffering from decreased sensation and weakness to his left leg since that time. And this second slip just exacerbated his preexisting condition in his low back to the point where it would not respond to conservative therapy and needed surgical intervention." See Dr. Orell deposition,

page 24. He opined that the September 11, 2006, incident was a prevailing factor causing the bulging disc or a change in the size of the bulging disc and the herniated disc, "Yes, I feel absent any other trauma, that was the prevailing factor in increasing the pathology in his low back to the point where he needed surgical intervention." See Dr. Orell deposition, pages 24, 25. He testified that the September 2006 accident was the primary and prevailing factor causing the claimant's bulging disc, herniated disc, need for surgery, and his disability. See Dr. Orell deposition, pages 25, 26.

In evaluating the four medical opinions, all four physicians are board certified surgeons and qualified by reason of experience and training to offer medical opinions on the etiology of the claimant's back disorder. Dr. Meyers, an examining physician, did not consider the claimant's preexisting back condition and therefore lacks an element of foundation for his findings. Dr. Kitchens, another examining physician, followed the claimant's progression of back pain and radiological reports and opined that the claimant's disorder was entirely degenerative, and that the accidents at work had no effect on the condition. Dr. Chabot, a treating physician, opined that the claimant suffered a low back strain from the May 2005 accident, but suffered no permanent partial disability from it. Dr. Orell opined that the May 2005 accident, based on the mechanics and his physical examination of the claimant at the time, caused back pain consistent with a back strain. Thus, the treating surgeons appear to be consistent that the May 2005 accident caused a low back strain and did not result in the claimant's low back surgical requirement.

Dr. Meyers opined that the claimant suffers from a 30% permanent partial disability to his low back. He opined that the claimant suffered most of it from the first accident and did not determine whether the claimant's preexisting condition contributed to the claimant's disability that existed after the first accident. However, the claimant's preexisting condition as well as his condition after the May 2005 accident are well documented in the medical record from Troy Family Practice Clinic, Dr. Chabot, and Dr. Orell. See Exhibits 5, 8, and 10.

Based on the weight of evidence, the claimant suffered a 5% permanent partial disability from a low back strain from the 2005 accident aggravating his preexisting degenerative condition.

Although the claimant alleges that he suffered permanent total disability from the May 2005 accident, he testified that he returned to work at the same position and worked for a substantial time before the September 11, 2006, accident. The facts clearly suggest that the claimant was employable, employed, and substantially productive after the May 2005 accident.

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.

The claimant alleges that the employer has liability for his hernia surgery and his low back surgery. The evidence as discussed above supports a finding that those conditions and medical procedures are not sufficiently related to the May 2005 to impose liability on the employer. The claimant also seeks to recover medical expenses for treatment of his headaches. The claim for medical expenses is denied.

FUTURE MEDICAL CARE

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow [s] from the accident."

Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present "evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible" for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

The claimant in this case seeks an award for over-the-counter medication. Dr. Meyers opined that the claimant continue to take over-the-counter analgesics on an as needed basis. See Dr. Meyers' deposition, page 23. Dr. Meyers did not specify from which condition the need for over-the-counter medication flowed or whether the requirement flowed from any of the accidents that the claimant suffered. The claimant certainly suffered from severe pain before this accident, and it is beyond belief that the claimant did not take over-the-counter pain relief medication for his severe low back pain for the year preceding the May 2005 accident. The Troy Family Practice Clinic recommended pain relief medication for the claimant on March 1, 2005, 52 days before the May 21, 2005, accident. The claimant has failed to show that his requirement for over-the-counter analgesics flowed from the accident, and his claim for future medical care is denied.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

At the time of this injury, "total disability" was defined as an "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020. The purpose of a temporary, total disability award is to cover the employee's healing period. Birdsong v. Waste Management, 147 S.W.3d 132, 140 (Mo.App. S.D. 2004). Temporary total disability awards should cover the

period of time from the accident until the employee can either find employment or has reached maximum medical recovery. Id. "When further medical progress is not expected, a temporary award is not warranted." Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418, 424 (Mo.App. W.D. 2000) (overruled on other grounds). "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 238 (Mo.App.2008).

The claimant in this case claims temporary total disability benefits during his recovery from his hernia surgery from May 25, 2006 to June 30, 2006, 5 1/7 weeks. He also claims temporary total disability benefits during his recovery from his low back surgery from January 17, 2007 to March 30, 2007, 7 3/7 weeks. The evidence as discussed above supports a finding that those conditions and medical procedures are not sufficiently related to the May 2005 to impose liability on the employer, and the claim for temporary total disability benefits is denied.

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

This award is dated and attested to this 26th day of April, 2011.

/s/ Naomi L. Pearson
Naomi L. Pearson
Division of Workers' Compensation

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

Injury No.: 05-104257

Employee: Jackie Hampton
Employer: Champion Precast, Inc.
Insurer: St. Paul Travelers/Travelers Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision reversing the April 26, 2011, award and decision of the administrative law judge.

Preliminaries

The issues stipulated at the hearing were: (1) medical causation; (2) past medical expenses; (3) future medical care; (4) temporary total disability; (5) permanent disability; and (6) Second Injury Fund liability.

The administrative law judge made the following findings: (1) employee's work was not a substantial factor causing employee's bilateral carpal tunnel syndrome; (2) employee proved \$4,458.00 in past medical expenses, but this amount is not recoverable because the claim is not compensable; (3) employee suffers a bilateral 17.5% permanent partial disability with a 10% multiplicity due to his carpal tunnel syndrome, but is not entitled to PPD benefits because the claim is not compensable; and (4) employee suffers enhanced permanent partial disability of 26.75 weeks owing to the synergistic combination of his preexisting and primary injuries, but the Second Injury Fund is not liable for benefits, because the claim is not compensable.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge erred because his determination was against the weight of the medical evidence.

For the reasons set forth herein, we reverse the award and decision of the administrative law judge.

Findings of Fact

Carpal tunnel syndrome

Employee worked for employer as a lead man at employer's precast concrete plant. Most of employee's duties involved working with concrete molds. Working with the molds required the use of a number of vibrating tools, including jackhammers, air chisels, needle scalers, concrete saws, impact wrenches, stick vibrators, and chainsaws, as well as tools requiring fine motor manipulation such as bolt cutters, hammers, and wrenches. Employee also spent an average of six hours per day on a forklift, which required manipulation of levers. In early 2005, in connection with an

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increase in employer's business, employee started working a lot of overtime, which included some six-day work weeks. In connection with this increase in his work activities, employee began to suffer symptoms of pain and numbness in his hands and wrists associated with vibrating tools and grip-intensive work.

Employer presented employee's supervisor, Jonathan Ohmes, who suggested the task of operating power tools was typically reserved for "the lowest guy on the totem pole." The implication of this testimony is that employee, as a lead man, would not usually be operating power tools. But Mr. Ohmes also testified that he was "sure" that employee performed tasks using those tools. In our view, this testimony does not detract from or otherwise cast doubt on employee's credible, firsthand testimony that his duties involved using all of the tools listed above. We find that employee regularly used vibrating and grip-intensive tools in performing his work for employer.

Although employee was suffering from pain and difficulty in his hands and wrists in the first few months of 2005, the record reveals that he did not miss work or go to the doctor. But then employee suffered an accident at work on May 21, 2005, and sustained some injuries to his neck and low back (see our Award in Injury No. 05-067328). After reporting the accident to supervisors, employee decided to wait to go to the doctor, in hopes that he was "just beat up" and not seriously hurt. Employee eventually did see a doctor, though, on June 29, 2005. Employee went to the doctor on that date because he had pain between his shoulders, in his low back, down his right leg, and also because, in employee's words, his right arm was "killing [him]." Employee testified he told his supervisor about his complaints on a Friday, and his supervisor told him to leave work and go to the doctor that day. Although employee did not specifically identify this date, we gather from his testimony that this conversation with his supervisor occurred on June 24, 2005 (the Friday before the June 29, 2005, doctor visit), and that employee first missed work related to his upper extremity complaints on that day.

Employee saw Dr. Orell, who ordered a nerve conduction study to determine the source of employee's severe right arm pain. On July 5, 2005, that study revealed bilateral carpal tunnel syndrome (hereinafter, "CTS"). On September 19, 2005, one of employer's authorized treating physicians, Dr. Chabot, performed a right carpal tunnel release during a surgery related to employee's injuries stemming from the May 2005 accident. On February 20, 2007, Dr. Orell performed a left carpal tunnel release. Employee identified the bills associated with this treatment and put the bills in evidence. From the evidence, we find employee incurred \$4,458.00 in past medical expenses for medical treatment related to the carpal tunnel syndrome.

Employee continues to complain of significant problems with grip strength and numbness in both hands and has aching pains in his right wrist and fingers.

Expert medical testimony

The parties have provided conflicting expert medical testimony on the question whether employee's bilateral CTS was caused by his work. Employer presents Dr. Richard Howard, who opined "the fact [employee] worked at the job for almost a decade before becoming symptomatic is clear evidence there is not a relationship between his work and carpal tunnel." Dr. Howard's opinion hinges on the assumption that employee did the same work for ten years straight; Dr. Howard agreed that if employee had a change in his work, that

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could affect his opinion. Dr. Howard was apparently unaware that employee began working a lot of overtime in early 2005. Dr. Howard also testified that he had no information as to the degree employee was exposed to vibrating machinery and hand-grip intensive work in the months leading up to the diagnosis of CTS.

In the "History" portion of his report, Dr. Howard states: "[employee] does have to spend a lot of time working with a jack hammer and states that this particular activity gives him tremendous difficulty in the morning." But in the "Plan/Discussion" section where Dr. Howard offers his causation opinion, Dr. Howard states as his rationale: "[C]ertainly operating jack hammers can be a contributing factor to the development of [CTS]. It does not appear from my discussions with [employee] that he does an excessive amount of this." On the one hand, Dr. Howard notes employee's reports of extreme pain associated with spending a lot of time using a jackhammer. On the other, Dr. Howard says employee doesn't use a jackhammer enough to cause concern. We find this contradiction notable, especially where Dr. Howard acknowledged he had no actual data as to employee's exposure to vibrating tools in the months leading up to the diagnosis of CTS, and where the doctor agreed that such data could affect his causation opinion.

Employee presents Dr. Jerry Meyers, who opined employee's work with jackhammers and other vibrating tools was a substantial factor causing him to sustain bilateral CTS, a need for surgery, and permanent partial disability amounting to 30% of the right hand and 25% of the left hand. Dr. Meyers explained that the intense gripping and vibratory motion associated with the use of such tools causes inflammation and swelling in the hands and wrists and that this tends, over time, to compress both the median nerve and also the small vessels that feed the median nerve, resulting in both a deficit of the vascular supply and a direct trauma to the median nerve and median carpal tunnel. On cross-examination, Dr. Meyers acknowledged employee didn't give him "a detailed description of exactly how often" employee used jackhammers or vibrating tools in a typical day. We note that the administrative law judge took this testimony to mean Dr. Meyers didn't know "the extent to which [employee] used jackhammers or vibrating tools," and found that these admissions have the effect that Dr. Meyers' causation opinion is without foundation. *Award*, page 5.

We disagree. That Dr. Howard didn't know the extent of employee's exposure to vibrating tools in the months leading up to diagnosis, and admitted this information could change his mind, makes him, in our view, no more informed than Dr. Meyers as to employee's work. Notably, Dr. Howard didn't offer an alternative causation opinion, perhaps because employee lacks any non-work risk factors for CTS except possibly his age. (Dr. Howard identified "middle age" as a risk factor; employee was 40 years old when diagnosed). Asked to explain what did cause employee's CTS if work did not, Dr. Howard listed some risk factors which are inapplicable to employee—employee is not a smoker, is not diabetic, and is not overweight—before opining that employee's CTS is idiopathic, or in other words, Dr. Howard believes the cause of employee's CTS is unknown. It appears to us that the question of medical causation in this case thus comes down to whether we should accept that employee's CTS materialized out of thin air or was related to his work.

Especially in light of employee's uncontested testimony that he started working a lot of overtime in the months leading up to his CTS diagnosis, and that his use of vibrating and impact-style tools produced CTS-type symptoms, we are convinced that Dr. Meyers' testimony provides the more logical and credible explanation for the medical cause of

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employee's CTS. We credit Dr. Meyers' testimony that employee's work was a substantial factor causing him to sustain bilateral CTS. We find that, as a result of his CTS, employee sustained a permanent partial disability amounting to 17.5% of each wrist, with a 10% multiplicity factor. We also find that the bilateral carpal tunnel releases and related medical treatments were reasonably required to cure and relieve from the effects of employee's CTS.

Conclusions of Law

Causation

Employee claims his bilateral carpal tunnel syndrome is an occupational disease caused by his work for employer. Section 287.067.2 RSMo sets forth the standard for causation in an occupational disease case and provides, as follows:

An occupational disease is compensable if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor.

The foregoing section refers us to the "requirements of an injury which is compensable" under subsections 2 and 3 of § 287.020, which provide, in relevant part, as follows:

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. ... The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

The courts have provided some guidance as to how we are to analyze the question of causation in an occupational disease case:

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate...

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Kelley v. Banta & Stude Constr. Co., 1 S.W.3d 43, 49 (Mo. App. 1999).

More recently, the courts have clarified that employee is not required to prove by “medical certainty” that work caused an occupational disease, but rather must show “a probability” that working conditions caused the disease. *Vickers v. Mo. Dep’t of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. 2009) (citations omitted).

Employee provided a medical opinion from Dr. Meyers which meets the foregoing requirements, and we have credited that opinion. Dr. Meyers’ testimony provides persuasive evidence that employee’s work with vibrating tools exposed him to a greater risk of developing carpal tunnel syndrome than that which affects the general public. As Dr. Meyers explained, the use of such tools (a “distinctive feature” of employee’s work) involves intense gripping and vibratory motion, which causes inflammation and swelling and, over time, injury to the upper extremities. Dr. Meyers stated he believed that employee’s use of a jackhammer could be “a direct cause” of his CTS condition. We conclude that the testimony from Dr. Meyers provides a sufficient “recognizable link” to establish a probability that employee’s working conditions caused his CTS.

We conclude that employee’s work for employer was a substantial factor causing him to develop bilateral CTS and disability. Employee has met his burden of proof on the issue of medical causation.

Past medical expenses

Because employee met his burden of proving he sustained a compensable occupational disease, it follows that employer is liable under § 287.140 RSMo to provide medical treatment that may reasonably be required to cure and relieve from the effects of employee’s CTS. Where the parties dispute whether a particular past medical expense comes within the employer’s obligation under § 287.140, the burden of proof falls on employee for each claimed past medical expense to provide 1) the medical bill, 2) the medical record reflecting the treatment giving rise to the bill, and 3) testimony establishing that the treatment flowed from the compensable injury. *Martin v. Mid-Am. Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

Here, employee provided his bills, records, and testimony establishing he received the bills for treatment for his carpal tunnel syndrome. We have found that the bills total \$4,458.00. We conclude that employer is liable under § 287.140 RSMo for these past medical expenses.

Future medical expenses

Employer is liable under § 287.140 RSMo to provide future medical treatment where employee establishes a reasonable probability that he will have a need for future care that flows from the work injury. *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo. App. 2010).

We have found that employee sustained a compensable injury by occupational disease. But employee has failed, in his brief, to identify any evidence suggesting he has a need for future medical treatment that flows from this work injury. We have searched employee’s testimony and that of his medical experts in an effort to find this evidence, but to no avail. Where employee has appealed an issue but has failed to identify evidence supporting his position, we are left with no choice but to find that he has failed to meet his burden of proof on the issue.

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We find that employee failed to meet his burden of proving he is entitled to any future medical treatment in connection with this work injury.

Temporary total disability

Under § 287.170 RSMo, employee is entitled to weekly benefits to compensate him for the time during which he was temporarily and totally disabled from working due to his work injuries.

Unfortunately, our analysis of this issue has been hampered by the same problems discussed immediately above. After a careful review of the record, we cannot find where employee or any of his experts testified as to the time he missed owing to his bilateral CTS. Employee has failed, in his brief before this Commission, to identify the evidence that would so demonstrate.

We find employee to have failed to meet his burden of proving he is entitled to any temporary total disability benefits in connection with this work injury.

Permanent partial disability

Under § 287.190 RSMo, employee is entitled to weekly benefits to compensate him for any permanent partial disability he sustained as a result of his work injury. We have found employee suffered a 17.5% permanent partial disability of each wrist, with a 10% multiplicity factor. This adds up to 67.375 weeks of disability. The parties stipulated the applicable rate for permanent partial disability is \$365.08.

Accordingly, employee is entitled to, and employer is liable to pay, \$24,597.27 in permanent partial disability benefits.

Second Injury Fund liability

Section 287.220.1 RSMo creates the Second Injury Fund and provides the framework for analyzing whether the Second Injury Fund may be liable for permanent total or permanent partial disability benefits. That section provides, in relevant part:

If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ... receives a subsequent compensable injury resulting in additional permanent partial disability ...

Given the foregoing language, Second Injury Fund liability is only implicated if employee had a preexisting permanent partial disability at the time the last injury was sustained. The cases suggest that, for occupational diseases, a compensable injury is sustained when an employee suffers some disability or loss of earning capacity. See *Garrone v. Treasurer of State*, 157 S.W.3d 237, 242 (Mo. App. 2004) (holding that an employee's carpal tunnel syndrome did not become a compensable injury until the date he missed work for surgery). It appears that employee first missed work or suffered disability referable to his CTS on June 24, 2005, when he told his supervisor he thought he had to go to the doctor, in part, because his right arm was "killing [him.]" Employee did have other complaints related to the May 2005 accident, but clearly emphasized his right arm

Employee: Jackie Hampton

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pain was a distinct motivating factor in his choice to leave work that day and seek medical care. We conclude that employee first suffered disability referable to his CTS on this date.

As of June 24, 2005, employee had not yet even begun his course of treatment for the cervical spine and low back injuries suffered in the work accident of May 2005. It follows that employee had not yet reached maximum medical improvement for those injuries, and therefore any determination, as of June 24, 2005, of permanent disability would be premature. Employee does not identify any other preexisting disabling conditions and does not even address the issue of Second Injury Fund liability in his brief.

In light of the foregoing considerations, employee's claim against the Second Injury Fund in this matter is denied.

Conclusion

Based on the foregoing, the Commission concludes and determines that employee met his burden of proof on the issues of medical causation, past medical expenses, and his entitlement to permanent partial disability benefits from employer.

Employee is entitled to, and employer is ordered to pay, \$24,597.27 in permanent partial disability benefits, and \$4,458.00 in past medical expenses.

This award is subject to a lien in favor of C. Dennis Barbour, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 26, 2011, is attached solely for reference.

Given at Jefferson City, State of Missouri, this 24th day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jackie Hampton

Injury No.: 05-104257

Dependents: N/A

Employer: Champion Precast, Inc.

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

Additional Party: Second Injury Fund

Insurer: St. Paul Travelers

Hearing Date: February 3, 2011

Checked by: EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: July 5, 2005 (alleged)
5. State location where accident occurred or occupational disease was contracted: Lincoln 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? No
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 lead person for a concrete manufacturer, suffers from bilateral carpal tunnel syndrome and alleged that his work with a jack hammer and power tools caused the condition.
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: Both wrists
14. Nature and extent of any permanent disability: 17 ½% permanent partial disability to each wrist and an additional 10% for multiplicity
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? \$4,458.00
- 18. Employee's average weekly wages: \$979.52
- 19. Weekly compensation rate: \$653.01/\$365.08
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

TOTAL:

None

23. Future requirements awarded: None

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: C. Dennis Barbour, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Hampton
Dependents: N/A
Employer: Champion Precast, Inc.
Additional Party: Second Injury Fund
Insurer: St. Paul Travelers

Injury No.: 05-067328
Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a lead person for a concrete manufacturer, suffers bilateral carpal tunnel syndrome. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Future medical care, (4) Temporary Disability, and (5) Permanent disability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered depositions of Jerry R. Meyers, M.D., David Easterday, D.O., Robert Orell, M.D., and J. Stephen Dolan, and voluminous medical records and medical bills. The defense offered depositions of the claimant and Daniel I. Kitchens, M.D., Richard F. Howard, M.D., John S. Pruett, M.D., David Easterday, D.O., Robert Orell, M.D., Jerry R. Meyers, M.D., J. Stephen Dolan, Donna K. Abram, and James M. England, and voluminous medical records from Barnes Hospital.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the occupational disease was alleged to have been contracted in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This 46 year old claimant graduated from Reynolds County R-2 High School in 1983, but achieved no other technical or vocational training or any other formal education. He was employed by this employer from 1996 to January 16, 2007, as a lead man concrete laborer performing a variety of tasks, including working with concrete molds that involved building cages for molds, pouring molds, stripping molds, welding molds, shoveling concrete, using jackhammers and air chisels to remove concrete away from hinges and latches on molds, putting inserts in molds, tighten and loosen bolts and drive a forklift. The claimant testified he worked with objects on a daily basis ranging from 20 to 150 pounds. He worked with his hands all day long. He worked approximately 48 to 55 hours per week, including a half day on Saturdays.

The claimant alleges that he sustained repetitive trauma to his hands from his work for the employer resulting in bilateral carpal tunnel syndrome. On March 1, 2005, the claimant

complained of numbness in his hands off and on. See Exhibit 8. On March 21, 2005, he suffered a severe injury to his neck at work.

Dr. Orell, an orthopedic surgeon, examined the claimant on June 30, 2005, for neck pain, back pain, right leg sciatica, and cervical radiculopathy into the right arm, and he ordered EMG / nerve conduction studies. See Exhibit 9. The EMG / nerve conduction studies were conducted on July 5, 2005, and revealed bilateral carpal tunnel syndrome, worse on the right side. See Exhibit 9.

In the course of medical care for the claimant's work related injury in May 2005, Dr. Chabot reviewed the July 2005 EMG / nerve conduction. See Exhibit 5. On August 25, 2005, Dr. Chabot examined the claimant regarding his carpal tunnel syndrome, and Dr. Chabot opined that the condition was not work related. See Exhibit 5. Dr. Chabot recommended the claimant consider a right carpal tunnel release at the same time as his cervical surgery, but the right carpal tunnel surgery would be done under his private health insurance. See Exhibit 5.

On September 19, 2005, Dr. Chabot performed right carpal tunnel release surgery at the same time Dr. Chabot did the claimant's cervical surgery. See Exhibit 5. The employer / insurer authorized and paid for the medical treatment for the cervical condition but did not authorize or pay for treatment for the right carpal tunnel condition.

On August 3, 2006, the claimant sought medical treatment from Dr. Orell for his left carpal tunnel syndrome. See Exhibit 9. Dr. Orell eventually did left carpal tunnel release surgery on February 20, 2007. See Exhibit 9. The claimant received follow up treatment from Dr. Orell for his left carpal tunnel condition on March 13, 2007, and April 5, 2007. See Exhibit 9. At the April 5, 2007, exam, Dr. Orell opined that the left carpal tunnel release was doing well. See Exhibit 9.

At the hearing, the claimant testified that he used vibratory tools such as concrete saws, jack hammers, needle scalers, vibration rods and other tools. He also testified that he used hammers, wrenches, and bolt cutters on a regular basis. He also testified that he drove a forklift truck for the employer.

Jonathan Ohmes

Jonathan Ohmes, the employer's plant coordinator since January 1998 and the claimant's supervisor testified that the claimant was a leadman / team leader supervising 2 or 3 others that worked in his department. Based on seniority, the claimant would delegate the more physical work to others in his department. Mr. Ohmes testified that the claimant drove a forklift truck about 4 - 5 hours a day and used power tools 0 - 30 minutes a day. He testified that the primary tool that the claimant used was a needle scaler, which required one hand to use it. The needle scaler is a pneumatic pressurized air tool that is used to remove excess concrete from a concrete mold. Mr. Ohmes testified that the claimant used the needle scaler about twice a month and did not use the needle scaler on a daily basis. Mr. Ohmes testified that the claimant did some welding between 30 minutes up to an hour per day. Mr. Ohmes testified that the claimant used a jackhammer about one and one half hours per month to remove a defective concrete casting from the mold.

Dr. Meyers

Dr. Meyers, a general surgeon, examined the claimant on August 28, 2007, and opined that the claimant's work with jackhammers and other vibrating tools was a substantial factor causing the bilateral carpal tunnel syndrome and need for surgery. See Dr. Meyers' deposition, page 26. He opined that the claimant sustained a 30% permanent partial disability to the right hand and 25% permanent partial disability to the left hand. See Dr. Meyers' deposition, page 26. He assigned restrictions to the hands consisting of avoiding any activity that requires repetitive pulling, pushing, twisting, fine motor skills, avoid exposure to vibrating machinery, and heavy lifting. See Dr. Meyers' deposition, page 26. Dr. Meyers based his forensic evaluation on the claimant's own presentation of his working conditions. Dr. Meyers testified that he did not know how long the claimant had worked for this employer, his job title, his job description, the extent to which the claimant used jackhammers or vibrating tools, how many hours the claimant worked per week. See Dr. Meyers' deposition, pages 28- 30.

Dr. Howard

On February 2, 2006, Dr. Howard, a board certified orthopedic surgeon specializing in hand, elbow and upper extremities, examined the claimant and reviewed his medical records, a job description and a work history. See Dr. Howard deposition, pages 7, 8. X-rays of the left hand and left elbow at the exam were normal. See Dr. Howard deposition, page 10. Dr. Howard diagnosed left carpal tunnel syndrome and opined that his carpal tunnel syndrome was not work related. See Dr. Howard deposition, page 10. He opined that the etiology was idiopathic. See Dr. Howard deposition, page 11. He opined that a carpal tunnel release was indicated. See Dr. Howard deposition, page 12. Dr. Howard opined that the claimant's job was highly varied. See Dr. Howard deposition, pages 10, 11. Dr. Howard testified that the claimant provided him with a history of using jackhammers at work but not an excessive amount of time. See Dr. Howard deposition, page 9. Dr. Howard testified that the claimant has worked for the employer for ten years and if work was the cause of his problem, the problems would have developed in the first year or so of employment. See Dr. Howard deposition, page 11. Dr. Howard testified that as a general rule a study looking at cause-effect relationship, two years is generally considered a fair standard of measure. See Dr. Howard deposition, page 15. Dr. Howard opined that the fact that the claimant worked at the job for almost a decade before becoming symptomatic is clear evidence that there is not a relationship between his work and carpal tunnel. See Dr. Howard deposition, page 11. In regard to the right hand, Dr Howard found a normal exam and opined that the claimant was at maximum medical improvement. See Dr. Howard deposition, page 24.

MEDICAL CAUSATION

An informative legal analysis of occupational diseases pursuant to Missouri law is found in Kelley v. Banta and Stude Const. Co., Inc., 1 S.W.3d 43 (Mo. App. E.D. 1999), from which the following legal principles are cited:

In order to support a finding of occupational disease, employee must provide substantial and competent evidence that he/she has contracted an occupationally induced disease rather than an ordinary disease of life. The inquiry involves two considerations: (1) whether there was an exposure to the disease which was

greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort.

Claimant must also establish, generally through expert testimony, the probability that the claimed occupational disease was caused by conditions in the work place. Claimant must prove "a direct causal connection between the conditions under which the work is performed and the occupational disease." However, such conditions need not be the sole cause of the occupational disease, so long as they are a major contributing factor to the disease. A single medical opinion will support a finding of compensability even where the causes of the disease are indeterminate. The opinion may be based on a doctor's written report alone. Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.

In conformity with the above-cited case law, the instant case is controlled by the "last exposure rule", sometimes referred to as the "rule of convenience" which has been the law in Missouri for many years. In a workers' compensation case in Missouri, based upon occupational disease, liability accrues and attaches to the employer as of the date of the disability. The test for determining when compensation accrues is the time when incapacity from occupational disease occurs, and not when the exposure commences or the disease begins and continues to develop. It is disability after exposure in the employer's business that creates the obligation to compensation. Because the development of occupational diseases is characteristically gradual, but variable in different diseases and with different persons, the earlier stages being frequently undetectable, the only rule which ensures the benevolent legislative objective of recovery in every meritorious case is one which fixes liability at the single and easily determinable point when there is inability to work.

In this case, the claimant developed carpal tunnel syndrome during the years that he worked for this employer, and surgical releases were performed by qualified orthopedic surgeons. The claimant contends that the claimant's work was a substantial factor causing the condition and resulting disability, because the claimant worked with vibrating power tools. His expert, Dr. Meyers, opined that the claimant's work with jackhammers and other vibrating tools was a substantial factor causing the bilateral carpal tunnel syndrome and need for surgery. See Dr. Meyers' deposition, page 26. However, Dr. Meyers based his forensic evaluation on the claimant's own presentation of his working conditions. Dr. Meyers testified that he did not know how long the claimant had worked for this employer, his job title, his job description, the extent to which the claimant used jackhammers or vibrating tools, and how many hours the claimant worked per week. See Dr. Meyers' deposition, pages 28- 30.

The claimant and his supervisor, Jonathon Ohmes, testified that the claimant used jackhammers and vibrating power tools, but the claimant spent a majority of his time operating a forklift. Mr. Ohmes testified that the claimant used the jackhammer and vibrating power tools very infrequently. Based on the evidence, Dr. Meyers' conclusion seems to lack adequate

foundation to support the claim, because he had lacked knowledge about significant areas of the claimant's work environment.

Dr. Chabot, a treating surgeon diagnosed the bilateral carpal tunnel syndrome, but also opined that the condition was not work related. See Exhibit 5. Dr. Howard opined that the etiology was idiopathic. See Dr. Howard deposition, page 11. Dr. Howard opined that the claimant's job was highly varied. See Dr. Howard deposition, pages 10, 11. Dr. Howard testified that the claimant provided him with a history of using jackhammers at work but not an excessive amount of time. See Dr. Howard deposition, page 9. Dr. Howard also testified that the claimant has worked for the employer for ten years and if work was the cause of his problem, the problems would have developed in the first year or so of employment. See Dr. Howard deposition, page 11. Dr. Howard testified that as a general rule a study looking at cause-effect relationship, two years is generally considered a fair standard of measure. See Dr. Howard deposition, page 15. Dr. Howard opined that the fact that the claimant worked at the job for almost a decade before becoming symptomatic is clear evidence that there is not a relationship between his work and carpal tunnel. See Dr. Howard deposition, page 11.

In summary, Dr. Meyers' forensic medical opinion lacks adequate foundation to support the claim. The weight of the evidence supports a finding that the claimant's work with jackhammers and vibrating power tools was not a substantial factor causing the claimant's bilateral carpal tunnel syndrome. An interesting question would be whether the operation of the forklift caused sufficient vibrations and hand stress to be a substantial factor causing the claimant's bilateral carpal tunnel syndrome, but neither expert addressed that set of facts. Accordingly, the claim is denied.

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.

The claimant offered the following bills related to his left hand carpal tunnel surgery on February 20, 2007:

Dr. Orell, Surgical services, Exhibit G	\$2,015.00
Lincoln County Medical Center, Medical services, Exhibit G	\$2,443.00
Total	\$4,458.00

However, since the claim is not compensable, no benefits are awarded.

PERMANENT DISABILITY

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). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to Section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in Section 287.190.1. "Permanent partial disability" is defined in Section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the

employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id. In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629.

In this case, the claimant's bilateral carpal tunnel syndrome resulted in substantial permanent partial disability. Dr. Meyers examined the claimant and opined the claimant sustained a 30% permanent partial disability to the right hand and 25% permanent partial disability to the left hand. See Dr. Meyers' deposition, page 26. He assigned restrictions to the hands consisting of avoiding any activity that requires repetitive pulling, pushing, twisting, fine motor skills, avoid exposure to vibrating machinery, and heavy lifting. See Dr. Meyers' deposition, page 26. Dr. Howard examined the claimant's right hand and found a normal exam. See Dr. Howard deposition, page 24.

Based on the evidence as a whole, the claimant suffers from a 17 ½% percent permanent partial disability to each hand with an additional 10 percent for multiplicity, but no benefits are awarded, because the injury is not compensable.

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).
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).
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 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (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).

In addition, the claimant filed a claim against the Second Injury Fund alleging that his permanent partial disability from this occurrence combined with preexisting permanent partial disabilities to result in a combined disability that was greater than the simple sum. From this occurrence, the claimant suffered a 17 ½% percent permanent partial disability to each hand, 61.25 weeks. Based on a prior award, the claimant had a 30% permanent partial disability to the neck, 120 weeks. Dr. Meyers testified about the nature and impact of these disabilities. Based on the evidence, the claimant's overall permanent partial disability is 52% of the body as a whole, 208 weeks. The difference is 26.75 weeks. However, since the claim is not compensable, no benefits are awarded.

OTHER ISSUES

This case also involves issues whether the claimant is entitled to past medical expenses, future medical care, and temporary total disability. However, the claimant offered no evidence relating to future medical care or time lost from work due to his carpal tunnel syndrome, and no benefits are awarded.

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

This award is dated and attested to this 26th day of April, 2011.

/s/ Naomi L. Pearson
Naomi L. Pearson
Division of Workers' Compensation

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

Injury No.: 06-133469

Employee: Jackie Hampton
Employer: Champion Precast, Inc.
Insurer: St. Paul Travelers/Travelers Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the April 26, 2011, 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

Permanent total disability

The administrative law judge determined that employee is not permanently and totally disabled, on a finding that Dr. Meyers' restriction that employee needs to lie down during the day is not valid. We disagree with the administrative law judge's finding and analysis on this issue. We note that the parties have also focused on the validity of the "lie down" restriction from Dr. Meyers. But especially in a case such as this one, where employee suffers from multiple significantly disabling conditions of ill, we are convinced it is error to assume we can resolve the question of permanent total disability solely by looking at the validity of an isolated physical restriction from a single doctor's testimony related to a single medical problem. Rather, as our courts have made clear:

The test for permanent total disability is whether, given the employee's situation and condition, he is competent to compete in the open labor market. This test measures the worker's prospects for returning to employment. Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. The central question is whether any employer in the usual course of business would reasonably be expected to employ the employee in his present physical condition.

Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo. App. 1992) (citations omitted) (emphasis added).

Employee's present physical condition is as follows. Employee suffers preexisting permanent partial disability of the body as a whole in the following amounts: 10% referable to his low back, 30% referable to his cervical spine, and 5% referable to his hernias. Employee also suffers a preexisting 17.5% permanent partial disability of each

Employee: Jackie Hampton

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wrist with 10% multiplicity owing to bilateral carpal tunnel syndrome (hereinafter "CTS"). Finally, employee suffers a 20% permanent partial disability of the body as a whole referable to the primary low back injury. This amounts to no less than 327.375 weeks of permanent partial disability under § 287.190 RSMo.

We acknowledge that the treating doctors did not assign significant work restrictions when they released employee. But the surgeon Dr. Orell didn't assign any restrictions specifically because he believed employee is not physically capable of returning to his last job. And as for Dr. Chabot, we consider the failure to issue restrictions to be largely a product of his obvious preference in this case for minimizing the extent of injury that can be said to be attributable to employer. Dr. Meyers, unlike the treating physicians, was looking at all of employee's disabling conditions when he assigned his restrictions, which are, as the parties have noted, significant.

Again, the question is whether we can imagine an employer hiring this employee in the usual course of business given his overall physical condition. At this point in his medical history, employee has undergone both a cervical fusion and low back surgery and he walks with a limp. He suffers residual pain and loss of grip strength from the CTS in both his hands and arms. He suffers from pain referable to his neck and low back conditions which prevents him from prolonged sitting, standing, and walking, and which interferes with his ability to focus. The evidence shows employee can't go back to his heavy labor job, that he has no background or experience in anything other than labor, and that he has serious limitations in the areas of math and reading and writing. Employee provided expert vocational testimony from J. Stephen Dolan, who opined that employee is permanently and totally disabled owing to the combination of all of his preexisting conditions and the effects of the primary injury. We find this expert opinion from Mr. Dolan credible. Given employee's physical condition, we do not believe any employer in the usual course of business could reasonably be expected to hire this employee. To the extent Ms. Abrams and Mr. England opine to the contrary, we find them lacking credibility.

We modify the award of the administrative law judge on the issue of permanent total disability. We find employee is permanently and totally disabled owing to a combination of the effects of the primary injury and his preexisting disabling conditions of ill.

Second Injury Fund liability

We have determined that employee is permanently and totally disabled. We now proceed to the question whether employee met his burden of establishing entitlement to compensation from the Second Injury Fund (Fund). Section 287.220 RSMo creates the Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

Employee: Jackie Hampton

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[T]he proper focus of the inquiry 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.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007) (citation omitted).

When we apply the foregoing test, we are convinced that employee's preexisting cervical spine, low back, hernia, and CTS conditions each had a potential to combine with future work-related injuries so as to cause a greater degree of disability than in the absence of the condition. Accordingly, we conclude each of these conditions were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220.1 RSMo.

For the Fund to be liable for permanent total disability benefits, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with the prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have adopted the administrative law judge's finding that, as a result of the last injury, employee sustained a 20% permanent partial disability of the body as a whole referable to the low back. We have found that the primary injury, considered in isolation, did not render employee permanently and totally disabled, but that employee is permanently and totally disabled due to a combination of his preexisting disability as it existed on September 11, 2006, in combination with the disability stemming from employee's injuries sustained on that date.

In light of our findings, we modify the award of the administrative law judge with respect to the issue of Second Injury Fund liability. We conclude employee met his burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1.

Future medical treatment

Employee argues the administrative law judge erred in failing to award future medical care related to his compensable work injury. We agree. The administrative law judge determined that employee sustained a compensable low back injury, but found that he is not entitled to over-the-counter pain medications, because employee probably took pain medicine before the work injury for a preexisting low back condition. Section 287.140.1 RSMo provides, in relevant part, as follows:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may

Employee: Jackie Hampton

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reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

The foregoing section makes clear that where employee sustains a compensable injury, he is entitled to any and all medical treatment that may reasonably be required to cure and relieve from the effects of the injury. Here, employee suffered a significant lumbar spine injury requiring surgery and resulting in a 20% permanent partial disability of his body as a whole. Employee continues to suffer pain and discomfort as a result of this injury. Dr. Meyers, in the context of a series of questions about his recommendations regarding employee's work injuries, credibly opined that employee should continue to take over-the-counter analgesics on an as-needed basis. Employee provided credible testimony that indicates such medications help to control his pain. Employee met his burden with this evidence.

Employee may well have taken over-the-counter pain medicine before the work injury for his low back. But our courts have consistently held that "an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury." *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 52 (Mo. App. 2008). Accordingly, the question is not whether employee may have taken over-the-counter pain medications before this work injury, nor whether taking those medications now might relieve symptoms referable to a non-work-related condition. The only question is whether employee established a need for future medical care that "flows from the accident." *Id.* at 54. We are convinced employee has shown that here.

We modify the award of the administrative law judge. We conclude that, pursuant to § 287.140.1 RSMo, employee is entitled to that future medical treatment which may reasonably be required to cure and relieve from the effects of his low back injury.

Clerical error

Employee appealed the issue of temporary total disability but did not address it in his brief. We did find an error in the administrative law judge's award. The first two pages of the award consist of a list of numbered paragraphs which appear to provide a summary of the findings and conclusions the administrative law judge makes elsewhere in his award. But on page 2, in the paragraph numbered 21, the administrative law judge states that employee is entitled to 3 3/7 weeks of temporary total disability benefits. This conflicts with the administrative law judge's finding, on page 20 of his award, that employee is entitled to 7 3/7 weeks temporary total disability.

The correct finding is that employee is entitled to 7 3/7 weeks of temporary total disability benefits. We are convinced that the administrative law judge appropriately analyzed this issue and that the error on page 2 was merely clerical. We hereby correct the award.

Award

We modify the award of the administrative law judge. Employee is entitled to permanent total disability benefits from the Second Injury Fund to commence on January 20, 2010 (the date employee reached maximum medical improvement for the primary low back

Employee: Jackie Hampton

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injury) at the rate of \$136.79 (the difference between the stipulated rates for permanent partial and permanent total disability) for 80 weeks (the extent of employer's liability for the primary injury). Thereafter, weekly payments shall continue at the stipulated rate of \$513.34.

Employee is entitled to that future medical treatment which may reasonably be required to cure and relieve from the effects of his low back and cervical spine injuries.

Employee is entitled to 7 3/7 weeks temporary total disability benefits.

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 Edwin J. Kohner, issued April 26, 2011, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 24th day of February 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jackie Hampton

Injury No.: 06-133469

Dependents: N/A

Employer: Champion Precast, Inc.

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

Additional Party: Second Injury Fund

Insurer: St. Paul Travelers

Hearing Date: February 3, 2011

Checked by: EJK/lsn

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: September 11, 2006
5. State location where accident occurred or occupational disease was contracted: Lincoln 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 lead person for a concrete manufacturer, misstepped while dismounting a forklift.
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: low back
14. Nature and extent of any permanent disability: 20% Permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? \$17,437.70
- 18. Employee's average weekly wages: \$770.00
- 19. Weekly compensation rate: \$513.34/\$376.55
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$17,437.70
3 3/7 weeks of temporary total disability (or temporary partial disability)	\$ 1,760.02
80 weeks of permanent partial disability from Employer	\$30,124.00
22. Second Injury Fund liability: Yes	
38.75 weeks of permanent partial disability from Second Injury Fund	\$14,591.31
TOTAL:	\$63,913.03

- 23. Future requirements awarded: None

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: C. Dennis Barbour, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jackie Hampton
Dependents: N/A
Employer: Champion Precast, Inc.
Additional Party: Second Injury Fund
Insurer: St. Paul Travelers

Injury No.: 06-133469
Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a lead person for a concrete manufacturer, suffered a cervical spine disc injury when he misstepped while dismounting a forklift. The issues for determination are (1) Medical causation, (2) Liability for Past Medical Expenses, (3) Future medical care, (4) Temporary Disability, and (5) Permanent disability. The evidence compels an award for the defense.

At the hearing, the claimant testified in person and offered depositions of Jerry R. Meyers, M.D., David Easterday, D.O., Robert Orell, M.D., and J. Stephen Dolan, and voluminous medical records and medical bills. The defense offered depositions of the claimant and Daniel I. Kitchens, M.D., Richard F. Howard, M.D., John S. Pruett, M.D., David Easterday, D.O., Robert Orell, M.D., Jerry R. Meyers, M.D., J. Stephen Dolan, Donna K. Abram, and James M. England, and voluminous medical records from Barnes Hospital.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

This 46 year old claimant graduated from Reynolds County R-2 High School in 1983, but achieved no other technical or vocational training or any other formal education. He was employed by this employer from 1996 to January 16, 2007, as a lead man concrete laborer performing a variety of tasks, including working with concrete molds that involved building cages for molds, pouring molds, stripping molds, welding molds, shoveling concrete, using jackhammers and air chisels to remove concrete away from hinges and latches on molds, putting inserts in molds, tighten and loosen bolts and drive a forklift. The claimant testified he worked with objects on a daily basis ranging from 20 to 150 pounds. He worked with his hands all day long. He worked approximately 48 to 55 hours per week, including a half day on Saturdays.

On Saturday, May 21, 2005, the claimant was building a mold for a pill box which was a concrete product to be used at the airport to encase landing lights, which required securing an 8

foot by 3 ½ foot steel door weighing 250 to 300 pounds to one side of the mold containing the pill box. There were 4 sides to the mold each containing a steel door. See Exhibits I, J, K, L and M. The claimant positioned the steel door in the upright position using a scotch pole as a brace, and knelt down in front of the steel door to pick up an electric drill. When he knelt down to pick up the drill, he heard the scotch pole come loose and hit the concrete floor. Simultaneously, the steel door came loose from the mold and fell on the claimant. The claimant tried to block the door from hitting him with his right hand but the door fell over on his right hand, arm, shoulder and head knocking him to the floor and pinning him down. A co-worker helped remove the steel door.

He testified that when the steel door fell and struck the claimant, he experienced a crunching feeling in his neck and felt pain instantly in his neck into his right shoulder, between his shoulders, down his right arm into his right hand, in his low back, and down his right leg. He testified that he also had pain in his abdomen. He reported the accident to the assistant plant manager John Ohmes on Monday, May 23, 2005. John Ohmes advised him to keep the employer posted of whether or not he needs medical treatment. His symptoms worsened over the next month and the claimant told another manager, Steve Perotti, who then advised him to seek medical treatment.

He first sought medical treatment for his injuries from Dr. Easterday on June 29, 2005, reporting pain from the shoulder blade down the arm, in the low back, and was limping on his right leg. See Exhibit C-17. He reported that the leg was achy and sometimes falls asleep. Dr. Easterday referred him to an orthopedic surgeon, Dr. Orell. See Exhibit C-20.

On June 30, 2005, Dr. Orell examined the claimant for low back pain with sciatica down the right leg, and neck pain with right arm radiculopathy. See Exhibit F- 20. Dr. Orell opined that the neck and right arm pain corresponded to the C7 dermatome radiating down the right arm with myositis and that the claimant had sciatica down the right S1 dermatome. He recommended a nerve conduction study of the upper extremities and an MRI of the cervical spine. See Exhibit F- 20.

On July 5, 2005, a nerve conduction study revealed electrodiagnostic evidence consistent with bilateral carpal tunnel syndrome, worse on the right side. See Exhibit F- 21. On July 5, 2005, an MRI of the neck revealed a C5-6 disc bulge with mild foraminal narrowing, a C6-7 disc complex with bilateral foraminal narrowing more pronounced on the right than the left, and a C7-T1 vertebral body spurring with mild bilateral foraminal narrowing. See Exhibit F- 21.

On August 19, 2005, the claimant went to Dr. Chabot, an orthopedic surgeon, who examined the claimant and opined that the claimant suffered from a herniated disc in the neck, cervical radiculopathy, cervical disc degeneration, back pain and sciatica and ordered an MRI of the low back to rule out any disc herniation, a cervical epidural steroid injection to moderate his neck complaints, prescribed additional medication, and released him to limited work duties with no lifting more than 10-15 pounds and gave him a return appointment. See Exhibit F-16.

On August 25, 2005, a lumbar spine MRI revealed a central focal discogenic protrusion at L5-S1, facet changes at L4-5, and otherwise satisfactory appearance of the lumbar spine. See Exhibit 6. On August 25, 2005, the claimant reported that the epidural injection in the neck only

provided a few hours of relief. Dr. Chabot's physical examination revealed findings consistent with a C6 and C7 radiculopathy. Dr. Chabot opined that the MRI of the low back did not reveal any clear evidence of a disc herniation. His impression was a low back strain with neuritis, and he recommended further conservative measures to address the low back pain. Due to the lack of improvement with conservative measures concerning the neck, the claimant opted to proceed with a cervical fusion. With regard to the carpal tunnel syndrome, Dr. Chabot opined that the condition was not work-related, but recommended that the claimant undergo a right carpal tunnel release at the time that he undergoes the cervical fusion. See Exhibit F-16. On September 19, 2005, Dr. Chabot performed an anterior cervical fusion from C5-6 and C6-7 with cervical plating and a right carpal tunnel release. See Exhibit F-16. The claimant received physical therapy.

On December 21, 2005, Dr. Chabot ordered cervical spine x-rays which revealed possible incomplete incorporation of the interbody implants. Dr. Chabot instructed him to use a bone stimulator, and returned him to regular duties on December 22, 2005. See Exhibit F-16.

The claimant returned to work on December 23, 2005, and he testified that the cervical surgery helped some of his right arm pain. He testified that from his return to work until he last worked for this employer on January 16, 2007, he had neck pain and headaches and he received help from fellow employees to perform heavy job tasks such as lifting and shoveling.

The claimant testified that his right hand grip was weaker after the carpal tunnel surgery, and he still experienced numbness and tingling. On February 2, 2006, Dr. Howard examined the claimant's left hand for numbness. See Exhibit 2. Dr. Howard reviewed the physical requirements of the claimant's job description, which included climbing, standing or bending for long periods of time, lifting up to 120 pounds and repetitive lifting of 94 pounds, and operation of a tractor, forklift and front loaders. See Exhibit 2. Dr. Howard concluded that the claimant required a left carpal tunnel release but the condition was not work related, because the claimant had a fairly physical job for his 10 years of employment and did not develop symptoms until the last year of employment as opposed to his first year of employment. See Dr. Howard deposition, page 10, 11, 15. The claimant testified that Dr. Howard did not do anything further for him.

The claimant returned to Dr. Chabot on March 15, 2006, and reported that his neck and upper extremity condition had improved since the surgery. See Exhibit F-16. However, his low back condition had deteriorated. He reported that his back pain worsens after two hours at work and is exacerbated with bending and twisting and radiates into the left lower extremity. See Exhibit F-16. The examination revealed decreased sensation involving the left anterior thigh and left first dorsal web space. The deep tendon reflexes were symmetric. He had bilateral hamstring tightness. Dr. Chabot opined that the claimant had reached MMI regarding the neck condition but recommended physical therapy and Naprosyn for the low back. See Exhibit F-16.

The claimant returned to Dr. Chabot on April 7, 2006, with persistent back pain radiating from the left buttock into the left proximal leg to the knee region aggravated with more vigorous activities. The diagnosis was sacroiliitis, lumbosacral strain, and back pain. The claimant underwent two injections of cortisone and physical therapy. On May 18, 2006, a lumbar spine MRI revealed mild diffuse facet arthropathy without stenosis but no evidence of disc herniation. See Exhibit 6. On May 17, 2006, Dr. Chabot opined that the claimant had reached MMI

regarding the back pain and recommended a second opinion from Dr. Wayne, a physiatrist. See Exhibit F-16.

On May 24, 2006, Dr. Wayne examined the claimant and the claimant reported low back pain, particularly with lifting, bending and with prolonged sitting and standing, but the physical examination of the low back was essentially normal. Dr. Wayne diagnosed a low back sprain/strain injury to the low back, opined that no further diagnostic testing or treatment was indicated, and discharged him at MMI. See Exhibit F-16.

On August 21, 2006, Dr. Chabot also opined that the claimant had suffered a low back sprain with no permanent disability and no need for further treatment or studies. He opined that the claimant could return to regular work duties. See Exhibit F-16. The claimant testified that during this time he felt pressure in his low back and pain down his legs.

The claimant testified that when he returned to "regular duty" on December 23, 2005, he did not engage in as vigorous activity as he did prior to the work injury. For example, if significant lifting was required, he would assign the job to other employees or seek assistance. On May 2, 2006, he went to Dr. Easterday, complaining of upper abdomen pain present since January 2006 and that was aggravated with lifting, pulling, and pushing. He testified that he thought the upper abdomen complaints were associated with the May 2005 incident and became more apparent when he returned to work in December 2005. Dr. Easterday's diagnosis was abdominal hernias and referred the claimant to Dr. Follwell for treatment. See Exhibit F-17.

Dr. Follwell examined the claimant on May 4, 2006, and found a bulge above the umbilicus with increased pain on activity. On May 25, 2006, Dr. Follwell performed laparoscopic repair of ventral and umbilical hernias. He discharged the claimant on June 22, 2006, to full activity effective July 1, 2006. See Exhibit F-15. The claimant claims temporary total disability benefits from May 25, 2006 to June 30, 2006, 5 1/7 weeks.

During this time, the claimant testified that he began to develop "dizzy spells". This was ultimately considered to be related to his tooth and the infection associated with it. Nonetheless, he went to Dr. Easterday complaining of "lightheadedness and indigestion." On July 5, 2006, an MRA of the brain revealed no definite pathology. (An MRA, magnetic resonance angiography, is an MRI that has contrast with it to see the blood vessels. See Dr. Easterday deposition, page 13.) On July 18, 2006, the claimant's wife spoke with Dr. Easterday's office and advised him that on June 29, 2006, the claimant had three teeth extracted. His symptoms of vertigo and lightheadedness soon subsided. He was instructed to return to the office if those symptoms persisted. See Exhibit F-17.

On August 3, 2006, the claimant returned to Dr. Orell complaining of left hand numbness, tingling, and pain waking him at night. Dr. Orell diagnosed left carpal tunnel and recommended surgery. See Exhibit F-20.

After the work accident of May 21, 2005, the claimant complained of low back pain with "sciatica" symptoms into the right lower extremity. On March 15, 2006, he reported radiating pain into the left lower extremity to Dr. Chabot. See Exhibit 5. He indicated that prior to September 11, 2006, his low back and leg symptoms were constant and painful. Oftentimes, he

would “misstep” with the foot. On September 11, 2006, he reported that he had been operating the forklift and began to have low back pain so he decided to stop the forklift, exit the operator’s chair, and loosen up. As he stepped off the forklift he misstepped and jarred his back. He testified that his left foot missed the forklift footstep and that his left foot struck the concrete floor. He testified he did not strike his low back on anything, and he did not fall. Immediately after the accident his left leg felt like it was on fire for 30 minutes. He reported the accident to his employer. The employer treated the incident as a “continuation” of the May 21, 2005, injury, and refused to extend medical treatment.

On September 14, 2006, the claimant went to Dr. Orell complaining of low back pain radiating down the left leg with left leg sciatica along the S1 dermatome and left sacroiliac joint somatic dysfunction. He received a lumbar support and medication for pain control. See Exhibit F- 20.

He returned to Dr. Orell on October 26, 2006, with low back sciatica. On October 27, 2006, an MRI of the low back revealed a posterior disc bulge with a small central disc protrusion at L5-S1. See Exhibit F- 20. On December 14, 2006, Dr. Orell referred him to Dr. Allen at Pain Management who suggested that the claimant not undergo further steroid injections, but proceed with surgical treatments. See Exhibit F- 18.

On January 17, 2007, Dr. Orell performed a prone laminotomy L5-S1 interspace on the left and excision of nucleus pulposus L5-S1 interspace. The pre-operative and post-operative diagnosis was herniated nucleus pulposus L5-S1 interspace on the left. The claimant returned to Dr. Orell on January 31, 2007, and reported that his low back pain and left sciatica had improved, although he still had occasional numbness in his left foot. See Exhibit F- 20.

On February 20, 2007, the claimant underwent left carpal tunnel surgery and returned to Dr. Orell earlier than scheduled. On March 12, 2007, the claimant fell off his porch, but x-ray and clinical exams revealed no significant pathologies. On March 30, 2007, Dr. Orell sent this employer a letter, “I do not feel that he can return to his previous job due to physical disability and I feel that he should apply for Social Security disability benefits.” Dr. Orell discharged the claimant on April 5, 2007. See Exhibit F-20.

On September 8, 2009, Dr. Orell referred the claimant to Dr. Krishnan for pain management. See Exhibit F-19. The claimant received pain management, including epidural injections, until January 20, 2010, when Dr. Krishnan surgically placed a permanent dorsal column stimulator implant in his lumbar spine. Dr. Krishnan’s pre- and post-operative diagnoses were “Failed back surgery and post laminectomy syndrome”. See Exhibit F-19. The claimant testified that from his lumbar surgery on January 17, 2007, until the stimulator was implanted in his low back, his low back pain got continuously worse. After the stimulator was implanted, he controlled his symptoms daily utilizing the stimulator.

The claimant testified that his neck pain is constant, with pain between his shoulder blades and frequent headaches. He has pressure in his low back and his right foot falls asleep. His right and left hands are numb, ache and his grip is weak. He feels a pulling pain in his abdomen when he squats down. The claimant takes Reglan for headaches 2 to 3 times per week and uses his dorsal column stimulator implant 2 to 4 times per day. Dr. Easterday prescribes his

medications. When he has pain throughout the day in his back or has headaches from his neck pain, he will take Reglan and use the stimulator, and lay down for 2 to 3 hours. The claimant can sit and ride in a vehicle 15 to 30 minutes. He can lift 30 to 35 pounds. Excessive lifting causes pain between his shoulder blades, down his right arm, and low back pain. He has trouble walking and with balance, particularly when he steps down sometimes his right leg gives out. He has trouble looking down because of his neck and has to take Reglan. The claimant has difficulty sleeping with pain in his neck and down his right arm. He has to re-position himself constantly and he sleeps one to one and half hours at a time.

The claimant testified that he cannot work because of the pain in his neck, right arm, and low back. He cannot sit and stand all day long, and does not believe he would be a dependable employee. Before May 21, 2005 the claimant had not received any medical treatment to his neck, low back, hands, arms, or abdomen. On March 1, 2005, the claimant reported to Lincoln County Medical Center that he had pain in his elbows, shoulders, knees, and back. See Exhibit F-9. He testified that he had fallen a year prior to that visit and wanted to get checked out. He testified those symptoms resolved before the May 21, 2005, work-related accident. He testified that he had multiple x-rays performed on March 5, 2005 at Lincoln County Medical Center, and had them done because his mother had passed away from bone cancer 8 to 10 months before that date, and he wanted to be checked out because he had been working a lot of overtime and had been experiencing pain in his shoulders, knees and muscle spasms. The x-rays were negative. See Exhibit F-9. The claimant had no medically imposed restrictions before May 21, 2005.

The claimant identified numerous medical bills that he received for treatment of his low back, hands, and hernia injuries. See Exhibit G.

John Ohmes

John Ohmes, the employer's plant coordinator, testified that this employer has 42 full-time employees. The claimant was a team leader responsible for daily production and had 1 to 2 employees underneath him. He did pouring into a mixer and molds. The claimant spent 2 hours in the morning stripping molds and drove a forklift 6 hours a day. On some days, the claimant would use handheld power tools and some days not at all. The mold that the claimant was working on was an older mold. Mr. Ohmes confirmed the claimant worked with heavy weights, used 8 pound jackhammers, and used stick vibrators to mix concrete. The forklifts do not have shock absorbers, and the operator feels vibrations on uneven surfaces.

Mr. Ohmes testified that the claimant did return to work for the employer on December 23, 2005, to the same Lead man / Team Lead position as he had prior to the May 21, 2005, work injury and worked full duty from December 23, 2005 – September 11, 2006. Mr. Ohmes testified that the claimant got his work done and was never written up for not getting his work done during this time frame and never required any special accommodations such as lying down due to headaches following the May 21, 2005, work injury. Mr. Ohmes testified that the claimant had a history of headaches prior to the May 21, 2005, work injury and that the claimant called in sick due to headaches 3 – 4 times a year before the May 21, 2005, work injury. Mr. Ohmes testified that the claimant resigned from Champion Precast in April 2007.

Dr. Meyers

Dr. Meyers, a general surgeon, evaluated the claimant on August 28, 2007, after taking a medical history, reviewing medical records, and examining the claimant. See Dr. Meyers' deposition, page 8. Dr. Meyers testified that the claimant walked with a slight limp and was bent forward at the waist complaining of low back pain and posterior neck pain. His vital signs were normal. He showed a reduction in rotation, flexion, and extension. There was mild tenderness in the back or posterior part of the neck. The abdomen showed healed incisions without evidence of any recurrent hernia formation. The back showed a healed laminectomy incision with no swelling, tenderness to palpation. See Dr. Meyers' deposition, pages 21-22. He had a significant decrease in rotation, lateral bending, flexion, and extension of 30 degrees. See Dr. Meyers' deposition, page 21, Deposition Exhibit B, page 4. The right shoulder showed a small loss of abduction; but otherwise the range of motion seemed good and no pain. The left lower extremity demonstrated normal reflexes with intact sensation. There was some lower back pain with straight leg extension and flexion. There was no muscle wasting or decrease in strength. The hand showed healed incision with minimal tears and reduced grip strength bilaterally, to full range of motion in both wrists. There were no abnormalities with fine motor function bilaterally. See Dr. Meyers' deposition, pages 21-22.

Dr. Meyers opined that the claimant was permanently and totally disabled. See Dr. Meyers' deposition, page 22. He opined that the May 21, 2005, accident was the prevailing factor causing the injuries to the claimant's neck, abdominal hernia, and lumbar spine. See Dr. Meyers' deposition, page 22. He assigned restrictions to the neck including avoiding heavy lifting, repetitive lifting, bending, rotation, and remaining in a fixed position, such as with prolonged standing and sitting. He should avoid any repetitive squats. He needs to take frequent breaks and be allowed to lie down due to his headaches. See Dr. Meyers' deposition, pages 22, 23. He recommended continued use of over-the-counter analgesics on an as needed basis. See Dr. Meyers' deposition, page 23. He opined that the claimant sustained a 50% permanent partial disability of the body as a whole due to the cervical fusion with plating and 5% permanent partial disability of the body as a whole for each hernia for a total of 10% permanent partial disability of the body as a whole. See Dr. Meyers' deposition, page 23.

Dr. Meyers opined that the September 11, 2006, accident was the prevailing factor causing the need for surgery of the claimant's low back, because the claimant experienced low back and left leg symptoms as a result of the 2005 accident. See Dr. Meyers' deposition, page 24. "This was a significant and I think a prevailing factor in causing the misstep and slip when he was on the forklift in September." See Dr. Meyers' deposition, page 24. Dr. Meyer testified the accident of September 11, 2006 was the prevailing factor in having him undergo lumbar surgery for the ruptured disc. See Dr. Meyers' deposition, page 24. Dr. Meyers agreed that assuming the September 11, 2006 accident was an accident as defined by Missouri law that it came into play in causing the need for some medical treatment and in causing some disability as a result of that medical treatment. See Dr. Meyers' deposition, pages 24, 25. Dr. Meyers opined that the claimant sustained a 30% permanent partial disability of the body as a whole for the low back condition. See Dr. Meyers' deposition, page 25. He opined that the claimant suffered a 25% permanent partial disability to his low back from the May 21, 2005 accident and 5% permanent partial disability to his low back from the September 11, 2006 accident. See Dr. Meyers' deposition, page 25. Dr. Meyers assigned restrictions to the low back including

avoiding any repetitive or heavy lifting, squatting, bending, twisting, climbing stairs, prolonged standing or sitting. He needs to freely move and alternate positions between sitting, standing, and walking. See Dr. Meyers' deposition, page 25.

Concerning the claimant's bilateral carpal tunnel syndrome, Dr. Meyers opined that the claimant's work with jackhammers and the vibrating tools were a prevailing factor causing the bilateral carpal tunnel syndrome and the subsequent need for surgery. See Dr. Meyers' deposition, page 26. He opined that the claimant suffered a 30% permanent partial disability to the right hand and a 25% permanent partial disability to the left hand. See Dr. Meyers' deposition, page 26. He assigned restrictions to the hands consisting of avoiding any activity that requires repetitive pulling, pushing, twisting, fine motor skills, avoid exposure to vibrating machinery, as well as heavy lifting. See Dr. Meyers' deposition, page 26.

Dr. Meyers opined that the claimant's disabilities from the 2005 and 2006 occurrences are an obstacle to his employment, and that he is permanently and totally disabled. See Dr. Meyers' deposition, page 27. The claimant's disabilities from these occurrences synergistically combine with one another, and that the claimant's overall disability from those disabilities is greater than the simple sum of the individual disabilities. See Dr. Meyers' deposition, page 27. He opined that the claimant could not compete in the open labor market but would defer to a vocational expert. See Dr. Meyers' deposition, page 27. Dr. Meyers testified within a reasonable degree of medical certainty that the 2006 event was the plain aggravation or an exacerbation of the condition he already had from the 2005 back injury. See Dr. Meyers' deposition, pages 35-36.

Dr. Orell

Dr. Orell, a board certified orthopedic surgeon, examined the claimant for a right shoulder injury in 2002. He examined the claimant on June 30, 2005, and ordered a cervical spine MRI and a nerve conduction study. X-rays of the cervical spine revealed arthritic changes. The patient was complaining of radicular pain, pain down his right arm. He performed the claimant's lumbar laminotomy on January 17, 2007, and a left carpal tunnel release on February 20, 2007. See Exhibit 10.

Dr. Orell testified, "I feel that when someone's trapped under a 300 pound door and has to, you know, twist to try to extricate himself from this weight, that that can cause bulging or herniation of disc material. I believe that that initial injury was a substantial factor in causing his back pain, and that it weakened his low back to the point where the injury on 9-11-06, where he slipped on an already numb lower extremity was a prevailing factor in his need for surgical intervention. He did not respond to conservative therapy after that." Dr. Orell opined that the 2005 accident was a substantial factor causing low back pain and left lower extremity numbness and decreased sensation and was directly attributable to the May 21, 2005 accident. See Dr. Orell deposition, pages 12-17.

Dr. Orell testified that the herniated low back disc into the interspace is consistent with holding up a 250 to 300 pound door and twisting. See Dr. Orell deposition, page 24. Dr. Orell testified, "I feel that the initial injury back in 2005 did weaken his low back. I mean, there was evidence on at least one prior MRI that he did have a herniated disc, and I feel that he had been

suffering from decreased sensation and weakness to his left leg since that time. And this second slip just exacerbated his preexisting condition in his low back to the point where it would not respond to conservative therapy and needed surgical intervention.” See Dr. Orell deposition, page 24. He opined that the September 11, 2006, incident was a prevailing factor causing the bulging disc or a change in the size of the bulging disc and the herniated disc, “Yes, I feel absent any other trauma, that was the prevailing factor in increasing the pathology in his low back to the point where he needed surgical intervention.” See Dr. Orell deposition, pages 24, 25. He testified that the September 2006 accident was the primary and prevailing factor causing the claimant’s bulging disc, herniated disc, need for surgery, and his disability. See Dr. Orell deposition, pages 25, 26.

On March 30, 2007, Dr. Orell wrote a letter to this employer at the claimant’s request opining that the claimant could not return to his previous job duties, and that he should apply for Social Security disability benefits. Dr. Orell testified, “Evidently, I had communication with Mr. Hampton where he requested that I write this letter stating that he did not feel that he could return to his job duties.” Dr. Orell said in the letter, “He had the neck surgery, he had back surgery, carpal tunnel surgery, and that I didn't feel that he was progressing satisfactorily where he could return to work after the normal three months’ time frame.” He did not have a specific time frame to return him to work, because the claimant had decided at that point that he was going to apply for disability benefits. He testified that he did not put any restrictions on the claimant, because he didn't send him back to work. Dr. Orell stated in his letter of August 20, 2009, if there were vocational rehabilitation available, then that would be something to pursue. See Dr. Orell deposition, pages 43-46.

On April 30, 2007, Dr. Orell opined that the claimant cannot kneel, squat, crawl, or bend repetitively due to his low back pain and weakness. See Dr. Orell deposition, pages 50, 51. He opined that the claimant cannot return to his prior employment. See Dr. Orell deposition, pages 51, 52.

Dr. Orell used the term, the straw that broke the camel's back and testified, “Well, I feel that these injuries were additive. I felt that his back was weakened by the initial injury and that something that was, that may have not been substantial enough to cause the total injury could certainly exacerbate this weakness in his back and hence the term, the straw that broke the camel's back, it wasn't something, it wasn't a large trauma, but it was just the last straw that caused his back problems.” He testified that it was a significant force to consider it a primary factor in causing the herniation. See Dr. Orell deposition, pages 52, 53. He opined that the claimant had mild preexisting joint disease, but the history of the two incidents led to a pressure on the nerve root requiring surgery. See Dr. Orell deposition, page 40.

Dr. Easterday

Dr. Easterday testified that the claimant visited the Troy Family Practice on March 1, 2005, for shoulder, elbow, and back pain. See Dr. Easterday deposition, page 8. He also reported that his hands would go numb intermittently. See Dr. Easterday deposition, pages 8, 9. On June 29, 2005, the claimant reported arm pain from the shoulder blade down the back of the arm and a limp on the right that was affecting the right leg that was achy and fell asleep. Dr. Easterday referred him to an orthopedic surgeon, Dr. Orell. See Dr. Easterday deposition, pages

9, 10. In May 2006, the claimant returned to Dr. Easterday for abdominal pain with a bulging in his upper abdomen. See Dr. Easterday deposition, page 10. Dr. Easterday diagnosed a midline abdominal hernia. See Dr. Easterday deposition, page 11. While the claimant attributed the condition to the May 2005 accident, Dr. Easterday could not determine a causative factor for the hernia. See Dr. Easterday deposition, page 11. In March 2007, the claimant reported neck pain, anxiety, and reported that he had had a short period of time where he was not able to speak. See Dr. Easterday deposition, page 11. All tests were all negative. See Dr. Easterday deposition, page 12. In June 2007, the claimant reported headaches, neck pain, and back pain. See Dr. Easterday deposition, page 12. Activities that made it worse were any position, standing, sitting, lying, or an increase in his level of stress. See Dr. Easterday deposition, page 12. On October 4, 2007, the claimant returned with neck, back, right arm, and bilateral leg pain. See Dr. Easterday deposition, page 12. On January 4, 2008, the claimant returned with bilateral leg pain, low back pain, and neck pain. See Dr. Easterday deposition, page 12. He returned on October 7, 2008 as he was having ongoing headaches, dizziness, and pain in his legs as well. See Dr. Easterday deposition, page 13. Dr. Easterday scheduled MRA's of the neck and head which were essentially negative. See Dr. Easterday deposition, page 12. Dr. Easterday continues to treat the claimant for headaches, stiffness, pain with activity, that "can be a complication even after" cervical fusion surgery of that magnitude. See Dr. Easterday deposition, page 13.

Dr. Howard

On February 2, 2006, Dr. Howard, a board certified orthopedic surgeon specializing in hand, elbow and upper extremities, examined the claimant and reviewed his medical records, a job description and a work history. See Dr. Howard deposition, pages 7, 8. X-rays of the left hand and left elbow at the exam were normal. See Dr. Howard deposition, page 10. Dr. Howard diagnosed left carpal tunnel syndrome and opined that his carpal tunnel syndrome was not work related. See Dr. Howard deposition, page 10. He opined that the etiology was idiopathic. See Dr. Howard deposition, page 11. He opined that a carpal tunnel release was indicated. See Dr. Howard deposition, page 12. Dr. Howard opined that the claimant's job was highly varied. See Dr. Howard deposition, pages 10, 11. Dr. Howard testified that the claimant provided him with a history of using jackhammers at work but not an excessive amount of time. See Dr. Howard deposition, page 9. Dr. Howard testified that the claimant has worked for the employer for ten years and if work was the cause of his problem, the problems would have developed in the first year or so of employment. See Dr. Howard deposition, page 11. Dr. Howard testified that as a general rule a study looking at cause-effect relationship, two years is generally considered a fair standard of measure. See Dr. Howard deposition, page 15. Dr. Howard opined that the fact that the claimant worked at the job for almost a decade before becoming symptomatic is clear evidence that there is not a relationship between his work and carpal tunnel. See Dr. Howard deposition, page 11. In regard to the right hand, Dr. Howard found a normal exam and opined that the claimant was at maximum medical improvement. See Dr. Howard deposition, page 24.

Dr. Pruett

Dr. Pruett, a general surgeon, examined the claimant on December 2, 2009 and opined, "Well, based on what [the claimant] told me, I felt that you could trace that back to his injury, his original injury in May of 2005." Based upon the medical records, he opined, "It's concerning to me that it's not better documented by the physicians that he saw. The story that he gives me is

consistent, but I can't document that based on the doctors' factual reports. It makes me less convinced. ... It certainly muddies the water considerably." See Dr. Pruett deposition, pages 17, 18. He also testified that all of his opinions were based on a reasonable degree of medical certainty. See Dr. Pruett deposition, page 18.

Dr. Kitchens

On November 19, 2008, Dr. Daniel Kitchens, a board certified neurological surgeon, took a medical history, reviewed medical records, and performed a clinical examination. Dr. Kitchen opined, "That he had an injury to his cervical spine, a disc herniation at C5-6 and C6-7 that was a result of the work incident of May 21st of 2005. That he had surgery performed by Dr. Chabot which was necessary for this work injury. That he had degenerative disc disease of his lumbar spine, lower back pain. And that the work incident of May 21st was not the prevailing factor in the cause of his lumbar disc degeneration or chronic back pain." See Dr. Kitchen's deposition, pages 5-9. He opined that the claimant's degenerative disc disease was the prevailing factor causing his low back pain, and the claimant's work injuries on May 21, 2005, and September 11, 2006, were not the prevailing factors causing his lumbar spine condition and low back pain. See Dr. Kitchens' deposition, page 10.

Based on his history he reports that he had back pain prior to the work incident of May 21st, 2005. His workup after the work incident, including the MRI of his lumbar spine, revealed degenerative changes at the lower lumbar spine and disc bulging of his lumbar spine. He then had another MRI on October 27th of 2006 and the MRI report revealed L5-S1 mild posterior disc bulging, with a small central disc protrusion. No other focal abnormalities were seen. Negative for neural foraminal or spinal stenosis of the lumbar spine. These findings are consistent, suggestive of degenerative disc disease of his lumbar spine. There is no objective information or data on the MRI of an acute injury to his lumbar spine, such as an acute disc herniation or nerve root impingement. See Dr. Dr. Kitchens' deposition, pages 10, 11.

He opined that the claimant requires no additional medical treatment, that he has attained maximum medical improvement, that he is able to work and return to work full duty, and that he is not permanently and totally disabled. See Dr. Dr. Kitchens' deposition, page 11. He opined that the claimant sustained a 10 percent permanent partial disability related to his cervical disc herniation, which is as a result of the May 21st, 2005 work injury, but he did not believe that the claimant sustained any permanent partial disability to his lumbar spine from the May 2005 or September 2006 work injuries. See Dr. Dr. Kitchens' deposition, pages 11, 12. He testified, "I did not see evidence of an acute injury to his lumbar spine. Specifically, he had two MRIs after the May 21st, 2005 work injury and neither MRI showed evidence of an acute disc herniation or nerve root compression." See Dr. Dr. Kitchens' deposition, page 12.

He testified that degenerative disc disease may be present but not be symptomatic and that trauma can aggravate underlying degenerative disc disease. See Dr. Dr. Kitchens' deposition, page 23. Degenerative disc disease "would be symptomatic at some point", but it's speculative as to when. See Dr. Dr. Kitchens' deposition, page 23. Dr. Kitchens testified he was

familiar with carpal tunnel syndrome. He confirmed the use of power tools is commonly associated with carpal tunnel syndrome. See Dr. Dr. Kitchens' deposition, page 36.

J. Stephen Dolan

J. Stephen Dolan, a vocational expert, evaluated the claimant on February 6, 2009, and opined that the claimant does not have the academic skills for nonphysical type jobs. Mr. Dolan opined that the neck injury precludes him from heavy or repetitive lifting. Mr. Dolan opined that the restriction eliminates every job Mr. Hampton has ever done. Mr. Dolan listed the claimant's neck restrictions. Mr. Dolan opined that Dr. Meyers' restrictions for the neck injury would, by themselves, preclude employment. Mr. Dolan opined that Dr. Meyers' restrictions were obviously not entirely accurate since the claimant worked in his regular job for a considerable period of time after his neck surgery and before the September 11, 2006 back injury.

Mr. Dolan reported the ramifications of the low back injury restrictions and the bilateral wrist restrictions. Mr. Dolan opined that the accumulation of his injuries and limitations prevents the claimant from engaging in gainful employment. Mr. Dolan testified that the accumulation of injuries and limitations that prevent him from gainful employment is a combination of his neck condition, low back condition, bilateral wrist condition and his other limitations together that make him unemployable in the open labor market. See Dolan deposition, page 29.

Mr. Dolan testified that the claimant told him when he returned to work following his cervical surgery, he did have some difficulties. See Dolan deposition, page 27. Mr. Dolan testified that the claimant told him that other employees were helping him with the heavy lifting or anything else he was having trouble with. See Dolan deposition, page 27. He testified that although the claimant had some difficulties, he was still able to work for the employer. See Dolan deposition, pages 27, 28. Mr. Dolan testified that the claimant is permanently and totally disabled right now but it is always possible that people will get better. See Dolan deposition, page 23.

Donna K. Abram

Donna K. Abram, a vocational counselor, met with the claimant, performed a vocational assessment and opined that the claimant is still employable and could be placed in a position in the open labor market. With a strong diligent effort he should be able to locate a job.

Ms. Abram opined that the claimant was not permanently and totally disabled. See Dolan deposition, page 20. Ms. Abram testified that if the claimant were deemed to be permanently and totally disabled, then it would be due to the combination of his neck, low back, hands, legs and all of the conditions that he listed to her. See Abram deposition, pages 19, 20.

Ms. Abram opined that if the claimant needs to lie down during a normal workday two to three times a week for more than an hour at a time each time, that it would certainly be a barrier to finding full-time employment. If they're looking for a full time capacity, she testified, "I think that would be very difficult to find anybody who could do that, or would be willing to accommodate them." Ms. Abram opined that it's very doubtful there are any jobs that the

claimant would be qualified for based on his age, education, transferable skills where an employer would allow him to lie down during the workday multiple times. See Abram deposition, pages 45, 48.

Ms. Abram testified that one of Dr. Meyers' restrictions concerning the neck was for the claimant to lie down if he gets a bad headache. Taking into consideration the claimant's age, education, transferable skills, and work experience, along with his May 21, 2005, injury and its sequelae, which includes the need to take frequent breaks and lie down because of his headaches, that in and of itself would render him unemployable in the open labor market, and she testified, "If you're looking at those factors I think that there are some serious doubts as to whether or not he would be able to find an employer in this labor market who would be willing to hire him. Whether or not that would have been the same when the doctor made that statement, and I am trying to get the date, in 2008, I don't think it would have been as significant a barrier as it is today." See Abram deposition, page 49. In response to whether or not an employer would be willing to hire the claimant with his age, education, transferable skills, and work experience, and the need to lie down for more than an hour at a time two to three times a week, and she testified, "I think that there are -- that that would be doubtful, but I can't state a hundred percent yes or no." See Abram deposition, page 49.

James M. England

On September 8, 2010, James M. England performed a vocational rehabilitation evaluation based on his review of all the medical records, vocational reports of Ms. Abram and Mr. Dolan along with the claimant's deposition. Mr. England concluded that based upon the restrictions of the treating doctors there would be some alternative work activity which the claimant could perform. Mr. England opined that based on Dr. Kitchens' opinion he could return to what he had done in the past. Based on Dr. Orell's restrictions there would still be some potential entry-level service employment positions such as retail sales, cashiering, courier work, security positions, etc. that he could perform. Mr. England opined that only if one assumes Dr. Meyers' findings and restrictions would one conclude the claimant is unemployable. Mr. England referenced the specific restriction from Dr. Meyers that if the claimant needed to take frequent breaks and lie down because of headaches, this would preclude his ability to maintain any type of employment in the open labor market.

MEDICAL CAUSATION

"The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job." Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). "Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission." Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, "[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability." § 287.020.2. On the other hand, "[a]n injury is not compensable merely because work was a triggering or precipitating factor." Id. "Awards for injuries 'triggered' or 'precipitated' by work are nonetheless proper *if* the employee shows the work is a 'substantial factor' in the cause of the injury." "Thus, in determining whether a given injury is compensable, a 'work related accident

can be both a triggering event and a substantial factor.’ Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ’s personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge’s opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant testified that he injured his low back dismounting a forklift on September 11, 2006, and went to Dr. Orell, the treating surgeon, on September 14, 2006. Lumbar spine x-rays revealed degenerative disc disease at L4 – S1 with no evidence of acute fracture or spondylosis. See Exhibit 9. On October 27, 2006, an MRI revealed mild posterior disc bulging with a small central disc protrusion with no other focal disc abnormalities. See Exhibit 6. The MRI was negative for neural foraminal or spinal stenosis of the lumbar spine. See Exhibit 6. Dr. Orell reviewed the MRI and found a bulging disc at L5-S1 centrally with no evidence of a herniated disc or spinal stenosis. See Exhibit 9. Dr. Orell referred the claimant to pain management. Dr. Orell opined that surgical intervention would be the last choice of treatment given the appearance of his MRI scan. See Exhibit 9. On January 17, 2007, Dr. Orell diagnosed a herniated disc at L5-S1 and performed a laminotomy at L5-S1. The claimant received ongoing medical treatment from Dr. Orell until he was released from care on April 5, 2007. At that time, the claimant still had sciatic pain in the left leg. See Exhibit 9.

On August 20, 2009, Dr. Orell opined that the September 11, 2006, accident was the prevailing factor in causing a large bulging disc in the lumbar spine requiring surgical intervention and that the September 2006 accident was the straw that broke the camel’s back. See Exhibit 9.

Dr. Meyers, an examining surgeon, opined that the September 11, 2006, accident was the prevailing factor causing the need for surgery of the claimant’s low back, because the claimant experienced low back and left leg symptoms as a result of the 2005 accident. See Dr. Meyers’ deposition, page 24. “This was a significant and I think a prevailing factor in causing the misstep and slip when he was on the forklift in September.” See Dr. Meyers’ deposition, page 24. Dr. Meyers testified the accident of September 11, 2006 was the prevailing factor in having him undergo lumbar surgery for the ruptured disc. See Dr. Meyers’ deposition, page 24. Dr. Meyers agreed that assuming the September 11, 2006 accident was an accident as defined by Missouri law that it came into play in causing the need for some medical treatment and in causing some disability as a result of that medical treatment. See Dr. Meyers’ deposition, pages 24, 25.

Dr. Kitchens, an examining neurosurgeon, reviewed all three lumbar MRI’s and opined that the microdiscectomy at L5-S1 was not a result of the May 2005 accident or the September 2006 accident. (Exhibit 1) He opined that the need for the L5-S1 discectomy resulted from the claimant’s pre-existing degenerative disc disease and degenerative disc bulging at L5-S1 based

upon the claimant's prior history of back pain, his workup and lumbar MRI revealing degenerative changes at the low lumbar spine and disc bulging of his lumbar spine. See Dr. Kitchens' deposition, page 10. Dr. Kitchens opined that the October 27, 2006, MRI report revealed L5-S1 mild posterior disc bulging, with a small central disc protrusion and no other focal abnormalities. See Dr. Kitchens' deposition, page 10. Dr. Kitchens opined that the claimant was negative for neural foraminal or spinal stenosis of the lumbar spine. See Dr. Kitchens' deposition, page 10. Dr. Kitchens opined that these findings are consistent and suggestive of degenerative disc disease of the lumbar spine. See Dr. Kitchens' deposition, page 11. Dr. Kitchens found no objective information or data on the MRI of an acute injury to the lumbar spine, such as a disc herniation or nerve root impingement. See Dr. Kitchens' deposition, page 11. Dr. Kitchens testified that May 2005 and September 2006 accidents were not a substantial factor in causing the claimant's low back complaints because they did not result in disc herniation or structural changes of his back. See Dr. Kitchens' deposition, page 35. Dr. Kitchens testified that in order for these incidents to aggravate the degenerative disc disease there would have to be nerve root impingement. See Dr. Kitchens' deposition, page 35. He opined that the MRI's document that there was no nerve root impingement pre or post September 11, 2006.

All three forensic experts are highly qualified surgeons with sufficient experience and training to render expert medical opinions on this subject. Dr. Meyers' lack of medical history of the claimant's persistent, severe low back pain for at least a year before the first accident is troubling. Dr. Kitchens' review of the radiology tests is very cogent and consistent with a deteriorating low back condition. However, he did not conduct ongoing examinations of the claimant and perform the surgical procedure. Dr. Orell testified that the September 2006 accident was the primary and prevailing factor causing the claimant's bulging disc, herniated disc, need for surgery, and his disability. See Dr. Orell deposition, pages 25, 26. He had ongoing contact with the claimant's epic low back disorder and understood that the claimant had mild degenerative joint disease, a back sprain from the 2005 accident, and a very disabling condition after the 2006 accident that required surgery within four months after conservative measures failed. Dr. Orell's findings appear to be generally consistent with the medical history. He had an advantage of a ringside seat including inspecting the disc condition personally during the claimant's surgery. Clearly, both the claimant's preexisting and progressive degenerative joint disease and his accidental injury are important factors causing his post-accident medical condition and increased disability. As the treating surgeon, Dr. Orell's findings appear to be the most credible. The claimant has met his burden of proving that the September 2006 accident was the prevailing factor or most important factor causing the claimant's post-accident medical condition and increased 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.

The claimant alleges that the employer has liability for his low back surgery, the evidence as discussed above supports a finding that the September 2006 accident was the prevailing factor causing the claimant's medical condition and disability. The claimant presented medical records and medical bills as follows:

12/7/06	Western Anesthesia & Pain Management, Pain Management eval	\$ 440.00
1/17/07	Lincoln County Medical Center, Lumbar Surgery	\$12,397.00
1/17/07	Robert Orell, M.D., Lumbar Surgery	\$ 4,600.00
Total		\$17,437.70

The claimant is awarded \$17,437.70 for past medical expenses.

FUTURE MEDICAL CARE

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow [s] from the accident." Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001)(quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present "evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible" for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

The claimant in this case seeks an award for over-the-counter medication. Dr. Meyers opined that the claimant continue to take over-the-counter analgesics on an as needed basis. See Dr. Meyer's deposition, page 23. Dr. Meyers did not specify from which condition the need for over-the-counter medication flowed or whether the requirement flowed from any of the accidents that the claimant suffered. The claimant certainly suffered from severe pain before this accident, and it is beyond belief that the claimant did not take over-the-counter pain relief medication for his severe low back pain for the year preceding the May 2005 accident. The Troy Family Practice Clinic recommended pain relief medication for the claimant on March 1, 2005, 52 days before the May 21, 2005, accident. The claimant has failed to show that his requirement for over-the-counter analgesics flowed from the accident, and his claim for future medical care is denied.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

At the time of this injury, "total disability" was defined as an "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020. The purpose of a temporary, total disability award is to cover the employee's healing period. Birdsong v. Waste Management, 147 S.W.3d 132, 140 (Mo.App. S.D. 2004). Temporary total disability awards should cover the period of time from the accident until the employee can either find employment or has reached maximum medical recovery. Id. "When further medical progress is not expected, a temporary award is not warranted." Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418, 424 (Mo.App. W.D. 2000) (overruled on other grounds). "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability." Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 238 (Mo.App.2008).

The claimant also claims temporary total disability benefits during his recovery from his low back surgery from January 17, 2007, to March 30, 2007, 7 3/7 weeks. The evidence as discussed above supports a finding that those conditions and medical procedures are sufficiently related to the September 2006 to impose liability on the employer, and the claimant is awarded 7 3/7 weeks of temporary total disability benefits.

PERMANENT DISABILITY

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).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to Section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in Section 287.190.1. "Permanent partial disability" is defined in Section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how

it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

None of the evidence supports a finding that the claimant is unemployable in the open labor market solely as a result of his low back disability from the September 2006 accident. The only expert to evaluate the claimant's overall disability to his low back was Dr. Meyers, who opined that the claimant suffered a 30% permanent partial disability to his low back as of his medical evaluation. See Dr. Meyers' deposition, page 26. Dr. Meyers' apportionment of the disability to the 2005 and 2006 accidents is flawed, because he did not have information about the claimant's preexisting degenerative disc disease memorialized in the March 2005 office visit to the Troy Family Practice Clinic and because he attributes more disability to the May 2005 accident than is supported by the evidence.

In a prior award in Injury Number 05-067328, the claimant's 5% permanent partial disability to his low back from his 2005 accident is well documented. Dr. Orell's commentary and the medical records demonstrated that the claimant had a 5% permanent partial disability to his low back before his 2005 accident. Based on these findings, the claimant suffered from a 10% permanent partial disability to his low back before the September 2006 accident.

In summary, the claimant suffered from a 30% permanent partial disability to his low back from all of the occurrences, and he suffered from a 10% permanent partial disability to his low back before the September 2006 accident. Therefore, the claimant suffered a 20% permanent partial disability to his low back from the September 2006 accident and is awarded the same.

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).

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).

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 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (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).

"Section 287.220 creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the [F]und in [a]ll cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, the claimant must establish that: (1) he suffered from a permanent *partial* disability as a result of the *last* compensable injury, and (2) that disability has combined with a *prior* permanent *partial* disability to result in total permanent disability. Section 287.220.1. The Fund is liable for the permanent total disability only *after* the employer has paid the compensation due for the disability resulting from the later work-related injury. Section 287.220.1 ("After the compensation liability of the employer for the last injury, considered alone, has been determined ..., the degree or percentage of ... disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined..."). Thus, in deciding whether the Fund is liable, the first assessment is the degree of disability from *the last injury considered alone*. Any prior partial disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself resulted in the employee's permanent, total disability, then the Fund has no liability, and the employer is responsible for the entire amount of compensation. ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, 263 S.W.3d 43, 50 (Mo.App. W.D. 2007).

The test for permanent, total disability is the worker'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 injured worker, given 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).

The claimant's disability from the September 2006 accident was a 20% permanent partial disability to his low back. The claimant suffered a 30% permanent partial disability to the cervical spine and 5% permanent partial disability to the lumbar spine from the 2005 accident. He suffers from a 10% preexisting permanent partial disability from his hernias. He suffers from a 5% preexisting permanent partial disability from his degenerative joint disease. He also suffers from a 17 ½% permanent partial disability to each wrist from his carpal tunnel syndrome.

Dr. Meyers opined that the claimant's disabilities from the 2005 and 2006 occurrences are an obstacle to his employment, and that he is permanently and totally disabled. See Dr. Meyers' deposition, page 27. The claimant's disabilities from these occurrences synergistically combine with one another, and that the claimant's overall disability from those disabilities is greater than the simple sum of the individual disabilities. See Dr. Meyers' deposition, page 27. There was no contrary evidence.

The key question is whether the claimant's overall disabilities render the claimant unemployable in the open labor market. The claimant testified that he cannot work because of the pain in his neck, right arm, and low back. He cannot sit and stand all day long, and does not believe he would be a dependable employee. Dr. Meyers assigned restrictions to the neck including avoiding heavy lifting, repetitive lifting, bending, rotation, and remaining in a fixed position, such as with prolonged standing and sitting. He should avoid any repetitive squats. He needs to take frequent breaks and be allowed to lie down due to his headaches. See Dr. Meyers' deposition, pages 22, 23. He also recommended that the claimant avoid any activity that requires repetitive pulling, pushing, twisting, fine motor skills, avoid exposure to vibrating machinery, as well as heavy lifting. See Dr. Meyers' deposition, page 26. Dr. Meyers assigned restrictions to the low back including avoiding any repetitive or heavy lifting, squatting, bending, twisting, climbing stairs, prolonged standing or sitting. He needs to freely move and alternate positions between sitting, standing, and walking. See Dr. Meyers' deposition, page 25. He recommended continued use of over-the-counter analgesics on an as needed basis. See Dr. Meyers' deposition, page 23. Dr. Meyers opined that the claimant could not compete in the open labor market but would defer to a vocational expert. See Dr. Meyers' deposition, page 27.

Three forensic vocational experts offered expert opinions on the claimant's employability. Mr. Dolan opined that the claimant was permanently and totally disabled based on all of Dr. Meyers' restrictions. The other two vocational experts, Ms. Abram and Mr. England, both opined that the claimant is not permanently and totally disabled, because he is capable of gainful employment based upon the restrictions of the treating physicians. They opined that the only restriction that could make the claimant permanently and totally disabled was from a rating physician, Dr. Meyers, who opined that the claimant should take frequent breaks and lie down because of headaches, if needed. None of the treating physicians, Dr. Chabot, Dr. Wayne, Dr. Orell, or Dr. Easterday, who is treating his headaches, issued this restriction. Further, the claimant appears to have a history of headaches that have interfered with his employment even before the May 2005 accident according to his supervisor. He appeared to have developed worse headaches and dizzy spells on June 28, 2006 according to Dr. Easterday's records. See Exhibit 8. On July 5, 2006, an MRA of the brain revealed no definite pathology. On July 18, 2006, the claimant's wife spoke with Dr. Easterday's office and advised him that on June 29, 2006, the claimant had three teeth extracted. See Exhibit F-17.

In reviewing the medical opinions, Dr. Meyers' restriction requiring the claimant be offered time to lie down and rest at his discretion is different from the restrictions of the treating physicians. His restrictions present a conflict in the medical opinions. To analyze this conflict, it is important to examine the law in force at the time of the injury in this case which provides, in part:

287.190.6 (2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The medical opinions addressing compensability and disability in this case appear to be inconsistent and conflicting. The findings of the treating physicians appear to be based on findings demonstrable on physical examination or by appropriate tests or diagnostic procedures. Dr. Meyers did not state whether he based his restriction on any finding that was demonstrable from his examination or by an appropriate test or diagnostic procedure. The only diagnostic procedure used in this matter related to the claimant's headaches was a brain MRA, which was negative. He appears to have based his restriction on the claimant's subjective reports based on his testimony cited above. Therefore, the medical opinions of the treating physicians and the brain MRA prevail over those of Dr. Meyers on this issue.

The vocational experts appear to be consistent that the claimant is employable in the open labor market if Dr. Meyers' restriction to lie down and rest periodically is not a valid restriction. Therefore, the weight of the credible evidence is that the claimant is employable in the open labor market, although he is clearly unable to return to his prior position.

Notwithstanding, the evidence supports a finding that the claimant is entitled to additional permanent partial disability benefits from the Second Injury Fund based on the following permanent partial disabilities:

20% Neck	80 weeks
30% Low back	120 weeks
17 ½% Right wrist	30.625 weeks
17 ½% Left wrist	30.625 weeks
Total	261.25 weeks

The simple sum of the claimant's individual disabilities is 261.25 weeks or 65.3125% of the body as a whole. The claimant's overall disability is 75% permanent partial disability of the body as a whole, and the claimant is awarded 38.75 weeks of permanent partial disability benefits of the body as a whole.

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

This award is dated and attested to this 26th day of April, 2011.

/s/ Naomi L. Pearson
Naomi L. Pearson
Division of Workers' Compensation