

FINAL AWARD ALLOWING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
with Supplemental Opinion)

Injury No.: 04-123833

Employee: Zemir Harbas  
Employer: Bethesda Health Group, Inc.  
Insurer: Self-Insured  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the Administrative Law Judge John Howard Percy dated August 27, 2008, as supplemented herein.

Employee requested that we make additional findings regarding the testimony of Vincent Stock. We make these supplemental findings in response to employee's request.

*Supplemental Findings*

Mr. Stock, a licensed psychologist, testified as a vocational expert on behalf of employee. Mr. Stock evaluated employee in December 2007 to determine employee's ability to compete in the open labor market. In reaching his professional opinions, Mr. Stock received and reviewed the medical records provided by employee and interviewed employee.

Based upon his discussions with employee, Mr. Stock concluded that employee was functioning at the levels ascribed by Drs. Volarich and Wolfgram. Accordingly, he accepted their restrictions in evaluating employee's vocational prospects.

Mr. Stock ultimately opined that employee is unable to compete in the open labor market due to a combination of the difficulties he had prior to November 2004, together with the injuries of November 2004. Mr. Stock also testified that employee needs ongoing mental health care and medical management of his medications.

We have adopted the administrative law judge findings and conclusions in this matter, including the following findings:

As I previously found that claimant did not sustain an aggravation of his patellofemoral syndrome as a result of the November 21, 2004 work-related accident, I find Dr. Volarich's opinion concerning permanent partial disability of the legs to be not credible. Based on Dr. Mishkin's credible opinion, I find that Employee sustained no permanent partial disability to his legs as a result of the work-related accident.

As I previously found that claimant did not sustain any injury to his back or a pain syndrome or major depression as a result of the November 21, 2004 work-related accident, I find Dr. Wolfgram's opinion concerning permanent partial disability of the body to be not credible. Based on Dr. Mishkin's credible opinion, I find that Employee sustained no permanent partial disability to his body as a whole as a result of the work-related accident.

Award p. 21.

Because Mr. Stock's vocational opinions are based upon the medical and psychiatric opinions of Dr. Volarich and Wolfgram, we are not persuaded by Mr. Stock's vocational opinions.

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

The award and decision of administrative law judge are attached and incorporated by this reference.

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

Given at Jefferson City, State of Missouri, this 20th day of May 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee: Zemir Harbas

Injury No. 04-123833

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: Bethesda Health Group, Inc.

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

Additional Party: Second Injury Fund

Insurer: Self-Insured

Hearing Date: May 13, 2008

Checked by: JHP

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
    - 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
    - Date of accident or onset of occupational disease: November 21, 2004
    - State location where accident occurred or occupational disease was contracted St. Louis 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
    - Was claim for compensation filed within time required by Law? Yes
  10. Was employer insured by above insurer? Self-insured
  11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
While moving a food cart, employee slipped and fell. The food cart struck his shins and mouth.
  12. Did accident or occupational disease cause death? No Date of death? No
  13. Part(s) of body injured by accident or occupational disease: lower extremities
    - Nature and extent of any permanent disability: None
  15. Compensation paid to-date for temporary disability: None
  16. Value necessary medical aid paid to date by employer/insurer? \$1,093.20
- Employee: Zemir Harbas Injury No. 04-123833
17. Value necessary medical aid not furnished by employer/insurer? \$624.00
    - Employee's average weekly wages: \$350.80

19. Weekly compensation rate: \$233.87 PTD/TTD/PPD

20. Method wages computation: Stipulation

### COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$ 624.00
4-4/7 weeks of temporary total disability	\$1,069.12
weeks of permanent partial disability from Employer	

22. Second Injury Fund liability: No

Total: \$1,693.12

23. Future requirements awarded: None

Said payments to begin and to be payable immediately 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:

Frank J. Niesen, Jr.

## FINDINGS OF FACT and RULINGS OF LAW:

Claimant:	Zemir Harbas	Injury No. 04-123833
Dependents:	N/A	Before the <b>Division of Workers' Compensation</b>
Employer:	Bethesda Health Group, Inc.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Self-Insured	Checked by: JHP

A hearing in this proceeding was held on May 13, 2008. An amended claim was filed on May 13, 2008. Amended answers were filed on May 23, 2008 at which time the record was closed. All parties submitted proposed awards, the last of which was received on June 20, 2008.

### STIPULATIONS

The parties stipulated that on or about November 21, 2004:

1. the employer and employee were operating under and subject to the provisions of the Missouri

Workers' Compensation Law;

2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$350.80;
4. the rate of compensation for temporary total disability and permanent total disability was \$233.87 and the rate of compensation for permanent partial disability was \$233.87; and
5. the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. no compensation has been paid; and
3. employer has paid \$1,093.20 in medical expenses.

### ISSUES

The issues to be resolved in this proceeding are:

1. whether claimant sustained, in addition to the injury to his bilateral shins, any other injuries as a result of the work-related accident of November 21, 2004;
2. whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for the medical bills set forth in employee's Exhibit M;
3. whether the employee should be provided with any additional medical treatment;
4. whether employee is entitled pursuant to Section 287.170 Mo. Rev. Stat. (2000) to any temporary total disability compensation subsequent to November 21, 2004;
5. whether and to what extent employee sustained any permanent partial disability which would entitle him to an award of compensation; and
6. if employee sustained any permanent partial disability for the injuries sustained as a result of the November 21, 2004 work-related accident, whether and to what extent employee sustained any additional permanent partial or permanent total disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disabilities with the primary injuries.

### MEDICAL CAUSATION

There is no dispute that Zemir Harbas, Employee herein, sustained injuries to both shins as a result of the November 21, 2004 work-related accident. Employee also claims that he sustained injuries to his back, knees, teeth and depression as a result of the foregoing work-related accident. Employer denies that Employee sustained any injuries to his knees or teeth and that Employee developed depression as a result of the work-related accident.

The employee must establish a causal connection between the accident and the claimed injuries. Davies v. Carter Carburetor Div., 429 S.W.2d 738 (Mo. 1968); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Blankenship v. Columbia Sportswear, 875 S.W.2d 937, 942 (Mo. App. 1994); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 198 (Mo. App. 1990); Cox v. General Motors Corp., 691 S.W.2d 294 (Mo. App. 1985); Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974); Smith v. Terminal Transfer Company, 372 S.W.2d 659, 664 (Mo. App. 1963).

Amendments made to Section 287.020.2 Mo. Rev. Stat. (2000) in 1993 require that the injury be "clearly work related" for it to be compensable. An injury is clearly work related "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor." The Supreme Court held in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo. 1999) that the foregoing language overruled the holdings in Wynn v. Navajo Freight Lines, Inc., 654 S.W.2d 87 (Mo. 1983), Bone v. Daniel Hamm Drayage Company, 449 S.W.2d 169 (Mo. 1970), and many other cases which had allowed an injury to be compensable so long as it was "triggered or precipitated" by work. Injuries which are triggered or precipitated by

work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury. Kasl, *supra* at 853. A substantial factor does not have to be the primary or most significant causative factor. Bloss v. Plastic Enterprises, 32 S.W.3d 666, 671 (Mo. App. 2000); Cahall v. Cahall, 963 S.W.2d 368, 372 (Mo. App. 1998). An accident may be both a triggering event and a substantial factor in causing an injury. Id. Subsection 2 also provides that an injury must be incidental and not independent of employment relationship and that "ordinary, gradual deterioration or progressive degeneration of the body caused by aging" is not compensable unless it "follows as an incident of employment." The extent to which the 1993 amendments have further modified prior caselaw will be determined by the appellate courts. See Cahall, *supra* at 372.

The quantum of proof is reasonable probability. Davies, *supra* at 749; Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); White v. Henderson Implement Co., 879 S.W.2d 575, 577 (Mo. App. 1994); Fischer at 199; Banner Iron Works v. Mordis, 664 S.W.2d 770, 773 (Mo. App. 1983); Griggs at 703. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Fischer at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). Expert testimony is required where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo. App. 1994); Brundige v. Boehringer Ingelheim, 812 S.W.2d 200, 202 (Mo. App. 1991). Expert testimony is essential where the issue is whether a preexisting condition was aggravated by a subsequent injury. Modlin v. Sun Mark, Inc., 699 S.W.2d 5 (Mo. App. 1985).

On the other hand, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence of the nature, cause, and extent of disability. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo. App. 1995). This is especially true where such testimony is supported by some medical evidence. Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768 (Mo. App. 1994); Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S. W. 2d 899, 904 (Mo. App. 1984); Fogelson v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelson at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993). Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

### **Findings of Fact**

Based on my observations of claimant's demeanor during his testimony, I find that he is only partially credible. Based on that portion of claimant's testimony which I find to be credible and on the medical records, I make the following findings of fact.

#### **Description of Accident**

Zemir Harbas began working as a dishwasher in the dietary department at Bethesda Dilworth Home on May 10, 2004. Although he has lived in the United States since 1998, he has a limited ability to speak or understand English. His testimony, which was given in Serbo-Croatian, was translated into English by a translator.

On Sunday, November 21, 2004, about 6:30 or 7:30 p.m. while pushing a cart filled with food and beverages up an incline, he slipped in water and the cart rolled back and struck both legs and his mouth. Claimant fell backwards with his legs underneath the cart. The cart scraped his legs and chin. After washing his face, Claimant returned to his work and finished his shift. The accident occurred 8 days before his 46th birthday. (Claimant's Testimony)

## Medical Treatment

Mr. Harbas returned to work the next day. After working a few hours he went to the break room where a nurse noticed that he was limping. Claimant told her about the accident and said that his legs were "all black". He was taken to the nursing department where his blood pressure was taken and blood sugar was tested. (Claimant's Testimony) A nurse examined his shins which were red, warm, and tight and had small open areas with yellow/green pus. Employer referred Mr. Harbas to St. Anthony's Lemay MedStop. (Claimant's Exhibit H, Page 16)

Mr. Harbas was examined at 5:08 p.m. on November 22, 2004. His legs were red with purulent drainage spots on both legs. His pain was worse in his right lower leg. Claimant had 3 cm. abrasion on his right lower leg and a small abrasion on his left leg which was less tender. There was no mention of any injury to either knee or his back. The assessment was bilateral abrasions and cellulitis of the right leg. Dr. Kevin Lickenbrock prescribed Dicloxacillin (a penicillin-like antibiotic), Silvadene cream and Tylenol. He indicated that Claimant should keep his legs elevated and not work for two days. (Claimant's Exhibit H, Pages 14-15)

Employee was reexamined at St. Anthony's Lemay MedStop on 9:25 a.m. on November 24. The right anterior leg had a necrotic center, erythema, 6 cm x 5.5 cm; the left leg had two areas 3.5 cm x 3.5 cm, 2.5 cm x 2.5 cm. The assessment was cellulitis. A wound culture was done. Dr. Maureen Lamm changed the antibiotic to Augmentin, prescribed Darvocet at bedtime only for pain, and allowed him to return to desk only as of November 24. (Claimant's Exhibit H, Pages 12-13)

Claimant returned to work where he sat in a chair and shredded papers for two days. He was then told there was no more light duty available and told to go home. (Employer's Exhibit 1, Page 2)

Mr. Harbas returned to St. Anthony's Lemay MedStop on November 26. His pain was minimally improved. There was no mention of any knee or back pain. It was noted that the abrasions with surrounding redness on both lower legs were unchanged in size. As his blood sugar was 200, Employee was advised Dr. Lickenbrock to avoid sugars, sweets, juices, and sodas and to see a private medical doctor. He was told to continue his medications and desk duty at work. (Claimant's Exhibit H, Pages 10-11)

Mr. Harbas returned to St. Anthony's Lemay MedStop at about noon on November 29, 2004. His left leg pain was better; his right leg pain was not. There was firm granulation on the right anterior lower leg with tenderness and surrounding redness; it was blackened in the middle. There were two smaller similar, less tender areas on the left lower leg. His blood sugar was 154. Dr. Lickenbrock advised him to continue Silvadene and Augmentin and released him to desk duty at work with no walking or standing over ½ hour. (Claimant's Exhibit H, Pages 7-8)

Dr. Christopher Maret examined Claimant about 3 hours later. Mr. Harbas complained of dysphagia and dyspepsia for the previous two to three years and some retrosternal burning, especially after meals. He reported slow healing wounds on his legs. He did not complain of any knee or back pain. On examination Dr. Maret noted one 2 cm by 2 cm pretibial erosion on the right leg and two pretibial erosions (2 cm by 2 cm and 2 cm by 1 cm) on the left leg. There was no purulent drainage; scabs were present. Dr. Maret ordered a culture of his leg ulcer. And prescribed Bactrim in addition to Augmentin. He diagnosed Mr. Harbas with hypertension. He suspected diabetes mellitus and advised him to check his blood sugars with his mother's equipment. Fasting blood tests were ordered. He also diagnosed him with Gastroesophageal reflux disease, prescribed Prevacid, and ordered an Upper GI Endoscopy. (Claimant's Exhibit G, Pages 11-12)

Dr. Susan Reynolds at St. Anthony's Lemay MedStop examined Employee on December 3, 2004. She noted one laceration to his right shin and two lacerations to his left shin. His blood sugar was 157. She advised him to continue Silvadene and Augmentin, to follow up with his regular doctor for diabetes mellitus. She released him to light duty with no prolonged walking or standing and no frequent bending or prolonged kneeling or squatting. He was instructed to sit on a stool or chair to wash dishes. (Claimant's Exhibit H, Pages 5-6)

Dr. Maret reexamined Mr. Harbas on December 3. He reported that his pretibial lesions were somewhat

painful and tender. Motor, sensory, and reflex testing were within normal limits. Dr. Maret noted one 2.5 cm by 3.5 cm pretibial area of shallow ulceration with surrounding erythema of two additional centimeters on the right leg and two 2 cm by 2 cm lesions with less surrounding erythema on the left leg. The culture was negative. He referred Claimant to the Barnes Hospital Wound Clinic and advised him to continue topical care and Bactrim. Mr. Harbas reported that Prevacid was helping. Dr. Maret told him that he needed to see some glucose numbers before recommending medication. He excused Claimant from work from December 3 to December 12, 2004 for uncontrolled hypertension and diabetes. (Claimant's Exhibit G, Pages 10 & 24)

On December 8, 2004, Claimant received treatment by a registered nurse at the Wound-Ostomy Clinic at Barnes-Jewish Hospital on referral from Dr. Maret. Claimant described the work-related accident with the food cart. She noted that the right anterior tibial area was swollen with periwound erythema extending approximately 1 cm in all directions. She noted three open areas covered by a thin crust with no periwound erythema on the left anterior tibia. She debrided the wound on the right shin and applied gentamicin cream and covered it with gauze. Claimant was instructed in washing the wound and applying gentamicin cream and covering the wound with a large Band-Aid twice daily. He was given a prescription for gentamicin cream. (Claimant's Exhibit F, Pages 6-7)

On December 8 Dr. Maret wrote to Claimant that his blood work showed that his HDL cholesterol was low, his LDL cholesterol was high, and his triglycerides were high. He enclosed a low cholesterol diet. (Claimant's Exhibit G, Pages 21-23)

On December 10, Claimant told Dr. Maret that the pain from the pretibial lesion was much improved. He was applying gentamicin cream. His blood glucose ranged from 100 to 150. He measured the right pretibial lesion as five millimeters. He recommended a colonoscopy and Upper GI Endoscopy because of the long history of dyspepsia. He released him to work light duty beginning December 13 for two weeks. (Claimant's Exhibit G, Pages 8-9 & 20)

On December 10 Claimant returned to St. Anthony's Lemay MedStop. He told the medical personnel that he was being treated at the Barnes Hospital Wound Clinic. (Claimant's Testimony) Dr. Reynolds reexamined Employee. The report of her examination was not in evidence. She continued the prior restrictions and told him to apply cream and Band-Aids to the lacerations. (Claimant's Exhibit H, Page 4)

Dr. Maret reexamined Mr. Harbas on December 13. Claimant sought treatment by Dr. Maret for an upper respiratory infection. He excused Claimant from work until December 16. (Claimant's Exhibit G, Pages 7 & 19)

On December 15 Dr. Maret notified Claimant that he was scheduled for an upper endoscopy and colonoscopy on December 20. He excused Claimant from work through December 22 because of the diabetes/GERD and the testing. (Claimant's Exhibit G, Pages 17-18)

Mr. Harbas returned to the Wound-Ostomy Clinic at Barnes-Jewish Hospital on December 17, 2004. He was examined and treated by a different nurse. She noted that the size of the wound on the right leg had decreased though the area of erythema had not changed. The wound bed was debrided and gentamicin was applied. Claimant was again instructed to wash the leg and apply gentamicin to the wound and cover with gauze twice a day. (Claimant's Exhibit F, Pages 12-15)

Dr. Reynolds at St. Anthony's Lemay MedStop reexamined Employee later that evening. She noted that his underlying diabetes made him a high risk for prolonged healing. She indicated that the open area was only 1 cm with 2 to 3 cm of surrounding erythema. The tenderness was much decreased. She advised him to apply the gentamicin cream to the lacerations and continued his prior restrictions of sitting on a stool or chair to wash dishes, no prolonged walking or standing and no frequent bending or prolonged kneeling or squatting. (Claimant's Exhibit H, Pages 2-3)

On December 22, Dr. Maret reexamined Mr. Harbas. Claimant reported that his blood sugars were as high as 150 to 160. Dr. Maret noted that Claimant's bronchitis was resolving. Motor, sensory and reflex testing were within normal limits. There was no reference to his pretibial lesion. He started Claimant on enalapril for hypertension. He advised him to stop drinking all juices and to check blood sugars regularly. He excused him from work until January 4, 2005 for uncontrolled hypertension and diabetes. (Claimant's Exhibit G, Pages 5-6 & 16)

Claimant underwent an upper GI endoscopy and a colonoscopy by Dr. Erik Thyssen on December 20. The impression was normal esophagus and normal duodenum. Mild gastritis was biopsied. Two small polyps were removed from the colon. The pathologist determined that the polyps were hyperplastic and the stomach tissue was positive for Helicobacter-like organisms. (Claimant's Exhibits F, Pages 40-46 and K, Pages 1-8)

On December 26 Dr. Lickenbrock reexamined Claimant. Mr. Harbas reported no pain and his wounds were healing well. Dr. Lickenbrock noted that there was a 3 by 4 mm nontender scab on the right shin and that the left shin had healed. He described the skin abrasions as healed and released Mr. Harbas to full duty. (Claimant's Exhibit H, Pages 1 & 9)

Mr. Harbas returned to the Wound-Ostomy Clinic at Barnes-Jewish Hospital on December 28, 2004. He was examined and treated by the same nurse as his last visit. She noted that the wound was scabbed over. The periwound area had minute redness. She removed the scab and applied Xenaderm and medrafil into the wound. Claimant was instructed to discontinue gentamicin cream and apply medrafil and cover with a dry dressing every day. (Claimant's Exhibit F, Page 50-53)

Dr. Maret reexamined Mr. Harbas on January 3, 2005. Claimant reported that his blood sugars were between 150 and 180 all of the time. Dr. Maret noted that the bronchitis had resolved, though Employee felt a little bit weak. Motor, sensory and reflex testing were within normal limits. There was no reference to his pretibial lesion. He increased the dosage of enalapril and released Employee to light duty work for one week. Dr. Maret wanted to get Claimant's blood pressure under control before starting diabetes medication. (Claimant's Exhibit G, Pages 4 & 15)

Claimant sought treatment from Gravois Dental on January 6, 2005. His last dental examination was in December of 1998. Seven teeth were extracted. The dental record does not identify a cause for the extractions. (Claimant's Exhibit L, Pages 2-3)

Claimant returned to Dr. Maret on January 12, 2005. He reported that he had not taken the medication prescribed by the Dr. Thyssen. Dr. Maret noted that he was not able to work. Motor, sensory and reflex testing were within normal limits. Dr. Maret telephoned Dr. Thyssen and discussed the diagnosis of Helicobacter pylori. Dr. Maret prescribed Flagyl, antiprotozoal and antibacterial agent, and Biaxin, an antibiotic, for two weeks with Prilosec. He planned to start Claimant on metformin for diabetes in about two weeks. (Claimant's Exhibit G, Page 3)

Mr. Harbas returned to the Wound-Ostomy Clinic at Barnes-Jewish Hospital on January 14, 2005. He was examined and treated by the same nurse as his last visit. She removed the scab from his right shin and noted a very minute opening in his skin. She advised him to apply gentamicin twice a day and return in three weeks. There was no record of a subsequent visit. (Claimant's Exhibit F, Pages 61-66)

On January 17, 2005 Claimant returned to the dietary department of Bethesda Dilworth Home and asked his supervisor for his timecard. She gave him a piece of paper which stated that he had quit and told him to go home. (Claimant's Testimony)

Claimant sought treatment from Dr. Mahrukh Khan on November 12, 2005. Mr. Harbas told him that he had a work injury. He complained of an abdominal lump and leg rash, low back pain, right shoulder pain and upper back pain. On examination Dr. Khan noted right posterior trapezius tightness, an erythematous, tender lump in the left preumbilical area, a small lump in the right lower quadrant, and a similar area in the left groin. There was a pruritic (itchy), dark color, scaly rash on his low lower extremity. His assessment was diabetes mellitus, abscess, low back pain with decreased sensation. He prescribed Dicloxacillin and Tylenol and recommended an MRI. A lipid panel was ordered for his hyperlipidemia. (Claimant's Exhibit I, Page 4)

Mr. Harbas returned to Dr. Khan on November 16 for follow up of blood work. He complained of back and leg pain ever since a work injury. He told Dr. Khan that he could not afford an MRI. Dr. Khan noted that the abscess had resolved. Dr. Khan also noted numbness in the legs and cramps in his legs and back. He recommended Tylenol and rehabilitation. (Claimant's Exhibit I, Page 3)

On December 24, 2005 the police found Claimant walking naked around his neighborhood. He was taken to St. Anthony's Medical Center. On admission, Mr. Harbas was quoted as saying "I can't do anything, I am weak." His initial diagnosis was "acute psychosis of undetermined etiology." He was prescribed Prozac and Trazadone. He was discharged on December 29, 2005. His final diagnosis by Dr. Ahmad B. Ardekani was "major depression". His condition had stabilized (Claimant's Exhibit E, Pages 11-13 & 16-17)

### Claimant's Testimony

Employee testified that in 2000, 2001, and 2002 he was unable to sleep; he had nightmares. He was tired and not feeling well. He treated himself with teas, garlic and creams. Notwithstanding those symptoms he was able to work. On cross examination he stated that his symptoms improved in 2003 and 2004. He boasted that he performed the work of three people at Bethesda Dilworth Home because he was a "crazy guy". He stated that he got much worse after the accident.

Mr. Harbas testified that the accident caused symptoms from his head to both feet with reference to his back, both arms and both legs. He also stated that he lost seven teeth because of "infections" which he related to the accident. He complained of dizziness and an electric-like feeling in his arms, legs and muscles. He complained of cramps which make him shake and he complained of exhaustion. He also attributed his depression to the accident.

### Medical Opinions

Dr. David T. Volarich testified by deposition on behalf of Claimant on April 18, 2008. He examined Mr. Harbas on May 2, 2007. Mr. Harbas described the work-related accident and complained of intermittent numbness and stabbing pain with muscle spasms and stiffness in the lower extremities bilaterally, right greater than left, difficulties with sleep, difficulty in standing or sitting in the same position for more than an hour. Once or twice a week, his exacerbations cause him to use a cane. He massages and stretches his leg muscles. He no longer engages in soccer or running, jumping, stooping, squatting, crawling or kneeling. He reported more pain difficulties with legs. He reported difficulty with depression and anxiety from 2002-2003 that gradually worsened. He had a psychiatric episode treated at St. Anthony's Highland Center in December 2005. (Claimant's Exhibit A, depo ex B, p. 3)

On physical examination Dr. Volarich noted 2+ crepitus in the patellofemoral joint along with trace swelling in the prepatellar bursa in the right knee and 1+ crepitus in the left knee with normal laxity of the patella in the medial and lateral direction. He recorded that the right shin demonstrated a 3 by 2 cm scar that had a slight brownish discoloration; it was well healed, but hyperpigmented. (Claimant's Exhibit A, depo ex B, p. 5)

Dr. Volarich opined that Claimant sustained "bilateral lower extremity tibial contusions with open wounds, right worse than left, well healed [and] aggravation of bilateral knee patellofemoral syndrome" as a result of the November 21, 2004 work-related accident. He also opined that Claimant required dental care as a result of the cart striking his face. (Claimant's Exhibit A, depo ex B, pp 5-6)

On cross examination Dr. Volarich admitted that there was no history or medical record which indicated that the accident caused injury to the knees. (Claimant's Exhibit A, Pages 19-20) He acknowledged that crepitus was the only objective finding of permanent disability in either knee. (Claimant's Exhibit A, Page 33) He agreed that Mr. Harbas' complaints of intermittent numbness and stabbing pain with muscle spasms and stiffness in his legs was somewhat inconsistent with Dr. Volarich's sensory examination and that Employee's complaints of weakness in his legs was also inconsistent with the results of Dr. Volarich's motor examination which was normal. (Claimant's Exhibit A, Page 35-36)

Dr. Edwin D. Wolfgram, a board certified psychiatrist, testified by deposition on behalf of Employee on March 17, 2008. He conducted a psychiatric examination of Mr. Harbas on August 8, 2007. Dr. Wolfgram determined that as far back as 1995 Employee had diabetes and that due to cultural issues, the diabetes, hypertension, weight

problems, etc. were never particularly addressed. He indicated that Mr. Harbas lack energy and, indeed, was depressed. He noted that Mr. Harbas came to the United States in 1998 and had worked steadily, though in menial jobs. (Claimant's Exhibit B, Pages 7-8)

Mr. Harbas described the work-related accident to Dr. Wolfgram and told him that he has had ongoing pain, spasms, headaches and muscle cramps since the accident and that he could no longer drive because of cramps. Employee also told Dr. Wolfgram that he has become more severely depressed since the accident which caused difficulty sleeping and rendered it impossible for him to continue to work. Mr. Harbas told Dr. Wolfgram that he sees life as a dismal experience as a result of his injury and he has suicidal thoughts. (Claimant's Exhibit B, Pages 9-11)

Dr. Wolfgram testified that on mental status examination Mr. Harbas seemed to be able to engage in a discussion and was coherent and that he had no overt hallucinations or delusions; his thought content was depressive in nature. (Claimant's Exhibit B, Page 12)

Dr. Wolgram testified that he diagnosed Claimant with a pain disorder associated with a psychological reaction to a general medical condition. He indicated that Mr. Harbas is in a continued state of pain involving his legs, back and head as a result of the November 21, 2004 injury. He said that this diagnosis is applicable in this case because he has continuous pain and the pain is disruptive of his mental function. Dr. Wolgram also diagnosed Claimant with major depression of a nonpsychotic nature. He also diagnosed Claimant with dysthymia pertaining to the prevailing low moods that he had from 1995 to 2000 which was an outgrowth of his deteriorating mental condition. He stated that the dysthymia preexisted the work-related injury. He indicated that Employee has a global assessment of functioning of 50 which represents a serious impairment of social and work function. He estimated that Employee's global assessment of functioning prior to the November of 2004 accident was around 63. (Claimant's Exhibit B, Pages 15-18 & 45-46 & depo ex B, pp 2-3)

On cross examination Dr. Wolgram testified that he disagreed with the treating doctor's release of Employee to full duty on December 26, 2004 because Mr. Harbas had abrasions and soft tissue injury and muscle injury due to the pressure of being under a cart which weighed 1,000 pounds. He did not accept the physician's report that Claimant was in no pain. (Claimant's Exhibit B, Page 29) Dr. Wolfgram acknowledged that he had not examined Employee's legs. Dr. Wolfgram incorrectly stated that Claimant stopped working at Bethesda Dilworth because of his pains and the increased depression because of his pains. (Claimant's Exhibit B, Page 31)

On cross examination Dr. Wolfgram acknowledged that Claimant had received no treatment for any head injury. Pertaining to the back, he referenced Employee's two visits to Dr. Khan for back pain in November, 2005, one year after the accident. (Claimant's Exhibit B, Pages 33-34)

On cross examination Dr. Wolfgram stated that the pain in Employee's legs, back, and head is the cause of the diagnosis of pain disorder. He also stated that Employee's depression was related to his pain. (Claimant's Exhibit B, Pages 34-35) He indicated that Claimant's preexisting dysthymia was also reflecting of his deteriorating medical conditions. Employee's hypertension, diabetes, bronchitis from smoking set the stage for his dysthymia. (Claimant's Exhibit B, Page 35)

On further cross examination Dr. Wolfgram conceded that if Employee did not the have cramping, soreness and pain associated with the accident, then he would not have major depression or a pain disorder. (Claimant's Exhibit B, Pages 49-50)

Dr. Marvin Mishkin, an orthopedist, examined Mr. Harbas at Metropolitan Orthopedics, Ltd. on July 10, 2007, at the request of Employer. Through an interpreter, Claimant described the accident to Dr. Mishkin, told him that his legs went underneath the cart, that the cart hit his mouth and broke his teeth, and that he hurt his back when he fell. When asked by Dr. Mishkin why the medical records do not indicate any problems with his back or teeth, he indicated that "somebody hid [his] records." (Employer's Exhibit 1, Pages 1-2 )

On physical examination Employee complained of pain on palpation of the thoracic region and through the lower and mid lumbar region. However, on repeated palpation of that area during the examination pain was not elicited. Dr. Mishkin noted that Employee he had full range of motion of the back. His straight leg raising was

negative bilaterally to 90 degrees both when sitting and when supine. There was tightness on external rotation of both hips to 35 to 40 degrees. He had good motor strength throughout both legs. Sensation was intact throughout both lower extremities. His reflexes were normal. He maintained his knees in flexion and/or extension against resistance. There was no evidence of any gross inflammation, cellulitis or residual infection of the legs. (Employer's Exhibit 1, Page 3)

Dr. Mishkin indicated that x-rays taken of the lumbar spine revealed mild degenerative arthritic changes in the lower facets at L4 and L5. The disc spaces were well maintained. X-rays taken of the hips showed indications of slight narrowing of the joint spaces bilaterally, suggesting early mild degenerative arthritis. X-rays of both legs showed no evidence of any bone injury or any residual of any bone injury and no evidence of any residual soft tissue injury or trauma. Dr. Mishkin also reviewed St. Anthony's Lemay MedStop medical records related to the accident. (Employer's Exhibit 1, Pages 3-4)

Dr. Mishkin concluded that Mr. Harbas sustained abrasions in the pretibial regions of both legs as a result of the accident. Dr. Mishkin concluded that Mr. Harbas had completely recovered from his leg abrasions. He indicated that there was no evidence of injury or residual of injury to either leg resulting from the work-related accident. He indicated that there was no discussion in any of the medical reports of any back problems or of any injury to his mouth or his teeth. Dr. Mishkin wrote that Mr. Harbas has some very mild degenerative arthritis in the lumbar spine involving the facets and the disc spaces are well maintained. He noted that Claimant had no clinical evidence of any injury to his back or residual injury to his back. (Employer's Exhibit 1, Page 5)

#### **Additional Findings**

Although Claimant testified that he has symptoms throughout his entire body, which he attributes to the accidental injury, the medical records and medical evidence suggest that injuries were limited to both shins. Based on my prior findings, I find claimant sustained one abrasion to his right shin and two smaller abrasions to his left shin as a result of the November 21, 2004 work-related accident.

Although Dr. Volarich concluded that Mr. Harbas sustained an aggravation of preexisting bilateral patellofemoral syndrome, there is no credible evidence of an injury to either knee and no evidence of medical treatment for an injury to either knee. Mr. Harbas had numerous opportunities during visits with Dr. Maret and the physicians at St. Anthony's MedStop to mention that he was experiencing pain in his knees. Yet he never once mentioned any injury to his knees until he was examined by Dr. Volarich, two and a half years after the accident. On cross examination Dr. Volarich admitted that there was no history or medical record which indicated that the accident caused injury to the knees. (Claimant's Exhibit A, Pages 19-20) He acknowledged that crepitus was the only objective finding of permanent disability in either knee. (Claimant's Exhibit A, Page 33) He agreed that Mr. Harbas' complaints of intermittent numbness and stabbing pain with muscle spasms and stiffness in his legs was somewhat inconsistent with Dr. Volarich's sensory examination and that Employee's complaints of weakness in his legs was also inconsistent with the results of Dr. Volarich's motor examination which was normal. (Claimant's Exhibit A, Page 35-36) Dr. Mishkin examined his knees and did not find any abnormalities. (Employer's Exhibit 1, Page 3) Taking into account all of the foregoing, I find the opinions of Dr. Volarich to be not credible regarding an alleged injury to Claimant's knees.

Based on my prior findings and the credible opinions of Dr. Mishkin, I find that claimant sustained no injury to either knee as a result of the November 21, 2004 work-related accident.

Although Claimant dental records support his testimony that seven of his teeth were removed on January 6, 2005, there is no expert dental opinion to support his claim that the removal was caused by the work-related accident. This is a matter about which expert opinion on causation would be required. There are many reasons why teeth are removed, including poor dental hygiene and gum disease. Claimant last had dental treatment in December of 1998. I find Dr. Volarich's opinion that the accident caused the need for removal of some of Employee's teeth to be not credible as it was not based on either an examination of Employee's mouth before their removal or an opinion from his dentist as to the cause for their removal. Based on the foregoing I find Claimant's personal opinion that the accident caused the need for extraction of several teeth to be not credible. Based on the lack of a credible expert dental opinion, I further find that the November 21, 2004 accident was not a substantial factor in causing the need for the extraction of seven of his teeth on January 6, 2005.

Although Employee claims that he injured his low back, Mr. Harbas had numerous opportunities during visits with Dr. Maret and the physicians at St. Anthony's MedStop to mention that he was experiencing back pain. Yet he never once mentioned any injury to his back until he was examined by Dr. Khan, almost one year after the work-related accident. Dr. Maret knew about the accident. When Employee complained that his shin abrasions were slow to heal, Dr. Maret referred Employee to the Barnes Jewish Hospital Wound-Ostomy Clinic for additional treatment. Dr. Maret was treating Employee for numerous medical conditions and was sending him to various clinics for additional testing. Had Claimant then been experiencing back pain, he would surely have mentioned it to Dr. Maret. His failure to do so leads to the inference that he was not experiencing any back pain while he was under treatment by Dr. Maret. While Dr. Khan did note Employee's history, he did not express any opinion as to the cause of Claimant's back and right shoulder pain.

Dr. Mishkin had x-rays taken of Employee's back and hips. He noted degenerative arthritis in both Employee's hips and back. On physical examination Employee complained of pain on palpation of the thoracic region and through the lower and mid lumbar region. However, on repeated palpation of that area during the examination pain was not elicited. Dr. Mishkin noted that Employee had full range of motion of the back. His straight leg raising was negative bilaterally to 90 degrees both when sitting and when supine. He had good motor strength throughout both legs. Sensation was intact throughout both lower extremities. His reflexes were normal. Dr. Mishkin opined that Claimant had no clinical evidence of any injury to his back or residual injury to his back. (Employer's Exhibit 1, Pages 3-5) Dr. Volarich did not diagnose any injury to Claimant's back. Though Dr. Wolfgram opined that claimant sustained a pain syndrome which included his back as a result of the November 21, 2004 accident, he did not even examine the back. His opinion was based on Employee's statements to him and Dr. Khan's records. In comparing the expert opinions, I find the opinions of Dr. Mishkin to be credible and the opinions of Dr. Wolfgram to be not credible regarding an alleged injury to Claimant's back. Based on my prior findings and the credible opinion of Dr. Mishkin, I find that Employee did not sustain any injury to his back as a result of the November 21, 2004 work-related accident.

Based on Dr. Mishkin's thorough examination of Employee's legs, he concluded that Mr. Harbas had completely recovered from his leg abrasions and that there was no evidence of injury or residual of injury to either leg resulting from the work-related accident. Though Dr. Wolfgram opined that claimant sustained a pain syndrome which included his legs as a result of the November 21, 2004 accident, he did not even examine the legs for cramping or other symptoms. His opinion was based solely on Employee's statements to him. In comparing the opinions of the experts, I find the opinions of Dr. Mishkin to be credible and the opinions of Dr. Wolfgram to be not credible regarding a pain syndrome affecting Claimant's legs.

On the basis of Mr. Harbas' many complaints of pain and other physical symptoms, Dr. Wolfgram opined that claimant developed a pain syndrome involving his back, head and legs as a result of the November 21, 2004 work-related accident and that as a result of the pain syndrome he developed major depression. On cross examination Dr. Wolgram testified that he disagreed with the treating doctor's release of Employee to full duty on December 26, 2004 because Mr. Harbas had abrasions and soft tissue injury and muscle injury due to the pressure of being under a cart which weighed 1,000 pounds. He did not accept the physician's report that Claimant was in no pain. (Claimant's Exhibit B, Page 29) Dr. Wolfgram acknowledged that he had not examined Employee's legs. Dr. Wolfgram incorrectly stated that Claimant stopped working at Bethesda Dilworth Home because of his pains and the increased depression from his pains. (Claimant's Exhibit B, Page 31) Dr. Wolgram was apparently not aware that Employee had returned to work on January 17, 2005 and requested his timecard and that his supervisor gave him a letter advising him that he had quit and told him to go home. Claimant apparently was untruthful to his own expert. (Claimant's Exhibit B, Page 32)

Dr. Mishkin wrote that Mr. Harbas has some very mild degenerative arthritis in the lumbar spine involving the facets and the disc spaces are well maintained. Based on his thorough examination of Employee's back, he opined that Claimant had no clinical evidence of any injury to his back or residual injury to his back. (Employer's Exhibit 1, Page 5) I find that should Claimant have any back pain, it is far more likely due to his degenerative arthritis than to the November 21, 2004 accident.

Based on my observations of Claimant's demeanor during his testimony and on the credible opinions of Dr. Mishkin, I find that claimant's testimony regarding his current pain symptoms from his head to his feet is greatly exaggerated.

Having found claimant's testimony regarding to his pain symptoms to be greatly exaggerated and that he did not sustain any injury to his back from the work-related accident and that he completely recovered from the abrasions to his shins, I find that Claimant is not suffering from any pain which is attributable to the November 21, 2004 work-related accident. As Dr. Wolfgram assumed as the basis for his diagnosis of pain syndrome that claimant was experiencing the symptoms which he described to Dr. Wolfgram and as I have found that claimant is not suffering from any symptoms which are the result of the work-related accident, I find Dr. Wolfgram's attribution of the pain syndrome diagnosis to the work-related accident to be not credible. As Dr. Wolfgram based his attribution of Claimant's depression to a work-related pain syndrome, I further find Dr. Wolfgram's attribution of major depression to the work-related accident to be not credible. Based on all of my prior findings, I find that claimant did not develop major depression as a result of the November 21, 2004 work-related accident.

### **REIMBURSEMENT FOR MEDICAL EXPENSES**

Employee is seeking reimbursement for hospital bills incurred as a result of treatment provided for his shin wounds by Barnes Jewish Hospital Wound-Ostomy Clinic. The bills are included in Claimant's Exhibit M and total \$624.00.

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

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 [the employee] from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

### **Additional Findings**

I previously found that Claimant received treatment from the Barnes Jewish Hospital Wound-Ostomy Clinic on December 8, 17 and 28, 2004 and January 14, 2005 on referral from Dr. Maret. The referral appears to have been made because Claimant's wounds were slow healing. The nurse at the Wound-Ostomy Clinic prescribed different creams for his wounds than had been prescribed by the physicians at St. Anthony's MedStop. I previously found that on December 10, 2004 Claimant told the medical personnel at MedStop that he was also being treated at the Wound-Ostomy Clinic. I also found that on December 17 Dr. Reynolds at MedStop told claimant to continue using the gentamicin cream which had been prescribed by Wound-Ostomy Clinic. Claimant must have told her who prescribed it. She apparently agreed with the treatment. There was no evidence that Employer ever objected to Claimant being treated at the Wound-Ostomy Clinic or told him that he would be solely responsible for those bills. Based on the foregoing, I find that Employer acquiesced in Employee's selection of an additional treatment provider.

The employee must also prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d

718 (Mo. App. 1975).

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

I also find that Employee required this additional expertise due to his underlying diabetes which Dr. Reynolds wrote on December 17 made him a high risk for prolonged healing. Based on the Barnes Jewish Hospital Wound-Ostomy Clinic treatment notes, I find that the medical treatment provided by the Wound-Ostomy Clinic was reasonably necessary to cure and relieve the employee of the effects of the wounds to his shins.

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Metcalf v. Castle Studios, 946 S.W.2d 282, 287-88 (Mo. App. 1997); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant testified that he received the treatment shown on the bills. Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's shin wounds. Employer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$624.00 for such treatment were fair and reasonable. Accordingly, I find that Employer is liable for the Barnes Jewish Wound-Ostomy Clinic expenses totaling \$624.00.

### **TEMPORARY TOTAL DISABILITY**

Employee is seeking temporary total disability compensation for the period from December 23, 2004 through January 14, 2005.

Section 287.170 Mo. Rev. Stat. (2000) provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 as the "inability to return to any employment and not merely ... [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Un. Of Missouri, 822 S.W.2d 504 (Mo. App. 1991); Phelps vs. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo. App. 1991); Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo. App. 1985).

With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ the claimant in his present physical condition." Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo. App. 1996). The refusal of an employer to allow an employee, who has been released by the treating physician to return to light duty work, to return to such work is some evidence that the employee could not find any reasonable or normal employment. Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 821 (Mo. App. 1995). However, an employer is not required to either provide light duty or pay temporary total disability compensation solely because the employee is still receiving medical treatment for a condition which is reasonably expected to improve. Cooper v. Medical Center of Independence, 955 S.W.2d 570, 575 (Mo. App. 1997).

An employee's unsuccessful attempts to perform some of the activities connected with his or her job do not in and of themselves constitute conclusive evidence that the employee was capable of working after the accident. Reeves v. Midwestern Mortg. Co., 929 S.W.2d 293, 296-96 (Mo. App. 1996). The failure of an employee who is released to light duty to seek sporadic or light duty work in the open labor market would not automatically disqualify the employee from receiving temporary total disability compensation. Cooper, supra at 575. While the ability of the employee to physically perform some work is relevant, it is not dispositive. Idem. An employee's ability to engage in occasional or light duty work in a protected environment where the employee is able to work at his or her own pace or with the help of friends or family members, does not necessarily disqualify employee from receiving temporary and total disability compensation. Minnick v. South Metro Fire Prot. Dist., 926 S.W.2d 906, 910-11 (Mo. App. 1996). Employee's performance of some work during the period of temporary disability is not controlling on whether employee was temporarily and totally disabled. Other factors, such as economic necessity, the expected period of time until claimant's medical condition reaches maximum medical improvement, the nature of the continuing course of treatment, whether there is a reasonable expectation that claimant will return to his or her former job, the nature of the work, and whether such work should not have been performed from a medical standpoint are important in deciding that issue. Cooper, supra at 576; Brookman, supra.

The employee has the burden of proving that he or she is unable to return to any employment. Such proof is made only by competent and substantial evidence. It may not rest on speculation. Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Unlike proof of permanency, evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern., 771 S.W.2d 850, 851 (Mo. App. 1989).

Temporary disability payments are intended to cover a healing period. Temporary total disability is to be granted only for the time prior to when the employee can return to work. Temporary total disability is not expected to encompass disability after the condition has reached the point where further improvement is not expected. Where further improvement of employee's is not likely, employee is no longer temporarily and totally disabled. Brufat v. Mister Guy, Inc., 933 S.W.2d 829, 835 (Mo. App. 1996); Williams v. Pillsbury, 694 S.W.2d 488, 489 (Mo. App. 1985). Employer is entitled to a credit for any temporary total disability payments made with respect to any period after employee is no longer temporarily totally disabled. Parker v. Mueller Pipeline, Inc., 807 S.W.2d 518, 522 (Mo. App. 1991).

### **Additional Findings**

I previously found that Claimant was excused from work for November 22 and 23, that he was released to return to desk work only on November 24, that he worked on November 24 and 25, and that he was then told that there was no more light duty available and did not work thereafter. I also previously found that Claimant was not released to full duty until December 26, 2004. Given the limitations imposed on Claimant's ability to work by Drs. Lickenbrock and Reynolds and the on-going treatment for the shin wounds, I find that it is unlikely that any employer, in the usual course of business, would reasonably be expected to employ Claimant in his physical condition at that time.

I previously found that although Dr. Maret excused Claimant from work, his reason for doing so was Employee's uncontrolled diabetes and hypertension. As these were not work-related conditions, I find that Claimant was no longer temporarily and totally disabled after he was released by Dr. Lickenbrock on December 26, 2004.

Accordingly, I find that Claimant was temporarily and totally disabled on November 22 and 23, 2004 and from November 26 through December 25, 2004, for a total of 4-4/7 weeks.

### **PERMANENT DISABILITY**

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on

speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and nonmedical. Accordingly, the appellate courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 505 (Mo. App. 1989); Quinlan v. Incarnate Word Hospital, 714 S.W.2d 237, 238 (Mo. App. 1986); Banner Iron Works v. Mordis, 663 S.W.2d 770, 773 (Mo. App. 1983); Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); McAdams v. Seven-Up Bottling Works, 429 S.W.2d 284, 289 (Mo. App. 1968). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. Fogelsong v. Banquet Foods Corporation, 526 S.W.2d 886, 892 (Mo. App. 1975). The finding of disability may exceed the percentage testified to by the medical experts. Quinlan v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. Gilley v. Raskas Dairy, 903 S.W.2d 656, 658 (Mo. App. 1995); Jones v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

### Medical Opinions

Dr. Volarich opined that Claimant sustained 25% permanent partial disability of the right leg at the knee and 20% permanent partial disability of the left leg at the knee due to the contusions and aggravation of patellofemoral syndrome. (Claimant's Exhibit A, depo ex B)

Dr. Wolfgram opined that Claimant sustained 75% permanent partial disability of the body due to his pain syndrome and major depression. (Claimant's Exhibit B, depo ex B)

Dr. Mishkin concluded that Mr. Harbas has no permanent partial disability as a result of the work-related accident. (Employer's Exhibit 1)

### Additional Findings

As I previously found that claimant did not sustain an aggravation of his patellofemoral syndrome as a result of the November 21, 2004 work-related accident, I find Dr. Volarich's opinion concerning permanent partial disability of the legs to be not credible. Based on Dr. Mishkin's credible opinion, I find that Employee sustained no permanent partial disability to his legs as a result of the work-related accident.

As I previously found that claimant did not sustain any injury to his back or a pain syndrome or major depression as a result of the November 21, 2004 work-related accident, I find Dr. Wolfgram's opinion concerning permanent partial disability of the body to be not credible. Based on Dr. Mishkin's credible opinion, I find that Employee sustained no permanent partial disability to his body as a whole as a result of the work-related accident.

### SECOND INJURY FUND LIABILITY

Employee is also seeking an award of permanent total disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that section where a previous partial disability or disabilities, whether from a compensable injury or otherwise, and the last injury combine to result in total and permanent disability, the employer at the time of the last injury is liable only for the disability which results from the last injury considered by itself and the Second Injury Fund shall pay the remainder of the compensation that would be due for permanent total disability under Section 287.200. Grant v. Neal, 381 S.W.2d 838, 840 (Mo. 1964); Wuebbeling v. West County Drywall, 898 S.W.2d 615, 617-18 (Mo. App. 1995); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990). The employee must prove that a prior permanent partial disability, whether from a compensable injury or not, combined with the subsequent compensable injury to result in total and permanent disability.

As I have previously found that Claimant sustained no permanent disability from the work-related accident of November 21, 2004, the claim against the Second Injury Fund is denied.

### **ATTORNEY'S FEES**

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Frank J. Niesen, Jr., for necessary legal services rendered to the employee.

Date: \_\_\_\_\_

Made by: \_\_\_\_\_

**JOHN HOWARD PERCY**

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker

*Director*

*Division of Workers' Compensation*

The amendments may have also modified prior caselaw which held that an accident did not need to be the sole or direct cause of the claimed injuries so long as it was the "efficient, exciting, superinducing, concurring or contributing cause" of the injuries. E.g. Smith v. Cook Paint & Varnish Co., 561 S.W.2d 730, 732 (Mo. App. 1978); Indelicato v. Missouri Baptist Hospital, 690 S.W.2d 183, 187 (Mo. App. 1985); Tibbs v. Rowe Furniture Corp., S.W.2d 410 (Mo. App. 1985).

On cross examination he stated that the metal handle of the cart hit his face.

This was the first of many instances where Claimant embellished his story.

All of the medical notes were prepared by an "AI", a few of which were reviewed by a physician. The Work Status Report for each visit was signed by a physician who made handwritten notes concerning restrictions and prescriptions.

Claimant testified that the evening of November 22 everything hurt from his neck to his feet. It felt like electricity. He stated that he was experiencing cramping in his legs. I again find that claimant was embellishing his story. None of the subsequent medical records describe any of these additional symptoms.

While Claimant testified that he worked only two days, he did not specify when those two days occurred. This finding is made from his history to Dr. Marvin Mishkin, who evaluated him on behalf of Employer.

The Barnes Jewish Hospital record did not refer to the treatment which Claimant had received at St. Anthony's Lemay MedStop.

The absence of this report is unfortunate since it might confirm that Dr. Reynolds was advised of Claimant's treatment at the Barnes Hospital Wound Center.

Claimant testified that he developed an infection in his mouth.

Dr. Wolgram was apparently not aware that Employee had returned to work on January 17, 2005 and requested his timecard and that his supervisor gave him a letter advising him that he had quit and told him to go home. See my finding on Page 10 supra.

He did not review the records of Dr. Khan or Gravois Dental. (Claimant's Exhibits I and L)

See my finding on Page 10 supra.

See my finding on Page 7 supra.

The employer's liability for permanent partial disability compensation is determined under Section 287.190. Stewart v. Johnson, 398 S.W.2d 850 (Mo. 1966).