

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

Injury No. 07-094608

Employee: Ricky Haskins
Employer: Board of Police Commissioners of Kansas City, Missouri
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) nature and extent of disability; (2) past medical expenses; (3) future medical treatment; and (4) liability of the Second Injury Fund.

The administrative law judge rendered the following findings and conclusions: (1) employee did not sustain any greater disability as a result of the accident of September 27, 2007; and (2) there is no Second Injury Fund liability.

Employee filed a timely application for review with the Commission alleging the administrative law judge erred in finding that employee was permanently and totally disabled from an accident of August 21, 2006.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred in finding employee was rendered permanently and totally disabled as a result of an injury of August 21, 2006.

On May 9, 2014, employee filed a "Motion to Strike the Application for Review of the Employer Board of Police Commissioners of Kansas City, Missouri" (Motion).

On May 29, 2014, the Commission denied employee's Motion.

Findings of Fact

Employee was 52 years of age at the time of the primary injury on September 27, 2007. Employee's entire employment history prior to the primary injury consisted of work as a law enforcement officer.

Preexisting conditions

On August 21, 2006, employee was in a motor vehicle accident while working for employer as a traffic control officer. He was driving a motorcycle at the time. Another motorist tried

Employee: Ricky Haskins

- 2 -

to make a left turn in front of employee, causing employee's motorcycle to collide with the front passenger side of the other automobile. Employee flew free of the motorcycle, turned two summersaults in the air, and landed on his left side. Employee suffered injuries to his left shoulder and cervical spine as a result of this event, which produced ongoing chronic pain and discomfort.

In our award in the companion case designated as Injury No. 06-077052, we rendered findings that, as a result of the August 21, 2006, motor vehicle accident, employee sustained a 15% permanent partial disability of the left shoulder at the 232-week level, and a 15% permanent partial disability of the body as a whole referable to the cervical spine. We hereby incorporate those findings herein.

Primary injury

On September 27, 2007, employee was working for employer in his role as a traffic police officer, when he responded to a report of an accident on the highway. It was rush hour, so employee parked his police cruiser in the right hand lane about a quarter mile ahead of the accident and activated his lights in order to divert traffic and provide protection for the officers and other personnel working at the accident site. A motorist driving an SUV approached employee's car from the rear and failed to slow down in time; the SUV tipped onto two wheels, hit the embankment or guardrail, then collided with employee's car.

Employee experienced immediate pain in his neck, back, and left shoulder, and received emergency treatment at the North Kansas City Hospital emergency room, where treating physicians diagnosed thoracic and cervical strains. On October 5, 2007, a cervical MRI revealed no changes from an earlier September 2006 MRI. (The September 2006 MRI had included findings of bulging discs at C4-5, C5-6, and C6-7, as well as an annular tear at C6-7.) On October 12, 2007, a left shoulder MRI revealed a change in the appearance of the AC joint with increased fluid and widening. The study also revealed a partial thickness tear of the distal supraspinatus tendon; the radiologist deemed this finding to be unchanged from a prior MRI study of September 2006.

On November 1, 2007, an orthopedic surgeon, Dr. Roger Hood, recommended left shoulder surgery. On November 21, 2007, Dr. Hood performed an open left Mumford procedure and acromioplasty. Dr. Hood found a .5" tear of the rotator cuff, which he repaired. Following the surgery, employee underwent physical therapy for the left shoulder.

Employee continued seeking treatment for ongoing severe neck and left shoulder pain. Treatment included diagnostic studies, physical therapy, prescription pain medications including narcotics, the use of a home traction unit for the neck, and epidural steroid injections. Employee did not experience significant improvement from any of these modalities.

On March 31, 2009, employer sent employee to Dr. Gill Wright for a return to duty exam. Dr. Wright formed a belief that employee's problems were related solely to degenerative disc disease and self limitations, and opined that there was no objective indication that employee could not return to full duty work as a police officer. Employer also sent employee to Dr. Jeffrey MacMillan on April 14, 2009. Dr. MacMillan rated employee's left

Employee: Ricky Haskins

- 3 -

shoulder injury at 10% impairment of the left upper extremity, and opined that employee could return to work at the medium physical demand level. Dr. MacMillan expressly declined (apparently at employer's request) to evaluate or rate any injury or disability referable to employee's cervical spine.

Despite these opinions from employer's evaluating doctors, employee did not feel capable of returning to work, and instead continued seeking treatment with his personal physicians. Employee provided extensive testimony regarding his physical capabilities and limitations following the September 2007 work injury; we deem employee's testimony on the subject to be persuasive. Employee continues to experience constant pain in his neck, for which employee takes Lyrica and Flexeril on a daily basis. Employee also takes Percocet a few times per week to address more severe pain. Employee's left arm is considerably weakened, and employee can only lift about 20 pounds with it. Following the September 2007 work injury, employee becomes fatigued easily, and experiences a need to lie down and rest one or more times during the day. Employee has trouble sleeping at night after the September 2007 work injury.

After November 21, 2007, the date of his left shoulder surgery, employee never returned to work for employer, although employee did attempt to work for his stepson's company for about 4 or 5 months. Employee's tasks were limited to answering the phones, and he could take his medications, come and go as he pleased, and take naps whenever necessary. Employee estimates he worked 30 to 40 hours per week and made \$10 per hour during this time period. Employee left this job when the company moved and employee couldn't tolerate the commute. Employee also saw that the company was growing and he felt he could no longer keep up with the demands of his position. Employee credibly testified (and we so find) that the only reason he obtained this job in the first place was because of the charity of his stepson.

On February 23, 2010, employer awarded employee duty-related disability retirement benefits, based on a medical evaluation ordered by the Kansas City Police Employees' Retirement System indicating employee could no longer perform the full and unrestricted duties of a police officer.

On October 15, 2010, the treating pain management physician Dr. Daniel Bruning opined that employee had reached maximum medical improvement from the standpoint of interventional treatment, after employee experienced minimal relief following a series of cervical epidural steroid injections. We deem persuasive this opinion from Dr. Bruning, and find that employee reached maximum medical improvement on October 15, 2010.

Expert opinion evidence

Employee presented expert medical opinion testimony from Dr. James Stuckmeyer, who opined that the primary injury caused employee to sustain a 20% permanent partial disability of the left shoulder, as well as a 20% permanent partial disability of the body as a whole referable to the cervical spine. Dr. Stuckmeyer believes employee remains in need of lifelong pharmacological management for his ongoing chronic pain condition referable to the cervical spine, as well as additional diagnostic procedures to assess this condition. Dr. Stuckmeyer further opined that employee is permanently and totally disabled based on

Employee: Ricky Haskins

- 4 -

a combination of the primary injury and employee's preexisting injuries referable to the August 2006 motorcycle accident. Dr. Stuckmeyer explained that it is unlikely employee would be able to participate in any sedentary-type work involving use of a computer, because of his problems with forward flexion of the neck, and that employee's medication regimen clouds his cognitive function.

Employee also presented expert vocational opinion testimony from Terry Cordray, who believes it is unrealistic to expect any employer in the normal course of business to hire employee given the combination of his injuries resulting from the 2006 and 2007 motor vehicle accidents. Mr. Cordray explained that employee has only a high school education and can no longer perform the only job he has held since 1979, has no vocational or academic skills for sedentary or light occupations, and has a daily need to take narcotic medications and muscle relaxants.

Employer, on the other hand, presented expert medical opinion testimony from Dr. Eden Wheeler, who opined that employee can return to his normal duties as a police officer, and that employee does not have any physical restrictions from either the 2006 or 2007 motor vehicle accidents. Dr. Wheeler was one of employer's authorized treating physicians. It appears to us from a careful review of Dr. Wheeler's treatment notes that she experienced some interpersonal conflicts during her interactions with employee, and that these issues may have colored her subsequent findings and recommendations. We note also that Dr. Wheeler admitted that she was unaware of employee's actual work duties beyond her personal impression of what police officers do, deferred to findings from non-physician physical therapists in reaching her opinions, relied on her own personal policy to release employees to return to work full duties whenever a functional capacity evaluation is deemed invalid, and admitted that she assigned preexisting permanent partial disability of the cervical spine predating employee's 2006 injury, despite her awareness that employee did not have any disabling cervical spine symptoms before that injury. In light of these concerns, we do not deem Dr. Wheeler's ultimate findings or opinions in this matter to be particularly persuasive.

Employer also presented expert vocational testimony from Michelle Sprecker, who opined that, based on the restrictions imposed by Drs. Wheeler and MacMillan, employee could perform 15 different jobs. We note that Ms. Sprecker did not consider the restrictions identified by Dr. Stuckmeyer (and did not even see his report) and was unaware that employer awarded duty-based disability retirement benefits to employee based on a determination that he was unable to perform the full and unrestricted duties of a police officer. We note also that, in identifying the jobs she believed employee could perform, Ms. Sprecker relied upon the restrictions from a physician (Dr. Wheeler) whose opinions in this matter we have found lacking persuasive value, and from another (Dr. MacMillan) who specifically declined to consider any restrictions referable to employee's cervical spine complaints. Given these circumstances, we do not deem Ms. Sprecker's ultimate opinions to be persuasive.

Rather, after careful consideration, we are most persuaded by the testimony from employee's experts, Dr. Stuckmeyer and Mr. Cordray. Accordingly, we adopt their findings, as set forth above, as our own.

Employee: Ricky Haskins

- 5 -

Conclusions of Law**Past medical expenses**

As the parties are aware, this case was consolidated and heard together with a companion case designated as Injury No. 06-077052. In his award in Injury No. 06-077052, the administrative law judge determined that employer was liable to employee for claimed past medical expenses in the amount of \$7,805.43. In reaching that determination, the administrative law judge did not attempt to delineate the charges referable to treatment for the injury at issue in Injury No. 06-077052 from treatment for the injury at issue herein, but instead considered all of employee's claimed bills together. None of the parties appealed the administrative law judge's determinations with respect to the issue of past medical expenses, and in our award in Injury No. 06-077052, we affirmed and adopted those determinations as our own.

We note that, at the hearing before the administrative law judge, the parties did not identify the amount of any disputed past medical expenses as specifically claimed as a result of the September 27, 2007, injury at issue herein. Nor do the parties identify any such amount in their applications for review or briefs filed with the Commission in this matter.

In light of the foregoing considerations, it appears to us (and we so conclude) that the issue of past medical expenses herein has been finally resolved by virtue of our award in Injury No. 06-077052. Accordingly, we conclude that employer is not liable for any additional past medical expenses over and above the amount identified by the administrative law judge and affirmed in our award in Injury No. 06-077052.

Future medical treatment

Section 287.140.1 RSMo provides for an award of future medical treatment where the employee can prove a reasonable probability that he has a need for future medical treatment that flows from the work injury. *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51-4 (Mo. App. 2008). We have credited the testimony from Dr. Stuckmeyer, who opined that employee is in need of future medical treatment to cure and relieve the effects of the primary injury. We conclude, therefore, that employer is liable under § 287.140.1 to provide employee with that future medical treatment that may reasonably be required to cure and relieve the effects of his September 27, 2007, work injury.

Employer's liability for permanent disability

Section 287.190 RSMo provides for the payment of permanent partial disability benefits in connection with employee's compensable work injury. We have found that, as a result of the primary injury, employee sustained a 20% permanent partial disability of the left shoulder and a 20% permanent partial disability of the body as a whole referable to the cervical spine. This amounts to 126.4 weeks of permanent partial disability. The parties stipulated that the appropriate weekly rate of compensation for permanent partial disability benefits is \$389.04. We conclude that employer is liable for \$49,174.66 in permanent partial disability benefits.

Second Injury Fund's liability for permanent disability

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

Employee: Ricky Haskins

- 6 -

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”:

[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).

We have found that, as of the date of the primary low back injury, employee suffered from preexisting permanent partially disabling conditions referable to his left shoulder and cervical spine. When we apply the foregoing test, we are convinced that both of these conditions had the potential to combine with subsequent work injuries to cause greater disability than in the absence of these conditions. Accordingly, we conclude both of these conditions were serious enough to constitute hindrances or obstacles to employment for purposes of § 287.220.1 RSMo.

Fund liability for PTD under Section 287.220.1 occurs when the claimant establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. For [an employee] to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD.

Lewis v. Treasurer of Mo., 435 S.W.3d 144, 157 (Mo. App. 2014).

Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003). 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. *Id.*

We have determined that, as a result of the primary injury, employee sustained a 20% permanent partial disability of the left shoulder and a 20% permanent partial disability of the body as a whole referable to the cervical spine. We have also found, based on the persuasive testimony from Dr. Stuckmeyer and Terry Cordray, that employee is unable to compete in the open labor market owing to his preexisting disabling conditions in combination with his disability referable to the primary injury. It follows that the primary injury, considered in isolation, does not render employee permanently and totally disabled.

Employee: Ricky Haskins

- 7 -

We conclude employee met his burden of establishing Second Injury Fund liability for permanent total disability benefits under § 287.220.1. We conclude employee is entitled to, and the Second Injury Fund is obligated to pay, permanent total disability benefits. We have found employee reached maximum medical improvement on October 15, 2010. We conclude the Second Injury Fund is liable to pay permanent total disability benefits beginning October 15, 2010, at the differential rate of \$353.68 per week for 126.4 weeks, and thereafter at the stipulated permanent total disability rate of \$742.72.

Conclusion

We reverse the award of the administrative law judge.

Employer is liable to employee for permanent partial disability benefits and is hereby ordered to pay those benefits in the amount of \$49,174.66.

Employer is ordered to provide employee with that future medical treatment that may reasonably be required to cure and relieve the effects of his September 27, 2007, work injury.

The Second Injury Fund is liable to employee for permanent total disability benefits and is hereby ordered to pay those benefits beginning October 15, 2010, in the amount of \$353.68 per week for 126.4 weeks, and thereafter at the stipulated permanent total disability rate of \$742.72. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Lawrence Rebman, issued April 15, 2014, is attached solely for reference.

For necessary legal services rendered to employee, Jerry Kenter, Attorney at Law, is allowed a fee of 25% of the compensation awarded, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 15th day of December 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: Ricky Haskins

Injury No: 07-94608

Dependents: N/A

Employer: Board of Police Commissioners of Kansas City, Missouri

Insurer: Self-Insured

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

Hearing Date: November 21, 2013

Briefs Submitted: January 13, 2014

Checked by: LGB/pd

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? 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 27, 2007
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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:
Mr. Haskins was working an accident scene when the car he was in was rear ended by another motorist going approximately 70 mph.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder and cervical spine
14. Nature and extent of any permanent disability: None. Claimant was permanently and totally disabled due to an earlier injury.
15. Compensation paid to date for temporary disability: \$2,853.73
16. Value necessary medical aid paid to date by employer/insurer? \$37,200.00

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$1,143.92
19. Weekly compensation rate: \$742.72/\$389.04
20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable: None
22. Second Injury Fund liability: None
23. Future requirements awarded: None

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of Mr. Jerry Kenter, Employee's attorney, for necessary legal services rendered MO.REV.STAT. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ricky Haskins Injury No: 07-94608

Dependents: N/A

Employer: Board of Police Commissioners of Kansas City, Missouri

Insurer: Self-Insured

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

Hearing Date: November 21, 2013

Briefs Submitted: January 13, 2014

Checked by: LGB/pd

FINDINGS OF FACT AND RULINGS OF LAW

On November 21, 2013, the Parties appeared for a hearing for a permanent partial disability award. The case was tried with Injury Number 06-077052 for an accident of August 21, 2006 wherein the employee seeks permanent disability payments. Separate decisions are entered in each case. The Division had jurisdiction to hear this case pursuant to Sec. 287.110 R.S.Mo. The employee, Ricky Haskins, appeared in person and with counsel, Jerry Kenter. The employer appeared with counsel, Assistant City Attorney, Anthony Bush, the Second Injury Fund appeared with counsel, Assistant Attorney General Richard Wiles.

STIPULATED FACTS

The parties stipulated that on or about September 27, 2007, the parties were operating subject to the Missouri Workers' Compensation Law and:

- 1) That both Employer and Employee were operating under and subject to the Missouri Workers' Compensation Law;
- 2) That Ricky Haskins was an employee of the Kansas City, Missouri Police Department;
- 3) That Ricky Haskins sustained an accident arising out of and in the course of his employment on September 27, 2007;
- 4) That a timely Claim for Compensation was filed;
- 5) That the Employer had notice of the injury;
- 6) That the Claim for Compensation was filed within the time prescribed by law;
- 7) That the Claimant's average weekly wage was \$1,143.92, and the applicable compensation rate for permanent total disability is \$389.04 and a permanent total/temporary total disability rate of \$742.72;
- 8) That temporary total disability benefits have been paid by the Employer in the amount of \$2,853.73; and
- 9) That medical aid has been furnished by the Employer in the amount of \$37,200.00.

ISSUES

The parties requested the Division determine:

1. The nature and extent of any permanent partial disability sustained by the injured employee;
2. The liability of the Second Injury Fund; and
3. The employer's liability for unpaid medical bills.

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

- Exhibit No. A - Medical Records –Vol I tabs 1-2; Vol 2 Tabs 3-10; Vol 3 Tabs 11-23
Exhibit No. B - Report of James Stuckmeyer, M.D. dated 2/12/2012
Exhibit No. C - Report of James Stuckmeyer, M.D. dated 5/21/2012
Exhibit No. D - Reports of Terry Cordray - Rehabilitation Expertise LLC dated 04/ 21/2011 and 08/15/2012
Exhibit No. E - Report of Michelle Sprecker dated 7 20 2011
Exhibit No. F - Deposition of Michelle Sprecker with exhibits attached
Exhibit No. G - Deposition of James Stuckmeyer, M.D. with exhibits
Exhibit No. H - Deposition of Terry Cordray with exhibits
Exhibit No. I - Medical Bills Tabs 1-5
Exhibit No. J - Temporary Award issued in Injury #06-077052 dated 08/24/2010
Exhibit No. K - Temporary Award issued in Injury # 07-094608 dated 8/24/2010
Exhibit No. L - Letter from David Kenner to Rick Haskins dated 10/11/2011
Exhibit No. M - Pictures of the employee's injured shoulder
Exhibit No. N - Picture of accident scene from accident of 8/21/2006

The employer offered the following exhibits all of which were admitted without objection.

- Exhibit No. 1 - Deposition of Eden Wheeler, M.D.
Exhibit No. 2 - Report of Eden Wheeler M.D. dated 02/17/09 and exhibits
Exhibit No. 3- Rating Report of Charles Orth , D.O.
Exhibit No. 4- Rating Report of Dr. Wheeler dated 5 13 2010
Exhibit No. 5- Report of Jeffrey MacMillan dated 4 14 2009?
Exhibit No. 6 - Exhibits attached to the deposition of Dr. Wheeler

The Second Injury Fund did not offer any exhibits.

Mr. Ricky Haskins was present at the hearing and his testimony was credible. At the time of the hearing, Mr. Haskins was 55 years of age. He is 6'1" tall and weighing about 255 lbs. He is a high school graduate with some post high school training in welding.

Mr. Haskins began his career as a police officer with the Ocean Springs, Mississippi Police Department where he worked for eight years.

He entered the Kansas City, Missouri Police Academy in 1987 and graduated in January of 1988. That training lasted about five months. From 1988 - 1995, he worked the day watch at the Central Patrol Division.

Next, for about two and a half to three years, he worked in crime prevention involving public speaking, presentation of seminars, working at the department's annual automobile show display, working in the DARE drug prevention program, and performing home and business surveys, which involved securing properties against crimes.

He then switched to the traffic division. He drove a motorcycle after about a two week school for motorcycle operators. At the time of the accident, on August 21, 2006, he was driving a motorcycle.

Prior to August 21, 2006, Mr. Haskins did not complain of neck or shoulder pain to his personal physician. (Ex 17)

On August 21, 2006, a vehicle was trying to make a left turn in front of him when it hit Mr. Haskin's motorcycle. Mr. Haskins was thrown off his motorcycle and somersaulted over the other vehicle. Exhibit N is police department's photographs of the accident.

Right after the accident, claimant was taken to the North Kansas City Hospital Emergency Room. (Ex 16 p 23) He was complaining of neck, left wrist and left ankle pain. He denied loss of consciousness at the scene of the accident. A CT scan of the head was normal. (Ex A, p 731) X-rays of the cervical spine showed mild degenerative disc disease at C5-6. (Ex A, p. 732-733) Claimant was diagnosed with a left wrist sprain, left ankle contusion, and cervical strain. He was given a cock up wrist splint and a left ankle stirrup and was discharged to follow up with an orthopedic surgeon. (Ex. 16)

He followed up with Charles Orth, D.O. On September 7, 2006, MRI's were performed of the left shoulder, left ankle, and left wrist. (Ex A p 1069-1071) The left ankle showed some Achilles tendinitis. The left wrist was suspicious for a contusion at the base of the second metacarpal. There was tendinitis and a bursal surface partial thickness tear of the supraspinatus tendon of the left rotator cuff. Claimant told Dr. Orth on September 13, 2006 that he had increased neck and back pain with radiation down the left side of the neck in addition to low back pain at the L2 level. Dr Orth ordered cervical and lumbar MRI's. (Ex A p 1088-1089)

An MRI, taken on September 14, 2006, showed a mild bulge with some neural foraminal narrowing at C4-5 with the bulge effacing the thecal sac and some neural foraminal narrowing at C5-6 and an annular tear and slight disc protrusion to the right at C6-7 with some minimal right neural foraminal stenosis. A lumbar MRI taken the same date was normal. (Ex A p 1067-1068)

On September 28, 2006, Dr. Orth recommended a neurosurgical consult due to claimant's continued neck pain. Accordingly on October 6, 2006, claimant was sent to William Rosenberg, M.D., a neurosurgeon, and although claimant was complaining of left neck and shoulder pain with intermittent tingling and numbness in the fourth and fifth digits on the left hand with a weak grip and some forearm pain, Dr. Rosenberg advised no surgical treatment for the neck and recommended a physical medicine referral. (Ex A p 826-827)

On October 19, 2006, the patient returned to Dr. Orth who recommended an arthroscopic subacromial decompression. (Ex A p 1091)

On November 3, 2006 at North Kansas City Hospital, Dr. Orth performed an arthroscopic subacromial decompression and removal of the distal clavicle on the left and repair of a frayed rotator cuff with bone on bone impingement in the AC joint. (Ex A p 1096-1097) On November 16, 2006, Dr. Orth again advised a second opinion by a neurosurgeon. (Ex A p 1092)

On December 18, 2006, the patient returned to Dr. Rosenberg who indicated that claimant had an excellent recovery from the shoulder surgery with the shoulder pain and distal arm symptoms resolved, but the neck pain returned after physical therapy. Dr. Rosenberg again believed that there was not a surgical component in the cervical spine and advised against surgery and again advised a physical medicine consult. (Ex A p 825)

On December 28, 2006, the police board referred the patient to Eden Wheeler, M.D., a physical medicine specialist. (Ex A p 416) The patient was complaining of posterior stabbing neck pain at the base of the neck hurt by work conditioning with no radicular component. Dr. Wheeler recommended conservative management and referral to physical therapy for the cervical spine with possible pain management and facet blocks to follow. She returned the patient to work with no lifting over 10 pounds occasionally, no bending, and no operation of a motorcycle or vehicle. The patient was placed on Relafen.

The police board next sent the patient to Craig Lofgreen, M.D., the Board's physician at Concentra. The patient was still on Oxycodone and complaining of posterior cervical pain but denied tingling and numbness into the extremities. Dr. Lofgreen questioned the need for narcotic medication and on 01/19/07, sent a letter to Dr. Orth warning of excessive narcotic use. (Ex A p 1084)

On January 24, 2007, the patient returned to Dr. Wheeler with no change in his neck symptomatology. He was referred for facet block injections to Dr. Bruning. He was returned to work with no lifting over 50 pounds occasionally. (Ex A p 419-421)

On January 31, 2007, the patient underwent medial branch blocks at C3, C4, C5 in the facet joints. The patient complained of constant stabbing pain in the shoulder. (Ex A p 747)

On February 1, 2007, Dr. Bruning wrote Dr. Wheeler that there was no modification from pain from the medial branch blocks to the facet joints and therefore further treatment of the cervical facets would not be warranted. Dr. Bruning indicated that the patient did have a C6 disc

protrusion and annular tear which could be the source of some of his neck pain and advised epidural injections and traction therapy. (Ex A p 749)

On February 13, 2007, Dr. Wheeler disagreed with Dr. Bruning that epidural injections or cervical traction would do him any good as she believed the patient was rapidly approaching MMI status. She did indicate that it was proper to receive a second neurosurgical opinion. She did not advise an FCE and returned the patient to work with a restriction of 50 pounds lifting occasionally. (Ex A p 420-421)

On March 21, 2007, the patient was referred to Stephen Reintjes, M.D., a neurosurgeon. (Ex A p 1057-1058) He complained of low back pain without any lower extremity pain and no arm numbness or tingling. He indicated that the epidural injections did not work. He was diagnosed with non radicular low back pain. Dr. Reintjes ordered a bone scan and an EMG but had no surgical recommendation at this time.

On April 4, 2007, a bone scan taken at North Kansas City Hospital showed minor arthritic changes in the cervical spine. (Ex A p 1066)

On April 10, 2007, NCS/EMG studies by Stephen Hendler, M.D., of the bilateral upper extremities showed a radicular component at C8 with borderline median nerve studies. (Ex A p 1064-1065)

On April 16, 2007, the patient returned to Dr. Reintjes who stated that he believed that the C8 radiculopathy was caused by a stretch injury rather than a true compression. He again made no surgical recommendation and advised referral to a physical rehab specialist. (Ex A p 1059)

On April 19, 2007, the patient returned to Dr. Wheeler still with persistent and consistent neck pain. He did not believe he could protect his weapon or partner in an emergency situation. (Ex 4 p 20) Dr. Wheeler noted that he was returned to normal duties but had taken 60 days of sick time. Mr. Haskins reported that when he is at home "he is good for 2-3 hours but then has to lie down due to his subjective neck pain." (Ex 4 p 20.) In Dr. Wheeler's concluding paragraph, she states: "I expressed the opinion that prognosis is not particularly favorable for symptom resolution even with the above interventions." (Ex 4 p 20.)

On April 23, 2007, the patient underwent a steroid ESI at C7/T1. (Ex A p 772)

On April 26, 2007, the patient started physical rehabilitation ordered by Dr. Wheeler at the Athletic Rehab Center until about May 08, 2007. (Ex A p 286-290)

On May 01, 2007, the patient told the physician at PainCare that he got about a half day relief from his ESI. (Ex A p 762)

On May 10, 2007, the patient told Dr. Wheeler that he was having improvements in his left hand but still some numbness in the left fourth finger. The cervical ESI provided only

minimal relief. Dr. Wheeler authorized a home traction unit and the patient was continued on Naproxen, Darvocet and Flexeril. She indicated the patient was capable of meeting his job demands. (Ex 4 p 17)

On May 14, 2007, the patient underwent a second ESI at the C7-T1 level. (Ex A p 761; 1285)

On May 21, 2007, the patient reported back to PainCare indicating no change since the last injection but with numbness in the ring finger on the left during home traction. (Ex A p 760)

On June 7, 2007, the patient returned to Dr. Wheeler with little change in symptoms and no long term benefit from the second epidural but some improvement in the left upper extremity numbness with now only intermittent involvement of the ring finger. Dr. Wheeler indicated that the patient was now at MMI "for all vocational conditions. Unfortunately, his symptoms have not resolved." She recommended an FCE and indicated that if the FCE was not valid then there was no basis to place permanent restrictions on the patient. She advised against use of Darvocet but advised the patient to continue his home traction unit. (Ex A p 424-425)

On June 27, 2007 at the Athletic and Rehab Center, the patient underwent an FCE which was said to be invalid. (Ex 4 p 4-12) The patient subsequently wrote a letter to Dr. Wheeler indicating that he had been heavily medicated prior to each visit to the Athletic and Rehab Center due to neck and low back pain and performed the FCE without medication that day which made it very difficult for him to complete the testing. (Ex 4 p 4-12)

On July 5, 2007, the patient saw Dr. Lofgreen who questioned the veracity of the claimant that he was unable to return to work due to neck and upper back pain. Dr. Lofgreen believed the patient was at MMI. (Ex A p 35-36)

Having been released from treatment by the physicians selected by the Board of Police Commissioners and still in pain, claimant now sought treatment on his own.

On July 25, 2007, the patient reported to Sidney Cantrell, D.O., indicating that he had constant pain with driving, lifting, bending, or any activity requiring use of the arms and neck. A physical exam showed exquisitely tender trigger points about the cervical spine with prominent muscle spasms and a restricted ROM in the cervical spine. There was said to be spasms in the upper thoracic spine and trapezius muscles especially on the left. Dr. Cantrell believed that the injuries were progressive and permanent requiring continued narcotic medication, muscle relaxers, and anti-inflammatory pain medication. He advised both trigger point and epidural injections. (Ex A p 811-813)

From July 25, 2007 until March 10, 2008, the patient treated with Dr. Cantrell for neck, low back, and left shoulder pain.

After this first accident, Mr. Haskins testified that the Police Department made him

change from his motorcycle to a patrol car. This was due to several physical restrictions. He could not pick up his bike if it fell over, if he forgot to put the kickstand down. Claimant testified that he had the same police duties while driving a patrol car that he had on the motorcycle. He worked intermittently until the second accident on September 27, 2007.

On September 27, 2007, Mr. Haskins was involved in another motor vehicle accident. Mr. Haskins reported to the Emergency Room at North Kansas City Hospital. A CT of the cervical spine showed mild narrowing and minor spurring at C5-6 and C6-7 with no fracture. A CT of the cervical spine showed mild narrowing and minor spurring at C5-6 and C6-7 with no fracture. (Ex A p 670, et seq)

On October 4 2007, Mr. Haskins was referred to Concentra and was said to be in mild distress. He started physical therapy for six visits at Concentra until October 17, 2007. (Ex A p 44)

On October 5, 2007, a cervical MRI taken at DRI of Kansas City showed the following:

1. At C5-6 a bulging disc with osteophyte formation causing some right mild neural foraminal stenosis.
2. At C6-7 a bulge and annular tear. There was said to be no change since the 2006 MRI.

(Ex A p 102)

On October 8, 2007, Mr. Haskins reported back to Concentra in terrible pain at the base of the neck and left shoulder. He was still returned to work with limited use of the neck. (Ex A p 107)

On October 11, 2007, claimant returned to Dr. Lofgreen at Concentra, again with severe neck pain that Dr. Lofgreen did not believe correlated with a benign MRI finding. He did believe the shoulder complaints to be legitimate. The patient was not responding to physical therapy and another MRI of the cervical spine and left shoulder were ordered. (Ex A p 59)

On October 12, 2007, an MRI of the left shoulder at DRI of Kansas City (Ex A p 103) showed a change in the appearance of the AC joint with increased fluid indicating rotator cuff tendinopathy with a partial thickness tear of the bursal surface of the distal supraspinatus tendon and unchanged since the prior study. On October 17, 2007, Dr. Lofgreen reviewed the MRI and indicated that the patient was not disqualified for regular duty. (Ex A p 64)

On October 25, 2007, the patient returned to see Dr. Wheeler following the second accident. He was again complaining of left shoulder pain at the tip of the shoulder, and pain along the biceps muscles. Dr. Wheeler still believed that most of the pain was due to DDD in the cervical spine, and returned the patient to work with no lifting over 25 pounds. She did not believe that the symptoms would resolve with physical therapy or other conservative moralities

and believed there was little evidence on which to base permanent restrictions. Mr. Haskins last day of work was November 21, 2007. (Ex A p 428)

Claimant was referred to Roger Hood, M.D., an orthopaedic surgeon. On November 21, 2007 at the Surgicenter of Johnson County, Dr. Hood performed an open left Mumford procedure and acromioplasty with repair of a rotator cuff tear. He found a ½ inch tear in the rotator cuff. (Ex A p 1135)

On December 04, 2007, Dr. Hood indicated that claimant was capable of returning to work on a keyboard-desk job capable of one handed duty only. (Ex A, p 111)

From December 20, 2007 to March 24, 2008, claimant underwent physical therapy ordered by Dr. Hood at the Athletic and Rehab Center. On January 08, 2008, claimant told Dr. Hood that he had more pain in the neck than in the shoulder and Dr. Hood advised treatment for the neck. He believed that the patient was not ready for full duty. (Ex A p 785)

On January 14, 2008, claimant reported to the emergency room at North Kansas City Hospital indicating that using the weights in physical therapy was causing excessive neck pain. (Ex A p 656) A CT scan showed narrowing at C5-6 with mild degenerative spurring. (Ex A p 668)

On January 15, 2008, claimant underwent a cervical MRI at North Kansas City Hospital showing the following:

- A. At C4-5, a mild bulge.
- B. At C5-6, a posterior osteophyte formation with a generalized disc bulge.
- C. At C6-7, a posterior osteophyte and bulge.
- D. AT C7-T1 a minor disc bulge. (Ex A p 654)

On January 16, 2008, claimant returned to Dr. Lofgreen with severe posterior neck pain. (Ex A p 70) On January 18, 2008, claimant returned to his family doctor, Dr. Shinn, with shoulder pain. Dr. Shinn advised another neurosurgical consultation and kept the patient off work. Physical Therapy was ordered. (Ex A p 930) (Ex A p 899)

On January 28, 2008, claimant sought another neurosurgical consultation from Clifford Gall, M.D. (Ex A p841) Dr. Gall did not believe that the MRI findings at C4-5 and C5-6 were causing the pain. He recommended flexion and extension films in the cervical spine to rule out instability but believed the patient had no clear myelopathy but was uncertain as to a radicular component. Dr. Gall indicated it would be hard for him to offer surgical relief at C4-5 and C5-6.

On January 28, 2008, X-rays at Liberty Hospital showed a strengthening of a normal cervical curve with no significant disc disease. (Ex A p 840)

On January 29, 2008, the patient returned to Dr. Hood who again advised desk-sedentary

work only. (Ex A p 784)

On February 05, 2008, Dr. Gall called claimant advising that the cervical X-rays were unremarkable and advised against surgery but did advise physical therapy. (Ex A p 839) From February 11, 2008 to about May 21, 2008, claimant underwent physical therapy at Northland Physical Therapy under the order of Dr. Shinn. (Ex A p 1098)

On March 27, 2008, Dr. Hood refused to authorize an FCE until physical therapy for the neck was completed. (Ex A p 782)

On September 03, 2008, claimant was referred to Cynthia J. Ward, D.O., a neurologist by Dr. Shinn. A physical exam showed mild diminishment in the C7 distribution. Claimant had a positive Tinel's at both wrists and both medial epicondyles. Dr. Ward diagnosed him with chronic left shoulder pain and wanted a repeat MRI of the cervical spine. She also wanted repeat NCS/EMG studies to evaluate the possibility of cubital tunnel or CTS. She started the patient on Lyrica and Zanaflex replacing Flexeril. (Ex A p 1166)

On September 06, 2008, claimant underwent an MRI of the left shoulder showing the rotator cuff intact. (Ex A p 1173)

On September 09, 2008, Dr. Ward performed EMG/NCS studies showing no neuropathic or myopathic process. Dr. Ward believed that most of the pain was from the Degenerative Disk Disease in the cervical spine and lack of healing from the shoulder surgeries. She advised a continuation of physical therapy and continuation of the same medication. (Ex A p 1172)

On September 17, 2008, claimant returned to Dr. Lofgreen at Concentra, the police department doctor. He told Dr. Lofgreen he had sold his personal motorcycle and did not believe he could work. The patient was said to be in better physical condition due to weight loss and regular exercise but continued to regard himself as incapable of working. Dr. Lofgreen indicated that the cervical spondylosis and resultant chronic neck pain were not work related. (Ex A p 20)

On September 18, 2008, a cervical MRI taken at North Kansas City Hospital showed the following:

- A. At C4-5, a broad based disc osteophyte complex indenting the ventral thecal sac with left neural foraminal stenosis.
- B. At C5-6, a broad based protrusion indenting the ventral thecal sac.
- C. At C6-7, a right paracentral disc protrusion and annular tear indenting the thecal sac.

(Ex A p 1170)

On December 9, 2008, Dr. Ward indicated that the EMG showed no definite neuropathy or radiculopathy but believed claimant had chronic myofascial pain due to the left shoulder injury

and a spondylosis at C4-5 and C6-7. He was unable to lift more than 10-15 pounds and had difficulty holding a rifle. He could not hunt for three years due to his neck and shoulder and could not tolerate the weight of a bulletproof vest as it was hard for him to lift his arms overhead. While there was not evidence of significant nerve damage Dr. Ward indicated that he needed long term management with pain medications and deferred an opinion as to whether he could work. (Ex A p 1163)

On March 6, 2009, claimant was started on Percocet by his personal physician Michael Shinn, M.D. (Ex A p 916)

On March 24, 2009, a functional capacity evaluation was conducted at Corporate Care for the purposes of determining whether Mr. Haskins could go back to work. It was noted that he had below average bilateral grip strength and decreased sensation at the C7 dermatome in the left upper extremity. It was undetermined if he could sustain a full day of work or perform his job requirements and the dynamometer testing was invalidated as it could not be determined if full effort was being given due to the invalidity of the heart rate. (Ex A p 1238)

On March 31, 2009, the Board sent the patient back to Gill Wright, M.D., at Concentra for a return to duty exam. Dr. Wright indicated that the degenerative disk disease and self limited restrictions were the cause of the current limitations of the patient and placed no restrictions on the patient in regard to the left shoulder problem. He indicated that the C8 radiculopathy and annular tear resolved per MRI and EMG and that the patient could perform his full duties as a police officer. (Ex A, p 1181)

On April 14, 2009, the Board of Police Commissioners sent the patient to Jeffrey MacMillan, M.D., an orthopedic surgeon in Overland Park, Kansas. Dr. MacMillan rated claimant at 10% impairment to the left upper extremity at the shoulder and said he could do medium physical demand work. He did not comment on the cervical spine problem. (Ex A, p 1233)

On August 19, 2010, Judge Magruder ordered additional medical treatment with Dr. Bruning in both awards and found that based upon the expert opinions in the case that Claimants need for this treatment arises from the 2006 accident. (Ex J)

On April 4, 2011, the clamant underwent a vocational evaluation at the request of his counsel with Terry Cordray, a vocational expert. At the time he saw Mr. Cordray, claimant was on Lyrica, Percocet, Flexeril, and Nexium. He stated that the affects of the pain medication were an inability to be alert and attentive, as well as sleepiness. Claimant said he could lift 8-15 pounds, sit for 30 minutes and stand for 30 minutes. His ability to reach overhead with his left arm was difficult with a weaker grip than on the right, his dominant side. He indicated that he avoided driving while taking his medications and to avoid neck pain from rotating his head. (Ex D Report of 4/21/2011, p 13)

Mr. Haskins was found to have an IQ of 95 which is considered average. He tested out as average in arithmetic but at the borderline level in spelling. Mr. Cordray opined that given the age of the claimant (55 at the time) and the effects of his pain medication, it was unrealistic for him to undergo vocational training. (Ex D Report of 4/21/2011, p 14)

A job survey utilizing the Residual Access to Employment publication revealed a job market loss for the claimant at 96% for the Kansas City labor market and the United States and a 95% loss for jobs in the State of Missouri because claimant has no skills as a sedentary worker, came from a job as a police officer which is classified at the heavy level of labor, and with a 35 lb lifting restriction from Dr. Reintjes (Ex A, p 1048) would not even be eligible for medium lifting jobs. (Ex D Report of 4/21/2011, p 15-17)

Mr. Cordray noted the fact that the Board did not offer claimant another job, even one as a police dispatcher, and that the Board gave him a disability retirement. (Ex L) He noted that the only occupation plaintiff had was that of a police officer for about 30 years. (Ex D Report of 4/21/ 2011, p 17) He concluded that based on the combination of injuries from the 2006 and 2007 accidents, claimant was not employable in the open labor market. (Ex D Report of 4/21/2011 p 15-16)²

On May 20, 2011, Mr. Haskins returned to Dr. Ward, the neurologist, indicating he had chronic pain from the left shoulder and neck which was not radiating. She gave Mr. Haskins samples of Lyrica and Flexeril. (Ex A, p 1144). At the hearing, claimant testified that he went to the emergency room at North Kansas City Hospital on January 14, 2008 because he could not stand the pain anymore. (Ex A p 656)

The Board retained Michelle Sprecker as its vocational expert. Her report dated July 20, 2011 was admitted as Exhibit E. Her deposition was admitted as Exhibit F. Mr. Haskins was consistent between what he told Ms. Sprecker and what he told Terry Cordray about his ability to sit, stand, lift, and walk. (Ex E p 10; Ex D first report p 13) Both vocational experts administered the Wide Range Achievement Test - Revision 4 and came up with almost identical grade scores for spelling and Arithmetic. (Ex E p 26; Ex D first report p 14)

² After reviewing additional medical records, Mr. Cordray issued a supplemental report dated August 15, 2012 reaching the same conclusions. (Also exhibit D) References to the Report of John Pazell, M.D., who examined claimant at the request of his attorneys because of the death of Dr. Pazell while these cases were pending making his reports admission objectionable because his deposition had not been taken. However, the Employer did offer the Deposition of Dr. Wheeler and its attachments which included the Report of Dr. Pazell (Wheeler Deposition Exhibit 19).

ISSUES

The parties requested the Division determine:

1. The nature and extent of any permanent partial disability sustained by the injured employee.
2. The liability of the Second Injury Fund.
3. The employer's liability for unpaid medical bills.

The workers compensation system was enacted to provide quick recovery to those who were injured without their incurring the cost and delay associated with litigation. McCormack v. Stewart Enterprises, Inc., 916 S.W.2d 219, 226 (Mo.App.1995). The act served to place upon industry losses experienced by employees arising out of injuries sustained in the course of employment. Rooks v. Trans World Airlines, 887 S.W.2d 671, 673 (Mo.App.1994); McFarland v. Bollinger, 792 S.W.2d 903, 907 (Mo.App.1990).

Nature and Extent of Disability

The first issue is the claim is the nature and extent of disability from the accident of August 21, 2006. Mr. Haskins alleges that he is permanently and totally disabled from a combination of the 2006 and 2007 accident.

Missouri courts have repeatedly held that the test for determining permanent total disability is whether the individual is able to compete in the open labor market and whether the Employer in the usual course of business would reasonably be expected to employ Mr. Haskins in his present physical condition. See Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995); Lawrence v. R-VIII School District, 834 S.W.2d 789 (Mo. App. 1992); Carron v. St. Genevieve School District, 800 S.W.2d 6 (Mo. App. 1991); Fischer v. Arch Diocese of St. Louis, 793 S.W.2d 195 (Mo. App. 1990). It is not necessary that an individual be completely inactive or inert in order to meet the statutory definition of permanent total disability. It is necessary, however, that they be unable to compete in the open labor market. See Reese v. Gary & Roger Link, Inc. 5 SW 3d 522 (Mo. App. 1999); Carlson v. Plant Farm, 952 SW 2d 369, 373 (Mo. App. 1997); Fletcher v. Second Injury Fund, 922 SW 2d 402 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft, 894 SW 2d 173 (Mo. App. 1995); Reiner v. Treasurer, 837 SW 2d 363 (Mo. App. 1992); Brown v. Treasurer, 795 SW 2d 478 (Mo. App. 1990).

A determination of permanent total disability should focus on the ability or inability of the Employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment. Gordon v. Tri-State Motor Transit, 908 S.W.2d 849 (Mo. App. 1995). The courts of the State have held that various factors may be considered including a claimant's physical and mental condition, age, education, job experience and skills in making the determination as to whether a claimant is permanently and totally disabled. See e.g., Tiller v. 166 Auto Auction, 941 S.W.2d 863 (Mo. App. 1997); Olds v. Treasurer, 864 S.W.2d 406 (Mo. App. 1993); Brown v. Treasurer, 795 S.W.2d 439 (Mo. App. 1990); Patchin v. National Supermarkets Inc., 738 S.W.2d 166 (Mo. App. 1987); Laturno v.

Carnahan, 640 S.W.2d 470 (Mo. App. 1982); Vogel v. Hall Implement Co., 551 S.W.2d 922 (Mo. App. 1977).

The fact-finder in a workers' compensation proceeding has wide discretion in assessing the credibility of the witnesses and may even decide a case upon its disbelief of an uncontradicted and unimpeached opinion. Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525, 527 (Mo. banc 1993) (quoting Ricks v. H.K. Porter, Inc., 439 S.W.2d 164, 167 (Mo.1969)). However, the fact-finder may not substitute its opinion on the question of medical causation of an injury for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994). "[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." Elliott v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D.2002).

A determination of the degree of disability is not strictly a medical question. The nature of the injury, its severity, and permanence are medical questions. However, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature. As a result, the courts have recognized that the extent and percentage of disability is a finding of fact within the special province of the Commission to determine. The Commission is not bound by the exact percentage of disability estimated by the medical experts. Quinlan v. Incarnate World Hospital, 714 SW2d 237 (Mo. App E.D. 1986).

The records in this case are voluminous and the medical records full of different opinions. The records and testimony indicate that Mr. Haskin's neck problems were the most serious. The following is a summary of the pertinent facts upon which this decision relies.

In Dr. Wheeler's deposition, she testified that on February 13, 2007, Dr. Bruning found that the torn annulus and disk protrusion could be the source of Mr. Haskins neck pain and torn annulus was likely caused by a traumatic event. (Ex 1 p.73) Furthermore, Dr. Wheeler testified that an April 10, 2007 EMG or nerve conduction study by her partner, Dr. Fendler, found a radiculitis and spontaneous activity on Mr. Haskins' neck muscles and in one hand muscle relating to C8-T1. (Ex 1 p.75-76)

On April 16, 2007, Dr. Stephen Reintjes stated: I suspect that the C8 radiculopathy is due to a stretch injury rather than a true compression. (Ex. 7 p 1)

On April 19, 2007, Dr. Wheeler, the Board's treating physician, saw Mr. Haskins and it is noted that he was returned to normal duties in February but had taken 60 days of sick time. Mr. Haskins reports that when he is at home, he is good for 2-3 hours but then has to lie down due to his subjective neck pain. (Ex 4 p 20.) In Dr. Wheeler concluding paragraph she states: "I expressed the opinion that prognosis is not particularly favorable for symptom resolution even with the above interventions.

On June 7, 2007, Dr. Wheeler again indicated that the claimant was at maximum medical

improvement, "for all vocational conditions. Unfortunately, his symptoms have not resolved." (Ex 4 p 13).

On June 27, 2007, Mr. Haskins underwent a functional capacity evaluation which allegedly revealed that he was not giving a valid test. The test was administered by a Ms. Nicole Pratt, Assessment Specialist. Ms. Pratt's narrative lists the basis for the invalid determination is based upon three findings. The first was that Mr. Haskins' heart rate was not consistent with maximum effort or the effect pain would have on his heart rate. Second, Mr. Haskins' weights did not correlate directly with a person of the same age, gender, and area of injury. Third, that resistance dynamometer testing was inconsistent based upon expected norms. (Ex 4 p 4).

On July 5, 2007, Dr. Wheeler saw Mr. Haskins at which time he presented a letter stating that he was heavily medicating in order to get through his work conditioning program from December through January. Dr. Wheeler continued him on Darvocet, Flexeril and Naproxen for two months and released Mr. Haskins to full duty due to the results of the functional capacity examination. (Ex. 4 p 2)

On July 25, 2007, claimant reported to Dr. Cantrell, his personal physician, indicating he had constant pain while driving, lifting, bending, or any activity requiring use of the arms and neck. His sleep is interrupted due to pain and it has limited his ability to do household chores and affected his marriage. Dr. Cantrell notes that Mr. Haskins had used 116 sick days during his treatment. Dr. Cantrell believed that the injuries were progressive and permanent requiring continued narcotic medication, muscle relaxers, and anti-inflammatory pain medication. He advised both trigger point and epidural injections. Dr. Cantrell notes that Mr. Haskins did not take his pain medication before the functional capacity evaluation because he thought it should be unbiased. Dr. Cantrell disputes the validity and conclusion of the functional capacity valuation and believes the reduced effort was a result of the pain. (Ex A p 811-813).

On September 27, 2007, Mr. Haskins was in another motor vehicle accident. Mr. Haskins was taken to the Emergency Room at North Kansas City Hospital. A CT of the cervical spine showed no significant changes to the cervical spine. (Ex A p 681: Ex 7, p 8.)

On October 25, 2007, Dr. Wheeler found that: "... based today's examination that day as well as MRI evidence that new pathology may have occurred. Although the MRI comments on 'no change' from an MRI preoperatively, this would imply that the rotator cuff was not repaired." Dr. Wheeler advised another orthopaedic consultation. (Ex 4 p 37).

An MRI from September 18, 2008 indicates that Mr. Haskins has a stable superimposed right pacentral disc protrusion and annular tear. (Ex. 18 p 8)

The evidence indicates that Mr. Haskins did not have any significant objective or subjective changes to his cervical spine following the September 27, 2007 accident. Dr. Wheeler testified that his neck symptoms didn't change as a result of the 2007 accident. (Ex A, p 413) And there is also a question of whether Mr. Haskins had any changes to his left shoulder following the September 27, 2007 accident given Dr. Wheeler's October 25, 2007 evaluation.

(Ex 4, p 37)

The Police Board admitted a 2009 Functional Capacity Evaluation from CorporateCare. (Ex. 9). This FCE report also questions Mr. Haskins' effort due to lack of expected heart rate increase. (Ex. 9, p 18). Notes from Dr. Wheeler dated May 25, 2011 state that Dr. Cynthia Ward, D.O. could not opine on whether Mr. Haskins would have a rise in blood pressure or pulse with anticipation of pain. (Ex A, p 390) Also, Dr. Ward is reported as having believed Mr. Haskins had been honest in his symptoms. (Ex A, p 390)

On August 30, 2009, Dr. Stephen Reintjes authored a report that states that the "...September 27, 2007 was a prevailing factor in causing Office Haskins' aggravation to his neck. I should note that I saw the patient in 2007 with neck pain related to a motorcycle accident. I did not see any significant changes to his cervical region on an anatomic basis that could be attributed to the alleged injury of September 27, 2007."

On May 13, 2010, Dr. Wheeler also notes in her Evaluation that Mr. Haskins' pain levels had not changed from July of 2007 to the October 2007 which is after the first accident. (Ex A, p 411)

Ms. Sprecker based her findings on the medical restrictions provided by four doctors, MacMillan, Orth, Wheeler and Wright which are reviewed as follows. Dr. MacMillan was a rating but not a treating doctor. (Ex. F, p 18 ll. 7-11; p. 19 ll. 20-23) In his report dated April 14, 2009, Jeffrey MacMillan, M.D., rated the claimant at 10% impairment of the left upper extremity under the AMA guidelines. Dr. MacMillan did not rate Mr. Haskins' neck. Dr. MacMillan's impairment rating is not credible under Missouri disability standards.

Dr. Orth was told not to rate the cervical spine and did not treat the cervical spine (Ex A p 1084; 1090) so could not offer a rating report combining disability for the left shoulder and the cervical spine. Dr. Orth opined that there was no disability at all from the 2006 injury despite the fact that he performed surgery on Mr. Haskins and he continued to complain of neck and shoulder problems. (Ex 3) Dr. Orth's opinion is not credible.

On two separate occasions, Dr. Wheeler rated the injuries from the first accident at 12% to the body as a whole referencing the left shoulder injury and cervical radiculitis with 4% opined as pre-existing due to cervical spondylosis and cervical degenerative disc disease. (Ex 2 and 4) Dr. Wheeler admitted in her deposition that there is no evidence that any pre-existing cervical condition interfered with claimant's work. (Ex 1 p 65-66) Dr. Wheeler also testified that cervical spondylosis can be non-disabling. (Ex 1 p 64-65) Dr. Wheeler testified that the claimant had no pre-existing cervical symptoms and the condition was not disabling until the accident of August 21, 2006. On June 7, 2007, the patient returned to Dr. Wheeler with little change in symptoms and no long term benefit from the second epidural but some improvement in the left upper extremity numbness with now only intermittent involvement of the ring finger. Dr. Wheeler indicated that the patient was now at MMI "for all vocational conditions. Unfortunately, his symptoms have not resolved." She recommended an FCE and indicated that if the FCE was not valid then there was no basis to place permanent restrictions on the patient. Dr. Wheeler then proscribed naproxen 500 mg, Darvocet and Flexeril. (Ex 4 p 13). Despite numerous findings of

radiculitis by EMG's, the repeated medical procedures to address Mr. Haskin's symptoms and the proscribing of narcotics and other controlled medications, Dr. Wheeler claims to have "no basis" to issue restrictions for a police officer.

In her rating report of May 25, 2010, Dr. Wheeler states that she believes that the medication Mr. Haskins is taking impair his ability to perform his duties as a police officer. Dr. Wheeler also states that she cannot conclude that Mr. Haskins' symptoms are the result of the September 27, 2007 accident and that he had chronic neck pain from the 2006 accident. I find that Dr. Wheeler's reports, her repeated treatment of his neck conditions, the lack of restrictions and her rating of Mr. Haskins to be inconsistent and therefore her rating is not credible.

On March 31, 2009, the Board sent the patient back to Gill Wright, M.D., at Concentra for a return to duty exam. Dr. Wright indicated that the degenerative disk disease and self limited restrictions were the cause of the current limitations of the patient and placed no restrictions on the patient in regard to the left shoulder problem. He indicated that the C8 radiculopathy and annular tear resolved per MRI and EMG and that the patient could perform his full duties as a police office. (Ex A p 1181).

Furthermore, Dr. Wright based his findings upon the alleged invalidity of the Functional Capacity Evaluation evaluations. And, in fact, Dr. Ward and Dr. Cantrell questioned the validity of the conclusions of the FCE. The physicians findings of invalidity or lack of disability based on the FCE appears to be a determination of the credibility of the witness which is the province of this court and ultimately the Commission. Vickers v. Missouri Dept. of Public Safety, 283 S.W.3d 287 Mo.App. W.D., 2009. Dr. Wright's report is not credible and invades the province of this court and commission.

On page 32 of her report, Ms. Sprecker listed 15 jobs that she believed Mr. Haskins could perform based upon the restrictions provided by the four doctors. In as much as Ms. Sprecker's opinion is based upon reports and opinions of the four doctors listed above that have been determined to lack credibility, her report is also not credible.

The evidence in this case is that Mr. Haskins was a motorcycle police officer in good physical health prior to the on-duty motorcycle accident on August 21, 2006. As a direct and proximate result of the accident on August 21, 2006, Mr. Haskins suffered a torn rotator cuff and annual tear in his neck. Mr. Haskins has not recovered significantly from In April of 2007, Mr. Haskins is reporting that he has taken 60 sick days since his release to work in February 2007 and by July Dr. Cantrell reports that he taken 116 days of sick leave. (Ex. A, 812, Ex 4, p 20). The Division takes note that there are 175 days from February 1st to July 25th. Assuming Mr. Haskins was scheduled to work five days a week over this period, then there were a possible 125 work days. Accordingly, Mr. Haskins would have only worked nine days in approximately six months.

Mr. Haskins' physical problems have been validated by the Board when they reassigned him to a patrol car and ultimately granted him non-duty disability.

Following the August 21, 2006 accident Mr. Haskins has significant complaints of pain in his neck and shoulders as a result of this accident. He has undergone repeat treatment for his

neck and shoulder pain. The Board of Police Commissioners retired Mr. Haskins on a non-duty related disability pension indicating that he could no longer perform the full duties of a police officer. (Ex L)

Mr. Haskins is still being treated by Dr. Ward with Lyrica, Percocet, Tiznidine and Flexeril. Dr. Ward indicated on December 9, 2008 that Mr. Haskins would need long term management with pain medications. (Ex A p 1163) Mr. Haskins has severe range of motion deficits in both his left shoulder and his cervical spine. Mr. Haskins has a weak grip in the left upper extremity, can lift only 10-15 lbs, can stand for at the most 30-45 minutes and can sit for, at the most, 30-45 minutes. (Ex. B)

Mr. Haskins cannot drive a commercial vehicle due to his cervical range of motion problems and the side effects of the medication he is taking. Dr. Stuckmeyer notes that the pain medication and Flexeril that impair his cognitive abilities. Dr. Wheeler also believes that the medication Mr. Haskins is taking impair his ability to perform his duties as a police officer. (Ex A, p 413)

Mr. Haskins testified that he does still fish from the bank, he had to give up golfing, bowling and hunting. He has to take naps during the day. He still has numbness down his arm and pain in his neck when moving it from side to side. He has no computer training.

The only job Mr. Haskins has had since September 2007 was working for his step-son. This was a job answering phones and he was given a cot to lay down on during the day while answering a phone. Even at that job he lasted only 2-3 months and had to quit when it required driving from Excelsior Springs to North Kansas City which he could not tolerate. Mr. Haskins testified that he did not want to be a charity case for his step-son.

Based on the medical evidence and vocation evidence presented, as summarized above, I find on August 21, 2006 Mr. Haskins sustained an accident in the course and scope of his employment that was the prevailing factor in causing his neck and shoulder injuries that required the medical treatment he has received to date and resulted in his current disability as detailed above. When Mr. Haskins was released to return to work in February of 2007, he took over 116 sick days by July 25, 2007. Mr. Haskins' attendance and physical limitation indicates that he was significantly accommodated by the Board following the August 21, 2006 accident.

The parties also presented evidence with respect to whether Mr. Haskins is employable in the open labor market given his current disability. James Stuckmeyer, M.D. rated Mr. Haskins at 35% of the left shoulder and 35% disability to the cervical spine as a result of both the 2006 and 2007 accidents but concludes that Mr. Haskins is permanently totally disabled. Dr. Stuckmeyer tries to apportion the disability to both accidents in his deposition. (Reports of Dr. Stuckmeyer Ex B and C; Deposition of Dr. Stuckmeyer (Ex G p 21 L 24; p 22 L 1-3) I do not concur in Dr. Stuckmeyer's apportionment of disability but find the rest of his report to be credible.

Dr. Stuckmeyer also opined that due to the medications he was taking, Mr. Haskins could not be involved in any occupation requiring commercial driving, that he would not be capable of

performing any occupation requiring him to have his neck in a forward flexed position, such as computer work, and that he should avoid any repetitive cervical spine motion, specifically side to side, and lateral rotation type activities. He opined that the continued use of Percocet clouded Mr. Haskins' cognitive function. He opined that Mr. Haskins was permanently and totally disabled due to a combination of the injuries from both accidents. (Ex B p 18)

On April 4, 2011, the claimant underwent a vocational evaluation at the request of his counsel with Terry Cordray, a vocational expert. At the time he saw Mr. Cordray, claimant was on Lyrica, Percocet, Flexeril, and Nexium. He stated that the affects of the pain medication were an inability to be alert and attentive, as well as sleepiness. Claimant said he could lift 8-15 pounds, sit for 30 minutes and stand for 30 minutes. His ability to reach overhead with his left arm was difficult with a weaker grip than on the right, his dominant side. He indicated that he avoided driving while taking his medications and to avoid neck pain from rotating his head. (Ex D Report of 4/21/2011 p 13)

A job survey utilizing the Residual Access to Employment publication revealed a job market loss for the claimant at 96% for the Kansas City labor market and the United States and a 95% loss for jobs in the State of Missouri because claimant has no skills as a sedentary worker, came from a job as a police officer which is classified at the heavy level of labor, and with a 35 lb lifting restriction (from Dr. Reintjes) (Ex A p 1048) would not even be eligible for medium lifting jobs. (Ex D Report of 4 21 2011 p 15-17). He concluded that based on the combination of injuries from the 2006 and 2007 accidents, claimant was not employable in the open labor market. (Ex D Report of 4/21/2011 p 15-16)

Given the patient's history as reported by Dr. Wheeler and the findings of Dr. Reintjes as well as the report of Mr. Cordray, it is my conclusion that the August 21, 2006 accident was the proximate and prevailing factor in causing Mr. Haskins' left shoulder and neck injury and I find that Mr. Haskins became totally disabled on August 21, 2006. It is not likely that any reasonable employer is going to hire Mr. Haskins in the open labor market given his present physical and mental condition, age, education, job experience and skills.

Second Injury Fund

There is no evidence, medical or otherwise, of a condition preceding this first accident of August 21, 2006 constituting any hindrance or obstacle to employment or re-employment of the claimant. Claimant testified as to his involvement in a prior automobile accident in January of 1990, but there was no evidence of any substantial medical treatment, and claimant testified that he did not miss time from work. I therefore find no liability of the Second Injury Fund under this injury number.

Unpaid Medical Bills

The second issue is the employer's liability for unpaid medical bills. Because the Board terminated treatment for the chronic neck pain, Mr. Haskins testified that he sought medical treatment on his own. On August 19, 2010, Judge Magruder ordered additional medical treatment with Dr. Bruning in both awards and found that based upon the expert opinions in the

case that Claimant's need for this treatment arises from the 2006 accident. (Ex J)

The law as to denial of an injury in regard to unauthorized medical care is as follows: Where an employer denies the allegations in an employee's claim, it also necessarily denies liability for medical aid to the employee and the employee may be entitled to an award for the cost of medical services. Wiedower v ACF Industries, Inc., 657 SW2d 71,74 (Mo.App.E.D. 1983)

The termination of authorized medical treatment caused Mr. Haskins to first seek care from Dr. Michael Shinn, his personal physician at the Briarcliff Medical Center. After extensive review of the billing records and the treatment notes, I find Mr. Haskins entitled to be reimbursed for the total amount paid by the group health carrier and what he paid out of pocket for treatment to his neck and shoulder in the amount of \$1,050.33 (Ex I, p. 2; Ex. A, p 855-1045).

Dr. Shinn referred his patient to Northland Physical Therapy from February 11, 2008 to July 29, 2008, so I therefore find that Mr. Haskins is entitled to the amount paid by his private insurance carrier and his out-of-pocket expenses in the amount of \$3,759.11. (Ex I, p 14-21)

Dr. Shinn referred his patient to Dr. Cynthia Ward, a neurologist, with whom he is still treating. I therefore find that Mr. Haskins is entitled to the amount paid by his private insurance carrier and his out of pocket expenses in the amount of \$900.19 (Ex. I, p 12-13). Mr. Haskins is still treating with Dr. Ward, the neurologist, every six months with medication. On December 9, 2008, Dr. Ward labeled his pain as chronic and advised he would need long term pain management. (Ex A p 1163-1164)

I find that Mr. Haskins is entitled to be reimbursed the amount paid by private insurance and his out of pocket cost for medications related to chronic neck and/or left shoulder pain. These medication are Oxycondone, Lyrica, Zanaflex and Tizanidine in the amount of \$2,095.80 (Ex. I, p 5, 7)

The total unpaid medical is \$7,805.43

Future Medical Care

Mr. Haskins claims he is entitlement to future medical benefits. The standard of proof for future medical is reasonable probability that the care will be needed. Martia v Contact Freighters, Inc. 929 SW2d 271,277 (S.D.1996) Modlin v Sun Mark, Inc., 699 S.W.2d 5,7 (E.D.1985); Kaderly v Race Brothers Farm Supply, 993 SW2d 512 (Mo.App.S.D.1999) To be awarded future medical benefits the claimant must show that the medical care flows from the accident. Crowell v Hawkins, 68 SW3d 432, 437 (Mo.App.E.D. 2001). The employee is entitled to compensation for care and treatment which gives comfort (relieves) even though restoration to soundness (cure) is beyond avail. Williams v A B Chance, 676 SW2d 1 (Mo.App. E.D.1985)

Mr. Haskins is still treating with Dr. Ward, the neurologist, every six months with medication. On December 9, 2008, Dr. Ward labeled his pain as chronic and advised he would

need long term pain management. (Ex A p 1163-1164) Dr. Stuckmeyer advised that Mr. Haskins should be given a myelogram and a post myelogram CT scan (Ex B, p. 17) along with lifelong pharmacological management. (Ex B p 18) Dr. Bruning's September 3, 2010 report also indicates a need for further medical treatment. (Ex A, p 1258-1260). Mr. Haskins continues to take medication to relieve him of the effects of the accident. I therefore find that Mr. Haskins has met his burden of proof as to the need for future medical treatment.

CONCLUSION

I find that as a result of the accident of September 27, 2007, Mr. Haskins did not sustain any greater disability because he was permanently and totally disabled from the August 21, 2006 accident.

I find no liability on the Second Injury Fund.

Claimant's counsel, Jerry Kenter, is entitled to attorney's fees of 25% of the sums recovered for his services rendered.

Lawrence Rebman
Administrative Law Judge
Division of Workers' Compensation