

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

Injury No.: 07-025425

Employee: Nathan Hempel
Employer: Lincoln County Electric, Inc.
Insurer: American Family Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 4, 2009. The award and decision of Administrative Law Judge Edwin J. Kohner, issued November 4, 2009, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 4th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Nathan Hempel Injury No.: 07-025425
Dependents: N/A Before the
Employer: Lincoln County Electric, Inc. **Division of Workers'**
Compensation
Additional Party: Second Injury Fund (Open) Department of Labor and Industrial
Relations of Missouri
Insurer: American Family Mutual Insurance Company Jefferson City, Missouri
Hearing Date: August 31, 2009 Checked by: EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: January 3, 2007
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, an electrician, struck his head on an overhead steel beam while installing conduit and suffered a closed head injury.
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: Head and neck.
14. Nature and extent of any permanent disability: 15% of the body as a whole
15. Compensation paid to-date for temporary disability: \$17,869.02
16. Value necessary medical aid paid to date by employer/insurer: \$4,831.47

- 17. Value necessary medical aid not furnished by employer/insurer? See Additional Findings of Facts and Rulings of Law
- 18. Employee's average weekly wages: \$1,078.31
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$ 4,898.72
17 4/7 weeks of temporary total disability (or temporary partial disability)	\$12,631.57
60 weeks of permanent partial disability from Employer	\$22,593.00

22. Second Injury Fund liability: Open

TOTAL: \$40,123.29

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

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

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Nathan Hempel	Injury No.: 07-025425
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	Lincoln County Electric, Inc.	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund (Open)	Jefferson City, Missouri
Insurer:	American Family Mutual Insurance Company	Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, an electrician, struck his head on an overhead steel beam while installing conduit and suffered a closed head injury. The issues for determination are (1) Medical causation, (2) Liability for past medical expenses, (3) Future medical care, (4) Temporary disability, and (5) Permanent disability. The Second Injury Fund claim remains open pursuant to an agreement among the parties. The evidence compels an award for the claimant for medical expenses, temporary total disability benefits, and permanent partial disability.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., Chatauqua Seymour, and Kathy Smart, and voluminous medical bills and records. The defense offered depositions of David M. Peeples, M.D., and Debra D. Lockrem and records from the defense claims representative. Exhibit AA was received in evidence with extensive pen and ink markings on the exhibit. The markings are not those of the writer, but were on the exhibit when offered and received in evidence without objection.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

SUMMARY OF FACTS

This thirty-two year old claimant, an electrician, suffered a closed head injury while bending conduit and running circuits at a gas station at about 3:00 p.m. on January 3, 2007. At the time of the accident, the claimant was walking on top of a large cooler, ten feet off the ground and did not see one of the steel beams above him. He hit the beam with his head and testified that he was immediately dazed. He sat down but was able to work an additional two hours of overtime. He went home, went to bed, and did not awake until the next evening at 8:30 p.m.

The claimant's employer observed the accident but offered no direction to the claimant for a medical provider. Dr. Katyal, a family practice physician, examined the claimant on January 9, 2007, and diagnosed a head injury, headache, concussion, blurred vision, dizzy spells, asthma, and allergic sinusitis. See Exhibits C, Q. Dr. Katyal reported that the claimant needed to be on his previous prescriptions for depression, bipolar disorder, which the claimant testified

include Depakote, Wellbutrin, and Adderall. See Exhibits C, Q. Dr. Katyal reported that claimant was down to 1-2 cigarettes per day, and 2 “joints” per week, and had decreased his beer consumption. See Exhibits C, Q. Dr. Katyal also noted a foot injury from the previous week, and a prior right elbow injury, stumbling, and neck pain. See Exhibits C, Q. He advised the claimant not to drive. See Exhibits C, Q. Also on January 9, 2007, a right forearm X-ray and a CT scan of his head were normal. See Exhibits C, Q. On January 16, 2007, the claimant followed up with Dr. Katyal who reported dizzy spells, blurred vision, headaches, and neck pain. See Exhibits C, Q.

On February 7, 2007, Dr. Casino, another family practice physician, who took over for Dr. Katyal while she was out for maternity leave, examined the claimant, and reported that the claimant’s intermittent headaches persisted. Dr. Casino reported that Dr. Katyal had excused the claimant from work until February 7, 2007, and Dr. Casino released the claimant to work with the restrictions of no work involving hot electrical panels or hauling loads until the claimant could be cleared by a neurologist. See Exhibits C, Q.

Dr. Myers, a neurologist, examined the claimant on February 19, 2007, and prepared a March 14, 2007, report. Dr. Myers reported that the claimant had significant neck pain and daily headaches. See Exhibits C, Q. Dr. Myers diagnosed a cervical strain, and ordered an MRI of the cervical spine, physical therapy to the neck, and a prescription for Pamelor. See Exhibits C, Q. Dr. Katyal excused the claimant from work from March 22, 2007, until April 22, 2007. See Exhibits C, Q.

On April 23, 2007, Dr. Peeples, another neurologist, examined the claimant and diagnosed a Grade I concussion, and reported that the claimant had no symptoms of post-concussive etiology. See Dr. Peeples deposition, 4/22/2009, pages 7, 15. Dr. Peeples physical examination was normal. See Dr. Peeples deposition, 4/22/2009, page 11. He reviewed the CT of the head, and noted it was normal. See Dr. Peeples deposition, 4/22/2009, page 16.

Dr. Peeples found that the claimant’s range of movement in the cervical spine on volition was somewhat reduced in all planes. See Dr. Peeples deposition, 4/22/2009, page 11. However, Dr. Peeples testified that he could not find a reason for the pain on physical examination and that a doctor can feel what is the “reason for pain, including reproducible areas of tenderness to the touch, either over the spine or over the muscles, which the claimant did not have.” He testified that the claimant voluntarily exhibited reduced range of movement in his neck, which in an isolated fashion means nothing without objective findings to account for why that would be. See Dr. Peeples deposition, 4/22/2009, page 15. Dr. Peeples testified that the MRI reported diffuse degenerative type changes with disc bulging and disc spur complex, which Dr. Peeples opined, “is a chronic type of condition, which would have been present before his injury.” See Dr. Peeples deposition, 4/22/2009, page 18.

Dr. Peeples opined that the claimant did not have symptoms of a post-concussive etiology. He also opined the claimant sustained a cervical strain. See Dr. Peeples deposition, 4/22/2009, page 17. He also opined there was a possibility the claimant had a thoracolumbar strain by the claimant’s history, because the claimant complained of initial symptoms including mid and low back pain. However, Dr. Peeples found no evidence that the claimant reported any types of symptoms relating to his low back to any of the three physicians he saw shortly after the accident. See Dr. Peeples deposition, 4/22/2009, page 17. Dr. Peeples testified that if someone

has an accident resulting in low back pain of the type the claimant is complaining of, then these symptoms should have been present immediately. See Dr. Peeples deposition, 4/22/2009, page 18.

Dr. Peeples released the claimant to work light duty with no climbing, no lifting greater than 50 pounds, or activities that require persistent awkward positions of postural instability. Dr. Peeples recommended physical therapy and an MRI of the cervical spine, similar to Dr. Myers' recommendation. See Dr. Peeples deposition, 4/22/2009, page 19. At no time did he recommend treatment with a pain management specialist, and testified that based on his evaluation, such treatment was not warranted. See Dr. Peeples deposition, 4/22/2009, page 22.

On April 30, 2007, Debra Lockrem, the defense insurance adjustor, contacted Dr. Myers and advised him of Dr. Peeples' assessment. She reported what Dr. Peeples had recommended, and advised Dr. Myers that the claimant wished to continue to treat with Dr. Myers. See Lockrem deposition, page 18. She also advised that treatment with Dr. Myers would be authorized, only to the extent of what Dr. Peeples had recommended. See Lockrem deposition, page 19. She did not receive a response from Dr. Myers. See Lockrem deposition, page 19.

On April 25, 2007, the claimant, on referral from Dr. Katyal, the claimant's family practice physician, elected to begin treatment with Dr. Padda, a pain management physician. The claimant complained of spasms in the neck and center of his back. See Exhibits D, E, F. This is the first time in the medical records that the claimant mentioned middle and lower back pain. See Exhibits D, E, F. Dr. Padda found that the claimant had myofascial trigger points in his upper back, but his examination of the lower back was normal. See Exhibits D, E, F. He diagnosed cervical dystonia and hypoesthesia C-5, C-6, and C-7 on the right side. See Exhibits D, E, F. Dr. Padda administered six sets of eight injections, for a total of 48 different injections, into the neck, mid-back, and lower back. See Exhibits D, E, F. Dr. Padda also prescribed medications for pain control and physical therapy. Claimant continues treatment with Dr. Padda. Dr. Padda ordered a cervical spine MRI that was completed on May 5, 2007, revealing a broad spur/disc complex with a minimal median component indenting the thecal sac with no neuroforaminal narrowing, minimal uncontrovertebral hypertrophy, and smaller spur/disc complexes at C5-C6, C4-C5, and C3-C4. See Exhibit F. Dr. Padda diagnosed cervical spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, cervical radiculopathy, and cervicgia. See Exhibit F. On June 18, 2007, Dr. Padda diagnosed lumbosacral spondylolysis without myelopathy. See Exhibit F.

By July 19, 2007, the claimant's condition appears to have deteriorated based on his family nurse practitioner's assessment. See Exhibit F. She assessed lumbar radiculopathy, status post procedure for cervical dystonia, spondylosis, and cervical radiculopathy. See Exhibit F. She recommended the following medications: Vicodin ES, Valium, MS Contin, Skelaxin, and Lidoderm. See Exhibit F.

On May 3, 2007, the claimant's attorney requested information from Debra Lockrem on why the claimant was not receiving temporary disability benefits. The claimant's attorney contacted Ms. Lockrem on May 30, 2007, advising that the claimant had "something in writing from the union indicating that they cannot bring the claimant back on restrictions." See Lockrem deposition, page 20. Debra Lockrem had not received any communication from the union at that time, nor did her notes indicate that she ever received information from the union indicating that they could not bring the claimant back to work on restrictions. See Lockrem deposition, page

21. On May 30, 2007 Debra Lockrem received information from the claimant's attorney that the claimant wanted to have physical therapy at Chippewa Pain Management, which is Dr. Padda's office. Debra Lockrem advised the claimant's attorney that she was not familiar with that facility, and would need further information. She contacted Chippewa Pain Management, but never received a response. See Lockrem deposition, page 21. About June 12, 2007, the claimant received information that the claimant's union was okay with the claimant working within his restrictions. This employer also advised that they did have light duty work within the Claimant's temporary restrictions. She therefore continued to not pay the claimant's TTD benefits at that time. See Lockrem deposition, page 23.

Debra Lockrem did not advise the claimant or his attorney that she would authorize anything other than an MRI, physical therapy, and non-steroidal anti-inflammatory medication recommended by Dr. Peeples. See Lockrem deposition, page 24. She never told anyone at Dr. Padda's office that Dr. Padda was authorized to treat the claimant, nor did she ever tell the claimant or the claimant's attorney she was authorizing treatment with Dr. Padda or Chippewa Pain Management. At no time did she authorize any treatment with Dr. Katyal. See Lockrem deposition, page 31. Furthermore, the only treatment authorized with Dr. Myers was the treatment recommended by Dr. Peeples, specifically the cervical MRI, physical therapy, and non-steroidal anti-inflammatory medications. See Lockrem deposition, page 32.

Although he was unsure of a specific month, the claimant testified that he did not work at all following the accident until the summer of 2008 when he did several ten-day hits. He testified that he did not have the endurance to complete the jobs. In August 2008, he began working full-time for a subsequent employer.

The claimant continues to treat with Dr. Padda and Dr. Katyal, on an ongoing basis since his alleged accident. He currently takes Vicodin prescribed by Dr. Padda. He testified that his headaches are more frequent than they have been in the past. Before the accident, he suffered from and received treatment for migraines but less frequently. He testified that before the accident, he had one migraine per week, but now has a migraine once or twice per day if he performs overhead work. If he does not do overhead work, he has three migraines per week.

He testified that his back "spasms out" if he pulls wire on his job for more than two or three days in a row. He testified that he has to take off of work if he has to pull wires for more than two or three days. He also testified that lifting is "scary" as he fears his muscles will give out because they are "not strong yet."

The claimant also testified that he has difficulty turning his neck more than 45 degrees to the left but has complete range of motion to the right and in flexion and extension. He has no difficulties with his neck unless he is wearing a hard hat, in which case he has pain in his arms which radiate down to his fingers and hand. The claimant testified that his worst symptom is his mid-back, ten inches above his belt line and that he has spasms frequently. He experiences these symptoms once daily, and takes Skelaxin, a muscle relaxer, prescribed by Dr. Padda. This condition is aggravated by activities such as picking up his child or riding in a car on a long trip.

Dr. Peeples

Dr. Peeples examined the claimant again on October 22, 2007, and reviewed medical records from Dr. Padda, diagnostic films of the cervical and lumbar spine, and numerous other

medical records. See Dr. Peeples deposition, 4/22/2009, page 23. Dr. Peeples noted that the claimant had a very fluid range of motion and full movement, even in the cervical spine and that he had no involuntary guarding of his head, neck, back or extremities at that time. See Dr. Peeples deposition, 4/22/2009, page 23. Dr. Peeples opined that the physical examination demonstrated a completely normal neurologic evaluation. Dr. Peeples opined that the claimant had intermittent subjective symptoms of headache and neck pain. He opined that the objective components of the claimant's examination were normal. He recommended two weeks of work hardening followed by a functional capacity evaluation. See Dr. Peeples deposition, 4/22/2009, page 25. Dr. Peeples recommended that the claimant not consume narcotic medication for his medical condition. See Dr. Peeples deposition, 4/22/2009, page 26.

By March 3, 2008, the claimant had not completed the FCE due to an alleged shoulder injury, which interfered with his ability to participate fully in the FCE. See Dr. Peeples deposition, 4/22/2009, page 27. Dr. Peeples examined the claimant on that date, opined that the claimant should finish the FCE, and would be at maximum medical improvement upon completion. Dr. Peeples observed that the claimant was guarding his right shoulder a little bit, but he had full range of movement. Dr. Peeples found that the claimant's head and neck were normal, as was the rest of his examination. See Dr. Peeples deposition, 4/22/2009, page 29.

Dr. Peeples noted in his reports that there were "situational impediments" to the claimant returning to work. He testified that a "normal individual who bumps his head, strains his neck, does not have a concussive episode with loss of consciousness, does not have significant symptoms of traumatic brain injury, does not have any early complaints of back pain or objective abnormalities on exam, will improve and return to work in short order." See Dr. Peeples deposition, 4/22/2009 pages 29-30. He testified that this was not the case with the claimant. Dr. Peeples pointed out that this was a clinical observation, and he opined that the claimant should have been back to work. Dr. Peeples testified that the fact the claimant stated two weeks of work hardening was not going to be enough, that he had an incomplete functional capacity evaluation, and that his previous history of psychiatric problems led Dr. Peeples to opine that the claimant would not have a "healthy rehab path," and caused concern that the claimant would not return to work. See Dr. Peeples deposition, 4/22/2009 pages 29-30. Dr. Peeples testified that statistically, the claimant's arm pain radiating into his fingers and hand is most likely caused by an ulnar nerve entrapment at the elbow, and testified that the claimant did not have this condition and could not have sustained these symptoms from bumping his head at work on January 3, 2007.

On April 21, 2008, the claimant completed the FCE. See Exhibit J. Dr. Peeples testified that the FCE revealed that the claimant could work within the medium to heavy physical demand category, and that the claimant was at maximum medical improvement. See Dr. Peeples deposition, 4/22/2009 page 31. He also testified that from an objective standpoint the claimant had no disability, but based on his subjective complaints, he was considered to have a cervical strain or sprain. See Dr. Peeples deposition, 4/22/2009 pages 33-34. Dr. Peeples rated the claimant at a permanent partial disability of 3% of the body as a whole. See Dr. Peeples deposition, 4/22/2009 pages 32-34.

Dr. Volarich

Dr. Volarich examined the claimant on September 9, 2008. Dr. Volarich is a physician who is board certified in Occupational Medicine and Nuclear Medicine. Dr. Volarich reviewed medical records reflecting treatment in 1996, 1997, and 1998 for low back pain by Dr. Fogarty and reported that the claimant advised this was “just brief muscle soreness that resolved.” Dr. Volarich found several indications of injury, such as a neurologic problem in the right leg. See Dr. Volarich deposition, page 9. He also noted lost motion in the cervical spine, which he attributed to the accident of 1/3/07 and some underlying arthritis. See Dr. Volarich deposition, page 11. He also found a trigger point in the cervical region – the trapezius muscle – which he described as a focal area of intense pain that is characteristic of myofascial pain. See Dr. Volarich deposition, page 12.

Dr. Volarich diagnosed pre-existing mild chronic cervical, thoracic, and lumbar syndrome, chronic headaches, and a right index crush injury that was surgically repaired. Dr. Volarich opined that the claimant had a preexisting permanent disability of 5% of the cervical spine due to his mild recurrent, chronic neck pain syndrome; 5% of the thoracic spine due to his mild recurrent mid-back pain syndrome; 5% of the lumbosacral spine due to his mild recurrent chronic lumbar pain syndrome; and 2-3% of the central nervous system due to headaches that occurred 1-2 times per month before January 3, 2007.

Dr. Volarich’s diagnoses regarding the January 3, 2007 injury included a closed head trauma without loss of consciousness causing concussion and posttraumatic headaches; a cervical strain/sprain and aggravation of underlying disc osteophyte complexes at C3-4, C4-5 and C5-6; thoracolumbar strain/sprain; minimal disc bulging lumbar spine – L5-S1 without radicular symptoms and minimally symptomatic at the lumbosacral junction. See Dr. Volarich deposition, pages 16, 17. He opined that the claimant sustained the following permanent partial disabilities from the 2007 accident: 5% of the head/central nervous system due to the closed head trauma causing posttraumatic headaches; 20% of the cervical spine due to the disc osteophyte complexes most prominent at C6-7; 15% of the thoracic spine due to the strain/sprain injury; and 5% of the lumbosacral spine due to the mild lumbar strain syndrome that causes occasional back discomfort. See Dr. Volarich deposition, pages 18, 19.

Dr. Volarich testified that although the claimant received medical care from Dr. Katyal, Dr. Casino, and Dr. Myers before Dr. Peeples’ examination on April 23, 2007, the first evidence of any complaint of mid or low back pain was over three months after the accident date, when he complained of mid or low back pain to Dr. Peeples. See Dr. Volarich deposition, page 41. Dr. Volarich also testified that typically, when one has a traumatic accident, if mid or low back symptoms are related to that accident, one would typically see the onset of symptoms prior to three months from the date of the accident. See Dr. Volarich deposition, page 41.

MEDICAL CAUSATION

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall

within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id. Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

In this case, the claimant testified that he accidentally struck his head on a steel beam while installing electrical conduit at work. Two experts, Dr. Volarich and Dr. Peeples, testified that the claimant suffered permanent partial disability as a result of the accident. The weight of the evidence compels a finding the claimant sustained his burden of proof that the accident at work caused disability. The defense failed to submit sufficient evidence to rebut the evidence. Accordingly, this issue is found in favor of the claimant.

LIABILITY FOR PAST MEDICAL EXPENSES

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

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

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

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

In this case, the claimant offered extensive medical bills and testified that the medical expenses resulted from the accident. The medical bills can be categorized into different stages of the claim.

Stage I

The first stage dates from the date of injury to the date that the defense designated any medical provider to offer medical care to the claimant. There is no doubt that this employer knew of the injury, because one of the claimant's supervisors witnessed the accident and the Report of Injury states the employer received notice on the day of the accident. See Exhibit Y. The claimant had greater and increasing complaints within a few days. At that point in time the employer knew of the claimant's need for medical care, but elected not to provide any medical care. Ms. Lockrem testified that the employer did not offer medical care or report the occurrence to its insurance company. See Lockrem deposition, pages 38-40.

The employer's failure to provide medical care means that the claimant was free to seek medical care on his own. Employer is therefore liable for that care. The medical bills incurred between the date of accident (January 3, 2007) and the date that the insurer was notified of the accident (February 13, 2007) are contained within Exhibit AA:

Date of Service	Provider	Amount of Bill	Medical Bill Exhibit	Medical Record Exhibit
1/9/07 (50%)	Affton Medical/ Dr. Katyal	\$110.00	O, S	Q, S
1/9/07	forearm x-ray/CT scan head/St. Anthony's Medical Center	\$1,306.00	N	B
1/16/07	Affton Medical/ Dr. Katyal	\$95.00	O, S	Q, S
1/26/07 (50%)	Affton Medical/ Dr. Katyal	\$205.00	O, S	Q, S
2/5/07	Affton Medical/ Dr. Katyal	\$95.00	O, S	Q, S
TOTAL		\$1,811.00		

Stage II

The second stage of this claim occurred between the date that the insurer became aware of the occurrence and the date that the insurer authorized medical treatment for the condition. The insurer became aware of the accident by February 14, 2007. See Lockrem deposition, pages 6, 38. Ms. Lockrem testified that she decided not to offer any medical care until she had the chance to obtain and review the treatment records to date. See Lockrem deposition, page 40. Ms. Lockrem eventually received the records on March 28, 2007. See Lockrem deposition, pages 14. She scheduled the claimant for an independent medical examination – not for treatment – with Dr. Peeples for April 16, 2007. See Lockrem deposition, pages 15. Due to a vehicular problem, Dr. Peeples' IME was rescheduled for April 23, 2007. See Lockrem deposition, pages 16. The examination took place on that date, and treatment was recommended, but not yet authorized. During this period, the claimant obtained medical care for his injury. The medical bill incurred between February 13, 2007 and April 23, 2007 is contained within Exhibit AA, and here:

Date of Service	Provider	Amount of Bill	Medical Bill Exhibit	Medical Record Exhibit
3/22/07 (50%)	Affton Medical/ Dr. Katyal	\$95.00	O, S	S

Stage III

The third stage of this claim occurred between the date of Dr. Peeples' evaluation (April 23, 2007) and the date that Dr. Peeples determined that the claimant had attained maximum medical improvement December 3, 2007. On April 25, 2007, the claimant, on his own, consulted Dr. Padda, a pain management physician, and had an initial office visit and examination. The claimant testified that the defense did not authorize any medical treatment from Dr. Padda. Dr. Padda reflected that Dr. Katyal referred the claimant to Dr. Padda's office. See Exhibits D, E, F. On April 30, 2009, Ms. Lockrem discussed the situation with the claimant and advised the claimant that Dr. Peeples

recommends non-steroidal anti-inflammatories and advises against narcotic medications. Advised claimant of same. He is not happy. He needs his narcotics as they are the only thing that helps and per his pain management doctor (was not advised he was seeing a pain management doctor) recommends narcotics to help his pain. He advised that if we are not going to follow the care per his neuro, Dr. Myers, he will keep his 4:30 appointment with an attorney. Then, he hung up. I lettered Dr. Myers advising of Dr. Peeples assessment and that Hempel would like to continue his care there and that we would only authorize the recommended PT and cervical MRI. See Exhibit 4.

On April 30, 2007, Debra Lockrem sent a letter to Dr. Myers and advised of Dr. Peeples' assessment. She noted what Dr. Peeples had recommended, and advised Dr. Myers that the claimant wished to continue to treat with Dr. Myers. See Lockrem deposition, page 18. She also advised that treatment with Dr. Myers would be authorized, only to the extent of what Dr.

Peeples had recommended. See Exhibit 4 and Lockrem deposition, page 19. She did not get a response from Dr. Myers. See Lockrem deposition, page 19.

Dr. Padda provided the claimant with six sets of eight injections, for a total of 48 different injections, into the neck and mid-back. Dr. Padda also prescribed medications for pain control and physical therapy. Claimant continues to treat with Dr. Padda. On May 30, 2007, Ms. Lockrem received information from the claimant's attorney that the claimant wanted to have physical therapy at Chippewa Pain Management, which is Dr. Padda's office. Ms. Lockrem advised the claimant's attorney that she was not familiar with that facility, and would need further information. She contacted Chippewa Pain Management, but never received a response. See Lockrem deposition, page 21.

Clearly, the claimant required medical care at that time. The critical questions are the type of medical care and the choice of medical provider. Dr. Peeples, a neurologist, recommended non steroidal anti inflammatory medications, physical therapy, and a cervical MRI, but recommended against narcotic medications. See Dr. Peeples deposition, pages 20, 21. The claimant sought a pain management program involving narcotic pain medication. See Exhibit 4. On March 14, 2007, Dr. Myers, another neurologist, diagnosed a cervical sprain, prescribed an antidepressant, Pamelor, (nortriptyline), and recommended a cervical MRI, physical therapy. See Exhibit G. Pamelor is commonly used for headaches. See Dr. Volarich deposition, page 62. On July 30, 2007, Dr. Myers noted that Dr. Padda had prescribed voluminous narcotic medications and recommended physical therapy. See Exhibit H. Dr. Myers' prescriptions during this period were all for physical therapy and did not designate any medical provider for the physical therapy. See Exhibit H. On the other hand, Dr. Volarich, board certified in nuclear medicine and occupational medicine, opined that a pain management program involving narcotic pain medication was indicated and beneficial for the claimant.

Evaluating the relative credibility of the experts, Dr. Peeples' expertise as a neurologist suggest additional training and experience in areas related to the study and treatment of disorders of the nervous system and their effects on the human organism. Thus, his treatment recommendations bear additional credibility. In addition, the claimant pursued his course of treatment through a medical provider selected by himself on referral from Dr. Katyal. The defense offered medical care from Dr. Myers, but the claimant elected to seek his own medical provider at his own expense. In addition, much of Dr. Padda's treatment relates to his low back, which was not a condition with symptoms or diagnosis for three and one-half months after the accident, until April 25, 2009. See Exhibits D, E, F.

The medical bills incurred between April 23, 2007, and December 3, 2007, are:

Date of Service	Provider	Amount of Bill	Medical Bill Exhibit	Medical Record Exhibit
5/2/07	Dr. Padda	\$14,927.32	P,R	D, E, F, R
5/3/07	Hampton Open MRI/MRI cervical and lumbar spine	\$3,341.00	T	I

5/15/07	Dr. Padda <u>Surgery</u> : cervical transforaminal epidural steroid injection bilaterally, under fluoroscopic guidance C5-6 bilateral	\$11,658.04	P, R	E, F, R
5/29/07	Dr. Padda <u>Surgery</u> : cervical transforaminal epidural steroid injection bilaterally, under fluoroscopic guidance C5-6 & C6-7 bilateral	\$17,967.06	P, R	E, F, R
6/05/07	Affton Medical/ Dr. Katyal	\$115.00	O, S	S
6/14/07	Pro Therapy	\$444.90	P, R	E, F
6/15/07	Pro Therapy	\$311.64	P, R	E, F
6/18/07	Dr. Padda <u>Surgery</u> : intraarticular injection of facet joints under fluoroscopic guidance bilaterally, under fluoroscopic guidance L3-4-5-S1 bilaterally	\$6,716.88	P, R	E, F, R
6/19/07	Dr. Padda	\$387.24	P, R	E, F
6/27/07	Dr. Padda	\$378.36	P, R	E, F
7/2/07	Dr. Padda	\$204.80	P, R	E, F
7/19/07	Dr. Padda	\$204.80	P, R	E, F, R
8/8/07	ProTherapy Dr. Padda	\$444.90	P, R	E, F
8/13/07	ProTherapy/ Dr. Padda	\$311.64	P, R	E, F
8/14/07	Dr. Padda/ ProTherapy	\$204.80	P, R	E, F, R
8/17/07	Dr. Padda	\$311.64	P, R	E, F
8/20/07	Dr. Padda	\$311.64	P, R	E, F
8/22/07	Dr. Padda	\$153.66	P, R	F, Z

8/29/07	ProTherapy/ Dr. Padda	\$251.64	P, R	F, Z
8/31/07	Dr. Padda	\$311.64	P, R	F, Z
9/5/07	Dr. Padda	\$251.64	P, R	F, ZZ
9/7/07	Dr. Padda	\$149.92	P, R	R
9/13/07	Dr. Padda	\$111.64	P, R	F, Z
9/14/07	Dr. Padda/ ProTherapy	\$461.56	P, R	F, R, Z
9/17/07	Dr. Padda/ ProTherapy	\$311.64	P, R	Z
9/19/07	Dr. Padda/ ProTherapy	\$322.32	P, R	Z
9/21/07	Dr. Padda	\$251.64	P, R	Z
10/05/07	Dr. Padda	\$235.38	P, R	Z
10/10/07	Dr. Padda/ ProTherapy	\$149.92	P, R	F, R, Z
10/12/07	Dr. Padda	\$155.82	P, R	R
10/16/07 (30%)	Affton Medical/ Dr. Katyal	\$170.00	O, S	S
11/13/07	Dr. Padda	\$204.80	P, R	R, Z
11/13/07 to 11/29/07	Select Physical Therapy	\$1,085.00	K	K
11/13/07	ProTherapy	\$204.80	P, R	R
11/15/07 (50%)	Affton Medical/ Dr. Katyal	\$95.00	O, S	S
TOTAL		\$63,119.68		

Stage IV

The final stage of medical bills relates to the period after Dr. Peeples indicated that the claimant had reached maximum medical improvement from May 7, 2008, through April 16, 2009, and consist of physical therapy through Dr. Padda's office, four drug tests (\$410.12- with no medical records), and one visit to Dr. Katyal.

Dr. Volarich opined that the medical care that the claimant received for his condition was reasonable and necessary. See Dr. Volarich deposition, page 16. The implication is that the physical therapy received to relieve the claimant's condition was reasonable and necessary. The relationship of the claimant's four drug tests to the occurrence is perplexing, but under established law, the defense has the burden of proving that the procedures are not related to the occurrence. The neurologists, Dr. Peeples and Dr. Myers, were not asked as to whether the

medical care received from May 7, 2008, through April 16, 2009, was reasonable, necessary, or related to the occurrence.

Dr. Peeples opined that the claimant would be at maximum medical improvement after he completed his Functional Capacity Evaluation. See Dr. Peeples deposition, pages 31-32. The claimant completed the Functional Capacity Evaluation on April 21, 2008, though Dr. Peeples did not see him after that time. Since then, the claimant has continued to receive medical treatment with Dr. Katyal and Dr. Padda. The claimant requested additional physical therapy on February 25, 2008, in a letter from his attorney to defense counsel. See Exhibit U. The only response noted in the record appears in Ms. Lockrem's file in a letter, dated July 11, 2008, from defense counsel instructing the claimant's counsel to "have your client check with his group health provider ... whether any of these medical bills could be paid for through that benefit program. If the claimant is in need of a letter denying these benefits from the employer or carrier, please just let me know and I will provide same." See Exhibit 4, page 28. The implication is that the defense denied the medical care and offered the claimant the right to select his own medical provider for medical care that was apparently reasonable and necessary.

The medical bills between April 21, 2008 and the present are:

Date of Service	Provider	Amount of Bill	Medical Bill Exhibit	Medical Record Exhibit
5/07/08	Dr. Padda/ Center for Interventional Pain Management/ Jayme Sparkman NP	\$204.80	R	R, Z
6/04/08	Same	\$204.80	R	R, Z
7/07/08 (50%)	Affton Medical/ Dr. Katyal	\$125.00	O, S	S
7/09/08	Dr. Padda/ Center for Interventional Pain Management/ Jayme Sparkman NP	\$281.76	R	R, Z
8/07/08	Same	\$204.80	R	R, Z
9/10/08	Same	\$204.80	R	R, Z
10/08/08	Same	\$204.80	R	R, Z
11/05/08	Same	\$204.80	R	R, Z
12/09/08	Same	\$204.80	R	R, Z
1/08/09	Same	\$204.80	R	R, Z
2/05/09	Same	\$537.96	R	R, Z

3/04/09	Same	\$204.80	R	R, Z
4/16/09	Same	\$204.80	R	R
TOTAL		\$2,992.72		

Based on the weight of the evidence, the claimant is awarded past medical benefits for stages I (\$1,811.00), II (\$95.00), and IV (\$2,992.72). The total awarded for past medical expenses is \$4,898.72.

FUTURE MEDICAL CARE

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

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622.

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present “evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible” for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008). To receive an award of future medical benefits, a claimant need not show “conclusive evidence” of a need for future medical treatment. ABB Power T & D Co. v. Kempker, 236 S.W.3d 43, 52 (Mo.App. W.D. 2007). Instead, a claimant need only show a “reasonable probability” that, because of her work-related injury, future medical treatment will be necessary. *Id.* A claimant need not show evidence of the specific nature of the treatment required. Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876, 883 (Mo.App. S.D. 2004); Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 237 (Mo.App. S.D. 2008). “Probable” in this context means “founded on reason and experience which inclines the mind to believe but leaves room for doubt.” ABB Power T & D Company v. William Kempker and Treasurer of the State of Missouri, Slip Op., Case No. WD67465 and WD67480, (Mo.App.

W.D. August 21, 2007).

For an employer to be responsible for future medical benefits, such care "must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury[.] Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App. S.D. 2004). While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Id.; Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 238 (Mo.App. S.D. 2008).

"The worker's compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award." Sharp v. New Mac Electric Cooperative, Slip Op., Case No. 24833 and 24850 (Mo. App. S.D. Jan. 7, 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be made available. Id. What is required is proof there is a "reasonable probability" that additional medical care will be needed to treat the work-related injury. Id.

The claimant suffered a Grade I Concussion and cervical strain when he struck his head on a steel beam while installing electrical conduit. He complained of headaches, loss of range of motion, and neck pain. The only expert recommending future medical care is Dr. Volarich:

I recommended ongoing care to maintain his current state primarily to control his pain syndrome using modalities that included narcotic and nonnarcotic medications such as the nonsteroidals as well as using muscle relaxants, physical therapy, and other similar treatments as directed by the current standard of medical practice for the symptomatic relief of his complaints. See Dr. Volarich deposition, page 17.

Dr. Volarich opined that the claimant's loss of range of motion resulted from:

[A] combination of things. I think it's his work-related injury from which he was struck on the head and injured his neck. I think it's some underlying arthritis as well that's been aggravated, so it's a combination of some preexisting difficulty in his neck, the arthritic change, and then the acute trauma to his neck from when he was struck on the head. See Dr. Volarich deposition, page 11.

Dr. Volarich found that the claimant had preexisting permanent partial disabilities from a mild recurrent, chronic neck pain syndrome, mild recurrent mid back pain syndrome, mild chronic lumbar pain syndrome, and headaches that occurred 1-2 times per month before the accident. See Dr. Volarich deposition, pages 20, 21. The implication is that his continuing medical condition results from a combination of his preexisting conditions and his work related occurrence.

Early on, Dr. Peeples, a neurologist, recommended non-steroidal anti-inflammatory medications, physical therapy, and a cervical MRI, but recommended against narcotic medications. See Dr. Peeples deposition, pages 20, 21. Dr. Myers' prescriptions after his early consultations consisted of physical therapy. See Exhibits G, H, V. Neither of the neurologists

offered an opinion relating to future medical care. Evaluating the relative credibility of the experts, Dr. Peeples' expertise as a neurologist suggests additional training and experience in areas related to the study and treatment of disorders of the nervous system and their effects on the human organism. His treatment recommendations bear additional credibility as to the type of treatment to be rendered for a neurological disorder. Thus, the claimant, apparently, requires nonnarcotic medications such as the nonsteroidals and physical therapy for his headaches and neck pain.

The next question is whether the treatment flows from the work-related injury or whether the course of treatment is a result of a preexisting condition. The only expert to address the question was Dr. Volarich, who found that the condition that requires treatment resulted from a combination of the work-related injury and the claimant's preexisting conditions. Looking to his allocation of permanent disability, he allocated substantially more permanent disability to the work-related injury than from the preexisting condition.

Based on the weight of the relevant evidence, the claimant is awarded treatment of nonnarcotic medications such as nonsteroidals and physical therapy for his headaches and neck pain to be provided by a medical provider selected by the employer.

TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. "Total disability" is defined as an "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020. The purpose of a temporary, total disability award is to cover the employee's healing period. Birdsong v. Waste Management, 147 S.W.3d 132, 140 (Mo.App. S.D. 2004). Temporary total disability awards should cover the period of time from the accident until the employee can either find employment or has reached maximum medical recovery. Id. The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id. Temporary total disability awards are designed to cover the employee's healing period, and they are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. When further medical progress is not expected, a temporary award is not warranted. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

"When further medical progress is not expected, a temporary award is not warranted." Boyles v. USA Rebar Placement, Inc., 26 S.W.3d 418, 424 (Mo.App. W.D. 2000) (overruled on other grounds). "A claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total

disability." Stevens v. Citizens Memorial Healthcare Foundation, 244 S.W.3d 234, 238 (Mo.App.2008). However, the question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

In order to analyze the claimant's entitlement to temporary disability benefits, one must determine the periods in which various medical providers opined that the claimant was not able to work due to a work related condition. The claimant suffered his work-related injury on January 3, 2007, and did not return to work until June 2008. He received temporary total disability benefits from July 27, 2007, to November 28, 2007, and from February 5, 2008, to March 24, 2008. On April 21, 2008, the claimant completed the FCE. See Exhibit J. Dr. Peeples testified that the FCE revealed that the claimant could work within the medium to heavy physical demand category, and that the claimant was at maximum medical improvement as of the date of completion of the FCE. See Dr. Peeples deposition, 4/22/2009, page 31.

Looking at the specific dates that various medical providers directed that the claimant not work due to the claimant's medical condition resulting from this accident, Dr. Katyal took the claimant off work starting on January 9, 2007, stating that the claimant could not drive and stated, "Work statement given". See Exhibits C, S. On February 5, 2007, Dr. Katyal opined that the claimant should not work until a neurologist examined the claimant. See Exhibits C, S. On February 7, 2007, Dr. Casino opined that the claimant "can go back to work with certain restrictions. He should not be assigned to work involving heights or hot, electrical panels or hauling heavy loads until clearance from the neurologist." See Exhibits C, S. Dr. Myers, a neurologist, examined the claimant on February 19, 2007, but issued no opinion pending the outcome of a cervical MRI. See Exhibits C, S. On March 22, 2007, Dr. Katyal advised the claimant to stay off work until medically cleared by a neurologist. See Exhibits C, S.

Dr. Peeples examined the claimant on April 23, 2007, and opined that the claimant could work with restrictions of light duty capacity, no climbing, no lifting greater than fifty pounds, or doing activities that require awkward positions of postural instability. See Dr. Peeples deposition, 4/22/2009, page 20. Dr. Katyal authorized the claimant to return to work, apparently without restrictions, on April 23, 2007. See Exhibit S. Dr. Katyal authorized the claimant to be off work from October 16, 2007, to November 16, 2007, due to neck and upper back pain and advised that the claimant would continue physical therapy for the next four weeks. See Exhibit S. Dr. Katyal authorized the claimant to be off work from November 16, 2007, to January 8, 2008, for reasons not stated. See Exhibit S. Dr. Katyal authorized the claimant to be off work from January 18, 2008, to February 18, 2008, stating, "Patient still experiencing neck spasms and pain on lifting over fifty pounds." See Exhibit S. Dr. Katyal authorized the claimant to be off work from February 25, 2008, to March 4, 2008, and from April 22, 2008, to May 16, 2008, for reasons not stated. See Exhibit S. She opined that the claimant could return to work on May 16, 2008. See Exhibit S. Dr. Katyal authorized the claimant to be off work at various times both before these periods and afterwards.

Starting on January 9, 2007, Dr. Katyal directed the claimant to not work until he was cleared by a neurologist. See Exhibit S. A neurologist, Dr. Peeples cleared the claimant to work on April 23, 2007, and opined that the claimant could work with restrictions of light duty capacity, no climbing, no lifting greater than fifty pounds, or doing activities that require awkward positions of postural instability. See Dr. Peeples deposition, 4/22/2009, page 20. Dr.

Katyal released the claimant to work as of that date. The implication is that the claimant was temporarily totally disabled from January 9, 2007, to April 23, 2007, 15 weeks as a result of the work-related accident.

Looking to the next period, the defense paid temporary total disability benefits starting on July 27, 2007. For the period between April 24, 2007, and July 27, 2007, 13 3/7 weeks, the claimant demonstrated no evidence that he was unemployable in the labor market due to his work related injury. It is certainly true that this employer did not offer the claimant light duty work. It is also true that the claimant was not able to return to his prior employment as a union electrician and seek light duty work from any other contractor because the hiring hall agreement stated that the claimant could not be sent out for work if he had restrictions. However, workers' compensation is not unemployment insurance. The test for total disability is whether the claimant was unemployable in the open labor market. The record is unclear whether the claimant was employable in the open labor market for positions other than as a union electrician. The claimant has the burden of proving the same and offered insufficient evidence to prove his entitlement to total disability benefits during that period.

Looking to the next period, the defense refused to pay temporary disability benefits from November 28, 2007, to February 5, 2008. Dr. Katyal authorized the claimant to be off work from November 16, 2007, to January 8, 2008, for reasons not stated. See Exhibit S. Dr. Katyal authorized the claimant to be off work from January 18, 2008, to February 18, 2008, stating, "Patient still experiencing neck spasms and pain on lifting over fifty pounds." See Exhibit S. Dr. Katyal authorized the claimant to be off work from February 25, 2008, to March 4, 2008, and from April 22, 2008, to May 16, 2008, for reasons not stated. See Exhibit S. Since Dr. Katyal authorized the claimant to be off work from January 18, 2008, through February 4, 2008, due to neck pain, the claimant is entitled to temporary total disability benefits during those 2 4/7 weeks.

Based on the weight of the evidence, the claimant is awarded an additional 17 4/7 weeks of temporary total disability benefits.

PERMANENT DISABILITY

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

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

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

In this case, the claimant testified that he accidentally struck his head on a steel beam while installing electrical conduit at work. He developed headaches and neck pain. The claimant currently takes Vicodin and testified that his headaches are more frequent than they have been in the past. Before the accident, he suffered from and received treatment for migraines but less frequently. He testified that before the accident, he had one migraine per week, but now has a migraine once or twice per day if he performs overhead work. If he does not do overhead work, he has three migraines per week.

He testified that his back "spasms out" if he pulls wire on his job for more than two or three days in a row. He testified that he has to take off of work if he has to pull wires for more than two or three days. He also testified that lifting is "scary" as he fears his muscles will give out because they are "not strong yet."

The claimant also testified that he has difficulty turning his neck more than 45 degrees to the left but has complete range of motion to the right and in flexion and extension. He has no difficulties with his neck unless he is wearing a hard hat, in which case he has pain in his arms which radiate down to his fingers and hand. The claimant testified that his worst symptom is in his mid-back, ten inches above his belt line. He has spasms frequently without any indication of onset. He experiences these symptoms once per day, and takes Skelaxin, a muscle relaxer, prescribed by Dr. Padda. This condition is aggravated by activities such as picking up his child or riding in a car on a long trip.

Two experts, Dr. Volarich and Dr. Peeples, testified that the claimant suffered permanent partial disability as a result of the accident. Dr. Volarich diagnosed pre-existing mild chronic cervical, thoracic, and lumbar syndrome, chronic headaches, and a right index crush injury that was surgically repaired. Dr. Volarich opined that the claimant had a pre-existing permanent disability of 5% of the cervical spine due to his mild recurrent, chronic neck pain syndrome; 5% of the thoracic spine due to his mild recurrent mid-back pain syndrome; 5% of the lumbosacral spine due to his mild recurrent chronic lumbar pain syndrome; and 2-3% of the central nervous system due to headaches that occurred 1-2 times per month before January 3, 2007.

Dr. Volarich's diagnoses regarding the January 3, 2007 injury included a closed head trauma without loss of consciousness causing concussion and posttraumatic headaches; a cervical strain/sprain and aggravation of underlying disc osteophyte complexes at C3-4, C4-5 and C5-6; thoracolumbar strain/sprain; minimal disc bulging lumbar spine – L5-S1 without radicular symptoms and minimally symptomatic at the lumbosacral junction. See Dr. Volarich deposition, pages 16, 17. He opined that the claimant sustained the following permanent partial disabilities from the 2007 accident: 5% of the head/central nervous system due to the closed head trauma causing posttraumatic headaches; 20% of the cervical spine due to the disc osteophyte complexes most prominent at C6-7; 15% of the thoracic spine due to the strain/sprain injury; and 5% of the lumbosacral spine due to the mild lumbar strain syndrome that causes occasional back discomfort. See Dr. Volarich deposition, pages 18, 19.

Dr. Peeples testified that the FCE revealed that the claimant could work within the medium to heavy physical demand category, and that the claimant was at maximum medical improvement. See Dr. Peeples deposition, 4/22/2009, page 31. He also testified that from an objective standpoint the claimant had no disability, but based on his subjective complaints, he was considered to have a cervical strain or sprain. See Dr. Peeples deposition, 4/22/2009, pages 33-34. Dr. Peeples rated the claimant at a permanent partial disability of 3% of the body as a whole. See Dr. Peeples deposition, 4/22/2009 pages 32-34.

Based on the evidence as a whole, the claimant suffers from preexisting permanent partial disabilities of 5% to each of the neck, mid-back, and low back and 3% to his central nervous system. The claimant suffers from a 15% permanent partial disability to the body as a whole as a result of the January 2007 accident. In addition, the claimant suffers from a 5% permanent partial disability to the low back as a result of a subsequent occurrence. Both of the experts testified that symptoms in the low back would develop rapidly if they resulted from the work related accident. See Dr. Peeples deposition, 4/22/2009, page 18; Dr. Volarich deposition, page 41. The conclusion is that the low back condition was the result of a non-work related occurrence.

Although the claimant testified that he complained of mid back and low back pain to all of his medical providers immediately and continually during the first three and one half months after the accident, his assertions on this point are impeached by the lack of any mention of the same in the medical records of those providers until April 25, 2007.

The claimant is awarded a 15% permanent partial disability to the body as a whole as a result of the January 2007 accident at work.

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

This award is dated and attested to this 4th day of November, 2009.

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