

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 00-081801

Employee: John Hoff
Employer: St. Clair R-XIII School District
Insurer: MUSIC c/o Gallagher Bassett Services
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 26, 2000

Place and County of Accident: Franklin County, Missouri

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, which provides for review concerning the issue of liability only in accordance with the Preliminary Order in Mandamus dated December 8, 2005. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated April 15, 2005, as supplemented herein.

All of the testimony and contemporaneous medical records consistently reflect that employee fell while working on July 26, 2000, and twisted his right ankle and right knee. Dr. Bonney's records reflect that employee was treated on July 30, 2000, at Urgi-Care where examination revealed employee had a swollen, tender ankle and abrasions on his knee. These medical observations are consistent with employee's description of his work fall. The administrative law judge's conclusion that employee sustained injuries by accident arising out of and in the course of employment is supported by competent and substantial evidence.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Kevin Dinwiddie issued April 15, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 13th day of January 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: John Hoff

Injury No. 00-81801

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Employer: St. Clair R-XIII School District

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: MUSIC c/o Gallagher Bassett Services

Hearing Date: 4/27/04; 7/14/04; 8/18/04, finally submitted 3/24/05 Checked by: KD:df

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: 7/26/00
5. State location where accident occurred or occupational disease contracted: Franklin County, MO
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 happened or occupational disease contracted: Claimant suffered injury at work while performing duties of a custodian.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Parts of body injured by accident or occupational disease: Knee and back
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? \$2,956.30
16. Value necessary medical aid not furnished by employer/insurer? See Award

Employee: John Hoff

Injury No. 00-81801

17. Employee's average weekly wages: \$528.82
18. Weekly compensation rate: \$352.21/\$314.26
19. Method wages computation: By agreement of the parties

COMPENSATION PAYABLE

20. Amount of compensation payable:

See Award as to past medical expense, future medical care, temporary total disability, and as to costs and costs of recovery.

TOTAL: SEE AWARD

Each of said payments to begin as of the date of this Award and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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:

Daniel J. McMichael

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Hoff

Injury No: 00-81801

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Employer: St. Clair R-XIII School District

Add. Party: State Treasurer, as Custodian of the
Second Injury Fund

Insurer: MUSIC c/o Gallagher Bassett Services

Checked by: KD:df

The claimant, Mr. John Hoff; the involved employer, St. Clair RXIII School District; and the State Treasurer, as Custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into certain stipulations and agreements as to the issues and evidence to be presented in this claim for compensation. The claimant has filed for a hardship hearing setting, and seeks a temporary or partial award. The issues to be resolved at hearing are as follows:

Injury by accident arising out of and in the course of employment;
Medical causation;
Liability for past medical expense;
Future medical care;
Temporary total disability; and
Costs/Cost of recovery under Sections 287.203 and 287.560 RSMo.

The claimant, Mr. John Hoff, appeared at hearing and testified on his own behalf. The claimant elicited testimony at hearing from Oliver "Wayne" Curry, Gordon Reed, and from his wife, Ms. Joyce Hoff. Claimant further submitted his prior deposition testimony, and the deposition testimony of the following: Dr. Michael Nogalski; Dr. Ronald C. Hertel; Dr. Patrick Hogan; Dr. Thomas D. Matthews; Ms. Joyce Hoff; Chad Johnmeyer; Michael Wildeisen; Ms. Jan Klosterman; Ms Linda Phillips; Henry Hildebrand; and Elvin Thebeau.

The employer elicited testimony at hearing from David Vogt, Jason Vermeiren, Jim Wagner, Christopher Long, Ph.D., and Dr. Michael Ralph. The employer further submitted the deposition testimony of Richard T. Katz, M.D.

EXHIBITS

Claimant's Exhibits A through Q, S through X, Z, BB, CC, GG, HH, II, and JJ are in evidence. Objection to Claimant's Exhibits R and FF sustained; those exhibits are not in evidence. Claimant's Exhibits Y, AA, DD, and EE were marked, but not offered. Employer and Insurer's Exhibit Numbers 1,2, and 3 are in evidence.

FINDINGS OF FACT AND RULINGS OF LAW

A history as to this claim for compensation might provide a helpful backdrop to a brief summary of the testimony of the numerous witnesses called by the employee and employer. Mr. John Hoff alleges to have suffered a right knee injury at work on July 26, 2000, while performing his duties as a maintenance man for the St. Clair School District. Claimant relates that he got one of his shoelaces trapped under a door while entering one of the school buildings, causing him to fall onto his right knee. Claimant immediately advised his supervisor of the injury, but did not seek medical treatment until July 31, 2000, when he was referred to Dr. Bonney at Urgicare (Urgicare records contained within Claimant's Exhibit P).

Claimant was diagnosed as having a right ankle sprain and an abrasion/contusion of the right knee. Dr. Bonney placed the right ankle in an air cast splint, and allowed the claimant to return to work the following day. Claimant continued to work, and did not seek any further treatment until a return to Dr. Bonney on 9/18/00. At his second visit to Dr. Bonney, Mr. Hoff complained of pain going up and down steps, and of a locking sensation in the medial knee. Claimant was referred to Dr. Nogalski for an orthopedic evaluation for what Dr. Bonney supposed was a probable medial meniscus tear of the right knee.

On 9/25/00 Dr. Nogalski documented the following history in his letter to Gallagher Bassett dated 9/25/00 (See Claimant's Exhibit P, the records of Dr. Nogalski):

He caught his shoestring while walking through a doorway and twisted his right knee awkwardly. He has had continued soreness and pain in the right knee with some swelling. He has had episodes in which his knee has caught and he has fallen down. He has continued to work at full duty. He states he fell at work last week and scraped both elbows because of this....

Dr. Nogalski examined the knee, noted effusion and tenderness along the medial joint line, and ordered an MRI for a suspected torn medial meniscus. Claimant went so far as to have an initial consultation for physical therapy at St. John's in Washington, Missouri relative to the suspected meniscus tear, when the results of the MRI taken on 9/27/00 (See Exhibit 9 to the deposition of Dr. Hertel, Claimant's Exhibit F) revealed "Posterior cruciate ligament tear with apparent detachment of the cruciate ligament from its insertion into the posterior central tibia". Dr. Nogalski performed a follow up evaluation on 10/16/00. Physical therapy records dated 9/27/00 indicate "Patient's right knee appears to be extremely edematous compared to the left...". A physical therapy record dated 10/6/00 suggests that observation revealed moderate to severe edema of the right knee. Claimant appears to have attended as many as six physical therapy sessions through 10/6/00.

On 10/6/00 Dr. Nogalski concluded that the claimant suffered from a tear of the pcl; chose to treat nonoperatively; and recommended a continued strengthening treatment at home. He further declined to recommend the use of a pcl brace; recommended a return to full duty; and released Mr. Hoff from his care.

Claimant continued to suffer giving way of his knee, to the point that he chose to take his four-prong cane to work to provide for protection against instability of the knee. The employer declined to have the claimant at work sporting a cane, and on 11/6/00 the claimant was referred to Dr. Nogalski for further evaluation. Dr. Nogalski noted similar findings as in his prior exam on 10/6/00, save for a lump in the pretibial region believed to be new. He concluded that claimant would be capable of an attempt to return to full duties with respect to the knee, noting that "other issues" might cause problems.

Claimant then chose to get a second opinion from Dr. Thomas Matthews. Claimant had a prior history of treatment with Dr. Matthews, who in December of 1999 had provided claimant with a corticosteroid injection to take care of complaints relative to the left knee. Dr. Matthews had also been treating Mr. Hoff for fracture to his left wrist suffered as a consequence of falling at home after having had a seizure in June of 2000.

On 11/14/00 Dr. Matthews performed an evaluation of the right knee; noted that diagnostics revealed a posterior avulsion type injury consistent with pcl rupture; and advised claimant to wear his knee sleeve brace at all times when walking and when on uneven surfaces. Dr. Matthews, like Dr. Nogalski, concluded that the injury to the pcl was nonoperative, and that extensive rehab was not likely to help, given the age of the injury.

Claimant continued to work thereafter, up to and including on 12/1/00, the date that he chose to accompany his wife Joyce to the Christmas Parade in St. Clair. Mr. Hoff testified that as he was making his way up a series of uneven stairs without a handrail, his right knee gave out, causing him to fall backward and to his right, landing on his back in the street. Claimant was transported by ambulance to St. John's in Washington, Missouri, where x-rays and MRI showed possible upper thoracic spine fracture and pneumothorax. Out of a concern as to possible aortic tear, Mr. Hoff was then transferred to St. John's Mercy Medical Center.

Claimant was found to have a right hemothorax, and had a chest tube inserted. Claimant was further found to have suffered a fracture deformity at T4, T5, and T6 with root canal compromise and possible cord injury. On the morning of 12/6/00, claimant suffered a number of seizures, and Dr. Carpenter was called in for a neurology consultation as to adjustment of medication to bring the seizures under control.

On 12/07/00 Dr. James T. Merenda performed an open reduction with internal fixation of the T5 fracture dislocation, using bone grafting from the claimant's right iliac, and with Isola rods between T2 and T11, and with screws, hooks, and Songer cables used to reduce the fracture. In his operative note, Dr. Merenda noted that in the recovery room the claimant did not appear to have any voluntary motor in his lower extremities.

The claimant has since been on a road toward a degree of recovery from what has alternately been described in the medical records as a paraplegia or paraparesis. Claimant has been able to progress from an apparent total loss of the sensation and motion in his lower extremities, to the point where, though still wheelchair dependent, claimant is able to walk with a walker for so long as his upper extremity stamina was able to help support him, and is using a machine in his rehabilitation that helps him to walk and to sense an increase in his leg strength.

The claimant's history of seizure disorder and as to his use of medication to control that disorder has been a complicating factor as to the issue of work relatedness of his claim of injury. The following is a summary of the testimony of the professional health care providers who have offered expert opinions as to causation, as well as a summary of the testimony of other fact witnesses.

SUMMARY OF WITNESS TESTIMONY

Oliver "Wayne" Curry

Mr. Curry acknowledges that he has known the claimant, Mr. Hoff, for about 25 years or so, and has been his maintenance supervisor since 1986 or 1987. The witness notes that Mr. Hoff performed both maintenance and custodial duties for the St. Clair School District. Mr. Curry notes that he is aware that Mr. Hoff has a history of seizure disorder, and can recall only having witnessed one such seizure in the 20 or more years of having known Mr. Hoff. The witness acknowledges that Mr. Hoff has a speech pattern that would be considered by some to be slow and deliberate.

Mr. Curry acknowledges that he did not witness claimant's fall onto his right knee on 7/26/00, but agrees that the claimant reported the injury to him that same day. Mr. Curry is unable to recall the claimant having made any other complaints as to injury to his right knee at any time prior to 7/26/00 or thereafter leading up to the fall from the steps on 12/01/00, and further acknowledges that Mr. Hoff continued to complain of his right knee "giving way" up until December of 2000.

Mr. Curry notes that he would see Mr. Hoff every day at work, as they would take their morning breaks together. He notes that the claimant always appeared to exhibit his usual demeanor or behavior, and did not at any time appear to be staggering, impaired, or otherwise intoxicated. The witness notes that subsequent to the right knee injury, and although he received no work restrictions from the claimant's physicians, he felt obliged to keep the claimant off of jobs that required climbing onto ladders or scaffolding.

Gordon Reed

Mr. Reed acknowledges that John Hoff is his uncle; that he has known claimant for 43 years; and that he has been claimant's coworker since 1984. The testimony of Mr. Reed echoed that of Mr. Curry, inasmuch as both testified that claimant always spoke slowly and deliberately; that through 2000 the claimant always exhibited the same demeanor, and did not appear intoxicated or otherwise impaired; that claimant had no complaints as to his right knee prior to work accident in July of 2000; and that claimant complained from time to time thereafter that his knee would "go out" at work.

Joyce Hoff

Ms. Hoff, the wife of the claimant, testified both by her deposition (Claimant's Exhibit B) and as a witness at hearing held on 4/27/04. Ms. Hoff relates that she has been married to John Hoff since 1963. She identified Exhibit Q as a compilation of billings for treatment provided to Mr. Hoff post his fall in December of 2000, and acknowledges that insurance, made available through her employment as an assembler at Von Weise Gear Company, has made payment of medical bills.

Ms. Hoff acknowledges that Mr. Hoff has always had a slow and deliberate speech pattern; that claimant had the seizure disorder prior to their first becoming acquainted; and that she was aware of the possibility that a change in seizure control medication could affect the claimant's behavior. Ms. Hoff notes that she was looking for any such changes when claimant's medications changed in 2000, but did not observe any changes to his appearance, or to the way he walked or talked.

Ms. Hoff recalls that when claimant treated at Urgicare, he had a knot on his ankle, and his knee was swollen. She further recalls that thereafter Mr. Hoff began complaining of his knee "giving way", and that she accompanied Mr. Hoff to his first visit with Dr. Nogalski. She recalls that the give way sensation started weeks prior to the second visit to Urgicare, and that the claimant delayed seeking treatment in hopes that the Ms. Hoff recalls that the claimant had another incident of his knee giving way while walking down the hall in the doctor's office.

Ms. Hoff recalls the events surrounding the claimant's fall off of the steps in St. Clair on 12/1/00. Ms. Hoff notes that she was walking up the steps ahead of her husband; that she did not actually witness the fall; and that as she turned at the top of the steps to look back, she saw her husband lying where the sidewalk met the road. Ms. Hoff notes that she went immediately to claimant's side; asked what had happened; and heard Mr. Hoff reply, "my damn knee gave way". Ms. Hoff recalls that her husband was alert, and was responsive to questions asked by her and by others. She further would agree that the photos in Exhibit X fairly represent the steps as they existed at the time of the fall.

Ms. Hoff notes that she agreed with the report of Jan Klosterman to the extent that it documents the number of hours spent by Ms. Hoff in the care and assistance of her husband upon his release from the hospital, noting that since December of 2003 she will spend an average of ½ to 1 hour a day assisting Mr. Hoff with such daily activities as bed, bath, and bathroom.

Ms. Hoff explains that Mr. Hoff is unable to support his weight with his legs, and will use arm strength to walk with a walker at home.

Ms. Hoff acknowledges that with a change in medication, Mr. Hoff began experiencing seizures, beginning with three in June of 2000, one of which led to a fall and a broken left wrist. Ms. Hoff further acknowledges that Mr. Hoff suffered another seizure in October of 2000, and that the number of seizures being suffered by Mr. Hoff in that period of time was unusual.

John Robert Hoff

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Mr. Hoff testified at hearing on 4/27/04; by his deposition taken on 1/25/02 (Claimant's Exhibit C); and had certain of his statements recorded in response to questions posed to him (Claimant's Exhibit GG).

Claimant relates that he was born on 11/30/99, and recalls that since approximately 1979 he has been employed as a custodian and maintenance man for the St. Clair School District. Mr. Hoff acknowledges that he has suffered from a seizure disorder since he was a teenager, and was obliged to have a change in his medication in the year 2000. Mr. Hoff acknowledges that he suffered seizures in June of 2000, but denies that the change in medication caused any changes in his behavior.

Claimant recalls that in July of 2000 he suffered injury to his right knee at work when his shoelace got caught in the door as he entered the kindergarten. Claimant recalls that he was pulled down on his right side, striking his right shin on a wall, and his right knee on the floor. Mr. Hoff recalls that he waited for about five days, treating on his own, before he sought medical treatment and was referred to Dr. Bonney. Claimant acknowledges that Dr. Bonney released him to return to work with a diagnosis of a twisted ankle and bruised knee.

Mr. Hoff cannot recall when his knee started "giving out", but notes that he had three or four such episodes before seeing Dr. Bonney for a second visit on 9/18/00. Claimant recalls complaining to Dr. Nogalski of his knee giving way, and to the physical therapist to whom he was referred, and further recalls being told to continue working after Dr. Nogalski advised him on 10/16/00 that the MRI revealed the torn ligament. Mr. Hoff recalls complaining of his knee to a representative of the insurer when asked to give a statement on 10/30/00. Claimant acknowledges that he took a walker to work out of concern as to his knee; was reevaluated by Dr. Nogalski on 11/6/00; and sought a second opinion as to the knee from Dr. Matthews on 11/14/00.

Mr. Hoff recalls that on 12/1/00 he fell from a flight of steps while on his way to a Christmas parade. Mr. Hoff recalls that his leading step was taken with his right leg, and that he fell as he was climbing the fourth step of the stairs. Claimant recalls the same sensation of having his knee give way as he had experienced in the past, and recalls that he then fell onto his back in the street. Mr. Hoff recalls seeing his wife Joyce immediately thereafter, and advising her that his "damn knee" had given way again. Claimant recalls that he was unable to get up, and had to be lifted into an ambulance for transport to the hospital.

Mr. Hoff acknowledges that his seizure medication was changed in 2000, and that he suffered from five or so seizures thereafter. Mr. Hoff acknowledges that some seizures were severe enough to lead to injury (broken left wrist), or to cause him to seek treatment (October of 2000).

Elvin Thebeau

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Mr. Thebeau testified that he has known John Hoff since 1996. Mr. Thebeau relates that he drove Mr. Hoff to two of the visits to the office of Dr. Nogalski, and recalls that he was present and heard Mr. Hoff when claimant complained to Dr. Nogalski that his knee gives out. Mr. Thebeau further testified that he witnessed no change in claimant's demeanor in May to December of 2000, and that claimant at no time acted drunk as if affected by alcohol.

Chad Johnmeyer

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Mr. Johnmeyer relates that for twelve years he has been employed as an emt, and acknowledges that he was the driver of the ambulance run on the evening of 12/1/00. Mr. Johnmeyer recalls that John Hoff showed no signs of seizure activity that evening, and recalls that claimant was alert to person, place, and time. Mr. Johnmeyer refutes the suggestion that Mr. Hoff was able to get onto the gurney without assistance, recalling that the usual protocol was followed, which involved applying a C-collar and strapping the patient onto a long board.

Michael Wildeisen

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Mr. Wildeisen acknowledges that he is the paramedic who authored the ambulance run report of 12/01/00. The witness agrees having documented the history of having Mr. Hoff state "having problem with right knee and gave out causing fall". The witness recalls that Mr. Hoff was alert and oriented times three, and would further agree that Mr. Hoff was carefully lifted onto a backboard for transport by ambulance.

Linda Phillips

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The witness relates that she worked as a custodian with Mr. John Hoff from September of 1999 to May of 2000, and again beginning in September of 2000. Ms. Phillips notes that she cannot recall any change in his demeanor at that time.

The witness recalls that she was a witness to the fall on 12/1/00. Ms. Phillips recalls that she was parked two car lengths from the steps next to Hibbard's Hardware; that she rolled down her car window and spoke with Mr. Hoff; and that he was climbing the steps as she was getting out of her car. Ms. Phillips recalls that she saw the claimant's right knee "kind of bent down" as he climbed to the last step at the top of the stairs, and further recalls that "He buckled, and then he just fell backwards".

Ms. Phillips notes that she approached immediately out of concern, as did several others, and states that the claimant was able to focus on her and recognize her. The witness recalls claimant stating that his knee had buckled, and that his back was hurting. Ms. Phillips recalls having witnessed a similar buckling of the knee at school that previous fall, when Mr. Hoff had fallen against a wall. The witness further recalls that Mr. Hoff had made previous complaints from time to time about his knee buckling.

Hank Hildebrand

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Mr. Hildebrand relates that he has known John Hoff since 1962, and would see claimant about every Sunday at church. The witness does not recall having ever seen Mr. Hoff with a staggering gait, or with slurred speech any different from the claimant's usual slow speech pattern.

Mr. Hildebrand notes that he is a retired police officer, and on 12/01/00 was working as a reserve officer at the St. Clair Christmas parade. Mr. Hildebrand recalls that he was unaware any right knee complaints made by Mr. Hoff as of the evening of the parade. This witness relates that he actually witnessed the fall by Mr. Hoff from the steps, noting that claimant fell backwards near the top step, twisting to the one side a little bit before dropping off the edge on the right side of the steps.

Mr. Hildebrand recalls that he immediately approached the claimant after the fall, and notes that claimant was alert and was complaining to his wife as to back pain. He recalls the claimant lying on his back as if he were helpless, and recalls the paramedics picking the claimant up and placing him onto a gurney.

Dr. Michael Nogalski

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Dr. Nogalski had his deposition taken on 5/20/02, and again on 3/15/04. He relates that his first opportunity to evaluate was on 9/25/00, and he acknowledges that claimant complained "He had had episodes in which his knee had caught, and he had fallen down"..... "He stated that he fell at work in the past week and scraped both of his elbows because of this." (Claimant's Exhibit O, p.7).

Dr. Nogalski first suspected a meniscus tear, until the 9/27/00 MRI revealed a posterior cruciate ligament tear. All other ligaments were found to be intact. Dr. Nogalski disputes that such a tear would cause any real rotational instability to the knee, and disputes that such tear would render the knee unstable or cause the knee to become dysfunctional. Claimant was found to have a grade II injury to the pcl, defined by Dr. Nogalski as a laxity that affects slide and glide but not stability. He released Mr. Hoff to return to full duty after the 10/16/00 evaluation, no brace for the pcl was recommended, as he did not believe the knee demonstrated laxity requiring bracing. Dr. Nogalski believes that as of his evaluation on 11/6/00, the claimant exhibited strength of the knee adequate to provide stability, and doubts that pcl insufficiency could cause a giving away episode.

Dr. Nogalski doubts that the condition of the right knee was medically causally related to the fall suffered by Mr. Hoff in December. Dr. Nogalski further reverses himself with respect to the issue of causation as to the pcl tear suffered by Mr. Hoff. In his deposition taken on 5/20/02, Dr. Nogalski opines that the fall suffered by Mr. Hoff on 7/26/00 caused the pcl tear. In his deposition taken on 3/15/04 he recants that opinion, and suggests that his review of certain records, notably those regarding the care provided by Dr. Bonney at Urgicare, convinces him that the pcl tear was not causally related to the fall at the school in St. Clair.

Dr. Thomas D. Matthews

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Dr. Matthews acknowledges that on 11/14/00 he performed a right knee exam, and found “a remarkable posterior drawer sign, which is a clinical physical examination sign that’s—that detects instability from a nonfunctioning posterior cruciate ligament. Instability meaning that the tibia bone in relationship to the femur bone has too much play in the backwards or posterior direction.” (Claimant’s Exhibit I, pp. 14,15).

Dr. Matthews notes that a pcl tear is a rare injury, and that he may see one every other year in his practice. He notes that the 9/27/00 MRI showed effusion of the knee joint, which suggests to him that the claimant had an event that caused that effusion some three to six weeks prior. He initially supposes that the claimant could have suffered an avulsion of bone on the tibia that attaches to the pcl; after reviewing the records of Dr. Bonney, he supposes that claimant could have suffered a stress fracture that worsened into an avulsion fracture over time, causing instability to manifest at a later date.

Dr Matthews notes that pcl instability causes problems typically when walking down an incline and with pivoting maneuvers. He provided claimant with a knee sleeve that was intended to give claimant a better feeling for where his knee was in space, whether flexed or extended. Dr. Matthews did not believe the claimant to be a surgical candidate or in need of further care, and did not put him under any work restrictions.

Dr. Matthews concludes that the knee condition and the claimant’s neurologically impaired motor system were both contributing factors to the fall on 12/01/00. He acknowledges that neuroleptic medicines like Phenobarbital, Dilantin, and Mysoline affect proprioception, cognition, and balance, and agrees that from time to time Mr. Hoff exhibited an unsteady gait pattern secondary to the side effects of the medicines (Claimant’s Exhibit I, p. 40).

Dr. Ronald C. Hertel

Dr. Hertel relates that he has been an orthopedic surgeon since 1963, and acknowledges that he performed a review of the medical records at the request of counsel for the claimant.

Dr. Hertel notes that he reviewed the MRI, and would agree that Mr. Hoff suffers from a complete tear of the pcl. Dr. Hertel notes that he has only done two pcl reconstructions in his career, and would agree that knees are not usually unstable as a result of a pcl tear.

Dr. Hertel notes that timing as to when a patient will seek treatment for a tear of the pcl varies with the patient. In the case of Mr. Hoff, Dr. Hertel supposes that the accident caused a complete tear, and that over time certain secondary restraints were partially torn or became worsened, causing an unstable knee.

Dr. Hertel supposes that an unstable knee was a substantial factor in causing the claimant to fall on 12/01/00, relying on findings of instability by Dr. Matthews, and on the complaints by Mr. Hoff of giving way of the knee. (Claimant’s Exhibit F, at pp. 22,23).

Dr. Hertel is aware of the history of convulsive disorder since age 15, and would defer to a neurologist as to the appropriate levels of medication necessary to control such disorder, and as to the effect of levels of medication on the claimant’s ability to function.

Dr. Patrick Hogan

Dr. Hogan notes that he is a neurologist who for over 28 years has treated Mr. Hoff for a convulsive disorder. Dr. Hogan acknowledges that he pushed the medication of Mr. Hoff as far as he was able short of intoxication to achieve control of convulsive activity, and acknowledges that the lab reports indicated that the claimant’s levels were “potentially” toxic.

Dr. Hogan relates that he would routinely see Mr. Hoff every three to six months. He denies ever having seen claimant in a drug-intoxicated state in the year 2000 or 2001, nor does he ever recall having the claimant appear drug intoxicated. Dr. Hogan recalls seeing the claimant in June and July of 2000, at a time when the claimant was reporting an increase in seizure activity. Dr. Hogan recalls that in April of 2000 he was obliged to change the claimant’s medication, adding Phenobarbital when one of the medications Mr. Hoff had been taking was taken out of service (Claimant’s Exhibit G, p. 22).

Jan Klosterman

Ms. Klosterman relates that she is a registered nurse, and is currently a certified nurse life care planner. The witness relates that over the last five years she had been developing such plans, with fifty such plans having been completed or put in progress.

Ms. Klosterman identified Exhibit 2 to her deposition as a description of services John Hoff has needed in the past, and that she believes he will need in the future, with a cost analysis. Ms. Klosterman prepared a determination of the cost of attendant care provided by Mrs. Hoff and a paid attendant post the discharge of claimant from a skilled nursing facility to the present, as well as her opinion as to the cost of care into the future.

The witness relates that she reviewed medical records; interviewed Dr. Sadowksy, claimant’s psychiatrist; spoke to Dr. Mitchell’s office, and to Jana, claimant’s current physical therapist; and spoke to Mark Petre, who does modification to make homes and vehicles wheelchair accessible. Ms. Klosterman notes that Mr. Petre went to the Hoff home to determine the cost of necessary modifications believe by Ms. Klosterman to be necessary.

David Vogt

Mr. Vogt relates that in 1997 he began working in general maintenance as an employee of St. Clair School District. Mr. Vogt notes that he would work with Mr. Hoff from time to time, noting that he would perform technical aspects of certain jobs like electrical and air conditioning, while Mr. Hoff and his work partner, Jim Wagner, would perform more general labor work. The witness notes that he would see the claimant perhaps a couple of times a day on average.

Mr. Vogt notes that from the day he started at St. Clair School he had concerns with respect to Mr. Hoff. He notes that he had reservations about Mr. Hoff driving a bus that had been converted into a trash truck, noting that on one occasion claimant had struck a car, and would routinely back into the dumpster.

Mr. Vogt describes the claimant's walk as unsteady, noting that Mr. Hoff tended to frequently stumble toward the back and toward his right side. The witness describes the claimant's gait as a shuffling, or not quite picking up his feet, while leaning forward as he walked. The witness notes that he supposed that Mr. Hoff was somehow intoxicated, perhaps due to his medication, given his manner of speech and his frequent stumbling. The witness doubts that he ever witnessed any seizure activity suffered by Mr. Hoff, noting that the stumbling to which he referred was always a temporary event.

Mr. Vogt noted that in the summer of 2000 he was unaware that the claimant had suffered a knee injury. He further testified on direct examination that he did not notice any change in the claimant's demeanor in the summer of 2000, and stated that his observations and concerns as to Mr. Hoff and his unsteadiness date back to when the witness was first employed by the school district.

Jason Vermeiren

This witness relates that he has worked in maintenance for the St Clair School District for six years, and has a recollection of John Hoff dating back to when the witness was a student at the school.

Mr. Vermeiren provided testimony as to his observations of Mr. Hoff that largely mirrored the testimony provided by Mr. Vogt. The witness relates that John Hoff has always exhibited a shuffling walk with slurred or slower speech, along with a penchant for backing the trash vehicle into the trash dumpster. Mr. Vermeiren recalls that as a student he and his auto body classmates modified the back of the trash vehicle to protect the taillights from the impact of the vehicle on dumpster when driven by Mr. Hoff.

Mr. Vermeiren was similarly unaware that claimant had suffered a right knee injury in the summer of 2000. He also testified that his observations and concerns as to Mr. Hoff were longstanding, and that he did not observe anything that was appreciably different about the demeanor Mr. Hoff in the summer of 2000.

Jim Wagner

Mr. Wagner relates that he is in his eleventh year as a maintenance worker for St. Clair School District, and acknowledges that from the inception of his employment he had been paired up to work with John Hoff. Mr. Wagner acknowledges that Wayne Curry, the maintenance supervisor, advised him to keep an eye out for Mr. Hoff and help when needed. Mr. Wagner acknowledges that he thinks of Mr. Hoff as a friend.

Mr. Wagner acknowledges that John Hoff walked with a forward lean, shuffling his feet, and that claimant might suffer a fall or two every year without any apparent precipitating cause.

The witness relates that he did not see John Hoff's fall in the kindergarten, but notes that he was in the same building at the time; heard the fall; and went to see what was the matter. The witness recalls that John Hoff advised that he had gotten his shoelace caught up in the door.

Mr. Wagner notes that on occasion thereafter he would hear the claimant complain about his knee giving out, although the witness acknowledges that he cannot recall ever having seen the knee collapse on Mr. Hoff. Mr. Wagner acknowledges that Mr. Hoff would attribute his knee giving way to the accident claimant had in July of 2000.

Christopher Long, Ph.D.

Dr. Long has his doctorate in toxicology, and testified that his concentration is in forensic toxicology, focusing on the individual implications of the use or abuse of drugs.

Dr. Long reviewed certain of the medical records to come to his conclusion that drug concentrations taken by Mr. Hoff in June and July of 2000, and on into December of 2000 were toxic, and that the concentration of Phenobarbital was borderline fatal. The witness noted that the Dilantin and Phenobarbital taken by Mr. Hoff were "cns depressants", having the effect of depressing the central nervous system. Dr. Long notes that the side effects from such medication can alter reaction time, gait, coordination, vision, and balance. The witness relates that concentrations of Phenobarbital over 40micrograms per milliliter are toxic, and notes that lab results indicate that claimant's levels were at 54 micrograms per milliliter in July of 2000, and at 59 micrograms per milliliter in December of 2000. Specifically, the drug levels indicated in December of 2000 would lead Dr. Long to conclude that the dosages could be fatal to someone new to the drug, and for others who have used

the drugs over time, the side effects would include clouding of thought, in coordination, and stumbling.

Dr. Long notes that one of the symptoms side effects of toxicity is “ataxia”, which he describes as the inability to walk properly. Dr. Long notes that a shuffling walk would be a sign of ataxia.

Dr. Long has no doubt that the claimant suffered from drug intoxication, noting that if all the lay witnesses observed the same shuffling walk for years, then the claimant was taking toxic levels of medication over a long period of time.

Dr. Long, who is not a physician, would agree that doctors must engage in a risk/benefit analysis as they push drug levels to the maximum required to achieve seizure control without causing the harm that can follow from over medicating. In the case of Mr. Hoff, Dr. Long suggests that the occurrence of seizures in 2000 suggests that the medications were not working, and that he would have recommended changing medication versus increasing the dosages.

Dr. Long opined, with a reasonable degree of certainty within his chosen field of toxicology, that claimant was drug intoxicated in December of 2000, and that the cause of his injury as he fell from the steps was drug toxicity. In support of his conclusion, he points to the lack of injury other than to the back as a consequence of the fall, suggesting that a lack of reaction time caused the claimant to fail to use his extremities to brace his fall.

Dr. Michael Ralph

Dr. Ralph related that he is an orthopedic surgeon, and notes that of the roughly 500 to 1000 patients that he saw last year for knee complaints, he performed perhaps as many as 100 surgeries. Dr. Ralph notes that he performed a medical record review as to Mr. Hoff, but did not meet with Mr. Hoff or perform any physical examination of claimant.

Dr. Ralph reviewed the MRI taken in September of 2000, and agreed that it showed a posterior cruciate ligament tear. Dr. Ralph noted edema around the knee, and stated that while it was difficult to say when the tear occurred, he was certain that it had not occurred on or about the date the MRI was performed. Dr. Ralph noted that what he saw on the MRI was not an avulsion of bone, but what he calls a “bony reaction”, and agrees that it might be showing injury that had occurred some six to twelve weeks prior.

Dr. Ralph doubts that the pcl tear occurred when claimant fell in the doorway at the school, noting that such tears are usually caused by severe hyperextension; that Dr. Bonney’s records did not support the conclusion that Dr. Bonney was looking at a severe knee injury; and that such injury is so painful and severe that a patient would not wait five days to seek treatment. Dr. Ralph further doubts that the knee was rendered unstable due to the pcl tear. He refers to the injury as an “isolated pcl tear”; is unable to say whether any “secondary restraints” of the knee had occurred, given that he did not examine the knee and was not looking for such injury when he reviewed the MRI; and doubts that the knee was rendered unstable, because his review of Dr. Nogalski’s notes suggests that claimant did not exhibit a “reverse pivot shift”. Dr. Ralph relates that a pcl tear will not be unstable absent a finding of a reverse pivot shift. Dr. Ralph further concludes that the fall on 12/01/00 was not the result of an unstable knee due to a pcl tear, but rather was the result of drug intoxication. In the course of rendering this conclusion as to causation, Dr. Ralph acknowledged that he did not hold himself out as an expert in matters of toxicology, relying on his discussion with Drs. Long and Head to aid him in his conclusion.

Curiously, at the close of cross-examination by the employee, Dr. Ralph read inherently inconsistent statements as to causation from two reports he had authored. In the first report dated 1/31/04, he notes that making categorical statements either way as to causation with respect to the pcl tear would not be telling the truth; in a report authored 5/14/01, he states, “I can tell you categorically that this patient did not sustain a tear of his posterior cruciate ligament from the injury described”. No effort was made on redirect to reconcile or explain these two statements made by Dr. Ralph.

Lastly, Dr. Ralph acknowledged that he was aware of diagnostics performed in 2003 that showed that the claimant had “loose bodies” in the knee. Dr. Ralph acknowledged that loose bodies in the knee could cause a knee to give out. Whereas Dr. Ralph supposed that it was the records of Dr. Matthews that revealed a report as to such “loose bodies”, this fact finder could find in the record but one reference to loose bodies in the right knee, and it was not in the medical of Dr. Matthews. Within the records of St. John’s Mercy Hospital in Washington, Missouri, as contained within Claimant’s Exhibit V, and located at the very end of those records and in front of a tab marked “Rehab Institute”, there is an MRI report as to the claimant’s right knee dated 9/18/03. The MRI report was taken at the request of Dr. Thomas Mitchell, in response to a clinical history “knee is painful and gives out”. In the section headed “FINDINGS”, the radiologist notes, in part, “There appear to be 2 or 3 loose bodies in the joint space on the sagittal and coronal views”.

Dr. Richard T. Katz

Dr. Katz relates that he is a physician, and that he had the opportunity to review various medical records prior to completing both a mental status exam and a physical examination of John Hoff on 4/6/04. Dr. Katz notes that he is board certified, in, among others, physical medicine and rehabilitation; that he has created dozens of life care plans for person suffering from spinal cord injury; and that he has both written and taught on the subject of life care planning. Dr. Katz defines a life care plan as “a budget for persons with disabilities” that estimates that amount of medical and related services needed by that person over a period of time. Dr. Katz acknowledges that he prepared a life care plan for Mr. Hoff, relying in large part on information gleaned from the United States Model Spinal Cord Injury Symptom Data Bank. Dr. Katz offered his opinion as to the future cost of care for the life of the claimant. The witness further stated that he reviewed the estimates

of Ms. Klosterman, and believes them to be greatly exaggerated.

Dr. Katz suggests that the terms “paraplegic” and “paraparetic” are essentially used synonymously, and states as follows with regard to John Hoff: “The important thing is that he is paraplegic, which means he has weakness in his legs due to the problem in the thoracic spinal cord, but he has considerable preservation of movement in his legs as well as considerable preservation of sensation in the buttocks and in the legs.”

Dr. Katz relates that his physical examination of the claimant’s right leg revealed marked edema up to the tibia, and noted that such edema was not a normal finding of a wheelchair bound person. He notes that claimant was unable to stand, and that his lower extremity function was not adequate for walking. Dr. Katz notes that sensation was clearly abnormal in the lower extremities, but was unable to distinguish a clear sensory level where sensation would progress from normal to decreased or absent. Dr. Katz acknowledges that the claimant’s physical therapy at Washington University includes the use of an ambulation machine. Dr. Katz notes that the use of the machine is an attempt to determine whether additional ambulation changes the neurological status of persons with a spinal cord injury. He notes that the use of the machine is part of an investigational research program, and that it is speculative at this point as to whether such a program can be of any benefit to participants.

Dr. Katz notes that it was possible but unlikely that the pcl tear could account for the swelling in the right knee that he observed on 4/6/04. Dr. Katz confirms that he found the right knee to be unstable. Dr. Katz was aware of the MRI taken on 9/18/03 that showed loose bodies in the knee. He opined that the loose bodies could be pieces of cartilage or bone, and stated that it was highly unlikely that loose bodies within the knee joint could be related to a pcl tear from outside of the joint. Dr. Katz confirms that loose bodies in the knee can account for both swelling and instability of the knee.

Dr. Katz deferred when asked to give a causation opinion with respect to a fall at work, or as to the fall suffered by Mr. Hoff on the steps. However, Dr. Katz did state as follows: “I felt that the fall description of 7/31/00 was not classical, but was reasonable enough to explain the pcl tear. However he walked five days later and there was no swelling and that was certainly puzzling” (Employer and Insurer’s Exhibit No. 3, at pp. 15, 16).

Dr. Katz further would agree that a pcl injury does not necessarily result in incapacitating pain, and would agree that walking with a limp and with a knee giving way or buckling within the first several months of injury would be a potential symptom of a posterior cruciate ligament tear.

INJURY BY ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

Subsection 2 of Section 287.020 RSMo, provides, in part, that “An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability”. Paragraphs (1) and (2) of Section 287.020.3 further provide as follows:

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

Injury by accident “arising out of” and “in the course of” employment has historically required a two -part analysis as to compensable injury. An injury occurs “in the course of employment” if the injury occurs within the period of employment at a place where the employee reasonably may be fulfilling the duties of employment. Abel v. Mike Russell’s Standard Serv., 924 S.W.2d 502, 503 (Mo banc 1996), citing Shinn v. General Binding Corp., 789 S.W.2d 230, 232 (Mo.App.1990). It is clear that the claimant suffered injury “in the course of his employment” when he tripped in the doorway of the kindergarten.

The meaning of “arising out of” employment is nebulous, and the more difficult of the two tests to grasp. At issue is

that “something else” that is required, as a test of causation, to make an injury compensable once it is established that the injury occurred in the course of employment. Injuries caused by conditions that are peculiar or innate to the individual, such as a fall related to a fainting spell, are deemed to be idiopathic in nature, and are not compensable, in the absence of a showing that a condition unique to the workplace or exacerbated by the workplace exists and contributes to cause the injury. Abel, at p. 504.

In Liebman v. Colonial Baking Company, 391 S.W.2d 948 (Mo.App.1965), Judge Cottey offered a very thoughtful analysis of causation as it relates to the test “arising out of”. Judge Cottey noted that Missouri had rejected the “positional risk theory” which suggests that an accident is compensable if the employee’s employment caused him to be at the place where the accident happened. In the context of assault cases, where the assault is irrational, unprovoked, and where the only connection to employment is that the employment afforded a convenient opportunity for the assault to take place, Judge Cottey concludes that the only rational relationship to employment is coincidence, not a cause. Liebman, at pp. 952-953.

With respect to the “something else” that will make the injury compensable, Judge Cottey notes as follows:

The familiar rule is that an accident will be held to have arisen ‘out of’ the employment when, from a consideration of all the relevant circumstances, it appears that there was a direct causal connection between the employment and the injury (attributable either to the nature of the employee’s duties or to the conditions under which he was required to perform them) so that the accident can be fairly said to have been a rational consequence of some hazard connected with (or aggravated by) the employment. Toole v. Bechtel Corporation, Mo., 291 S.W.2d 874,879; Gregory v. Lewis Sales Co., Mo.App., 348 S.W.2d 743, 745-6; Scherr v. Siding & Roofing Sales Co., Mo.App., 305 S.W.2d 62, 65; Long v. Schultz Shoe Co., Mo.App., 257 S.W.2d 211,212; May v. Ozark Central Telephone Co., supra, 272 S.W.2d 849. That is the cardinal requirement for compensability in all cases in Missouri, no matter how or where the accident may have occurred and no matter in what category the causative risk may be classified. Its basic factors are ‘causal connection’ and ‘rational consequence’. When they are shown to exist, the test has been satisfied; otherwise, it is not. Liebman, at p. 950.

Judge Cottey goes on to note that causal connection and rational consequence exist if the causative risk was ‘inherent in the particular conditions under which the employment was carried on’, citing Long v. Schultz Shoe Co., at p.213, and Graves v. Central Electric Power Co-op. Mo., 306 S.W.2d 500, 504. He concludes that inherency of the risk in the working environment is the causal link to employment. In other words, it is inherency of risk that distinguishes coincidence from cause. But Judge Coffey does not stop there. He further suggests that even in the absence of an inherent risk, “There is a rule that runs to the effect that where a risk is common to the public generally, it is incumbent on the claimant to prove that his employment increased his exposure to it beyond the common average, and thereby enhanced the likelihood of his being injured by it”, citing May v. Ozark Central Telephone Co., and Schmidt v. Adams & Sons Grocer Co., Mo.App., 377 S.W.2d 564. The classic example of the application of this second test are those cases where a tornado or other “act of God” causes injury, and the injury is not deemed to arise out of the employment in the absence of a showing that the employment somehow exposed the claimant to a risk of harm greater than that of the general public. Williams v. Great Atlantic & Pacific Tea Co., 332 S.W.2d 296 (Mo.App.1960).

More current cases most revealing as to interpretation by the courts as to “arising out of” are those involving idiopathic causes. In Collins v. Combustion Engineering Co., 490 S.W.2d 394 (Mo.App. 1973), claimant suffered a dizzy spell and fell off a ladder from height of four feet. The court of appeals noted that idiopathic falls were not compensable as a rule, but applied an exception that provided that recovery would be allowed if it could be shown that a hazard or special risk connected with the employment and not common to the general public contributed to the injuries. The court in Collins concluded that work on a ladder at a height of four feet was not a “greater hazard”, and that the injury did not arise out of the employment.

The Missouri Supreme Court subsequently had before it a claim that, like Collins, involved injury that was precipitated by an idiopathic event. In Alexander v. D.L. Sitton Motor Lines, 851 S.W.2d 525 (Mo. banc 1993), claimant was a tractor-trailer truck driver who became dizzy while standing on a platform behind the tractor-cab, uncoupling the trailer from the cab. The claimant fell from the platform to the ground below, a distance of about 4 and ½ feet, and suffered his injury.

The Court explicitly overruled Collins, noting that it was rejecting the ‘idiopathic fall/greater hazard’ doctrine therein. In the process of finding the injury to Mr. Alexander to be compensable, the Court noted its earlier finding in Wolfgeher v. Wagner Cartage Serv., Inc., 646 S.W.2d 781, 785 (Mo. banc 1983), where it declared that an injury would be compensable if “clearly job related”. The Court went on to note that “The test for a “causal connection between the injury and the work to be performed is equivalent to the Wolfgeher test for “job relatedness”, and that “It is well settled that an accident arises “out of” the employment “when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury”, citing Kloppenburger v. Queen Size Shoes, Inc., 704 S.W.2d 234, 236 (Mo. banc 1986).

The Court, in the process of rejecting Collins, noted that "...the proper test of 'causal connection', simply put, is whether the conditions of employment caused or contributed to cause the accident", and that "Recovery is not limited solely to accidents arising out of conditions of employment that constitute a "greater hazard" than normally encountered by the employee". Alexander, at p. 528.

The Missouri Supreme Court had the opportunity to revisit the issue as to causal connection, under circumstances involving an idiopathic event giving rise to injury, in Abel v. Mike Russell's Standard Serv., 924 S.W.2d 502 (Mo. banc 1996). The Court raised the question whether the intent behind the decision in Alexander was to adopt the positional risk theory, and to make compensable all injuries to employees occurring at their workplace. The Court rejected such an interpretation, and noted, "The *sine qua non* of recovery under Section 287.120 .1 and Alexander is a condition of the workplace that bears a causal connection to the employee's injury. The condition of the workplace bears a causal connection to the injury only when the condition is unique to the workplace or is a common condition that is exacerbated by the requirements of employment". Abel, at p. 504.

The legislature redefined compensable injury by accident when it amended Section 287.020. The legislature adopted the standard of clear work relatedness as expressed in Wolfgeher, but also provided, within Section 287.020.3(2)(d), that an injury could only be deemed to arise out of and in the course of employment if "It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life".

It is apparent that the standard to date continues to be more or less the same as expressed in Alexander, and that the Missouri Supreme Court is focusing on "whether the conditions of employment caused or contributed to cause the accident", without the element of increased risk. It is further apparent that the language within Section 287.020.3(2)(d) is being interpreted so narrowly that it will preclude recovery only where the cause of the injury is idiopathic, or perhaps in certain cases of assault, or where injury is the result of an act of God. For those who are dissatisfied with the result reached in Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo banc 1999); Drewes v. Trans World Airlines, Inc., 984 S.W.2d 512 (Mo banc 1999); and in DeVille v. Hiland Dairy Company, 2005 WL171943 Mo.App. S.D., Jan 27, 2005, the source of frustration is that, per the analysis by Judge Cottey, the only relationship to work they are able to perceive is coincidence, and not cause.

Mr. Hoff provided wholly credible testimony to substantiate that on or about 7/26/00 he suffered an injury to his right lower extremity while walking through the doorway of the kindergarten. The medical records of Dr. Bonney dated 7/31/00 substantiate the history provided by Mr. Hoff. Claimant suffered an injury to his leg as a consequence of having his shoelace catch under the door, causing him to trip and fall onto his right knee. This history is further consistent with the testimony of Mr. Wagner, who was in the same building at the time of the injury; who heard but did not witness the injury; and to whom Mr. Hoff immediately confided that he had gotten his shoelace caught up in the door. The conditions of employment, in this case the necessity of going through the doorway to get from point A to point B while performing his duties as a maintenance man, lead to the injury to the knee as described by Mr. Hoff. The interpretation of "injury by accident arising out of and in the course of employment" as expressed in Kasl and in Drewes cannot be distinguished in the case of Mr. Hoff to reach a different conclusion as to whether the injury arose out of employment. The claimant suffered a compensable injury by accident arising out of and in the course of employment, within the meaning of Section 287.020 RSMo.

MEDICAL CAUSATION

The Employer and Insurer dispute that the trip and fall suffered by Mr. Hoff at school resulted in a pcl tear. The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

"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". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

The testimony of Mr. Hoff persuades that prior to his injury at work on or about 7/26/00, he had no condition in his right knee that was of any concern in terms of a fear of the knee giving way or otherwise being unstable. The testimony of Mr. Hoff is further persuasive that he did not have any problems with giving way or locking of the knee, and though he is unable to state exactly when the giving way first began, testifies persuasively that he had three or four giving way episodes prior to seeing Dr. Bonney on 9/18/00. The complaints of giving way are consistent with the testimony of several of the witnesses, as well as the various medical records. Ms. Phillips and Ms. Hoff both recall instances of knee buckling that

occurred after the fall in July of 2000; Nurse Laskowitz, in her report dated 11/06/00 (See Exhibit A to Claimant's Exhibit O), acknowledges being present on 11/6/00 when Mr. Hoff advised Dr. Nogalski of falls that claimant was attributing to his knee giving out. In his letter dated 9/25/00, Dr. Nogalski by his own notation acknowledges, "He had had episodes in which his knee had caught, and he has fallen down." (Claimant's Exhibit P). Claimant made complaint of his knee giving way, and of falling, when his statements were recorded on 10/30/00 (Claimant's Exhibit GG). Lastly, in what now appears to be an ominous foreshadowing of what was to come, the following is recorded in an initial physical therapy evaluation dated 9/27/00 contained within Claimant's Exhibit P:

Patient states he recently started having problems with the (R) knee giving way on him.... Patient states that his gait is slow secondary to he is cautious and fearful of the knee giving away and has had 2 falls secondary to the knee giving away. Patient states he now has to hold onto the rail when ambulating up and down steps, where there was no limitation before.

On 11/14/00 Dr. Matthews had the opportunity to evaluate the claimant's right knee, and concluded that the claimant had an instability from a nonfunctioning pcl. Dr. Matthews also notes that a pcl instability causes problems typically when walking down an incline, and in pivoting maneuvers. Dr. Matthews did not offer an opinion as to causation with respect to the pcl tear suffered by Mr. Hoff.

Dr. Ralph has an apparent bias in this case which appears to have compromised his objectivity when it comes to offering an opinion as to the likelihood that the injury at work on 7/26/00 could have caused a pcl tear. In fairness to Dr. Ralph, he acknowledges that the edema showing on the MRI could support the theory that the pcl tear occurred some six to twelve weeks prior, or, in other words, on or about the date that claimant had his work injury in July of 2000.

Dr. Nogalski chose to reverse his position as to causal relationship between the involved work injury and the pcl tear. Dr. Nogalski does not dispute that the mechanics of the fall in July of 2000 as described by Mr. Hoff could have resulted in a pcl tear. For that matter, Drs. Hertel and Katz also agree that fall described could cause a pcl tear; it is only Dr. Ralph who provides an expert opinion to the effect that such a fall could not have caused such injury. The explanation of Dr. Nogalski as to the reason for his change of opinion is not persuasive. He admits that he had the records of Dr. Bonney in front of him at the time that he first rendered his opinion that the fall in July of 2000 caused the pcl tear. It is apparent, when reading the tenor of his comments on the issue as to the reasons for his change in opinion as to causation (see pp.22 and 23 of the deposition of Dr. Nogalski, Claimant's Exhibit A) that Dr. Nogalski is speculating that some other event caused the injury, where he states:

There are documents of the emergency room visits, falls, instability, all of which lend credibility to the idea that Mr. Hoff would have had opportunity to fall at other times, and given this theory what we would term benign or very unremarkable exam of Dr. Bonney that was done five days after his alleged injury, it's totally incongruous with a PCL injury; and the big picture that's presented regarding Mr. Hoff argues or multiple falls, multiple injuries, multiple chances of problems and in my mind strongly supports with a reasonable degree of medical certainty that Mr. Hoff didn't injure his PCL prior to 7/31/00."

The problem with this justification for the change of opinion by Dr. Nogalski is that it speculates that claimant had to have had some other fall or injury after 7/31/00; Dr. Nogalski can not point to any fall, or any medical document generated between 7/31/00 and 9/25/00, the date of his first visit with Mr. Hoff, that lends credence to this theory. Remember that Dr. Ralph acknowledges that the injury complained of most likely occurred six to twelve weeks prior to the taking of the MRI on 9/27/00. Further, supposing Mr. Hoff to be a credible witness, both his testimony and his work history suggest that there was no intervening trauma that substantially affected his ability to work, or caused him to suffer a worsening of his complaints. Mr. Hoff continued to work throughout the interval from 7/31/00 to 9/25/00, and there is nothing in any of the credible testimony to support the conclusion suggested by Dr. Nogalski. Furthermore, Dr. Nogalski, as part of his justification for the change in opinion, refers to 'falls, instability'; Dr. Nogalski denies a relationship to the pcl tear and an instability in the knee, yet uses "instability" as part and parcel of his justification for denying causation. Further, the fact that Dr. Nogalski, in his own right, was unable to properly diagnose the pcl tear after his clinical evaluation (recall he diagnosed, and began prescribing physical therapy for a suspected meniscal tear or chondromalacia) makes the failure of Dr. Bonney to make the

diagnosis all the more understandable.

The testimony of Mr. Hoff as to the history of his complaint as to his right knee is wholly consistent with the medical records in evidence and with his work history, and is wholly worthy of belief. Under these circumstances, the most plausible and consistent medical explanation of the likely medical history as to mechanics of injury is that ascribed by Dr. Hertel. From all of the evidence, claimant has shown, as a matter of a reasonable probability, that his work injury on 7/26/00 resulted in the tear of the pcl in his right knee.

The parties further dispute the issue as to medical or legal causal relationship between the injury on 7/26/00 and the fall from the steps on 12/1/00, resulting in, among others, fractures of the thoracic spine. In part, the employer relies on the testimony of Dr. Nogalski to suggest that in the event the work injury on 7/26/00 did result in a pcl tear, the injury to the pcl was not of the sort to render the knee unstable and cause the fall off of the steps. The employer and insurer further argue that “drug intoxication” or “medication” was the cause of the fall suffered by Mr. Hoff on 12/01/00. Drs. Ralph and Nogalski, and the toxicologist, Dr. Long, argue that the fall was related to medication. Dr. Matthews believes that both the knee condition and a neurologically impaired motor system were contributing factors to the fall, noting specifically that Mr. Hoff exhibited from time to time an unsteady gait pattern secondary to the medication. As for causal relationship to the fall of 12/01/00, Dr. Matthews supposes that Mr. Hoff stumbled on the stairs, and that his neurologic problems, in combination with knee instability, affected his ability to right himself. Dr. Hertel, to the contrary, opines that an unstable knee was a substantial factor causing the fall on 12/01/00, citing findings of instability by Dr. Matthews, and the complaint of giving way of the knee expressed by Mr. Hoff.

Mr. Hoff testified that prior to his fall on 12/01/00 he experienced the same sensation of having his knee give way that he had experienced on occasion in the past. Ms. Phillips testified that immediately after the fall, claimant advised her that his knee had buckled. Ms. Phillips testified that she witnessed the fall, and that claimant’s right knee “kind of bent down”, and that “He buckled, and then just fell backwards”. Dr. Katz agreed with medical literature that suggests that among the various symptoms of pcl injury is knee instability, collapsing or giving way while walking (Employer and Insurer’s Exhibit No.3, at p. 47).

It is an inescapable conclusion that medication more likely than not played a part in the fall suffered by Mr. Hoff on 12/01/00. Dr. Matthews, one of the few physicians to testify based on a treatment history with Mr. Hoff that extends beyond the confines of this particular workers’ compensation matter, acknowledges that claimant is from time to time unsteady in his gait pattern due to medication. Dr. Matthews further supposes that the claimant’s medication contributed as a causal factor with respect to the fall.

However, equally more likely than not is that the instability in the claimant’s knee from his work injury on or about 7/26/00 contributed as a causal factor of the fall on 12/01/00. The testimony of Mr. Hoff persuades that the precipitating cause of his fall was his knee buckling as he attempted to navigate the fourth step of the stairs. All of the evidence persuades that his reaction time to protect himself from the consequences of that giving way in his knee was compromised by his neurologic condition.

The claimant cites Manley v. American Packing Company, 253 S.W.2d 165 (Mo. banc 1952), for the proposition that injuries suffered by Mr. Hoff as a result of his fall on 12/01/00 follow as a “legitimate consequences” of the right knee injury on 7/26/00, and for that reason are to be deemed compensable. Further, “Where an employee sustains an injury arising out of and in the course of his employment, every natural consequence that flows from the injury, including a distinct disability in another area of the body, is compensable as a direct and natural result of the primary or original injury”. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo.App. E.D. 1997), citing Lahue v. Missouri State Treasurer, 820 S.W.2d 561, 563 (Mo.App. W.D. 1991).

The decision in Manley, coincidentally, involved an original injury to the right knee of the claimant in 1947. Claimant in Manley received a temporary award after a hearing in February of 1949, and in September of that same year re-injured the right knee while visiting at the home of his father. During a surgical procedure to repair the knee, Mr. Manley died as the result of a pulmonary embolism. The surviving widow testified that her husband’s right leg would give way causing him to fall. The son of the deceased witnessed the involved fall, and testified that his father ‘just sort of folded’ on his right leg. Manley, at p. 747-748. The Court affirmed an award that found that the original compensable injury caused subsequent injury culminating in death, noting that the subsequent fall was “due to the weakened and injured knee rather than to some external force”.

In support of the decision, the Court cited the following authorities:

‘The chain of causation means the original force and every subsequent force which it puts in motion. If an accident causes an injury and that injury moves forward step by step, causing a series of other injuries, each injury accounting for the one following until the final result is reached, the accident which set the first injury or force in motion is responsible for the final result. It is immaterial that the final result might not ordinarily be expected. It is enough if the injury in a given case did produce the final injury or death.’ Schneider on Workmen’s Compensation, Vol. 6, p. 53, and cases cited in footnotes.

Thus injuries which follow as legitimate consequences of the original accident are compensable, and such accident need not have been the

sole or direct cause of the condition complained of, it being sufficient if it is an efficient, exciting, superinducing, concurring, or contributing cause; thus it is immaterial whether or not a disability results directly from the injury or from a condition resulting from the injury. So, also, if the resultant disability is directly traceable to the original accident, the intervention of other and aggravating causes by which the disability is increased will not bar recovery. The inquiry as to whether the result is the natural and probable, or a normal or abnormal one, is immaterial.' 71 C.J., § 390, pp. 635-636. Manley, at p. 169.

The test of causation in Manley suggests that the original injury need not be the sole or direct cause of the condition complained of, but rather needs to be a "concurring" or "contributing" cause. The burden rests upon the employee to show by a preponderance of the evidence that his incapacity subsequent to the second incident or accident resulted from the original injury. Oertel v. John D. Streett & Co., 285 S.W.2d 87 (Mo.App. 1956).

The evidence in this matter persuades that instability of the right knee due to the work related pcl tear contributed as a cause of the fall from the steps on 12/01/00. Claimant has shown, by the greater weight of all of the evidence, that his incapacity following the fall from the steps was a result of the original injury to the right knee. Per Manley, injury due to the fall on 12/01/00 is found compensable as a consequence of the original injury to the right knee.

LIABILITY FOR PAST MEDICAL CARE

The issue as to the requisite proof needed to support a claim for medical expense was addressed in Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo banc 1989). The Court stated:

In this case, Martin testified that her visits to the hospital and various doctors were the product of her fall. She further stated 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 the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation. The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. In this age of soaring medical costs it no longer serves the purposes of the Act to assume that medical bills paid by an injured worker are presumed reasonable (because they were paid), while those which remain unpaid, very probably because of lack of means, must be proved reasonable and fair. Martin, at pp. 111-112.

It is further apparent that there must be medical records in evidence that correspond to the bills put in evidence. See Meyer v. Superior Insulating Tape, 882 S.W.2d 735 (Mo.App. E.D. 1994).

The claimant has submitted in the neighborhood of 2000 pages of medical records, and a supporting "Special Damage Summary", Claimant's Exhibit Q, containing a summary of fees and charges totaling \$296,463.19.

In the process of reviewing the medical billings in relationship to the medical records documenting such large expense, it became readily apparent that as often as not the claimant was submitting, in lieu of the medical billing, an explanation of benefit payments from the health insurer for Joyce Hoff. Certain charges for services at St. Clair Nursing Center were documented by a note as to payments received, in lieu of an itemized billing for such charges. In other instances, both a medical billing and an explanation of benefit payments documented fees and charges.

A summary of medical bills, in lieu of the actual medical bills, will not serve as an adequate substitute when past medical is in dispute. Farmer-Cummings v. Personnel Pool of Platte County, 2002 WL 31654578 at *5 (Mo.App. W.D.), rev'd on other grounds, 110 S.W.3d 818 (Mo. banc 2003). Likewise, an explanation of benefits from an insurer is not a medical bill, and will not serve the same purpose as its substitute, unless the parties otherwise agree.

An attempt to cull out and award those fees and charges that are supported by actual medical bills, and to deny the request for payments in those cases where the only documentation is an explanation of benefit payments, has the potential only to lead to confusion and uncertainty as to which fees and charge are deemed to be compensable, versus those that are not. The issue as to past medical shall remain open, and a ruling held in abeyance, pending a stipulation between the parties as to the expenses at issue, or until such time as further proof is made as to the involved medical billings.

In addition to the aforementioned medical expense, claimant is seeking an award of nursing expense for care rendered to Mr. Hoff by his wife, Ms. Joyce Hoff. Nursing care provided to a spouse that is above and beyond the care ordinarily provided to a spouse is compensable. Breckle v. Hawk's Nest, Inc., 980 S.W.2d 192, 194 (Mo.App. E.D. 1998). The spouse need not be a health care professional; it is enough that the nursing care has been provided. Fitzgerald v. Meyer, 820 S.W.2d 633 (Mo.App. E.D. 1991); Stephens v. Crane Trucking, Incorporated, 446 S.W.2d 772 (Mo. 1969).

Jan Klosterman, a Registered Nurse with experience in many different areas of nursing care over the last twenty-five years, provided testimony intended to support an award of nursing care for services provided to Mr. Hoff by Joyce Hoff since his return home in May of 2001. The testimony of Ms. Hoff and of Jan Klosterman persuades that Ms. Hoff provided necessary nursing care to cure and relieve Mr. Hoff of the effects of his injury. The testimony persuades that necessary

nursing care was provided by Ms. Hoff for 8 hours a day, seven days a week, for 9 weeks in 2001; for 6 hours a day, seven days a week, for 25 weeks in 2001; for 6 hours a day, seven days a week, for 18 weeks in 2002; for 4 hours a day, 7 days a week, for 34 weeks in 2002; for two hours a day, seven days a week, in 2003; and, since January 1 of 2004 to the date of hearing in the matter, Ms. Hoff has been providing care, in the form of assistance with claimant's bowel routine, half an hour a day, seven days a week. The total due for nursing services performed by Ms. Hoff from 5/8/01 through 12/31/03, at the rate of \$9.50 per hour, is for 3,990 hours, or a total of \$37,905.00. The employer is further liable for necessary nursing services provided by Ms. Hoff for 3 and ½ hours a week from 1/1/04 to the date of the hearing in this matter, and continuing thereafter for so long as the need for such nursing care continues to subsist.

The issue as to cost of the nursing care provided by Ms. Pendegraft and by an alternate caregiver, Ms. Reed, can be resolved because that issue does not involve a review of medical billings. The testimony persuades that the nursing care provided by Ms. Pendegraft and Ms. Reed, as documented in those sections tabbed as 17 and 18 of Claimant's Exhibit Q, was necessary and reasonable to cure or relieve of the injury. The total due from the employer, as provided in 17 and 18 of Exhibit Q, is \$31,257.05.

FUTURE MEDICAL CARE

Section 287.140.1 RSMo, provides, in part, as follows: "In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

An award of future care to cure or relieve, per section 287.140 RSMo, is not necessarily inconsistent with a finding that the claimant may have achieved maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271 (Mo.App. S.D. 1996). Further, the claimant is not obliged to present evidence of specific medical treatment or procedures that would be necessary in the future in order to receive an award for medical care. Bradshaw v. Brown Shoe Co., 660 S.W.2d 390 (Mo.App.1983). It is sufficient to show "by reasonable probability" the need for additional medical treatment as a result of the work injury. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823,828 (Mo.App. S.D. 1995).

Both parties submitted life care plans that included projections as to future medical. The employer is to provide such future medical care as necessary to cure and relieve of the effects of this paraplegia, consistent with the recommendations made by Dr. Katz per the life care plan he authored, Exhibit 2 to Employer and Insurer's Exhibit Number 3.

Both Dr. Katz and Jan Klosterman made recommendations as to modification necessary to make the home of Mr. Hoff wheelchair accessible. The courts have recognized that both home and van modifications may be necessary to allow an employee full use of a wheelchair, and that such modifications are a matter of medical necessity per Section 287.140 RSMo. Mickey v. City Wide Maintenance, 996 S.W.2d 144 (Mo.App.1999); Hall v. Fru Con Const. Corp., 46 S.W.3d 30 (Mo.App. E.D. 2001). The employer is to provide such home modification as is necessary to make the home of John Hoff wheelchair accessible, consistent with the recommendations of Jan Klosterman as contained within her testimony and cost projection, Exhibit 2 to Claimant's Exhibit H.

TEMPORARY TOTAL DISABILITY

Section 287.020.7 defines "total disability" as the "inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident". "Temporary total disability" is a judicial creation that is defined by case law and not by statute. See Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 820 (Mo.App 1995). Temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. Vinson v. Curators of Univ. of Missouri, 822 S.W.2d 504, 508 (Mo.App. 1991) In determining whether an employee is totally disabled, the main issue is whether any employer, in the usual course of business, would reasonably be expected to employ the employee in the employee's present physical condition. Brookman v. Henry Transp., 924 S.W.2d 286, 290 (Mo.App. 1996). A number of cases have acknowledged that a claimant can be totally disabled even if able to perform sporadic or light duty work. Minnick v. South Metro Fire Protection Dist., 926 S.W.2d 906, 909 (Mo.App. 1996); Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849 (Mo.App. 1995). "A nonexclusive list of other factors relevant to a claimant's employability on the open labor market includes the anticipated length of time until the claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the claimant will return to the claimant's former employment." Cooper v. Medical Center of Independence, 955S.W.2d 570, 576 (Mo.App. W.D. 1997).

An attempt to come to any definite conclusion with regard to Mr. Hoff as it relates to maximum medical progress is made difficult by the lack of any current disability evaluation by any of the physicians offering their expert testimony in the matter. Dr. Katz, the last of the experts to both perform a physical examination of Mr. Hoff and to testify in this matter,

offers no opinions or conclusions as to the claimant's current medical status. He makes it clear that his purpose is not to offer medical advice or treatment to Mr. Hoff, but rather to perform an independent medical evaluation and to prepare a life care plan.

Dr. Katz acknowledges that as of his exam of claimant on 4/06/04, claimant was participating in an ambulation program at Washington University that involves the use of a machine that assists the participant to walk. In response to questioning as to the known benefit of the program, Dr. Katz noted that the research program was investigational, and that it was unknown as to whether such assisted ambulation would change the neurological status of persons with spinal cord injury. Mr. Hoff testified that he believed his leg strength had improved as a result of his participation in the program

The parties, through their written argument submitted in the matter, provide little, if any, guidance as to their perspectives on the issue of temporary total disability. The employer chose not to address the issue at all, and the claimant requests that TTD be awarded without argument as to the merits of the claim for such benefit. The problem with that silence is that it presumes that the requisite proof has been made that claimant has yet to reach maximum medical progress, or presumes that it is self evident, based on the medical history and the testimony, that an employer, in the usual course of business, could not reasonably be expected to employ Mr. Hoff given his current physical condition.

It is certainly self evident from the medical history that Mr. Hoff was unable to work, and suffered a temporary total disability from 12/01/00, the date of his fall from the steps, until 5/8/01, the date that he was released from the nursing home. Not self-evident is the issue as to whether and to what extent thereafter further medical progress was to be expected. At some point on the road to maximum medical progress, any disability suffered by Mr. Hoff is to be deemed permanent, not temporary, in nature. The issue as to nature and extent of temporary and total disability after 5/8/01 will remain open, and a ruling held in abeyance, pending any stipulations reached by the parties as to the issue, or pending further proof.

COSTS AND COST OF RECOVERY PER SECTIONS 287.560 AND 287.203 RSMO

Section 287.203 RSMo provides for the award of "cost of recovery" to the prevailing party. The statute further provides, however, as a condition precedent to such an award, that benefits under Section 287.170 must have been provided by the employer and subsequently terminated. The employer in this matter has made no payments to Mr. Hoff under Section 287.170 RSMo. The request for cost of recovery per Section 287.203 must be denied.

Section 287.560 RSMo provides, in part, "..... if the division or the commission determines any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them."

In Phoenix v. Sandberg, Phoenix, & Von Gontard, 1998 WL 831865 (Mo.Lab.Ind.Rel.Com.), the Commission noted the similarity in rationale between claims for costs under Section 287.560 and an award of damages for frivolous appeal under Missouri Supreme Court Rule 84.19. The Commission noted, at page three, as follows:

Breshears v. Malan Oil Co., 671 S.W.2d 402, 404[3] (Mo.App.1984), states that damages for frivolous appeals are awarded with the greatest caution; the court must not chill appeals of even slight or colorable merit. Awarding damages for a frivolous appeal is a drastic and unusual remedy, reserved for those rare occasions when an appeal on its face is totally devoid of merit. O'Bar v. Nichols, 698 S.W.2d 950, 957 (Mo. App. 1985). An appeal is frivolous if it presents no justiciable question and is so readily recognizable as devoid of merit on the face of the record that there is little prospect that it can ever succeed. Papineau v. Baier, 901 S.W.2d 190, 192 (Mo.App.1995). The purpose of sanctions under Rule 84.19 is (1) to prevent congestion of appellate court dockets with meritless cases which, by their presence, contribute to delaying resolution of meritorious cases and (2) to compensate respondents for the expenses they incur in the course of defending these meritless appeals. Fravel v. Guaranty Land Title, 934 S.W.2d 23, 24 (Mo.App.1996).

The defense of the claim for benefits put forth by the employer relied on a arguable interpretation of the law and the facts as presented at hearing, and was not so devoid of merit as to be deemed unreasonable. The issue as to costs under Section 287.560 is found in favor of the employer.

This award is temporary or partial in nature, and the matter to remain open pending a request by the parties for further disposition of issues ready for adjudication.

Date: _____

Made by: _____

KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia Secret
Director
Division of Workers' Compensation