

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

Injury No.: 06-124920

Employee: Terry Hornbeck
Employer: Spectra Painting Inc.
Insurer: Allied Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge dated July 30, 2009. This Commission adopts the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the decision set forth below.

Preliminaries

Employer admits employee suffered a compensable work injury on November 9, 2006. The administrative law judge heard this matter to consider the following issues: (1) medical causation; (2) the extent of employer's liability for unpaid medical expenses; (3) whether employee is entitled to additional temporary total disability; (4) the nature and extent of permanent disability; (5) Second Injury Fund liability; (6) attorney fees and costs under § 287.203 RSMo (7) whether employee is entitled to a fifteen percent increase due to employer's violation of the Scaffolding Act; (8) whether employee is entitled to interest on unpaid temporary total disability benefits and medical expenses; and (9) dependency of employee's spouse and minor child.

The administrative law judge made the following findings: (1) employee reached maximum medical improvement on April 24, 2007; (2) employee is not entitled to unpaid medical expenses; (3) employee is not entitled to future medical treatment; (4) employee is not entitled to additional temporary total disability benefits; (5) as a result of employee's injuries sustained on November 9, 2006, he suffered permanent partial disability of 20% of the left biceps, 5% of each foot, and 2.5% of the body as a whole for lower back pain; (6) employee's injuries warrant the application of a 5% multiplicity factor; (7) employee is entitled to 42.4 weeks of permanent partial disability compensation from the Second Injury Fund; (8) employer did not violate the Scaffolding Act; and (9) employee is not entitled to attorney fees and costs.

The employee filed an Application for Review arguing that the administrative law judge erred: (1) in entering a final award on employee's claim; (2) in finding employee failed to meet his burden of proof on medical causation; (3) by applying the wrong legal standard applicable in hardship hearings brought under § 287.203 RSMo; (4) in finding employee is not entitled to past medical expenses, interest on unpaid medical expenses, and future medical care; (5) in failing to address employee's arguments regarding the proper

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average weekly wage; (6) in finding employee is not entitled to additional temporary total disability benefits and interest on past due amounts; (7) in finding employee not entitled to attorney fees and costs; (8) in finding employee is not entitled to a fifteen percent increase under § 287.120.4 RSMo for employer's violation of the Scaffolding Act; (9) in finding, alternatively, that employee is not permanently and totally disabled; and (10) in failing to find employee's spouse and dependent daughter entitled to conditional survivor benefits under § 287.230.2 RSMo.

For the reasons set forth below, the Commission reverses the conclusion of the administrative law judge that employee is not entitled to a fifteen percent enhancement under the Scaffolding Act. All other conclusions of the administrative law judge are affirmed as supplemented and modified below.

Discussion

Standard of proof in a section 203 hearing

Employee urges that the administrative law judge erred as a matter of law in applying an inappropriate standard of proof for a hardship hearing brought pursuant to § 287.203 RSMo. Upon careful reading of the award, it does appear to this Commission that the administrative law judge would require employee to provide evidence of "poor medical treatment" or "misconduct" on the part of the employer in order to prevail in a hardship hearing under § 287.203. We agree that such a burden of proof is inappropriate and is not contemplated within the law. Section 287.203 provides as follows:

Whenever the employer has provided compensation under section 287.170, 287.180 or 287.200, and terminates such compensation, the employer shall notify the employee of such termination and shall advise the employee of the reason for such termination. If the employee disputes the termination of such benefits, the employee may request a hearing before the division and the division shall set the matter for hearing within sixty days of such request and the division shall hear the matter on the date of hearing and no continuances or delays may be granted except upon a showing of good cause or by consent of the parties. The division shall render a decision within thirty days of the date of hearing. If the division or the commission determines that any proceedings have been brought, prosecuted, or defended without reasonable grounds, the division may assess the whole cost of the proceedings upon the party who brought, prosecuted, or defended them.

The purpose of the foregoing section is to provide parties a procedural device for obtaining a fast-track hearing when there are disputes regarding the cessation of medical treatment. Nowhere does the section impose upon employee the additional burden of showing "poor treatment" or "misconduct" by employer.

Employee identifies additional problems with the administrative law judge's analysis. Employee points out that the award includes considerable discussion of perceived "treatment gaps," and the procedural posture of the case (the hearing did not take place until seventeen months after the motion for hardship setting was filed). We agree with

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the employee that these factors, in the absence of any expert medical testimony relating them to the issues in dispute, are not strictly relevant to the issue of medical causation. We also note that the administrative law judge makes a medical conclusion that is not supported by any expert testimony when he suggests that the slip and fall in January 2007 caused encroachment of the L4 nerves. Finally, we note that the administrative law judge never cited the appropriate standard of proof for medical causation. Because employee's injuries occurred on November 9, 2006, this case falls under the purview of the 2005 amendments to the Missouri Workers' Compensation Law, and thus the appropriate standard of proof for medical causation is found at § 287.020.3(1) RSMo (2005)¹: "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability." We agree that the failure to identify or cite the appropriate standard of proof raises the question of whether the appropriate standard was applied.

Our supplemental opinion on the issue of medical causation, set forth immediately below, is intended to clarify the issue and to make clear that the appropriate standard of proof has been applied to employee's claim. We affirm the award of the administrative law judge because we conclude that employee failed to demonstrate that the work injury was the prevailing factor resulting in a medical condition that warranted treatment after April 2007.

Medical causation & nature and extent of disability

Employer's termination of treatment and temporary total disability benefits are vigorously disputed in this case. The parties agree that employee sustained compensable injuries when he fell from a scaffold in the course of his duties for employer on November 9, 2006. The key issue is the nature and extent of the medical condition and disability resulting from that accident. "Injury" and "accident" are defined in § 287.020 RSMo. Section 287.020.3(1) RSMo defines "injury" as an injury that arises out of and in the course of employment:

In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

If an injury by accident is compensable under the Workers' Compensation Law, we look to § 287.140.1 RSMo to determine employer's liability to provide treatment for the injury:

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.

¹ All references are to the 2005 Revised Statutes of Missouri, unless otherwise indicated.

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Given the language of the foregoing sections, employee's burden is to show that the accident of November 9, 2006, was the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required *after* April 24, 2007 (the date on which employer's treating doctors found employee to have reached maximum medical improvement). In support of his claim, employee offers the testimony of Dr. David Volarich, who performed an independent medical examination. Employer presents the testimony of treating Drs. George Paletta, Michael Chabot, and Craig Aubuchon. In addition, the parties have provided extensive treatment records relating to each of employee's claimed conditions of ill.

The administrative law judge agreed with employer's experts that employee reached maximum medical improvement as of April 24, 2007, on a finding that Dr. Volarich lacked credibility. Although we disagree with the comments and rationale of the administrative law judge for discounting the opinion of Dr. Volarich, we do agree that the opinion of Dr. Volarich does not provide a convincing basis for the award sought by employee.

With regard to the spine, Dr. Volarich's theory is that the work injury caused employee to develop lumbar syndrome (a non-specific diagnosis) secondary to aggravation of degenerative disc disease and degenerative joint disease at L3-4, L4-5, and L5-S1. Dr. Volarich also testified that employee sustained an axial compression injury when he fell, pointing to the x-rays showing a narrowing at the L5-S1 disc space. Dr. Volarich is the only doctor in this case to opine that the narrowing at L5-S1 was traumatic in origin, and we find his reasoning less than compelling. When asked whether the lumbar surgery notes provide any evidence that employee suffered an acute injury, Dr. Volarich admits that "it's too late to make an identification of an acute injury ... two and a half years down the road." Dr. Volarich also agrees that Dr. Graven, the surgeon who performed the fusion, found nothing beyond a degenerated disc at L5-S1. Dr. Volarich's ultimate causation opinion appears to be circular: "I have to go back and say that the work accident was the cause of the L5-S1 disc and his symptoms because that was the one that was identified [via discogram] as being concordant with causing his problem."

With respect to the left shoulder injury and tear of the biceps tendon, although Dr. Volarich offers his opinion as to the reasonableness of the charges for surgery, he does not explain why the surgery was reasonably required to cure the effects of the work injury. This oversight is especially glaring given the evidence that the surgery was strongly discouraged by the treating physician, Dr. Paletta, and in light of employee's 2003 left shoulder surgery and Dr. Volarich's finding that employee suffered a 30% disability of the left upper extremity prior to the work injury.

With respect to the feet, Dr. Volarich never specifically explains why employee remained in continued need of treatment for his feet after April 2007. Dr. Volarich admits that he could find no improvement in employee's heel condition in any of the treatment notes, including those following employee's resumption of treatment in October 2007; he also confirms that employee's continued complaints of pain are unusual because plantar fasciitis usually improves with time. We note that Dr. Aubuchon did initially testify that employee will remain in need of prescription orthotics for the feet as a result of the work injury. This testimony is confusing in light of Dr. Aubuchon's report dated April 24, 2007, in which he

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stated: "No amount of treatment from any provider has provided [employee] any relief. He has not improved at all with time. He states he is 'at least as bad' as he was before." Dr. Aubuchon then opined: "It is my opinion within a reasonable degree of medical certainty, there is not any further treatment that will be of benefit to this patient." We find unpersuasive that portion of Dr. Aubuchon's testimony tying a future need for orthotics to the work injury. Dr. Aubuchon did not identify the objective findings, diagnosis, or medical condition resulting from the work injury that would reasonably require future treatment in the form of orthotics. As a result, we find that Dr. Aubuchon's testimony does not establish the requisite showing that employee has a need for orthotics that "flows" from the work injury. See *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 86 (Mo. App. 2006). Rather, much like the other treating doctors in this case, Dr. Aubuchon appears to be puzzled that employee's symptoms fail to respond to any treatment. We also note that Dr. Aubuchon explained his testimony on redirect examination; Dr. Aubuchon acknowledged he could not say whether orthotics were a medical necessity because they did not appear to have any effect in alleviating employee's symptoms.

Surprisingly, given the nature of the dispute over medical causation in this case, employee did not offer testimony from any of the doctors who provided his self-directed treatment after employer's doctors released him. We have, nevertheless, carefully examined the medical records generated in connection with employee's self-directed treatment. We conclude that these records provide no support for employee's claim that he remained in need of treatment after April 2007 as a result of the work injury. Dr. Brian Martin found normal x-rays and normal articulations of the feet. Dr. Theodore Rummel found impingement syndrome of the left shoulder, but did not specify whether the impingement was related to the work injury or employee's preexisting left shoulder condition. Dr. Timothy Graven's notes identify degenerative changes with no mention of traumatic back injury. Essentially, employee asks this Commission to find that he remains in need of treatment as a result of the work injury, despite extensive treatment by six different specialists, none of whom identified the November 2006 accident as the prevailing factor causing a medical condition and disability that warranted treatment after April 2007. In support of his position, employee offers the testimony of Dr. Volarich, whose opinions suffer from the defects identified above.

We find Drs. Chabot, Paletta, and Aubuchon more credible than Dr. Volarich. We conclude that the work injury of November 9, 2006, was not the prevailing factor causing a resulting medical condition and disability for which treatment was reasonably required after April 24, 2007.

Is employee entitled to enhancement under the Scaffolding Act?

Employee argues that the administrative law judge erred in denying his claim for a fifteen percent enhancement under § 287.120.4 RSMo for employer's violation of the Scaffolding Act. We agree. Section 287.120.4 provides as follows:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

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Under the foregoing section, in order to prove his entitlement to a fifteen percent enhancement of the benefits awarded herein, employee is required to establish three elements: (1) the existence of a statute applicable to the facts surrounding the work injury; (2) the violation of that statute by employer; and (3) a causal connection between the violation and the compensable injury. *Akers v. Warson Garden Apts.*, 961 S.W.2d 50, 53 (Mo. 1998), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). Employee has identified the statute upon which he relies. Section 292.090 RSMo provides, in relevant part:

All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling therein, or the falling of such materials or articles as may be used, placed or deposited thereon.

The first question is whether the facts of this case fall within the terms of the foregoing statute. The work injury at issue in this matter took place while employee was helping paint the roofline of a building. At some point during the job, it became necessary to get on the roof. There was no extension ladder provided by employer that would have allowed employee to get on the roof, so the foreman instructed employee to erect a scaffold, and then hoist up and place an A-frame ladder atop the platform of the scaffold. The platform of the scaffold was constructed of a single board with a metal rim. The A-frame ladder was closed and leaning against the roofline. We find that these facts fall within the purview of § 292.090, because employee's task involved the use of a "scaffold or structure used in or for the ... repairing ... of any kind of building." See *Meyer v. Wells Realty & Inv. Co.*, 292 S.W. 17, 18 (Mo. 1927) (holding that "repair" means "[a] restoration to a sound state of what had gone into partial decay or dilapidation, or a bettering of what had been destroyed in part; restoring to a sound, good or complete state after decay, injury, dilapidation or partial destruction," and indicating that painting would fall within such a definition).

The second question is whether employee proved that employer violated § 292.090. In construing identical language in the predecessor version of § 292.090, the Missouri Supreme Court held that "in the absence of exculpatory showing on the part of the employer, the fall of a scaffold is prima facie evidence of negligence on the part of the employer and a violation of the statute." *Prapuolenis v. Goebel Constr. Co.*, 213 S.W. 792, 795 (Mo. 1919). We find no authority overturning this holding. Here, employee produced uncontradicted evidence that the scaffold/ladder contrivance fell. The burden shifted to employer to present exculpatory evidence. Employee testified that he was not provided with a rope, cleats, or any other means of securing the ladder to the scaffold, and that he was not provided a safety harness. Employer provided no evidence to contradict employee's testimony. Nor has employer provided any other evidence of an exculpatory nature. We conclude that employer violated § 292.090.

The final question is whether employee demonstrated a causal connection between employer's violation of the statute and the compensable work injuries. The undisputed

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evidence shows that employee sustained compensable injuries as a direct result of the collapse of the ladder and scaffold. There is no evidence that any negligence or intervening action on the part of employee caused employee's injuries. We conclude that employer's violation of § 292.090 caused employee to sustain his compensable work injuries.

Based on the foregoing, we reverse the conclusion of the administrative law judge that employee is not entitled to recovery under § 287.120.4. Employee has established the three elements requisite to an award of compensation under § 287.120.4 as set forth in *Akers, supra*. Section 287.120.4 mandates that we increase the compensation awarded by fifteen percent because employee's injuries were caused by employer's failure to comply with § 292.090.

Computation of the appropriate temporary total disability rate

Although employee argued at the hearing that employer underpaid temporary total disability benefits, the administrative law judge made no findings regarding this issue. Employee was paid by the hour and was employed by employer during the thirteen weeks immediately preceding the week in which he was injured. Section 287.250.1 RSMo provides, in relevant part, as follows:

Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows: ...

(4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for a calendar week. ...

Employer placed into evidence a document entitled "13 Week Gross Wage Statement" (hereinafter "Wage Statement.") This document indicates employee earned a total of \$13,612.66 gross pay for the thirteen weeks immediately preceding the week in which employee was injured. Divided by thirteen, this sum yields an average weekly wage of \$1047.13. This would indicate a temporary total disability rate of \$698.09. The parties stipulated that employer paid twenty-four weeks of temporary total disability. The parties also stipulated that employer paid a total of \$16,754.88 in temporary total disability benefits. This would indicate that employer paid temporary total disability benefits at a weekly rate of \$698.12 per week.

Employee failed to offer any evidence of his average weekly wage other than his testimony, which consisted merely of his estimate that his typical gross pay was "around \$1,100, I

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think.” Employee did not offer any check stubs, tax forms, or any other documentary evidence to show his weekly earnings during the applicable period. In support of his argument that employer underpaid temporary total disability benefits, employee points out that certain totals contained in the Wage Statement produce confusing results when subjected to careful analysis. For example, the document inexplicably states that employee’s gross earnings for the pay period ending November 5, 2006, were \$1,111.60, when he worked 40 hours at a wage of \$26.73 per hour. Unless some other unspecified factor was taken into account, this calculation is clearly incorrect ($\$26.73 \times 40 = \$1,069.20$, not \$1,111.60). We note that if the hourly wage of \$27.79 is substituted in place of \$26.73, the calculation produces the expected result. (Employee testified, and the administrative law judge found, that employee’s hourly wage at the time he was injured was \$27.79). The evidence is further complicated, however, by the fact that substituting \$27.79 for the other weeks does not always yield the sum listed on the Wage Statement, and because of an indication that employee received a pay raise at some point during the thirteen weeks.

In his brief, employee first argues that the Commission should find that he consistently worked forty hours per week at \$27.79 per hour, yielding an average weekly wage of \$1,111.60. In the very next paragraph, employee argues that he did not always work forty hours per week, and that the Commission should take this into account under the provision of § 287.250.1 RSMo regarding “absence of five regular or scheduled work days.” In essence, employee asks us to simultaneously disregard certain figures from the Wage Statement while adopting others in order to calculate an average weekly wage that is more favorable to employee.

Section 287.250.4 RSMo provides: “If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.”

Although it is apparent that employer’s Wage Statement omits certain data relevant to the calculation of employee’s gross weekly pay, given the circumstances and the facts presented, we conclude that the total gross wages listed on that form provides the best evidence available of employee’s gross wages during the applicable period. We find that \$698.12 is a fair and just determination of employee’s temporary total disability rate. We conclude that employer did not underpay temporary total disability benefits.

Award

We reverse the award of the administrative law judge on the issue of employee’s entitlement to a fifteen percent enhancement under § 287.120.4 RSMo due to employer’s violation of the Scaffolding Act. Accordingly, the compensation as awarded by the administrative law judge is hereby increased by fifteen percent (15%). We modify and supplement the analysis of the administrative law judge on the issue of the appropriate standard of proof under a hardship hearing brought under § 287.203, and on the issue of medical causation. We supplement the award of the administrative law

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judge with our findings on the issue of the appropriate temporary total disability rate. In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued July 30, 2009, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

We note that on September 30, 2009, employee's attorney filed a Motion to Supplement the Record. Our decision in this matter renders that Motion moot.

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

Given at Jefferson City, State of Missouri, this 21st day of September 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

SEPARATE OPINION FILED
John J. Hickey, Member

Attest:

Secretary

Employee: Terry Hornbeck

**SEPARATE OPINION
CONCURRING IN PART AND DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. While I agree with the decision of the Commission to award a fifteen percent enhancement for employer's violation of the Scaffolding Act, I dissent from the majority's decision to affirm the remainder of the award.

The parties dispute nearly every element of employee's claim. The key issue, however, is medical causation, and I agree that the administrative law judge complicated the resolution of this matter by applying an inappropriate standard of proof to employee's claim solely because it was heard in the context of a hardship hearing brought pursuant to § 287.203 RSMo. Rather than cite and apply the appropriate "prevailing factor" standard of proof under § 287.020.3(1) RSMo, the administrative law judge appeared to apply standards of proof of his own creation, requiring employee to show that employer committed "misconduct" in providing treatment, or that its management of its duty to provide treatment was "improper." These standards are not found anywhere in Chapter 287 or in any of the cases construing the Missouri Workers' Compensation Law. The administrative law judge also went outside the scope of the medical evidence and used the procedural posture of the case as a basis for denying employee benefits, on the mistaken belief that employee should be penalized because the hardship hearing was continued several times.

There is no dispute that employee suffered multiple work-related injuries on November 9, 2006. There is no dispute that these injuries are compensable. Nevertheless, employee was forced to bring a hardship hearing in this case because employer's doctors released him from treatment even though he continued to experience disabling levels of pain in his left shoulder, low back, and feet. On the issue of medical treatment, § 287.140.1 RSMo states: "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." In cases where a cure is not possible, employer's duty to provide care extends to treatment designed merely to give "comfort or relief from pain." *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007). This is because "[a]n employer's duty to provide statutorily-required medical aid to an employee is absolute and unqualified." *Id.*

On November 9, 2006, employee was performing his duties for employer when the scaffold he was standing on collapsed. Employee fell approximately eight to ten feet onto a concrete surface. Employee testified that he landed on his feet, "folded up like an accordion," and then fell onto his left side. Employee experienced immediate pain in his feet, left shoulder, and back. At St. Louis Hospital, x-rays revealed a narrowing of the L5-S1 disc space. Employee was taken off work and prescribed medications. On November 13, 2006, an MRI of the lumbar spine revealed bulging discs at L4-5 and L5-S1; employee complained of back pain radiating into his legs. On November 15, 2006, an MRI of the right shoulder revealed a partial tear of the long head of the facets

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tendon, tendinopathy of the supraspinatus tendon, and deformity of the distal clavicle with small bony fragments in the region of the AC joint.

Before November 9, 2006, employee had no complaints and did not seek any treatment for his lower back, legs, or feet. Employee had previously injured his left shoulder on two separate occasions in May 2003 and May 2000, but after treatment for those injuries he was able to use his left arm for work and did not experience the daily disabling pain that accompanied any movement of his left arm following the work injury. Employee experienced headaches and blurred vision following the work injury. He also became anxious and depressed; his treating doctors prescribed Lexapro and Xanax for these conditions.

Employer sent employee to Dr. Paletta from November 15, 2006, through March 28, 2007. At the first examination on November 15, 2006, employee complained of lower back pain with radiation into his buttocks, tightness down his legs, left shoulder pain and difficulty of movement, bilateral heel pain, and difficulty walking. Dr. Paletta's course of treatment included physical therapy for the shoulder and low back, and heel cups for the feet. None of these measures were effective in relieving employee's disabling pain. Dr. Paletta eventually made up his mind that employee's pain complaints were out of proportion with objective findings. Employee testified that he did "jerk away" from Dr. Paletta on examination of the left shoulder, but this was because the doctor pulled his left arm up sharply during the first examination, causing intense pain. Dr. Paletta opined that employee suffered a 5% permanent partial disability of the left shoulder as a result of the work injury.

Employer next sent employee to Dr. Chabot on February 7, 2007. Dr. Chabot diagnosed hip pain, trochanteric bursitis, back strain, and heel contusions. Dr. Chabot's course of treatment included Kenalog and Marcaine injections for the left greater trochanteric bursa. Dr. Chabot also recommended pain and anti-inflammatory medications and physical therapy for the low back. These measures were ineffective in relieving employee's symptoms. Like Dr. Paletta, Dr. Chabot eventually came to regard employee's condition as "symptom magnification." Dr. Chabot released employee with no further treatment recommendations for his back as of April 2, 2007. Dr. Chabot opined that employee could return to work without restrictions, even though employee continued to experience disabling lower back pain with radiation into his lower extremities. Dr. Chabot opined that employee suffered a 2% permanent partial disability of the body as a whole referable to low back pain as a result of the work injury.

Employer finally sent employee to Dr. Aubuchon for his feet complaints on March 13, 2007. It should be noted that, despite employee's well-documented complaints regarding both feet immediately after the work injury, employer did not send employee to a foot specialist until approximately four months later. Dr. Aubuchon diagnosed traumatic contusions of the heel pads and recommended orthotics and physical therapy. The orthotics helped, but they did not solve employee's problem. Dr. Aubuchon took the same course as Drs. Paletta and Chabot: he essentially threw up his hands and sent employee back to work. Dr. Aubuchon recommended employee continue home exercise and the use of orthotics and anti-inflammatory medications. Dr. Aubuchon also opined that employee would remain in need

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of future medical care in the form of periodic examinations and replacement of his orthotics every two to three years. Dr. Aubuchon opined that employee suffered a 3% permanent partial disability of the bilateral heel pads as a result of the work injury.

After employer's doctors released him, employee attempted to return to work as a painter/taper for Knaust Drywall in May 2007. Employee tried this job for two to three weeks but was never able to put in a full week because the pain in his feet, back, and left shoulder caused him to be miserable. Employee had to lie down and take frequent breaks on the jobsite. Employee was unable to sleep at night. Employee eventually called his boss and told him he couldn't perform his job in his condition. Employee has not worked since May 2007.

Employee sought treatment on his own from Drs. Rummel, Martin, and Graven. Dr. Rummel performed left shoulder surgery on December 26, 2007; employee testified that Dr. Rummel's treatment relieved the sharpness of pain and the intense ache that he experienced in his left shoulder following the work injury. Dr. Martin exchanged employee's heel pads, prescribed a Medrol Dosepak and injections, provided employee with a brace, and restricted employee from high impact activities; employee testified that Dr. Martin's treatment helped his feet but that he continues to experience problems. After concluding that non-operative treatment had failed to relieve employee's back pain and radicular symptoms, Dr. Graven performed an anterior discectomy and fusion surgery at the L5-S1 level. At the time of trial, employee had not yet been released from Dr. Graven's post-operative care.

The majority agrees with employer's doctors that employee reached maximum medical improvement as of April 24, 2007. I disagree with the majority's determination. I find Dr. Volarich's opinion more credible as to whether employee remained in need of treatment after April 2007. Dr. Volarich explained that employee's ongoing need for back treatment was due to employee suffering an axial compression injury of the lumbar spine when he fell. Contrary to the findings of the majority, Dr. Volarich's opinion is amply corroborated by the objective medical evidence on record. For example, Dr. Volarich's testimony that employee suffered an axial compression injury is corroborated by x-rays taken immediately after the work injury, which showed a narrowing of the L5-S1 disc space. When he examined employee, Dr. Volarich found a trigger point at the S1 level, which he described as "[A]n objective finding on physical exam ... an irritation in the area of the muscle, soft tissues." Dr. Volarich also found atrophy of 1 cm in employee's left thigh and explained that this is evidence of impingement of the L5 nerve. The discogram of December 2008 also corroborated Dr. Volarich's diagnosis of L5 radiculopathy at the L4-5 level. The diagnosis of post-injury radiculopathy is especially important because there is no evidence that employee suffered radicular symptoms prior to the work injury of November 9, 2006. The earliest treatment records following the work injury make consistent mention of radicular-type complaints. It is also uncontested that employee had no problems with his feet before the work injury, and that he did not experience disabling pain in his left shoulder until after the work injury. Dr. Volarich's opinion provides the most logical and credible explanation for employee's medical conditions and disabilities.

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I am convinced that employee met his burden of proof on the issue of medical causation. I conclude that the accident of November 9, 2006, was the prevailing factor causing employee's medical conditions and disabilities warranting continued treatment after employer's doctors released him from their care in April 2007. I would also credit Dr. Volarich's testimony that the medical treatment employee received after employer's doctors released him was reasonable and necessary to cure and alleviate the effects of employee's work injury, and that the treatment met the appropriate standard of medical care. Where an employer has notice that the employee is in need of medical care but refuses to provide it, "the employee may select his or her own medical provider and hold the employer liable for the costs thereof." *Martin*, 220 S.W.3d at 844. Here, because employer had notice that employee remained in need of treatment after April 2007, and because employer refused to provide that treatment, I would award employee his past medical expenses. Because employee credibly testified that his disabilities caused him to be unable to work after May 2007, I would also award temporary total disability payments throughout the relevant period.

As for future medical care, I would credit Dr. Volarich and find that employee remains in need of medical care as a result of his injuries sustained on November 9, 2006. Specifically on the issue of future medical treatment for employee's feet, I note that the administrative law judge incorrectly found that Dr. Aubuchon released employee with no further treatment recommendations. This finding is directly contrary to Dr. Aubuchon's testimony. Dr. Aubuchon opined that employee should be examined by a physician and that his orthotics will need to be replaced every two to three years. I disagree with the majority's reading of Dr. Aubuchon's opinion, and conclude that Dr. Aubuchon's testimony mandates an award of future medical care from the employer.

Given the foregoing, I conclude that employee did not reach maximum medical improvement in April 2007. I find that employee is entitled to receive the costs of the reasonable and necessary medical expenses he incurred through the date of trial. I find that employee remains temporarily totally disabled and in immediate need of medical care to cure and relieve the effects of the work injuries sustained on November 9, 2006. Because the evidence shows that employee has not yet reached maximum medical improvement, I would enter a temporary award under § 287.203 RSMo and order that the award be kept open until a final award can be made.

Because the majority has determined otherwise, I respectfully dissent.

John J. Hickey, Member