

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

Injury No. 11-107791

Employee: Kabura Jack
Employer: Triumph Foods, LLC
Insurer: Travelers Indemnity Company of America

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 10, 2015, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert B. Miner, issued December 10, 2015, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 15th day of April 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Kabura Jack

Injury No.: 11-107791

Employer: Triumph Foods, LLC

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

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Insurer: Travelers Indemnity Co. of America

Hearing Date: September 10, 2015

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Cumulative to November 17, 2011.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee repetitively cut meat with his right upper extremity using a Wizard knife.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Right upper extremity.
14. Nature and extent of any permanent disability: None.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? N/A.
18. Employee's average weekly wages: \$622.18.
19. Weekly compensation rate: \$414.80 for temporary total disability and \$414.80 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable: None. Employee's claim against Employer is denied.

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

No weeks of disfigurement.

No weeks of permanent partial disability from Employer.

Claimant's request for additional medical aid is denied.

TOTAL FROM EMPLOYER: None.

22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.
23. Future requirements awarded: None.

No attorney's fee is awarded to the claimant's attorney.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Kabura Jack

Injury No.: 11-107791

Employer: Triumph Foods, LLC

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

Before the
**Division of Workers'
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PRELIMINARIES

A hearing was held in this case on Employee's claim against Employer on September 10, 2015 in St. Joseph, Missouri. Employee, Kabura Jack, appeared in person and by his attorney, Angela Trimble. Employer, Triumph Foods, LLC, and Insurer, Travelers Indemnity Co. of America, appeared by their attorney, John D. Jurcyk. Interpreter, Joshua Nyaundi, also appeared. The Second Injury Fund did not appear. Angela Trimble requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-hearing briefs would be due on September 24, 2015.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about November 17, 2011, Kabura Jack ("Claimant") was an employee of Triumph Foods, LLC ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about November 17, 2011, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Travelers Indemnity Co. of America ("Insurer").
3. Employer had notice of Claimant's alleged injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.

5. The average weekly wage was \$622.18, the rate of compensation for temporary total disability is \$414.80 per week, and the rate of compensation for permanent partial disability is \$414.80 per week.

6. No compensation has been paid by Employer for temporary disability.

7. No medical aid has been paid or furnished by Employer.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Did Claimant sustain an injury by accident or occupational disease on or about November 17, 2011 arising out of and in the course of his employment for Employer?

2. Is Claimant's current condition medically causally related to the alleged work injury of November 17, 2011?

3. What is Employer's liability, if any, for additional medical aid?

4. What is Employer's liability, if any, for permanent partial disability benefits in the event it is determined that Claimant is at maximum medical improvement?

Claimant testified in person. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

A—Medical report of Dr. Edward Prostic with Dr. Prostic's Curriculum Vitae

B—Medical report of Dr. Edward Prostic

Employer offered the following exhibit which was admitted in evidence without objection:

1—Medical report of Dr. Everett Wilkinson with Dr. Wilkinson's Curriculum Vitae

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

At the beginning of the hearing, the attorneys for the parties announced their agreement that a final Award should be issued in the event it is determined that Claimant

sustained a compensable injury and Claimant is at maximum medical improvement. The attorneys for the parties further announced their agreement that a Temporary Award should be issued in the event it is determined that Claimant sustained a compensable injury and Claimant is not at maximum medical improvement. The attorneys further announced their agreement that in the event it is determined that Claimant did not sustain a compensable injury, the Award will be a final Award.

The Post-Hearing Briefs have been considered.

Findings of Fact

Claimant's Testimony

Claimant testified he started working for Employer in June 2010. He used a wizard knife in his right hand to remove fat from meat.

Claimant began to have problems with his right hand in February 2011. His right hand swelled and locked. He had pain from his right hand to his right shoulder. The problems came on over time.

Claimant did not have those problems with his right hand and arm before the time he worked for Employer.

Claimant testified he told Employer's Health Services Department most of the time when he had complaints in his right hand and right arm. He stated he went to Health Services most every day. Health Services put ice and Biofreeze on his arm. That treatment did not help him much. Employer did not send Claimant to a doctor for his right arm other than Health Services.

Employer put Claimant on a different job where he did not use a wizard knife for only one day. The next day Employer put him back on the job where he was required to use the wizard knife.

Claimant was terminated by Employer in November 2011.

Claimant testified he had pain continuously from February 2011 until the last day he worked for Employer.

Claimant went to his own doctor, Dr. Prostic, two times. He first saw Dr. Prostic on March 30, 2012, as noted in Exhibit A. The second time he saw Dr. Prostic was on October 6, 2014, as noted in Exhibit B. Claimant told Dr. Prostic all of his complaints. His sister, who speaks English, was with him at the time. Dr. Prostic recommended

treatment for Claimant on October 6, 2014. Claimant testified he took a paper from Dr. Prostic to Employer.

Claimant understood what Dr. Prostic's reports said. Claimant discussed those reports with his attorney.

Claimant testified that he currently has pain from his right shoulder to the end of his right hand. He does not sleep well at night due to pain in his right shoulder, right arm, left elbow, and left arm to the index finger of his left hand.

Claimant testified that he had left arm symptoms that started when he worked at Employer. He stated he had swelling and tingling in his right hand.

Claimant did not have a job from the time he left Employer in November 2011 until he started his new job, about two years after he left Employer. He did not notice any difference in his hands during the two years when he did not work.

Ointment prescribed by Dr. Prostic did not help him. Claimant does not use the ointment anymore because it does not help.

Claimant tried to buy medicine from Africa to help his hands, but he could not afford it. He takes no other medication.

Claimant is currently working at La Costa putting bottles on a line. He has had his current job for about one year. He collects bottles and puts them on a production line in his current job. The bottles come in a box. He takes bottles out of the box and puts them on the line. He reaches and picks up bottles with both hands. He lifts one or two bottles at a time. He does the same work all day long. He works eight hours per day. He described his current job as "easy."

Claimant is allowed to take breaks as needed at his current job. On an average day, he takes breaks six times. His breaks last between five and ten minutes each. He did not report a new injury at La Costa. He wants to quit his job due to pain.

An interpreter was present when Claimant saw Dr. Wilkinson. He told Dr. Wilkinson all of his complaints. Dr. Wilkinson mentioned pain in Claimant's hips and legs.

Claimant wants the workers' compensation insurer to pay for what Dr. Prostic recommends.

I find this testimony of Claimant to be credible unless otherwise discussed later in this Award.

Medical Evidence

Dr. Edward Prostic Evaluations

Dr. Edward Prostic examined Claimant on two occasions. His reports are addressed to Claimant's attorneys. Claimant was first examined by Dr. Prostic on March 30, 2012. Dr. Prostic's March 30, 2012 report states Claimant reported progressive difficulties with his right hand with pain about the thumb and difficulty opening his fingers. Claimant reported pain predominately on the palm side ulnarly but also about the wrist. Dr. Prostic noted Claimant had what seemed like a triggering as he tried to open his fingers.

Dr. Prostic noted the Tinel's test was negative at the wrist as well as flexion compression median nerve testing of the right wrist. Wrist strength was noted to be satisfactory. Grip was noted to be 12 kg on the right compared to 33 kg on the left. Dr. Prostic noted two-point sensory discrimination was significantly decreased to the ring finger and poor to the little finger. There was negative Tinel test at the elbow with worsening symptoms with flexion compression ulnar nerve testing at the elbow. Dr. Prostic noted that there were obvious flexor tendon nodules at the A1 pulleys of the long, ring and little fingers with mild tenderness with no triggering.

Dr. Prostic's March 30, 2012 report states in part:

COMMENT:

During the course of his employment at Triumph Foods, Kabura Jack sustained repetitious minor trauma. At his right upper extremity, he appears to have cubital tunnel and stenosing tenosynovitis of the long, ring, and little fingers. He should be sent for an EMG. If it confirms cubital tunnel syndrome, decompressive surgery should be provided. For his hand, he should have tendon sheath injections and consideration of occupational therapy. The source of his chest symptoms is not clear to me at this time because of difficulty in taking the history. It is suggested that he be placed on a [sic] medicines appropriate for GERD. If the chest symptoms disappear, no other investigation will be required for the chest pain. The work-related activity at Triumph Foods is the prevailing factor in the right upper extremity symptoms.

The opinions reached are within reasonable medical certainty.

Dr. Prostic's Supplementary Medical Report dated October 6, 2014 states:

Mr. Jack returns for re-evaluation of work-related injury sustained at Triumph Foods. He was seen by me March 30, 2012. Since that time, he has had no significant additional treatment. He did not return to work for Triumph Foods. He has been doing part-time work at a factory where he is doing relatively light work moving bottles. He denies injury at the new employer.

The patient denies new injuries or new health problems.

The patient continues to be bothered by pain at both hands. He points up the dorsum of the thumbs and index and long fingers. He has weakness of grip. He has some difficulty sleeping. He is not currently taking medicine.

Physical examination reveals no heat, swelling, erythema, or atrophy. There is full range of motion and good stability of all joints. There is negative Tinel testing at each wrist. Flexion compression median nerve testing causes what the patient reports his [*sic*] "coldness" of his hands. He has decreased power of pinch and grip bilaterally. Maximum grip is 36 kg on the right compared to 28 kg on the left. Two-point sensory discrimination is decreased in the long and ring fingers of the right hand and of the index, long, and ring fingers of the left hand. Testing for basal joint disease, flexor tenosynovitis, and deQuervain's disease is within normal limits.

COMMENT:

During the course of his employment at Triumph Foods, Kabura Jack sustained repetitious minor trauma. Presently, he does not have physical evidence of stenosing tenosynovitis. He does appear to have bilateral carpal tunnel syndrome. He should have an EMG to guide further treatment. As he is, permanent partial disability is rated at 10% of each upper extremity. The repetitive minor trauma while working for Triumph Foods is the prevailing factor in the injuries, the medical conditions, the need for medical treatment, and the resulting disability or impairment.

Dr. Everett Wilkinson Evaluation

Dr. Everett Wilkinson examined Claimant on August 14, 2015. Dr. Wilkinson's August 18, 2015 report addressed to Employer's attorney notes Claimant reported he was a meat cutter for Employer and trimmed fat off the meat using a manual knife. Claimant told Dr. Wilkinson that around August of 2011, he reported to his Employer's health service department with complaints of pain that had begun in May of that year. Claimant reported that he worked for a new Employer, Costa, and currently had problems with both upper extremity pain from the fingertips all the way to the shoulders. Claimant stated that the pain was on the dorsum of the fingertips on the dorsal aspect of the hand and sometimes the volar aspect of the hand all of the way up to the shoulder.

Dr. Wilkinson's August 18, 2015 report states in part:

Physical examination of the patient, patient does state that there is diffuse tenderness throughout the complete examination no matter what portion of the upper extremities are examined. He also has some pain even with motion of the lower extremities, although this was a very limited exam due to the fact that this is not part of the complaints for the patient. However, it should be noted that he did state that he was having some mild pain even with flexion and extension of the hips and knees. Physical examination of the upper extremities are [*sic*] equal in regards to forward elevation, abduction, internal and external rotation of the shoulders. There are no signs of impingement. No signs of tendonitis. No signs of weakness testing right versus left and the deep tendon reflexes are intact to the upper extremities and the skin is intact. There is no desensitization in the medial and ulnar distributions of the upper extremities and those are equal bilaterally. There is a negative Tinel's at the elbow, negative Tinel's at the wrist bilaterally. There is no thenar or hypothenar atrophy. There is no atrophy of the musculature of the upper extremity, more specifically the volar or dorsal compartments. There is no diffuse swelling about any of the joints of the upper extremity. He has full flexion and extension of the elbow. He has full supination and pronation. He has full dorsiflexion, palmer flexion, radial and ulnar deviation of the wrists. He has full range of motion of the MCP, PIP and DIP joints of the digits 2 through 5, full range of motion of the MCP and IP joint of that thumb and no pain or problems with range of motion of the CMC joint. No signs of stenosing tenosynovitis of the first dorsal compartment. There is no pain with palpation of the A1 pulleys of any of the digits of the hand. No signs of stenosing tenosynovitis. It

should be noted again during the examination that the patient states that he does complain of discomfort with any motion.

.....

IMPRESSION: bilateral upper extremity subjective pain.

PLAN: At this time, I have reviewed the patient's history and have gone over the reports for Mr. Jack. The reports from Dr. Prostic were reviewed as well as evaluations from the Health Services Department. Currently there are no objective findings that there is [*sic*] any significant deficits in regards to range of motion, strength or any other abnormalities of the upper extremities at this point. While the patient does complain of pain with any type of examination that also is occurring the in the lower extremities as stated before. I do not see any specific report nor did the patient tell me about any specific incident at work. However, due to the documentation it is noted that this appears to be more of a chronic minor repetitive trauma type of injury.

I do not believe that the patient sustained any significant injury of the upper extremities. No signs or symptoms of carpal tunnel, cubital tunnel, stenosing tenosynovitis of the first dorsal compartments or any of the digits of the hands. There is no significant problems with him in regard to strength as he is slightly stronger with grip and pinch on the right versus the left which is normal for a right hand dominant male. I do not see any atrophy or any other signs of symptoms of inflammation at all. I will therefore state that this patient definitely has subjective complaints. However, has no objective findings. I therefore would rate him at a 0% disability bilateral upper extremities.

I therefore do not believe the patient needs any further work up or further diagnostic studies. I also believe that he does not need any further treatment in regards to nonsteroidal anti-inflammatory medications or any type of physical therapy and certainly no surgical intervention is needed. I do not see any other treatments needed in the future. I do believe his prognosis is excellent due to the fact that the patient continues in a manual labor job and appears to be ongoing without any difficulty at all. I would again believe he has reached maximum medical improvement and has 0% disability in regard to his ongoing complaints.

Rulings of Law

Based on the substantial and competent evidence, the stipulations of the parties, and the application of the Workers' Compensation Law, I make the following Rulings of Law:

1. Did Claimant sustain an injury by accident or occupational disease arising out of and in the course of his employment for Employer on or about November 17, 2011?

Section 287.800, RSMo¹ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3, RSMo provides in part:

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. An injury by

¹ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

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.

(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 accident is the prevailing factor in causing the injury; and

(b) 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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.067.1, RSMo provides:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo provides:

2. An injury by occupational disease is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused

by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3, RSMo provides:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.063.1, RSMo provides:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 228 (Mo.banc 2003)²; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987).

²Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992)), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 229 (Mo. banc 2003); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. *Cardwell v.*

Treasurer of State of Missouri, 249 S.W.3d 902, 907 (Mo.App. 2008), citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 2012 WL 1931223 (Mo. banc 2012) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950)).

“In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim.” *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990).

8 CSR 50–2.010(14) states in part, “Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.” Such stipulations “are controlling and conclusive, and the courts are bound to enforce them.” *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 2012 WL 1319428 (Mo.App. 2012) (citing *Boyer v. Nat'l Express Co.*, 29 S.W.3d 700, 705 (Mo.App. 2001)).

Claimant described his repetitive work activities for Employer before his alleged November 17, 2011 right upper extremity injury. Claimant repetitively and continuously cut meat with a wizard knife using his right hand. I find Claimant's description of his work activities at Employer to be accurate and true.

Claimant testified he told Employer of his right hand complaints. I believe this testimony. Claimant was sent to Employer's Heath Services Department for treatment of his right hand complaints.

Dr. Prostic stated that during the course of his employment at Employer, Claimant sustained repetitious minor trauma and the repetitive minor trauma while working for Employer is the prevailing factor in the injuries. Dr. Wilkinson stated that this appears to be more of a chronic minor repetitive trauma type of injury.

I believe and find that Claimant's occupational exposure and repetitive work activities for Employer was the prevailing factor in causing a minor repetitive injury to his right hand.

I find that the credible evidence establishes that Claimant sustained an injury to his right hand which resulted from repeated and constant exposure to hazards he encountered in Employer's workplace.

Based on the competent and substantial evidence, I find and conclude Claimant's November 17, 2011 occupational disease was the prevailing factor in causing a minor repetitive injury to his right hand and the need for the past medical treatment he has received for the injury at Employer's Health Services Department. I find that Claimant was exposed to a risk that was greater than and different from that which affects the public generally. I find and conclude Claimant sustained a minor repetitive injury to his right hand on November 17, 2011 by occupational disease arising out of and in the course of his employment in this case.

2. Is Claimant's current condition medically causally related to the alleged work injury of November 17, 2011? and 3. What is Employer's liability, if any, for additional medical aid?

Claimant is requesting an award of additional medical aid for his upper extremities. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under Section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995);

Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo.App. 1995). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Farmer*, 257 S.W.3d at 197; *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. 2006). Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. *Id*; *Tillotson*, 47 S.W.3d 519.

The court in *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 2011 WL 2313691 (Mo.App. 2011) states at 524:

To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that, because of her work-related injury, future medical treatment will be necessary. A claimant need not show evidence of the specific nature of the treatment required. *Id*.

The court in *Tillotson* also states at 525:

In summary, we conclude that once the Commission found that *Tillotson* suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

The court in *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466 (Mo. App. 2012)

states at 472-73:

Based upon the plain language of this statute [discussing section 287.02.2-3, RSMo] Claimant was not entitled to compensation unless he proved that: (1) he suffered an accidental work-related injury; and (2) the accident was the prevailing factor in causing both the resulting medical condition and disability. *See, e.g., Bond v. Site Line Surveying*, 322 S.W.3d 165, 170–71 (Mo.App.2010). The Commission correctly used that legal standard in determining that Claimant did not sustain a compensable injury on May 12, 2010 because the accident was not the prevailing factor in causing both his resulting medical condition and disability. As we noted in *Jordan v. USF Holland Motor Freight, Inc.*, 383 S.W.3d 93, 95 n. 4 (Mo.App.2012), there is a material distinction between determining whether a compensable injury has occurred and determining what medical treatment is required to treat a compensable injury. *Id.* *Tillotson* addressed the latter, while Claimant's case involves the former. *See id.* Thus, *Tillotson* does not support Claimant's argument. Claimant's point is therefore denied.

See also, EMPLOYEE: PAMELA BERTELS, EMPLOYER: HOUGHTON MIFFLIN HARCOURT PUBLISHING COMPANY, INSURER: AMERICAN INTERNATIONAL GROUP, INC., Injury No. 09-072091, Labor and Industrial Relations Commission, April 14, 2015, where the Commission states:

Notably, the parties did not specifically stipulate the particular medical conditions or disabilities resulting from the accident of August 6, 2009. fn1 In her brief and at oral argument, employee failed to explain how we are to resolve the issue of what medical treatment flows from her stipulated injury by accident without resolving the conflicting expert medical opinions as to the question what particular medical conditions resulted from that accident. As recognized by the court in *Armstrong v. Tetra Pak, Inc.*, 391 S.W.3d 466 (Mo. App. 2012), the *Tillotson* decision does not relieve an employee from the burden of proving that an accident was the prevailing factor in causing the resulting medical conditions and disability (i.e. the particular injuries) for which the employee claims compensation. *Id.* at 471. Even where an employee is shown to have suffered an injury by accident, there may remain legitimate disputes regarding the particular medical conditions and disabilities resulting from the accident. *Id.* at 472-73. The *Armstrong* court made clear that, in such cases, it is

appropriate to apply the standard for medical causation of a compensable injury set for in [section symbol] 287.020.3 RSMo. *Id.*

fn1. Section 287.020.3(1) provides that “[a]n injury by accident is *compensable* only if the accident was the prevailing factor in causing both the resulting medical condition and disability” (emphasis added).

Based on the competent and substantial evidence, I find and conclude Claimant has failed to prove his current condition is causally related to the alleged November 17, 2011 right upper extremity injury. I also find and conclude Claimant has failed to prove he needs additional medical treatment as a result of the alleged November 17, 2011 right upper extremity injury. These conclusions are supported by the competent and substantial evidence including the following.

Claimant continues to have right and left upper extremity pain. He wants further medical treatment for his upper extremities. Claimant’s complaints are subjective. They have not been documented by objective testing. Claimant has had no treatment for his upper extremities since he last worked for Employer in November 2011. He does not take any medication for his condition. He performs full-time repetitive upper extremity work for a subsequent employer without any restrictions.

Claimant described repetitive work with only the right hand for Employer up to the time of this alleged injury. The Court takes administrative notice that Claimant’s Claim for Compensation and Amended Claim for Compensation against Employer only allege an injury to the right upper extremity. There is no persuasive evidence that the work Claimant described could have caused injury to his left upper extremity. At the time Claimant first saw Dr. Prostic in 2012, he did not have any complaints of pain or discomfort in the left upper extremity. Dr. Prostic diagnosed stenosing tenosynovitis³ of the long and ring finger of the right hand and a possible cubital tunnel syndrome of the right upper extremity.

I find and conclude Claimant failed to prove that he sustained an injury to his left upper extremity arising out of and in the course of his employment for Employer.

Dr. Prostic’s October 6, 2014 report states Claimant appears to have bilateral carpal tunnel. Dr. Prostic recommends an EMG to guide further treatment. It is Dr. Prostic’s opinion that the repetitive minor trauma while working for Employer is the

³ “Stenosing tenosynovitis” is defined as “inflammation of a tendon and its sheath resulting in contracture of the sheath causing an obstruction of tendon gliding; can be a cause of trigger finger conditions.” *Stedman’s Medical Dictionary (28th Edition)*.

prevailing factor in the injuries, the medical conditions, the need for medical treatment, and the resulting disability or impairment. I find these opinions of Dr. Prostic are not credible or persuasive.

On March 30, 2012, Dr. Prostic diagnosed right cubital syndrome and tenosynovitis. On October 6, 2014, nearly three years after Claimant last worked for Employer, and while Claimant was doing repetitive work with his upper extremities for a different Employer, Dr. Prostic noted Claimant reported pain in both upper extremities. However, on October 6, 2014 Claimant did not have physical evidence of stenosing tenosynovitis, the condition Dr. Prostic diagnosed in 2012. There was also no evidence of cubital tunnel syndrome. Dr. Prostic noted in 2014 that Claimant appeared to have bilateral carpal tunnel syndrome, a condition he did not diagnose in 2012.

Dr. Prostic does not convincingly explain how Claimant's work for Employer could have caused the carpal tunnel condition he diagnosed in 2014 when Claimant did not have carpal tunnel in 2012, and Claimant had not worked for Employer since 2011.

Claimant testified that at the time of the hearing in this case he had a job with a subsequent employer repetitively handling bottles for eight hours a day with some breaks. His progressive symptoms of bilateral lower extremity pain cannot be explained by his work at Employer. There is no evidence that Claimant has had any restrictions while working for his subsequent employer.

Dr. Wilkinson does not believe Claimant sustained any significant injury of the upper extremities. He found no signs or symptoms of carpal tunnel, cubital tunnel, stenosing tenosynovitis of the first dorsal compartments or any of the digits of the hands. He found no significant problems in regard to hand strength, as Claimant was slightly stronger with grip and pinch on the right versus the left. He did not see any atrophy or any other signs of symptoms of inflammation. He stated Claimant has subjective complaints, but he has no objective findings.

Dr. Wilkinson does not believe Claimant needs any further work up or further diagnostic studies. He believes Claimant does not need any further treatment in regards to nonsteroidal anti-inflammatory medications or any type of physical therapy or surgical intervention. He does not see any other treatments needed in the future. He believes Claimant's prognosis is excellent due to the fact that Claimant continues in a manual labor job and appears to be ongoing without any difficulty at all. Dr. Wilkinson believes Claimant has reached maximum medical improvement. I find these opinions of Dr. Wilkinson are credible and persuasive.

Claimant did not offer evidence from a treating physician who recommends any more treatment for Claimant. Claimant has not presented persuasive evidence of a

present need for treatment from a qualified treating physician who has offered to provide further treatment for Claimant for an injury occurring on or about November 17, 2011.

I find the opinions of Dr. Wilkinson are more persuasive than the opinions of Dr. Prostic regarding whether Claimant needs any additional treatment for any injury allegedly sustained while working for Employer. Dr. Wilkinson examined Claimant more recently than Dr. Prostic. There is no objective evidence of a current medical condition caused by Claimant's work for Employer. Claimant has worked for more than one year at a different Employer doing repetitive work with his upper extremities. Dr. Wilkinson noted Claimant complained of pain in his upper extremities and also his lower extremities. Claimant's Claim for Compensation in this case only alleges a right upper extremity injury. Dr. Wilkinson noted Claimant's right grip strength was greater than his left. Further, Dr. Prostic does not explain how Claimant's work for Employer (that ended in November 2011) could have caused the carpal tunnel condition he diagnosed in 2014, when Claimant did not have carpal tunnel in 2012.

I find Claimant has been thoroughly evaluated by a qualified physician who has determined that Claimant is at maximum medical improvement.

I find Claimant's claim that he sustained an upper extremity injury on or about November 17, 2011 that presently requires treatment is not adequately supported by the credible medical evidence.

I find and conclude Claimant does not need any further work up or further diagnostic studies. I find and conclude Claimant does not need any further treatment in regards to nonsteroidal anti-inflammatory medications or any type of physical therapy or surgical intervention. I find and conclude Claimant does not need any other treatments in the future relating to his upper extremity condition.

I find and conclude Claimant has reached maximum medical improvement in connection with his upper extremity condition.

I find and conclude that Claimant's current medical condition is not causally related to the November 17, 2011 injury.

The Administrative Law Judge notes that Claimant did not appear to be in pain during the hearing in this case. The Administrative Law Judge did not observe Claimant grimace, squirm, or ask for a break during the hearing in this case.

Claimant has the burden of proof based upon reasonable degree of medical certainty that the need for treatment flows from the November 17, 2011 work accident. I find and conclude that convincing evidence of that was not presented in this case.

I find Claimant has failed to provide convincing evidence that he needs additional treatment in this case. I find Claimant has failed to sustain his burden to prove that he is entitled to an award for additional medical care in this case. Claimant's request for additional medical aid is denied.

4. *What is Employer's liability, if any, for permanent partial disability benefits in the event it is determined that Claimant is at maximum medical improvement?*

Section 287.190.6(2), RSMo provides:

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

The Court in *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo. App. 2001) states at 626-627:

In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. *Hunsperger v. Poole Truck Lines, Inc.*, 886 S.W.2d 656, 658 (Mo.App.1994) (citations omitted). Thus, the appellant had the burden of proving to a reasonable probability an injury to his lumbar spine which entitled him to a PPD rating thereon. *Cooper v. Med. Ctr. of Independence*, 955 S.W.2d 570, 574-75 (Mo.App.1997).

I believe and find Claimant had ongoing right hand complaints while working for Employer, and that he has had subjective right hand complaints since he left Employer. However, I do not believe Claimant's testimony regarding the nature and severity of his upper extremity complaints.

Claimant has not received treatment for his upper extremities. He is not taking medication for his upper extremities. He does not have objective medical findings. He continues to work for a subsequent employer repetitively using his upper extremities.

As discussed previously, when Dr. Prostic examined Claimant in 2014, Claimant did not have physical evidence of stenosing tenosynovitis, the condition Dr. Prostic diagnosed in 2012. There was also no evidence of cubital tunnel syndrome in 2014. Dr. Prostic noted in 2014 that Claimant appeared to have bilateral carpal tunnel syndrome, a condition he did not diagnose in 2012.

Dr. Prostic does not convincingly explain how Claimant's work for Employer could have caused the carpal tunnel condition he diagnosed in 2014 when Claimant did not have carpal tunnel in 2012, and Claimant had not worked for Employer since 2011.

Dr. Prostic stated in 2014 that as Claimant is, his permanent partial disability is rated at 10% of each upper extremity. I find this rating of Dr. Prostic is not credible.

Dr. Wilkinson rated Claimant at a 0% disability to the bilateral upper extremities. I find this rating is credible. As noted previously, Dr. Wilkinson does not believe Claimant sustained any significant injury of the upper extremities. He found no signs or symptoms of carpal tunnel, cubital tunnel, stenosing tenosynovitis of the first dorsal compartments or any of the digits of the hands. He found no significant problems in regard to hand strength, as Claimant was slightly stronger with grip and pinch on the right versus the left. He did not see any atrophy or any other signs of symptoms of inflammation. He stated Claimant has subjective complaints, but he has no objective findings. I find these opinions and findings of Dr. Wilkinson are credible and persuasive.

I find the opinion of Dr. Wilkinson is more persuasive than the opinion of Dr. Prostic regarding whether Claimant sustained any permanent partial disability as a result of his work for Employer.

Based on the competent and substantial evidence, I find and conclude that Claimant failed to prove the November 17, 2011 injury was the prevailing factor in causing disability. I deny Claimant's claim for permanent partial disability benefits.

Attorney's Fees

No attorney's fee is awarded to the claimant's attorney.

Claim against the Second Injury Fund

Because I have determined that Claimant did not receive a subsequent compensable injury resulting in additional permanent partial disability, Claimant's claim against the Treasurer of the State of Missouri as Custodian of the Second Injury Fund is denied. Section 287.220.1, RSMo.

This award is final and is subject to immediate appeal.

Made by: /s/ Robert B. Miner
 Robert B. Miner
 Administrative Law Judge
 Division of Workers' Compensation