

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

Injury No.: 07-056930

Employee: Chaz Jacobs  
Employer: Walsworth Publishing Co.  
Insurer: The American Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: April 25, 2007  
Place and County of Accident: Marceline, Linn County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated January 23, 2008.

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

The award and decision of Administrative Law Judge Robert B. Miner, issued January 23, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 5th day of June 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

### **TEMPORARY OR PARTIAL AWARD**

Employee: Chaz Jacobs

Injury No.: 07-056930

Employer: Walsworth Publishing Co.

Additional Party: Second Injury Fund

Insurer: The American Insurance Company

Hearing Date: December 20, 2007

Checked by: RBM

### **FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: April 25, 2007.
5. State location where accident occurred or occupational disease was contracted: Marceline, Linn 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 was loading books onto a binder machine.
12. Did accident or occupational disease cause death? No.

13. Part(s) of body injured by accident or occupational disease: Neck, left shoulder, and left upper extremity including left arm, left elbow and left hand.
14. Compensation paid to-date for temporary disability: \$3,575.00 at the rate of \$165.00 per week.
15. Value necessary medical aid paid to date by employer/insurer? \$5,763.73.
16. Value necessary medical aid not furnished by employer/insurer? None.
17. Employee's average weekly wages: \$330.00 per week.
18. Weekly compensation rate: \$220.00 per week for temporary total disability and permanent partial disability.
19. Method wages computation: Section 287.250.4, RSMo.

### **COMPENSATION PAYABLE**

20. Amount of compensation payable:

Temporary total disability: (a) The underpayment of temporary total disability benefits in the amount of \$1,045.00 for the period April 26, 2007 through September 20, 2007; (b) In addition, temporary total disability benefits from September 21, 2007 through December 20, 2007, the date of hearing in this case, or 13 weeks at the rate of \$220.00 per week, which is the amount of \$2,860.00 for the period September 21, 2007 through December 20, 2007; (c) In addition, Employer/Insurer is to pay Claimant temporary total disability benefits at the rate of \$220.00 per week from December 21, 2007 until Claimant has reached maximum medical improvement, or is able to compete in the open labor market for employment, or until 400 weeks of temporary disability benefits have been paid, or until Claimant's death, whichever first occurs, pursuant to Section 287.170, RSMo.

Medical aid: Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his April 25, 2007 work injury, including the further diagnostic testing in the form of a cervical MRI, EMG, and nerve conduction study Dr. Jacques Van Ryn has recommended, and such additional medical treatment based upon the findings from those diagnostic tests, in accordance with Section 287.140, RSMo.

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

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

The compensation awarded to Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to Claimant: David J. Jerome.

### **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Chaz Jacobs

Injury No: 07-056930

Employer: Walsworth Publishing Co.

Additional Party: Second Injury Fund

Insurer: The American Insurance Company

Hearing Date: December 20, 2007

Checked by: RBM

### **PRELIMINARIES**

A Section 287.203, RSMo temporary hearing was held in this case on December 20, 2007 in Linneus, Missouri. Employee, Chaz Jacobs (“Claimant”) appeared in person and by his attorney, David J. Jerome. Employer, Walsworth Publishing Co. (“Employer”) and its Insurer, The American Insurance Company (“Insurer”) appeared by their attorney, Lisa A. Reynolds. James Payden, Safety and Training Manager for Employer, was also present at the hearing. No one appeared on behalf of the Second Injury Fund. The Second Injury Fund is a party to this case, but was not represented at the hearing since the parties agreed to leave the Second Injury Fund claim open. Attorneys for Claimant and Employer/Insurer agreed that although the hearing was a Section 287.203, RSMo hearing, neither party was requesting penalties or attorneys’ fees from the other pursuant to Section 287.203, RSMo in connection with the hearing. David J. Jerome requested an attorney’s fee of 25% from all amounts awarded. It was agreed that proposed Findings of Fact and Conclusions of Law would be due on January 5, 2008.

### **STIPULATIONS**

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

1. On or about April 25, 2007, Chaz Jacobs (“Claimant”) was an employee of Walsworth Publishing Co. (“Employer”) and was working under the provisions of the Missouri Workers’ Compensation Law.
2. On or about April 25, 2007, Employer was an employer operating under the provisions of the Missouri Workers’ Compensation Law, and was duly insured by The American Insurance Company

("Insurer").

3. Employer had notice of Claimant's injury.
4. Claimant's Claim for Compensation was filed within the time allowed by law.
5. Compensation paid to date of hearing for temporary disability was \$3,575.00 that was paid at a temporary total disability rate of \$165.00, representing 21 weeks for the period of April 26, 2007 through September 20, 2007.
6. The value of medical aid paid to date of hearing by Employer/Insurer was \$5,763.73.

#### DISPUTED ISSUES

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

1. Whether on or about April 25, 2007, Claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment.
2. Whether Claimant's current condition is medically causally related to the work injury of April 25, 2007.
3. Whether Claimant is entitled to past temporary total disability benefits from September 21, 2007.
4. Whether Claimant is entitled to an underpayment of temporary total disability benefits for benefits paid from April 26, 2007 through September 20, 2007.
5. Whether Claimant is entitled to future medical treatment as a result of the work injury of April 25, 2007.
6. Claimant's average weekly wage and the compensation rate.

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

Claimant's Exhibit A--Deposition of Dr. Jacques Van Ryn.

Claimant's Exhibit B--Medical records of Pershing Memorial Hospital.

Claimant's Exhibit C--Medical Records of Dr. Craig Newland.

Claimant's Exhibit D--Medical Records of Liberty Hospital.

Claimant's Exhibit E--Medical Records of Genesis Plastic Surgery.

Claimant's Exhibit F--Medical Records of Northland General Surgery.

Claimant's Exhibit G--Walsworth Publishing Company Disciplinary Action Form.

Claimant's Exhibit H--Medical Records of Dr. Minerva Concepcion-Rivera.

Claimant's Exhibit I--Correspondence from Employee's Attorney dated 6/14/07.

John Koehl and James Payden testified on behalf of Employer/Insurer. In addition, Employer/Insurer offered the following exhibits which were admitted in evidence without objection:

Employer/Insurer's Exhibit B--Deposition of D. Christopher Main, M.D. dated 11/29/07. This exhibit was offered and admitted subject to the objections contained in the deposition.

Employer/Insurer's Exhibit C--Medical Records of Dr. Timothy C. Hodges of Heartland Health dated 6/8/07 – 7/23/07.

Employer/Insurer's Exhibit D--Medical Records of Dr. T. Reardon of Northland General Surgery, P.C. dated 5/7/04 – 5/19/04.

Employer/Insurer's Exhibit E--Medical Records of Dr. Frederick E. Thompson of Genesis Plastic Surgery, P.C. dated 5/19/04.

Employer/Insurer's Exhibit F--Wage Statement of Employer and Benefits Paid by Employer/Insurer.

Employer/Insurer's Exhibit G--Display Reports of Walsworth Publishing dated 4/25/07.

Employer/Insurer's Exhibit H--Shop Floor Reports dated 4/17/07 – 4/25/07.

Employer/Insurer's Exhibit I--Bindery Ticket from Walsworth Publishing.

Employer/Insurer's Exhibit J--Photographs of bindery machine.

Employer/Insurer also offered Employer/Insurer's Exhibit A, Statement of Employee, dated March 2, 2007, into evidence. Claimant's counsel objected to the admission of Employer/Insurer's Exhibit A, and his objection was sustained. Employer/Insurer Exhibit A was not admitted into evidence.

#### SUMMARY OF THE EVIDENCE

Claimant testified at the December 20, 2007 hearing. I find that Claimant was a credible witness. Claimant testified that he was born on December 10, 1981 and was twenty-six years old. He said that he injured his neck and left upper extremity on April 25, 2007 while working for Employer. He started working for Employer on March 10, 2007 as a bindery helper. He worked as a temporary employee and was paid \$8.25 per hour. He was scheduled to work forty hours per week. He identified a wage statement and said that he worked thirty-two hours in four days the first week, sixteen hours over

two days the next week, thirty-two hours in four days the following week, and forty hours in five days the following week, which was the week before he was injured.

Claimant testified that in June 2004 he was in a car accident. He injured the top half of his body and broke his collarbone. He was treated by Dr. Newland at Liberty Hospital for a fractured left clavicle. A metal plate was inserted in his left clavicle on September 13, 2004. He last treated with Dr. Newland for that injury on September 13, 2004. He said he had no treatment for his left clavicle between September 13, 2004 and April 25, 2007. He said he took Percocet in 2004, but not after 2004. After September 2004, the only problems he had with his clavicle were occasional pain in the winter in the front area at the plate at the bottom of his neck. He said he had no problems with his shoulder, neck, arm, or hand when he finished treating with Dr. Newland. He said that after September 2004, he was restricted to lifting with his left arm, and he did have some restricted motion. He did not have pain when he moved his arm. He said he had had no other accidents or treatment of his neck, shoulder or left arm prior to the car wreck in 2004.

Claimant testified that on April 25, 2007, the date of injury, he started work at 8:00 a.m. He loaded collators and did handwork before going to the binder. He was putting covers on books set in separating binders. He said he was transferred to the binder about 12:30 p.m. He identified photographs that showed the collating work. He put sheets in books. He moved the books on carts. Hundreds of books were on the carts.

Later, around 12:30 or 1:00 p.m., when he moved to the Perfect Binder machine, he put whole books onto the machine which glued bigger books and bound books with a strip of glue. Employer and Insurer's Exhibit J, was a group of photographs. Claimant identified a photograph in Exhibit J, as a photograph that showed the binder machine. He marked one of the photographs with the number "1" and said that photograph showed the binder. The books that he worked with did not have the covers on them, just pages. He picked the books up off of the pallet and put them onto the machine. He lifted two books at a time and put them on the binder machine at shoulder level. He estimated he moved between 2000 and 3000 books per hour. He had one other helper with him, and each did about one-half of the work. Claimant's share was about 1000 to 1500 books per hour. Claimant said he is five feet eight inches tall.

Claimant stated that the binder machine sped up on April 25, 2007. He and his coworker did not have a third person helping them lift the books. He was engaged in constant nonstop lifting. He had problems that started about one hour after he began working on the binder machine. His left shoulder started cramping. He reported the complaints about his arm to his supervisor, Bill. He said the pain was not where his clavicle had been injured. He continued to work until about three o'clock. He picked up two books at a time. His left arm tingled and his left hand turned bluish-purple. He had little feeling in his hand. He stated that before April 25, 2007, he never had numbness or tingling in his hands. This was the first time he had those symptoms in his hand, arm or shoulder. He had complaints in his left shoulder, left arm, left elbow, and down to his small fingers on his left hand on April 25, 2007.

He reported his complaints to his supervisor. He also reported his problems to Tammy Atterbury and James Payden who worked for Employer. His hand was still blue at that time. They sent him to a doctor. He went to the doctor and reported he been lifting books that were stacked between five and six inches high. He used both hands to lift the books. Dr. Concepcion sent him to the emergency

room and took him off work. He went to Pershing Hospital and reported that he hurt himself lifting flats of books. He said that the doctor was not sure what caused that. He was then referred to Dr. Newland.

Dr. Newland examined him and X-rayed his shoulder. He said Dr. Newland told him that his problem was not related to the clavicle fracture. Dr. Newland referred Claimant to a vascular doctor. Employer then sent him to Dr. Mains. Claimant said that Dr. Newland said that he was not to return to work, and that he had a 5 pound lifting restriction. Claimant said that Dr. Concepcion told him not to work and said he had a 5 pound lifting restriction. Claimant said he took the doctor's slips to work and was told they had no work for him, and that he could not work until he was fully released. Claimant saw Dr. Main on May 19, 2007. He said Dr. Main diagnosed a thoracic outlet syndrome. Claimant had not been diagnosed with that before April 2007. Claimant said that Dr. Main told him he had a 20 to 25 pound work restriction, and that he should not return to work.

Claimant said he was fired by Employer for no-call, no-show between May 18, 2007 and May 21, 2007. Claimant said he was not released on May 21, 2007, and was doing physical therapy then. He said Dr. Main recommended that he see a vascular surgeon. He also said Dr. Main said the condition could be caused by the clavicle or by over-exertion. Claimant saw Dr. Hodges, a vascular surgeon, four months later. He said Dr. Hodges recommended more tests, and wanted Claimant to see a nerve specialist. Claimant was having problems from the top of the shoulder to his left hand, and not his left clavicle. He said that is what he reported to Dr. Hodges.

Claimant saw Dr. Van Ryn in St. Louis. Dr. Van Ryn said he should be off work. Dr. Van Ryn wanted to treat and test Claimant, and Claimant testified that he wanted to treat with Dr. Van Ryn. Claimant said his temporary total disability benefits stopped on September 20, 2007. He said no doctor has released him to full duty.

Claimant said his current problems are pain in his left shoulder when he sleeps or lifts. His pain is rated at three out of ten when he is not active. When he is active, his pain is a six or seven. He has pain from the top of his left shoulder outside of the left arm over his elbow and down to his small finger and ring finger on his left hand. He said those fingers tingle constantly. He said the first time he felt tingling was after the April 25, 2007 injury. He hurts from his left shoulder down when he tries to lift. His hand goes numb when he holds it up. He said he can lift between 1 and 5 pounds with his left hand. He can lift a gallon of milk, but his hand goes numb. These are problems he has had since April 2007.

Claimant testified on cross-examination that he weighed 125 pounds at the time of his injury in April 2007. He now lives with relatives. He had worked at Excelsior Manufacturing as a general laborer before March 2007. He riveted metal products that weighed less than 4-5 pounds. He also worked at a convenience store. He said he was not working at the time of the December 20, 2007 hearing. He had looked for work at banks and McDonald's, but had not been hired. He said he had not worked since April 25, 2007. He said Dr. Van Ryn authorized him to be off work. He testified he had not received any unemployment benefits since April 25, 2007. He worked for Employer between November 11, 1999 and May 11, 2000, and also between August 21, 2006 and September 16, 2006. He stopped working for Employer earlier because the work was completed. He worked for Employer in a temporary capacity.

Claimant was hired by Employer as a floater in the binding department. He did handwork,

loaded collators, put covers on books, and put glue on spines of books. Most books weighed between 1 pound and 5 pounds. He loaded collators with books that weighed between 1 pound and 5 pounds. He stated that of the five weeks he worked for Employer in 2007, he worked full-time three weeks and part-time two weeks. He stated that John Koehl was his immediate supervisor on April 25, 2007. He agreed that he went to the Perfect Binder machine at 11:07 that day. He moved books from carts to pallets and loaded them onto the binder machine. The binder glued bigger books and moved them to a trimmer. Bill, a supervisor, watched the machine and helped load it if someone went to the restroom.

The yearbooks Claimant worked with that day had no covers and were untrimmed. He did not dispute that the two books he worked with at the binder that day weighed 5.2 pounds and 5.46 pounds. Claimant was shown Dr. Main's April 2007 report and acknowledged he told Dr. Main that he handled 5,000 books per hour and that the books were 3-4 inches thick. He said that referred to the stack, not the individual book. He said he sometimes handled 5-6 inches, which represented two books.

Claimant said he spent three hours at the Perfect Binder on the day of injury. He spent three to four hours loading the hopper. He estimated that he and his helper handled between 8,000 and 10,000 books on his shift that day. The operators are supposed to have so many books out. The supervisor would speed up the process if necessary. He was not aware of the quota that day-- just that they were behind. He estimated that he loaded about one half of the books, or 4,000 to 5,000 during the three to four hour shift. He said each book weighed between 5 pounds and 5 ½ pounds. He said his problem was caused from lifting.

Claimant stated he had a permanent weight-lifting restriction from his prior accident of 35 pounds. He said he told his supervisor, John Koehl, about that restriction. He was not restricted in the pace of his work. He said the pace wore him out. He said that John Koehl took him off his job between three o'clock and three-thirty o'clock.

His prior accident caused right biceps tear, facial lacerations, and left clavicle injury. He was in the ICU for one week. He said he took Tylenol daily from 2004 to the present. He said he never had blue color in his left upper extremity before the April injury. Intermittent winter cramping was caused by cold weather. He lifted books at the date of hearing and said it caused pain rated between two and three. Raising his hand at the present time between 5 inches and 7 inches caused numbness. He did not have a problem with numbness before the April injury.

He stated he had no problems with his left arm when he worked at Excelsior and at the convenience store. When he put the books on the binder machine, he lifted two books at a time that weighed up to 11 pounds total. He only estimated the number of books run that he reported to Dr. Main. It was more than average on the day of injury. He handled smaller books when he worked at Employer the two previous occasions.

Employer called John Koehl as a witness. He testified he had worked at Employer for 26 years. He was currently the Bindery Supervisor and was Claimant's supervisor on April 25, 2007. He identified records, Employer and Insurer's Exhibits G and I, which showed that Claimant started work on April 25, 2007 at 8:01 a.m. The records showed that Claimant worked for three hours putting tape on the spines of 6 inch by 9 inch books. Claimant started working on the Perfect Binder machine at 11:07 a.m. that day. He worked there until 11:53 a.m. when he took a lunch break that lasted until 12:21 a.m. The

machine had a problem and stopped working until 1:07 p.m. Claimant worked on the Perfect Binder machine until 1:38 p.m. when he reported his injury. Claimant was back on the Perfect Binder machine between 2:15 p.m. until 3:18 p.m. except for a five-minute break at 2:00 p.m. John Koehl testified that the total amount of time that Claimant worked on the Perfect Binder machine on April 25, 2007 was two hours and ten minutes.

John Koehl testified that Claimant worked with two books that day. One book weighed 5.2 pounds and the second weighed 5.46 pounds. He said that 1,366 books that weighed 5.2 pounds were processed, and 1,722 books that weighed 5.46 pounds were processed, while Claimant worked on the Perfect Binder machine on April 25, 2007. Claimant had a coworker on the machine. In addition, Bill Arthur did set up on the machine and made adjustments to the machine, and from time to time would pull books off the machine. The books did not have covers when they were placed on the Perfect Binder. They were trimmed after they were placed on the binder. Workers pulled the books off of carts and placed them on the machine. The Perfect Binder put glue on the edge the book before it went to the trimmer. The machine did all the work except for the loading. Their goal was to run 4,900 books per hour, but with the large size of those books, the more likely rate was 2,500 and 3,500 books per hour.

Mr. Koehl stated that Employer's records showed that a total of 3,088 books were processed in the two hours and ten minutes that Claimant worked on the Perfect Binder machine. He estimated that Claimant handled no more than half of those books, or approximately 1,544 books. The goal was 3,000 books per hour with that size book. The books untrimmed were 9.5 inches x 13 inches. He testified that Claimant lifted between 8,028 and 8,430 pounds of books on April 25, 2007 while working on the Perfect Binder machine.

Mr. Koehl was aware of Claimant's lifting restrictions from the automobile accident when Claimant was hired. He said Claimant's lifting the books was within his weight restrictions of 25 to 35 pounds. He said the binder machine needed to have at least two books at a time in order to run. Claimant reported about two o'clock that he was having pain in his shoulder area when he raised his arm. Claimant asked whether it would be covered if it was work-related. Mr. Koehl filled out an accident report. He called Jim Payden and gave him the accident report. Mr. Payden then talked to Claimant. Claimant did not give a statement at that time.

Mr. Koehl agreed on cross examination that the Incident Report contained in Claimant's Exhibit H, stated that Claimant "hurt left shoulder, left hand going numb." The report was filled out at 2:15 p.m. He did not look at the knot on Claimant's shoulder. Claimant had not reported shoulder pain or his hand going numb before April 25, 2007. Claimant may have been moving carts that weighed 400 to 500 pounds during the thirty minute time the machine was down. Claimant was keeping up with his work. Mr. Koehl said that Claimant and another worker processed 1,366 books in forty-five minutes in the morning, and 1,722 books in thirty-one minutes in the afternoon. Claimant would handle approximately one-half of the books. The binder was 3 ½ to 4 feet tall. Claimant would lift to chest level to load the machine with books.

Employer called James Payden as a witness. He is the Safety and Training Manager for Employer and managed Employer's workers compensation. He filled out the wage statement, Employer and Insurer Exhibit F, and said the amounts shown on it were accurate. He said that in 2005, Dr. Main saw the machine that Claimant was using. Mr. Payden was not aware of any other employees injured on

the binder machine other than burns and a rotator cuff injury when someone removed something.

Mr. Payden said that Mr. Koehl called him about Claimant's injury. When Mr. Payden saw Claimant, Claimant was holding his left arm across his chest. Claimant asked whether this would come under workers compensation and Mr. Payden said he could not say. He arranged for Claimant to see the doctor. Claimant said he had tingling in his hand and arm, and had a blue hand. Mr. Payden did not notice if the hand was blue. Claimant saw Dr. Concepcion-Rivera and was then referred to Dr. Newland. Claimant needed a work release before he could return to work. Claimant was terminated because he did not call or show for three days after Mr. Payden received notes from Dr. Main that said the injury was not work-related.

On cross examination, Mr. Payden testified that he sent Claimant to Dr. Concepcion-Rivera, the company doctor. Dr. Rivera provided work restrictions of 5 pounds on April 27, 2007. Claimant was not able to return to work within Dr. Rivera's restrictions. Dr. Main provided restrictions of 20-25 pounds lifting. He said Employer could have accommodated Claimant within Dr. Main's restrictions. Claimant started work for Employer on Monday, March 26, 2007. An employee has a duty to bring a return to work slip to Employer. Claimant never gave him Dr. Main's restrictions. Mr. Payden got a copy of Dr. Main's restrictions within two to three days of May 18, 2007.

Claimant was recalled as a witness and testified that he saw Dr. Main on May 18, 2007. He stated that Dr. Main gave him no disability slip, and gave him no disability slip to send to Employer. He said Dr. Main said he would fax it to Employer. He said Dr. Main told him he could not return to work without restrictions.

### MEDICAL TREATMENT RECORDS

The medical records of Pershing Memorial Hospital were admitted in evidence as Claimant's Exhibit B. These records noted that Claimant was treated at the Pershing Memorial Hospital emergency room on April 25, 2007. Chief complaint was left upper extremity pain. Mechanism of injury was noted to be lifting flats of books. Claimant was noted to be in moderate distress. He was given medication and a sling for his left arm. The records noted Claimant's prior left clavicle fracture and pinning. Claimant was prescribed physical therapy three times per week for two months for the shoulder girdle conditioning. Claimant had physical therapy from April 30, 2007 through May 21, 2007.

The medical records of Dr. Concepcion-Rivera were admitted as Claimant's Exhibit H. These records included Injury and Illness Incident Report dated April 25, 2007. The Doctor's Statement portion of the Incident Report noted that the patient was in pain and had very limited range of motion of the left arm. X-ray of left shoulder showed six metal screws, two of which were noted to be suspiciously loose. Claimant was instructed not to return to work until further orders. Claimant was noted to have been loading books on the Perfect Binder. Claimant was noted to have hurt left shoulder and left hand was going numb. The record noted that Claimant's response to the question, "Describe how the injury occurred?" was, "I was lifting a pallet of books 5-6" thick when my hand went numb and I dropped the books." Claimant was noted to have been lifting two books at a time on the Perfect Binder book feeder. The Incident Report was also signed by Employer's Supervisor John Koehl.

Dr. Concepcion-Rivera's Physician Record dated April 25, 2007 noted that Claimant

complained of pain in his left hand, numbness, and discoloration of arm from clavicle to hand. The injury was noted to be a recent injury at 3:30 p.m. that day at work at Walsworth. The Physician Record noted sharp pain in clavicle, numbness before only if he put pressure on it, now numbness and pain. The severity was noted to be moderate/severe exacerbated by movement. Claimant was noted to have limited range of motion on the left arm. His arm was immobilized with a sling. Claimant was instructed not to work until further orders. He was prescribed pain medication. A radiology examination report dated April 25, 2007 noted a healed fracture of the left clavicle, stabilized by a cortical plate and eight screws. The fracture was healed. The screws were in satisfactory position. The humerus and scapula were normal. The impression was normal left shoulder with healed fracture of the left clavicle stabilized by internal orthopedic fixation. The orthopedic screws and plate used to stabilize the fracture were in satisfactory position.

The medical records of Dr. Craig Newland were admitted as Claimant's Exhibit C. The records included Dr. Newland's report dated April 26, 2007. That report noted that Claimant saw Dr. Newland on April 26, 2007. Claimant reported a lifting episode with some popping in his arm and subsequently a tendency towards a bluish appearance to the arm ensuing and pain. Claimant was noted to have previous surgery three years ago to his left clavicle. The examination showed the wound was well-healed at the clavicle. Contour was satisfactory. He was noted to have no frank atrophy and no winging. Passive range of motion, while painful, was full. He was noted to have diffuse tenderness about the shoulder girdle. Provocative maneuvers for thoracic outlet were negative, but Claimant got tingling. He demonstrated a slight asymmetry of color. No edema was evident. X-rays of the shoulder girdle were negative. X-rays of the left shoulder showed a healed clavicle fracture with internal fixation in satisfactory alignment.

Dr. Newland noted that the manifestations could be those of a thoracic outlet such as a venous thoracic outlet. The doctor noted that he could appreciate what Claimant talked about in certain positions as a slightly bluish cast to the left arm relative to the right. He noted that could be a manifestation of a venous thoracic outlet. He noted they generally recommend shoulder girdle conditioning exercises. If the problem is ongoing, then vascular assessment is advisable. He noted no further follow-up was indicated there. He noted further that if Claimant had ongoing pain complaints and vascular thoracic outlet was ruled out, then it could be managed as a minor trauma dystrophy with the vascular manifestations reflective of the sympathetic overdrive and managed in that way, perhaps in conjunction with a pain service. He noted that the mechanism was not one of an acute trauma, but rather lifting repeatedly. He stated there was no demonstrable relatedness to his previous clavicle fracture. Dr. Newland's records contained a physical therapy order dated April 26, 2007 for shoulder girdle conditioning, three times per week for two months for left shoulder pain. The records also included an Off Work Authorization dated April 26, 2007 that included restrictions of 5 pound limit left arm until further notice. His records also included Dr. Concepcion-Rivera's April 27, 2007 restrictions of 5 pound limit left arm until further notice.

The records of Heartland General Vascular Surgery, Dr. Timothy Hodges, were admitted as Employer and Insurer's Exhibit C. Dr. Hodges' History and Physical dated June 8, 2007 described Claimant's chief complaint was that his left arm had constant pain. He also had numbness and tingling. Claimant stated he injured himself at work on April 25, 2007. Claimant stated he was lifting a stack of books and he dropped them because he lost all strength in his left arm. Dr. Hodges' June 8, 2007 Clinic Note Physician noted that he saw Claimant at the request of Dr. Rivera for evaluation of left shoulder

pain on June 8, 2007. Dr. Hodges' June 8, 2007 Clinic Note included a description of the history of Claimant's treatment before and after April 2007. Dr. Hodges examined Claimant on June 8, 2007 and did a provocative exercise elevating both hands above his head and exercising his fingers. Claimant developed quite a bit of paresthesia in the left arm as a result. Dr. Hodges stated that it seemed that Claimant did have the neurologic component of thoracic outlet syndrome likely based on his fracture of the clavicle, body habitus changes with additional growth over the past few years as well as possibly some exertion. He did not think Claimant had an arterial component and he strongly doubted that he had a venous component. The note stated that the mainstay of therapy for thoracic outlet syndrome with a neurologic component is physical therapy. Dr. Hodges thought Claimant needed to get back into that. Dr. Hodges' June 8, 2007 Clinic Note Physician stated in part: "As to whether this is work related, it is hard to say. It sounds like it might have been exacerbated a little bit by his activity that day, but I think the underlying problem was his motor vehicle accident." He noted that Claimant may come to require first rib resection to try to improve his symptoms.

Dr. Hodges' July 2, 2007 clinic note stated that Claimant returned for follow-up of his CT scan. Claimant was no better and no worse. Dr. Hodges stated there was no obvious impingement on the artery or vein in the region through the thoracic outlet. He noted there was what looked like a little bit of extra calcium in the region, perhaps, due to his injury. He did not really see any arterial or venous problem that could be fixed right now. He suspected Claimant may have some scar involvement with his nerve. He stated he would see him back on an as needed basis. Dr. Hodges' July 2, 2007 work release form stated that Claimant was released to return to work July 23, 2007, regular duty. The work release form also stated, "Pt needs to see a neurologist."

Dr. Newland's records, Claimant's Exhibit C, included his records relating to his treatment of Claimant following the May 2004 automobile accident. His May 20, 2004 note indicated Claimant had a right biceps muscle laceration that was repaired and was in a long arm split. He had a left clavicle fracture with some tinting of the skin. He was prescribed antibiotics. The records noted that Dr. Newland treated Claimant through September 13, 2004. At that time, Dr. Newland noted that there was satisfactory healing of the left clavicle, and Claimant had full range of motion with some intermittent aching at times. Claimant had a laceration on his right arm, hand and had full range of motion of the elbow, and the wound was well-healed. X-rays noted satisfactory indication of healed clavicle fracture. The note stated that Claimant may advance use as tolerated without weight restrictions and was to follow up on an as needed basis.

The medical records of Liberty Hospital were admitted as Claimant's Exhibit D. Those records related to treatment of the injuries sustained by Claimant on May 7, 2004 when he was involved in an automobile accident. The Emergency Department Note dated May 7, 2004 stated that Claimant was involved in a motor vehicle collision with injury to the chest and head. It stated that he was evidently going highway speed unrestrained and went off the road. The vehicle was overturned and he was ejected. He was found underneath the car partially with his neck in a very precarious position. He lost consciousness. The History and Physical Examination dated May 7, 2004 noted that Claimant had multiple operations and lacerations, a laceration on his biceps, multiple rib fractures, pneumothoraces, sinus fractures, and a pulmonary contusion. The Discharge Summary noted a final diagnoses of motor vehicle accident with C-spine trauma-no C-spine fracture, neurologically intact; closed head trauma, concussion-improved; laceration to his chest and abdomen; right biceps laceration-closed per Dr. Newland; blunt chest and abdominal trauma; blunt chest trauma with multiple rib fractures, tiny apical

pneumothoraces—resolved spontaneously; and clavicle fracture. The records included an Operative Report dated June 4, 2004 that noted a preoperative diagnosis and postoperative diagnosis of comminuted mal-angulated fracture of the left clavicle. Dr. Craig Newland performed an open reduction internal fixation and inserted a plate and screws.

## EXPERT WITNESS DEPOSITIONS

Employer/Insurer's attorney deposed Dr. D. Christopher Main on November 29, 2007. Dr. Main's deposition was admitted as Employer and Insurer's Exhibit B. The objections contained in Dr. Main's deposition are overruled. Dr. Main testified that he is an orthopedic surgeon and is a licensed physician in the state of Missouri. He attended four-years of medical school at the Kirksville College of Osteopathic Medicine and passed the boards in 2003. He had been practicing since 2001. His CV noted that he was Board Certified Orthopedic Surgeon by the American Osteopathic Association, October 2003. He examined Claimant at the request of Employer on May 18, 2007. He was provided records of Dr. Concepcion, physical therapy records from Pershing Health Systems, and records from Dr. Craig Newland.

Claimant complained of pain in his left shoulder region that had been associated with some work activities at Employer including picking up some books and doing some collating. Claimant described picking up books weighing between 5 and 10 pounds on a repetition basis at 5,000 books per hour. He began having some left shoulder discomfort and difficulty reaching over his head. Claimant also described some numbness and a discoloration involving his left arm and hand. Dr. Main did not believe that a 5,000 book per hour rate was accurate from his experience of working with Employer in the past. He had seen production rates of 100 books per hour up to maybe 2,000 books per hour for small type books. Five to 10 pound books were pretty heavy books.

Dr. Main obtained a medical history from Claimant including a motor vehicle accident in which Claimant sustained quite a few lacerations, and left clavicle fracture that required surgery with plate and screw fixation. He also had an injury to the chest wall, a pneumothorax, which is a partially collapsed lung, and a biceps injury. Dr. Main felt that Claimant's complaints when he saw him affected some of the same body parts that were injured previously. Most of that was around his shoulder blade, shoulder, clavicle region, as well as extension on down the left upper extremity. He noted Claimant was a pretty skinny kid and the plate was pretty prominent. Claimant had an alteration in the contour of his shoulders that was a rounding effect of the shoulder.

The physical examination revealed restriction in range of motion of Claimant's shoulder, significant sticking out of his left shoulder blade, and significant weakness around his rotator cuff muscles. A vascular exam of Claimant's distal pulses in his wrist was normal. Allen's test, which looks for irregularities in pulses in the hand, was normal. He found Claimant's radial and ulnar regions were functioning properly. He did not perform Waddell's, Tinel's or Spurling's tests because it was felt to be more related to a thoracic outlet type of syndrome. Claimant did not have any actual falls or traumas that specifically would correlate with more of the disc herniation in his neck. The numbness and tingling extended from the clavicle region down into his hand.

Dr. Main testified that Claimant's prior fractured collarbone and the shortening effect that had occurred to it had predisposition for other problems. That can lead to muscle dysfunction, shoulder blade

dysfunction, weakness, numbness and tingling involving the arm, and long-term, it can actually affect the vascular supply. Dr. Main examined X-rays and did not see any problems with the shoulder from an X-ray standpoint. He did see alterations to the clavicle, and felt the shortening effect across the clavicle was causing the majority of Claimant's problems. He did not find any indication of double-crush syndrome. He felt Claimant's fracture from the motor vehicle accident in 2004 had healed, but his soft tissues around the shoulder had not. He believed Claimant's symptoms that he presented to his office were directly related to the car accident in chronic shoulder weakness--shoulder blade weakness. He believed the activities that Claimant had been performing at work, which he believed he had been doing for just a few hours, had certainly aggravated his pre-existing condition.

Dr. Main's diagnosis of Claimant was thoracic outlet syndrome to the left upper extremity, mild malunion to his left collarbone, and a left shoulder dyskinesia. Those conclusions and opinions were based to a reasonable degree of medical certainty. Dr. Main recommended that Claimant see a vascular surgeon as it related to his thoracic outlet. They discussed some options and tried to make appropriate referrals for Claimant. When asked whether the April 25, 2007 alleged incident was a prevailing factor in the causation of Claimant's current condition, Dr. Main answered: "No, I do not believe that the work—alleged work injury caused his current condition." He stated that at best Claimant may merely have aggravated a pre-existing condition as opposed to sustaining a discrete new injury. When asked whether the incident was a substantial cause of the need for treatment, Dr. Main stated, "No. I do not believe work caused that."

Dr. Main stated that Claimant required further treatment for his left upper extremity complaints. He suggested extensive physical therapy, medications to control pain, and also finding work that would not stress his upper extremity. He also recommended that Claimant see a vascular surgeon because vascular surgeons typically are the ones used to identify if any surgical treatment is warranted for thoracic outlet if a patient failed conservative treatment. Dr. Main stated that he did not believe, to a reasonable degree of medical certainty, that Claimant had any permanent partial disability as a result of the April 25, 2007 incident. He recommended that Claimant basically limit the amount of weight that he was lifting with work on a 20-25 pound weight restriction.

Dr. Main also stated that Claimant's motor vehicle accident injuries predisposed him to develop the conditions that he diagnosed as well as the complaints that Claimant had during his evaluation of Claimant. He stated that he did not believe within a reasonable degree of medical certainty that the short duration that Claimant was performing the work activity could have caused thoracic outlet syndrome or a herniated disc in his neck or any of the type of neurologic involvement. He did believe that the type of work Claimant was doing brought out Claimant's underlying symptoms as it related to his motor vehicle accident. Dr. Main stated that it was possible that his diagnoses could have been manifestations that were the result of the injuries sustained in a motor vehicle accident, but perhaps aggravated by his work at Employer.

Dr. Main stated that he did not agree that Dr. Van Ryn's diagnoses of costovertebral syndrome, scapulothoracic bursitis causing crepitation, left cubital tunnel and ulnar tunnel syndrome, and possible left cervical radiculopathy and brachial plexopathy were related to Claimant's work injury. He agreed with the diagnosis of costovertebral syndrome which he believed was manifested from the automobile accident. He stated the scapulothoracic bursitis was caused by Claimant's shoulder winging which related back to the original accident. He did not find any evidence, based on Claimant's subjective

history, which led him to consider cubital or ulnar tunnel syndrome or a cervical radiculopathy. He said a brachial plexopathy was possible, but would be more related to a chronic injury related to his clavicle malunion, cervical ribs, and thoracic outlet. He said that certainly, brachial plexopathy would not originate from doing just a few hours of work related activities.

On cross-examination, Dr. Main testified that he reviewed only a letter from Dr. Concepcion dated May 14, 2007, a note from Dr. Craig Newland dated April 26, 2007, and a form from Pershing Health Systems, Gary Fite, physical therapist, dated May 3, 2007. He did not review any of the actual notes generated from the treatment following the motor vehicle accident in 2004. He stated from his physical examination that Claimant had weakness involving his rotator cuff and scapular mechanism. He X-rayed only the shoulder and clavicle. The X-rays he took did not permit him to detect the presence of a cervical rib. X-rays would not detect any type of nerve injury or nerve damage. He sees employees of Employer from a work comp standpoint as well as commercial insurance standpoint. He had been to Employer twice, both plants, and had been through the entire plant. He had viewed collating type of work that Claimant did on two occasions in around 2002 and in late 2005 or early 2006.

Dr. Main understood that Claimant was a collator when he did the job, and prior to that had done more light-type activities, with sorting. He was not provided with a videotape or job description with respect to the collating position. Claimant did not give a history of problems before the April 25, 2007 incident. He had not reviewed any other medical records besides the report of Dr. Van Ryn. He noted that Dr. Van Ryn had recommended additional diagnostic testing, including a cervical MRI and an EMG. It would not be unreasonable to order those diagnostic tests from a non-occupational standpoint. He agreed with Dr. Van Ryn that Claimant was not at MMI, and that Claimant was in need of additional treatment. He felt Claimant could go back to work with some general guidelines of avoiding any work above chest level, and below chest level, a 20-25 pound weight restriction, and no lifting, carrying, pushing, or pulling. Claimant's work activities at Employer required work activities above chest level, so Claimant would not be able to perform those types of activities. It would aggravate his symptomatology.

Dr. Main stated that Claimant's work activities could not possibly have caused the types of conditions he had because thoracic outlet syndrome is an anatomical problem, not something you just get out of the blue as an injury. When asked to explain a situation where an individual was performing the work activities such as Claimant was, prior to April 25, 2007 without any difficulty, but then had an incident on that date and later developed difficulty, he stated that unless you put your body under undue stress, that is going to involve more repetitive or heavy types of things, especially overhead, you are not going to see the symptoms come out. He agreed that the work Claimant was doing on April 25, 2007 was heavier in nature than he had been doing up until that time. He agreed that a person of a small stature such as Claimant would be more prone to having an injury when performing the heavier-type tasks. He stated that the injuries Claimant sustained in a motor vehicle crash that involved a comminuted fracture of his clavicle, a collapsed lung, numerous abrasions, an injury to his biceps muscle that had to be repaired, was a substantial trauma, and that could take months to never, ever being able to overcome the soft tissue injury.

Claimant did not report to Dr. Main any ongoing problems following a motor vehicle accident. Dr. Main did not have any records or other evidence to indicate that there were any ongoing soft tissue problems prior to the April 25, 2007 incident. Dr. Main stated that Claimant had significant trauma from the motor vehicle accident, and once he went back through the initial healing of his collarbone, he

believed Claimant learned to adapt and live with his dysfunctions and was able to hold down less involved and more sedentary jobs. The alleged incident, which involved more activities than what he was used to, brought out the symptoms related back to his original accident.

The Deposition of Dr. Jacques S. Van Ryn taken on behalf of Claimant on November 7, 2007 was admitted as Claimant's Exhibit A. The objections contained in Claimant's Exhibit A are overruled. Dr. Van Ryn testified that he was an orthopedic surgeon and had been for twenty years. Dr. Van Ryn's CV noted that he was Board Certified by the American Board of Orthopedic Surgery in 1985, and was a Fellow in the American Academy of Orthopedic Surgery 1987. He treated patients in a workers compensation setting. He examined Claimant on September 26, 2007 at the request of Claimant's attorney. The purpose was for an independent medical evaluation. Claimant's report dated September 26, 2007, marked Employee's Exhibit 2, was offered in evidence at the deposition and is admitted. Dr. Van Ryn understood that Claimant was working at a book bindery, and his job was to stack books and then lift them from one line to another line, to a pallet so they could be boxed and shipped. Claimant told him he was 5'10" tall and weighed about 125 pounds. That looked very accurate. Ideal body weight for a male at 5'10" is 166 pounds. Claimant was a very thin man and not highly muscled. Someone without a high degree of muscularity will fatigue their muscles earlier and be more likely to sustain injury in a heavy work environment.

Claimant stated he was on a line that day working with schoolbooks that came off in a stack 3-4 inches thick. His job was to move them from a pallet and then stack them to a collating machine so they could be bound together. His job required reaching from various heights on the pallet, shoulder height all the way closer to the floor, then lifting, twisting, and then putting them up on the line to be collated. Claimant told him that day they had to speed up the line so that the rate was about 5,000 sets of textbooks per hour. Claimant said the textbooks were 3 to 4 inches thick, so it was probably in excess of 20 pounds per stack.

On that date Claimant had been doing that job for about 3 1/2 hours. He picked up two sets of books and then felt an immediate onset of pain in the upper shoulder area. The pain went rapidly down the hand followed by, Claimant said, a bluish discoloration in the hand, and then followed by numbness and pins and needles feeling. Claimant was not able to return to work and saw a company physician and had various tests and physical therapy. He was not able to resolve his physical problems and was not able to get back to work. He had orthopedic and vascular surgery consults and was told he had a problem with thoracic outlet. He had physical therapy for three months and worked on resistive exercise. That helped for strength but did not relieve the pain and pins and needles feeling in the hand. He did not get to the point where he could functionally use his arm again. About two months prior to the examination, Claimant started noticing pain when he turned his head to the left side. About three weeks prior to Dr. Van Ryn's examination, Claimant said the numbness got worse, especially to the long finger in the pinky finger.

Dr. Van Ryn stated that when he saw Claimant, Claimant was having pain at rest and pain at night that would wake him up. Claimant had to shake his hand to loosen it up to get rid of some of the numb feelings. Claimant had pain with almost any use of the hand, reaching, lifting and gripping. Claimant's pain would increase any time he would exercise to any significant degree. He had trouble getting the arm overhead because of pain and could not sustain keeping the arm overhead. He also popped and clicked in the area of the shoulder blade. He was not able to return to work even though he

had a lifting restriction of 25 pounds. Claimant was not on a narcotic medication when he saw him.

Dr. Van Ryn reviewed records and films brought by Claimant. The films showed Claimant had a history of a collarbone fracture that was well healed. It did not have any exuberant callus. It looked like a standard healed collarbone fracture. The ball and socket joint of the shoulder was normal. By the time one is a year out from the fracture, the amount of bone is not going to grow again with the healed fracture. It will be stable. If Claimant's car accident occurred in 2004, the fracture would have been stable by 2005. He said a medical report that talked about the problems stemming from the further growth of that callus formation did not make sense to him because Claimant's callus was mature, and there was all the bone that was going to be there to heal the fracture by a year. Claimant was functional at that point.

Dr. Van Ryn was aware that Claimant had done a number of different jobs, including working for the book bindery on an on-call basis for two or three months in 2006 doing a job that was different than the one that he had when he sustained his injury. He also had other more sedentary jobs after the motor vehicle accident. Claimant sustained a left clavicle fracture, which is the collarbone, in a motor vehicle accident in 2004. He also had a number of cuts, including a cut to the right biceps muscle. He had surgical repair of those. Claimant told him it took about four months to recuperate from that, and he was then able to get back to his normal activities. Claimant said he did not have any problems once he had finished his recuperation. Dr. Van Ryn reviewed the medical records associated with Claimant's treatment for the 2004 motor vehicle accident.

Dr. Van Ryn reviewed Claimant's systems and noted that Claimant had problems with fatigue, cramping, and anxiety because he had a medical condition that was not resolving. He also had depression because of his medical condition and the fact that he had not been able to get back to normal use of his arm. Dr. Van Ryn performed a physical examination on Claimant on September 26, 2007. He noted Claimant had a mild thoracic kyphosis, or poor posture. He slumped over a little bit when he sat. He went straight up easily when asked. His kyphosis was postural and not due to a degenerative condition. He had a normal range of motion of his neck but he did have pain when he moved his neck to the left. He was not tender in the middle of the neck, only over toward the side of the neck and the first rib point which is between the neck and the shoulder blade where the nerves exit from the neck between muscles before they go down the arm.

Claimant was also very tender over the costovertebral articulations where the ribs have the joints which hook them into the middle of the spine. He was not tender, however, on the right side. He had normal range of motion in his lower and mid back. Waddell's tests were normal. Those tests can indicate a nonphysical cause for the pain. Adson's maneuver, which checks to see if the pulse in the arm stops, was performed. If it does, that indicates a diagnosis of thoracic outlet syndrome. That did not happen in Claimant's case. Claimant performed a Roos maneuver and was not able to complete that because of too much pain in his left arm. He was able to do it with the right side. He did a Spurling's maneuver where he turned the neck and put pressure on it. That caused Claimant to have reproduction of a tingling sensation in his left hand, which indicated a pinched nerve in the neck. Claimant's range of motion was stable in both shoulders. He had subscapular crepitation on the left side, but not the right side. That indicated a diagnosis of subscapular bursitis—a chronic inflammation of a fluid-making sac between the shoulder blade and the rib cage.

Claimant had a little more than average range of motion of the left elbow. He had a positive Tinel's at the ulnar tunnel where the nerve actually entered the hand at the wrist. The Tinel's test at the median nerve was negative. The tests were negative on the right side. He had intensely positive Tinel's at the left cubital and intensely positive at the left ulnar that indicated that nerve was very irritated in at least two places. Claimant had decreased sensation in most of the dermatomes to the left arm. Claimant had decreased muscle strength through the left arm compared with the right. He had good pulses. His left hand was just a little bit darker than the right.

Dr. Van Ryn took X-rays of Claimant's neck and noted that Claimant had down-sloping shoulders. He had a cervical rib on both sides. That is an extra rib and means that the nerves have to climb up and get over the cervical rib before they can exit down the arm. Dr. Van Ryn stated that people who have down-sloping shoulders and the extra rib are at significant risk to develop thoracic outlet syndrome because the nerves can kink under heavy stress because they have to go up and over that rib, and then they are more closely applied to the rib cage as they leave the neck to go down the arm.

Dr. Van Ryn stated that based upon his review of the medical records, his discussions with Claimant regarding the history of injury, his physical examination of Claimant, and his review of the radiographs, he had five working diagnoses from the injury. First was costovertebral syndrome. That is an irritation and subluxation of the ribs where they come into the back. He had scapulothoracic bursitis which is a chronic inflammation of the bursa sac between the shoulder blade and the rib cage. He had a left cubital tunnel and ulnar tunnel syndrome which is the irritation of the ulnar nerve down the left arm. Claimant had a possible left cervical radiculopathy, which is possibly a pinched nerve from the neck. And then he had a brachial plexopathy, which is an irritation of the nerves as they course between the neck and the shoulder.

Dr. Van Ryn testified that Claimant had not had a full evaluation of his condition. He stated that Claimant needs further testing to determine whether all five diagnoses are present or not. He stated Claimant's neck has never been closely looked at. He stated Claimant needs an MRI scan of his neck to look for a herniated disc causing his problem. He stated Claimant needs nerve conduction testing to confirm the diagnosis of left cubital and ulnar tunnel syndrome.

Dr. Van Ryn stated that in his opinion, the single substantive cause to all five of his diagnoses was the work Claimant was doing at the book bindery, specifically, the date in which he had to increase both the weight and rapidly increase the repetitive nature of taking the books to the collating machine from the pallets. He said he would call it the prevailing factor that was causation of those diagnoses. He stated that the work activities that Claimant did on that day exceeded his body's capabilities to withstand that kind of work and he broke down. He stated that he did not feel that Claimant was at maximum medical improvement. He recommended that Claimant needs a cervical spine and neck MRI, nerve conduction velocities, EMG testing, that is a full neurologic electrical test of the left arm and neck.

Dr. Van Ryn also stated that as of September 26, 2007, Claimant was not capable of returning to work that involved the use of his left arm or any kind of significant lifting. Dr. Van Ryn recommended in his September 26, 2007 report that Claimant be off work until the additional diagnostic studies were completed, and that would remain so if further treatment were indicated by the studies. Dr. Van Ryn stated that if it was later determined that Claimant had thoracic outlet syndrome, he disagreed with Dr. Hodges' conclusion that it was due to overgrowth and body habitus. He disagreed because

Claimant does not have overgrowth of his clavicle because the collarbone had been completely healed with no further bony growth for well over a year, two years before this happened. And Claimant was functional, so the clavicle fracture, he felt, had no role in the causation of this diagnosis. He stated that Claimant's body habitus did have some role in the causation of that diagnoses, but it was not the prevailing condition that caused it. Dr. Van Ryn considered Claimant's work he was doing on the day that he reported the injury to be the prevailing factor in bringing about the diagnosis of Claimant's brachial plexus or thoracic outlet syndrome. He stated all his opinions were within a reasonable degree of medical certainty.

Dr. Van Ryn testified on cross-examination that Claimant estimated he was lifting sets of books that weighed about 20 pounds per set. He stated there were probably 3 to 4 inches thick of books. He stated that the diagnoses discussed could be caused by two or three hour's worth of work doing that. He said that if Claimant worked on the machine between 1:00 p.m. until 2:30 p.m. on the date of injury, that would be enough time to exceed his ability to do that work and create body damage if the rate and the books were as Claimant actually portrayed. Dr. Van Ryn stated he had treated numerous cases of thoracic outlet syndrome, cervical radiculopathy, and each of his other diagnosis, but he had not had one exactly like this with five diagnoses.

Dr. Van Ryn stated that he was aware that Dr. Hodges diagnosed Claimant with thoracic outlet syndrome. He did not agree with that diagnosis as being the causation of all of Claimant's symptoms because there was a lot more going on there than would be explained by thoracic outlet syndrome. Claimant had a number of symptoms on physical examination findings that were negative in thoracic outlet syndrome but positive in Claimant's case. Dr. Van Ryn stated that he disagreed with the statement in Dr. Hodges report in which Dr. Hodges indicated that Claimant's thoracic outlet syndrome may have been exacerbated a little by his activity, but that the underlying problem was the motor vehicle accident. He disagreed because Claimant had other diagnoses that caused a large part of his symptoms, because the findings that Claimant had on the CAT scan were very minor findings and would not, in and of themselves, cause a profound thoracic outlet syndrome or the degree of symptoms that Claimant exhibited, and Dr. Hodges did not do a full musculoskeletal examination.

Dr. Van Ryn stated that the things that caused him to believe that Claimant's current symptoms and condition were work related was the description of the work history on that date—a significant increase in the frequency while doing a fairly heavy lifting. Then there was how Claimant had to lift them, various heights on the pallet, and then go up to shoulder height to do the stacking. That required a lot of extension, rotation of both the neck, the muscles connected from the neck to the shoulder blade, the muscles connecting the shoulder blade to the rib. He found the activities that day, and a change from his normal activities, to be consistent with producing the diagnoses he had made. Second, there was Claimant's history of having had other significant injury in the past and being able to rehabilitate. Then there was a work history that Claimant had been at the book bindery, although a different job, in 2006 and had been able to do that job for several months. Then there was the positive Spurling's maneuver which he found to be a very specific test for nerve irritation from the neck. Objective findings were scapulothoracic bursitis that he felt and the consistency of Claimant's pain in the rib cage which correlated to the mechanism of injury and created the diagnosis of costovertebral syndrome. Also included was the Tinel's in the hand and elbow which indicated significant irritation of the ulnar nerve.

Dr. Van Ryn reviewed the records of Dr. Christopher Main. He was aware that Dr. Main found

that Claimant's injury was not work-related. He disagreed with Dr. Main. He noted that Dr. Main did not do a Spurling's maneuver or a good neck examination. He did not put his hand on the shoulder blade. He did not do a Tinel's examination of the nerves in the left arm. He did not see a result of Dr. Main palpating the rib to thoracic articulations. He disagreed with Dr. Main finding that Claimant had thoracic outlet syndrome that was related to Claimant's old clavicle fracture.

Dr. Van Ryn disagreed because the old clavicle fracture was a mild malunion which will not in and of itself cause a thoracic outlet syndrome. He said it would not be possible that Claimant's symptoms, when he saw Claimant, were the result of an aggravation of an old injury rather than due to a discrete new injury because he did not have a history of an old injury that was consistent with those things. He said Claimant's symptoms should not have resolved somewhat during his time off work after the injury necessarily, because Claimant did not receive treatment for his specific diagnoses. He thought Claimant had a double crush syndrome because he had signs of cervical radiculopathy with his pinched nerve in the neck and then pressure on his ulnar nerve in two different spots.

Dr. Van Ryn said he worked about 50/50 on the side of the plaintiff and the employer. He had done eight to ten IMEs for Claimant's attorney's firm in the past year.

Dr. Van Ryn stated that in reviewing the records from the 2004 accident, there was never a diagnosis of costovertebral syndrome, scapulothoracic bursitis, cubital tunnel or ulnar tunnel syndrome, a cervical radiculopathy, or brachial plexopathy. Those were all new conditions since the episode of April 2007. He stated that if that was related to the mild malunion of the shoulder, that shoulder fracture, and if that brought about thoracic outlet syndrome, he would have expected to see the onset of those symptoms after finishing the recuperation from the shoulder sometime in 2005. Claimant reported to him that he did not have those symptoms in 2005 or 2006, and the first time he had those problems was after the episode of April 2007.

#### WAGE STATEMENT

Employer and Insurer's Exhibit F included a Missouri Wage Statement for Claimant. It noted a date of hire of March 26, 2007, a date of accident of April 25, 2007, and an hourly rate on date of accident of \$8.25. The Wage Statement showed the following:

	Week Ending	# of Hrs Worked	Total Gross Wage
1	3-31-07	32	264.00
2	4-07-07	16	132.00
3	4-14-07	32	264.00
4	4-21-07	40	330.00
5	4-28-07	24	198.01

Employee's total gross wages for the four weeks immediately preceding April 25, 2007 were \$990.00.

#### DISCUSSION

#### ACCIDENT, OCCUPATIONAL DISEASE, MEDICAL CAUSATION

Did Claimant sustain an injury by accident or occupational disease arising out of and in the course of his employment for Employer, and if so, was his injury medically causally related to an accident or occupational disease arising out of and in the course of employment?

Section 287.800, RSMo 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 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 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of ‘accident’, ‘occupational disease’, ‘arising out of’, and ‘in the course of the employment’ to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care*,

Inc., 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Occupational diseases are compensable under the Missouri Workers' Compensation Act. Sections 287.067.1, 2, RSMo. An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

- 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 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.

“When construing a statute, our primary goal is to ascertain the intent of the legislature from the language used and to give effect to that intent by giving the words used their plain and ordinary meaning.” *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. banc 2004).

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*, 121 S.W.3d at 228; *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). 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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226 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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *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).

The cause of an employee's medical condition need not be a single traumatic event. An employee may obtain compensation pursuant to The Workers' Compensation Law for gradual and progressive medical conditions which result from repeated or constant exposure to hazards encountered by the employee in the workplace. *Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo.App. 1996), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. 1991). Diseases resulting from the chronic traumata of repetitive occupational body movements qualify for compensation if they cause an employee to sustain a loss of earning capacity. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972); *Coloney*, 952 S.W.2d at 759.

Gradual and progressive injuries resulting from repeated exposure to on-the-job hazards is broad enough to now treat compensable aggravations of preexisting diseases or infirmities caused by nonaccidental conditions of employment as either accidents or occupational diseases. *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 49 (Mo.App. 1999); *Smith*, 939 S.W.2d at 436. Aggravation of a preexisting disease or infirmity caused by nonaccidental conditions of employment is compensable as either an accident or as an occupational disease. *Smith*, 939 S.W.2d at 436.

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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228. 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*, 481 S.W.2d at 555.

Missouri courts have interpreted section 287.063, RSMo to provide that an employee with an occupational disease is “injured” within the meaning of the section 287.120, RSMo when the disease causes a “compensable injury.” *Coloney*, 952 S.W.2d at 759, citing *Hinton v. National Lock Corp.*, 879 S.W.2d 713, 717 (Mo.App. 1994) (citing *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 228 (Mo.App. 1988)). The “injury” requirement of the Act necessitates that the employee's “injury” create a harm that tangibly affects the employee's earning ability. *Coloney*, 952 S.W.2d at 763; *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995). Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the legislature in enacting the Worker's Compensation Act which was to provide indemnity for loss of earning power and disability to work and not for pain, suffering, or mere physical ailment. *Coloney*, 952 S.W.2d at 760.

The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229. “Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

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 in part on other grounds by Hampton*, 121 S.W.3d at 229; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. 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 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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. 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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.

A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the pre-existing condition to “escalate to the level of disability.” *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo.App. 2005); *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo. App. 1998), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228. An employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury. *Gennari v. Norwood Hills Corporation*, 322 S.W.2d 718, 722-23 (Mo. 1959); *Miller*, 890 S.W.2d at 376; *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652 (Mo.App. 1983). It is sufficient to show only that the performance of usual and customary duties led to a breakdown or change in pathology. *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504, 509 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Smith*, 939 S.W.2d at 434; *Wolfgeher v. Wagner Cartage Serv, Inc.*, 646 S.W.2d 781, 784 (Mo. banc 1983). The Court noted in *Winsor* at 509: “Dr. Weed testified that there was an exacerbation of Winsor's previous back injury by virtue of the August 11th incident. ‘Exacerbation,’ whether used in medical parlance or everyday conversation, means the same thing: an ‘increase in the severity of a disease or any of its symptoms,’ *Dorland's Illustrated Medical Dictionary* 589 (28th ed.1994), an ‘intensification or aggravation, as of a disease, pain, etc.’”

The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a “change in pathology.” *Winsor*, 950 S.W.2d at 509; *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo.App. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229. “If substantial evidence exists from which the Commission could determine that Claimant’s preexisting condition did not constitute an impediment to performance of Claimant’s duties, there is sufficient competent evidence to warrant a finding that Claimant’s condition was aggravated by a work-related injury.” *Avery*, 966 S.W.2d at 322; *Miller*, 890 S.W.2d at 376.

This case is governed by the provisions of the 2005 amendments to the Missouri Workers’ Compensation Law. Claimant needs to prove that work was the prevailing factor in causing his injury and disability. Based on all of the evidence and the application of the Missouri Workers’ Compensation Law, I find that Claimant has met his burden to prove that his repetitive work for Employer on April 25, 2007 was the prevailing factor in causing his neck, left upper extremity, left shoulder, and left hand injury, and the resulting disability, and the need for further medical treatment. I find that Claimant sustained a compensable occupational disease from repetitive motion on his last day of work with Employer on April 25, 2007. I find that Claimant was exposed to a risk that was greater than and different from that which affects the public generally. He was engaged in numerous repetitive lifting tasks. I find that Dr. Van Ryn’s conclusions are credible and prove the probability that Claimant sustained an occupational disease from repetitive motion that was caused by conditions in Claimant’s workplace. Additionally, I find the opinions and conclusions of Dr. Jacques Van Ryn and Dr. Craig Newland regarding causation and need for future medical care to be more credible than the conclusions of Dr. Christopher Main.

Claimant testified that on April 25, 2007, he was working at the Perfect Binder loading the collator with books that weighed approximately 5 to 5 ½ pounds each. Claimant testified that he was lifting two of these books at a time and that his goal was to load approximately 3,000 books per hour with the help of a co-worker. As a result, Claimant's job was to lift and manipulate 1,500 books per hour. Claimant testified that after performing this task for two to three hours, he developed pain in his left shoulder and left arm. He also developed problems with numbness in his left hand as well as his hand turning blue. Claimant's symptoms became so severe that he had to stop work and tell his supervisor.

Claimant's direct Supervisor, John Koehl, testified that the production goal for the Perfect Binder was 3,000 books per hour for the type of book that Claimant was handling on the date of the injury. Mr. Koehl testified that on the date of injury, the Perfect Binder processed 3,088 books that weighed over 8,000 pounds during the two hours ten minutes that Claimant worked on that machine on April 25, 2007.

Additionally, the testimony of Claimant and Mr. Koehl, and the photographs in Employer/Insurer's Exhibit J, demonstrated that Claimant moved the books from a cart onto the binder machine, and was frequently required to lift them to the height of his shoulder. These repetitive activities are consistent with the descriptions provided to the various medical care providers, including Dr. Jacques Van Ryn. These activities are determined to be repetitive enough to cause the injuries sustained by Claimant.

Employer/Insurer asserts that Claimant's current condition is causally related to a motor vehicle accident that occurred in 2004. However, I find that its position is not convincingly supported by the medical records or the testimony. I find that Claimant's neck and left upper extremity injury arose out of and in the course of his employment for Employer on April 25, 2007, and that his work for Employer on April 25, 2007 was the prevailing factor in causing his resulting medical condition and disability.

The evidence demonstrates that Claimant's motor vehicle accident in May 2004 resulted in injury to his right shoulder, right bicep, left clavicle and face. His left clavicle required surgical repair and the implantation of a metal plate and screws. After his recovery in September of 2004, Claimant sought no further medical care until April 25, 2007, the date of injury in this case. Claimant continued to have occasional aches at the clavicle site, but had no problems with or treatment of his left shoulder, left arm, and left hand.

The treatment records relating to the motor vehicle accident do not reveal treatment for or complaints of numbness or tingling in any of the fingers of his left hand. However, on April 25, 2007, after working over two hours on the Perfect Binder, Claimant developed severe problems down his left shoulder, left arm, and into his left hand. Claimant was noted to have numbness and tingling in his left hand. These problems have persisted up and until the time of the December 20, 2007 hearing. Claimant's symptoms became so severe on April 25, 2007 that he had to stop work and advise his Supervisor. Claimant's Supervisor, John Koehl, testified that he witnessed Claimant earlier in the day and noted that Claimant was able to perform his work activities and had no problems with his shoulder or arm. However, at approximately 2:00 p.m., Claimant advised Koehl that he was in severe pain and had a knot on his shoulder. Koehl noted that Claimant appeared to be in pain to such extent that Koehl brought him to James Payden. Mr. Payden testified that when Claimant

appeared in his office, he was holding his arm in a fixed position across his body. The symptoms were of such severity that Payden immediately sent Claimant to Dr. Concepcion-Rivera.

Dr. Concepcion-Rivera noted that Claimant was having moderate to severe pain that was exacerbated by any movement. Moreover, the doctor noted that Claimant had a discoloration of his arm from the shoulder to the hand. At that time, the doctor recommended X-rays of the left shoulder as well as a CT scan. Dr. Concepcion-Rivera instructed Claimant not to return to work until further notice. Although Dr. Concepcion-Rivera had seen what she believed to be two loose screws at the clavicle site, a radiological examination confirmed that the screws and plate used to stabilize the fracture were in satisfactory position. There was no indication of any misplacement or loosening of these screws.

Moreover, Dr. Newland examined Claimant on April 26, 2007. Dr. Newland noted that Claimant was having pain and popping in the arm with a bluish appearance to the arm that began thereafter. Dr. Newland reviewed the recent X-rays and compared them to those in 2004 and confirmed that the left shoulder showed a healed clavicle fracture with the internal fixation device in satisfactory alignment. Dr. Newland stated that the mechanism of injury was not one of acute trauma, but rather lifting repeatedly. He also stated that there was no demonstrable relatedness to Claimant's previous clavicle fracture. Dr. Newland's opinion on this matter is given significant weight given the fact that Dr. Newland had also surgically repaired the clavicle and treated Claimant's condition following the motor vehicle accident in 2004.

In spite of the medical opinion from Dr. Newland as well as an X-ray finding verifying that the clavicle fracture was not the cause of Claimant's symptoms, Dr. Christopher Main came to an opposite conclusion. Dr. Main concluded that Claimant had thoracic outlet syndrome as well as a mild malunion of the left clavicle and left shoulder dyskinesia. Dr. Main concluded that he felt that these conditions were related to the past motor vehicle accident and not to Claimant's work activities. Dr. Main's opinion and deposition testimony fails to explain why Claimant was able to go from September 2004 until April of 2007 with no treatment and no symptoms down his left shoulder, left arm, and left hand until performing the work activities.

Dr. Main concluded that Claimant's conditions were related to the motor vehicle accident, yet Insurer authorized the physical therapy, provided a neurological consult, and paid temporary total disability until September 20, 2007. When Claimant was sent by Employer to Dr. Timothy Hodges on June 8, 2007, Dr. Hodges concluded that Claimant had a neurological component of thoracic outlet syndrome that was likely based on the fracture of the clavicle, body habitus changes with additional growth over the past few years as well as possibly some exertion. Dr. Hodges admitted that Claimant's condition may have been exacerbated by his work activities on the date of accident. Dr. Hodges failed to explain how Claimant could have continued to perform work activities from September of 2004 up through April 25, 2007 without requiring further medical attention or without problems or pain down his left shoulder, left arm, and left hand until after the lifting work for Employer on April 25, 2007.

The opinions of Dr. Main and Dr. Hodges were refuted by Dr. Van Ryn. Dr. Van Ryn noted in his deposition and report that Claimant's symptoms were not coming from the clavicle fracture but instead were coming from the shoulder, neck, and hand. Dr. Van Ryn diagnosed Claimant as having a chronic subluxation of the rib articulations that was seen in his X-ray. Dr. Main admitted that his X-rays did not go as high to show the rib articulations.

In addition, Dr. Van Ryn noted that Claimant had bursitis at the scapulothoracic region. The doctor confirmed this by noting the crepitus within the shoulder. Moreover, Dr. Van Ryn noted that Claimant had intensely positive findings of the Tinel's at the left cubital tunnel and left ulnar tunnel. The doctor concluded that this confirmed the diagnosis of left cubital tunnel and would explain Claimant's left handed symptoms. Dr. Van Ryn also noted that Claimant could have possible left cervical radiculopathy but needed further testing to verify this condition as well as possible thoracic outlet syndrome that would come in the form of a brachial plexopathy.

In the present case, Claimant testified that following the 2004 motor vehicle accident, his symptoms were to the front portion of his chest at the site of his clavicle. Claimant testified that although he had limitations in lifting his left arm overhead, he had no severe symptoms when performing his work activities until after the work injury. Additionally, Claimant testified that while he had occasional aching at the clavicle fracture site, he only took occasional Tylenol and received no treatment after September of 2004. Claimant noted that following his lifting activities with the Employer on April 25, 2007, he developed severe pain in his left shoulder. Claimant noted that those symptoms were at the bend at the top of the shoulder and not at the front portion of the collar bone where the clavicle had previously been fractured. Additionally, Claimant noted that for the first time, he had problems with his hand going numb as well as pain going down the backside of his arm into his hand. Claimant noted that following the motor vehicle accident in 2004, he had no such symptoms, and all of these problems were new following the lifting of over 8,000 pounds of books over two hours for Employer on April 25, 2007.

Employer/Insurer argue that Dr. Van Ryn's opinion with regard to medical causation should be discounted and discarded because he based his opinion on incorrect numbers and weights of books moved by Claimant. Employer/Insurer argues that the evidence revealed that there was not adequate exposure at Employer on April 25, 2007 to cause Claimant to develop the diagnoses. Employer/Insurer further argued that those conditions developed over a period of time following Claimant's 2004 accident and its resulting injuries. I disagree. I find that Claimant's repetitive lifting on April 25, 2007 was adequate exposure to cause his injury, and that Dr. Van Ryn's opinion with regard to causation is credible even though Claimant's description of the extent of his exposure to the repetitive lifting to Dr. Van Ryn was inflated. Claimant first reported his injury on April 25, 2007. He had new complaints of pain, numbness and tingling, and bluish color in his left upper extremity. He was diagnosed with an injury by Dr. Concepcion-Rivera and referred to Dr. Newland who examined him on April 26, 2007 and stated that the mechanism was not one of an acute trauma, but rather lifting repeatedly. Dr. Newland stated that there was no demonstrable relatedness to his previous clavicle fracture. Claimant was a very thin man without a high degree of muscularity. Dr. Van Ryn noted that someone without a high degree of muscularity will fatigue his or her muscles earlier and be more likely to sustain injury in a heavy work environment. Dr. Van Ryn noted that the work activities that Claimant did on April 25, 2007 exceeded his body's capabilities to withstand that kind of work and he broke down.

Dr. Van Ryn noted in his deposition that the work that Claimant did for Employer on April 25, 2007, in which he had to increase the weight and rapidly increase the repetitive nature of taking the books to the collating machine to the pallets, was the prevailing factor that caused his diagnoses. Dr. Van Ryn stated that the things that caused him to believe that Claimant's current symptoms and condition were work related was the description of the work history on that date—a significant increase in the frequency while doing a fairly heavy lifting. He also noted how Claimant had to lift the books to

various heights on the pallet, and then go up to shoulder height to do the stacking. He noted that required a lot of extension, rotation of both the neck, the muscles connected from the neck to the shoulder blade, the muscles connecting the shoulder blade to the rib. He found the activities that day, and a change from his normal activities, to be consistent with producing the diagnoses he had made. Second, was Claimant's history of having had other significant injury in the past and being able to rehabilitate. Then there was a work history that Claimant had been at the book bindery, although a different job, in 2006 and had been able to do that job for several months. Then there was the positive Spurling's maneuver which he found to be a very specific test for nerve irritation from the neck. Objective findings were scapulothoracic bursitis and the consistency of Claimant's pain in the rib cage, which correlated to the mechanism of injury and created the diagnosis of costovertebral syndrome. Also included was the Tinel's in the hand and elbow which indicated significant irritation of the ulnar nerve. I find these opinions of Dr. Van Ryn to be credible.

Employer/Insurer's counsel asserts in her post-trial Proposed Decision that Claimant's injury is the result of an idiopathic condition and is not compensable pursuant to the provisions of Section 287.020.3(3), RSMo. I disagree and find that the evidence does not support Employer/Insurer's position. An idiopathic condition is a condition that is "innate or peculiar" to claimant. *Kasl. v. Bristol Care, Inc.* 984 S.W.2d 852, 854 (Mo.banc 1999). I find that the evidence proves a known cause of Claimant's injury—the repetitive lifting he did on April 25, 2007. I find that Claimant's injury was not due to an innate or peculiar condition.

Claimant has proven that he suffered a new injury on April 25, 2007. Claimant's testimony and the medical records confirm that in the years leading up to the work injury, he was receiving no active medical treatment and had no problems relating to his neck, left shoulder, left arm, and left hand. Additionally, Claimant had no numbness or tingling down the left hand until following this work injury. Claimant has proven that it was the repetitive work activity for Employer on April 25, 2007 that led to his current condition and, therefore, he has a compensable work injury under the Workers' Compensation Law.

Based on the foregoing, and the application of the Missouri Workers' Compensation Law, I find that the credible evidence has established that Claimant sustained an injury to his neck and left upper extremity arising out of and in the course of his employment for Employer which resulted from repetitive motion exposure to hazards encountered by Claimant in Employer's workplace. I find that Claimant's occupational exposure to repetitive motion while working for Employer on April 25, 2007 was the prevailing factor in causing his injury, his resulting disability, and the need for medical treatment.

#### AVERAGE WEEKLY WAGE AND COMPENSATION RATES

What is Claimant's average weekly wage and what are the compensation rates?

Pursuant to Section 287.250, RSMo the average weekly wage is determined in the following manner:

(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 13 the wages earned while actually employed by the employer in each of the last 13 calendar weeks immediately preceding the week in which the employee was injured or if

actually employed by the employer for less than 13 weeks, by the number of calendar weeks, or any portion of the 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 an absence for a calendar week if the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the earnings earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision.

At trial, the Employer entered into evidence a wage statement, Employer and Insurer's Exhibit F, which represented four weeks of income prior to the date of injury. During the four weeks of wages, Claimant earned a total of \$990.00. However, during the course of that four week time period, Claimant missed five days from work. As a result, these earnings should be divided by three weeks of work, pursuant to the Statute. This creates an average weekly wage of \$330.00 with corresponding temporary total disability and permanent partial disability rates of \$220.00 per week.

### TEMPORARY TOTAL DISABILITY

What is Employer/Insurer's liability for past temporary total disability?

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226. Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would

never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Claimant has never returned to work following the work injury of April 25, 2007. He was initially treated by Dr. Concepcion-Rivera and was taken off work until further notice. He was subsequently given a 5 pound restriction by Dr. Newland as well as by Dr. Concepcion-Rivera. Claimant testified that he presented this disability slip to Employer but was advised by Supervisor Koehl that there was no light-duty available and that he should only return when he was released to full-duty.

Subsequently, Claimant was seen by Dr. Christopher Main who provided him with a 20-25 pound lifting restriction. Additionally, Dr. Main advised him not to work above his chest as it would be extremely difficult and probably too painful to perform. Claimant testified that he was never given paperwork by Dr. Main nor was he contacted by Employer advising that they would accommodate work restrictions. Instead, Claimant was contacted by Safety Manager Payden on May 21, 2007 advising him that he was terminated for not calling or showing up for work. Mr. Payden admitted on cross-examination that the days that were missed were days that Claimant either saw Dr. Main or was undergoing physical therapy at the request of Dr. Main. Mr. Payden testified that they had never contacted Claimant to advise him that Employer had changed its position and that Employer was willing to accommodate the restrictions. Employer had originally advised Claimant that they could not accommodate the restrictions, then reversed this position without ever advising Claimant of this change of status. Additionally, it should be noted that during this time period, Claimant was receiving temporary total disability benefits by the Workers' Compensation carrier.

Claimant testified that he had been trying to find work within the restrictions given to him by the various doctors. However, he testified that when he provided the employers with these restrictions, he has been turned down for multiple jobs. Claimant testified that he had tried to find work with banks and convenience stores but had been unsuccessful to date due to his disability.

Dr. Van Ryn stated that as of September 26, 2007, Claimant was not capable of returning to work that involved the use of his left arm or any kind of significant lifting. Given the severity of the work restrictions, Claimant has demonstrated that he remains unemployable in the open labor market. Claimant noted that he had attempted to find positions with multiple employers, but had been rejected due to the severity of his work restrictions.

I find that as a result of his work injury on April 25, 2007, Claimant was not able to return to work, and that he was temporarily and totally disabled, from April 26, 2007 to September 20, 2007, and from September 21, 2007 to the date of trial, and ongoing.

Based upon the foregoing, I find that Claimant has proven that he is entitled to temporary total benefits from April 26, 2007 up to the date of hearing and ongoing until he reaches maximum medical improvement, or is able to compete in the open labor market for employment, or until 400 weeks of temporary disability benefits have been paid, or until Claimant's death, whichever first occurs, pursuant to Section 287.170, RSMo.

It was stipulated at the outset of trial that the Employer/Insurer had paid temporary total disability benefits from April 26, 2007 through September 20, 2007, representing 21 weeks. The

Employer indicated that it had paid a total of \$3,575.00 in temporary total disability benefits. However, for that period of time, Claimant was entitled to 21 weeks at the rate of \$220.00 per week, totaling \$4,620.00. As a result, I hereby order Employer/Insurer to pay the underpayment of temporary total disability benefits in the amount of \$1,045.00 for the period April 26, 2007 through September 20, 2007.

In addition, I order Employer/Insurer to pay Claimant temporary total disability benefits from September 21, 2007 through December 20, 2007, the date of hearing in this case, which is 13 weeks, at the rate of \$220.00 per week, which amounts to \$2,860.00 for the period September 21, 2007 through December 20, 2007.

In addition, I order Employer/Insurer to pay Claimant temporary total disability benefits at the rate of \$220.00 per week from December 21, 2007 until Claimant has reached maximum medical improvement, or is able to compete in the open labor market for employment, or until 400 weeks of temporary disability benefits have been paid, or until Claimant's death, which first occurs, pursuant to Section 287.170, RSMo.

Employer/Insurer requested in its Proposed Decision that Claimant reimburse it the sum of \$3,575.00 for temporary benefits Claimant received, pursuant to Section 287.160.1(2) RSMo. I have found that Claimant's claim is compensable, and Employer/Insurer's request for reimbursement is denied.

#### FUTURE MEDICAL AID

What is Employer/Insurer's liability for future medical aid?

Claimant is requesting an award of future medical aid. 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*, 132 S.W.3d at 266. 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. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226. It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227. "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. *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231.

The type of treatment authorized can be for relief from the effects of the injury even if the

condition is not expected to improve. *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224. 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*, 132 S.W.3d at 270. Medical aid may be required even though it merely relieves the employee's suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brollier*, 163 S.W. 2d at 115. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

While Employer has the right to name the treating physician, he or she may waive that right by failing or neglecting to provide necessary medical aid. *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 822 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Emert v. Ford Motor Company*, 863 S.W.2d 629, 631(Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228; *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984). Where the employer with notice of an injury refuses or neglects to provide necessary medical care, Claimant may make his own selection and have the cost assessed against the employer. *Herring*, 914 S.W2d at 822.

Dr. Main, Dr. Hodges, Dr. Newland and Dr. Van Ryn all agreed that Claimant has not reached maximum medical improvement. Dr. Van Ryn has recommended further diagnostic testing in the form of a cervical MRI, EMG, and nerve conduction study. Further treatment would be based upon the findings from these diagnostic tests. Dr. Hodges recommended further physical therapy but suggested that Claimant may also need a first rib resection to try to improve his symptoms. Similarly, Dr. Main had indicated that Claimant was in need of further treatment.

Based upon the foregoing, I find that Claimant continues to suffer from pain and problems in his neck, left shoulder, left arm, and left hand as a result of his April 25, 2007 work injury. I find that Claimant is in need of further diagnostic testing and treatment to cure and relieve his symptoms resulting from that injury. Since Employer/Insurer has previously denied medical treatment, I find that the Employer/Insurer has waived its right to select and approve the treating physician. Claimant may make his own selection and have the cost assessed against Employer/Insurer.

Employer/Insurer is therefore directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his April 25, 2007 work injury, including the further diagnostic testing in the form of a cervical MRI, EMG, and nerve conduction study Dr. Jacques Van Ryn has recommended, and such additional medical treatment based upon the findings from those diagnostic tests, in accordance with Section 287.140, RSMo.

## CONCLUSION

For all these reasons, and based on substantial and competent evidence, and the application of

the Missouri Workers' Compensation Law, I find in favor of Claimant. I find that Claimant has met his burden of proof that he sustained an injury by a repetitive occupational disease arising out of and in the scope of his employment for Employer on April 25, 2007, and that he needs further medical treatment for that injury. I further find that Claimant's claims for future medical aid, past temporary total disability benefits and underpayment of temporary total disability should be allowed, and they are hereby awarded in accordance with the foregoing Findings of Fact and Rulings of Law. No costs are assessed against any party under Section 287.203, RSMo.

Date: January 23, 2008

Made by: /S/ Robert B. Miner

Robert B. Miner  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker, Director  
Division of Workers' Compensation

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).