

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 08-001945

Employee: Andrew Lukowski
Employer: Macon Electric Cooperative
Insurer: Missouri Electric Cooperative Insurance Plan
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein. Pursuant to § 286.090 RSMo, we issue this final award and decision affirming the May 25, 2012, award and decision of the administrative law judge, as modified herein. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Employer asserts that the administrative law judge did not credit the past medical expense award with amounts employer paid for treatment of this injury. Employer's point is well-taken. The administrative law judge awarded the full amount of the medical expenses without credit for amounts paid directly to providers by employer.

This case was tried with Injury No. 09-045934. The parties stipulated that employer paid \$3,141.88 in medical expenses relative to the 2008 injury and that employer paid nothing on behalf of the 2009 injury. The billing records suggest that of that \$3,141.88, employer paid \$1,866.48 for treatment of the 2008 injury and \$1,275.40 for treatment of the 2009 injury. However, we are bound to accept the parties' stipulation so we credit all of employer's payments to the injury in this case and none to the medical expenses incurred relative to the 2009 injury.²

Next, employer asserts that the administrative law judge awarded medical expenses in the amount of \$3,867.00 for treatment of a heel spur that was not related to this work injury. Employee concedes this point.

The administrative law judge awarded to employee medical expenses in the amount of \$24,459.70. We must subtract from that amount employer's credit of \$3,141.88 and the non-work-related heel spur expenses of \$3,867.00. We reduce the award of medical expenses due from employer to \$17,450.82.³

¹ Statutory references are to the Revised Statutes of Missouri 2007, unless otherwise indicated.

² The parties in each case are identical, so no party should be financially prejudiced by the misallocation.

³ \$24,459.70 - \$3,141.88 - \$3,867.00 = \$17,450.82.

Employee: Andrew Lukowski

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In all other respects we affirm the award of the administrative law judge.

We further approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

The award and decision of Administrative Law Judge Vicky Ruth, issued May 25, 2012, is attached and incorporated by this reference, except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 1st day of February 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T
Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Andrew Lukowski

Injury No. 08-001945

Dependents: N/A

Employer: Macon Electric Cooperative

Additional Party: Second Injury Fund

Insurer: Self-insured, Missouri Electric Cooperative Ins. Plan,
c/o CCMSI as third-party administrator

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: February 23, 2012

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 15, 2008.
5. State location where accident occurred or occupational disease was contracted: Macon County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee slipped on a running board as he was exiting his truck.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right shoulder and right knee.
14. Nature and extent of any permanent disability: 22% of the right knee and 7% of the right shoulder.
15. Compensation paid to-date for temporary disability: \$3,514.41.
16. Value necessary medical aid paid to date by employer/insurer? \$3,141.88.
17. Value necessary medical aid not furnished by employer/insurer? See Award.

- 18. Employee's average weekly wages: N/A.
- 19. Weekly compensation rate: \$664.89 / \$389.04.
- 20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:
 - PPD (51.44 weeks x \$389.04): \$20,012.22.
 - TTD: \$10,452.07
 - Past Medical: \$24,459.70

TOTAL: \$54,923.99

- 22. Second Injury Fund liability: \$10,367.92.
- 23. Future medical awarded: Yes.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder (excluding future medical treatment) in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson.

Employee: Andrew Lukowski

Injury No. 08-001945

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Andrew Lukowski

Injury No: 08-001945

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Macon Electric Cooperative

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

Additional Party: Second Injury Fund

Insurer: Self-insured, Missouri Electric Cooperative Ins. Plan,
c/o CCMSI as third-party administrator

On February 23, 2012, Andrew Lukowski, Macon Electric Cooperative, Missouri Electric Cooperative Insurance Plan (MECIP), and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 08-001945. Andrew Lukowski, the claimant, was represented by attorney Dean Christianson. Attorney Joseph Page represented Macon Electric Cooperative/MECIP, the employer/insurer. The Second Injury Fund elected not to participate in the hearing. The claimant testified in person at the hearing. Dr. Mark Lichtenfeld, Dr. Bruce Schlafly, and Dr. Michael Nogalski testified by deposition. The Administrative Law Judge set a deadline of March 22, 2012, for the filing of briefs or proposed awards and the record closed at that time. Claimant and the employer/insurer submitted briefs/proposed awards; the Second Injury Fund did not.

STIPULATIONS

The parties stipulated to the following:

Injury No 08-001945

1. On or about January 15, 2008, Andrew Lukowski (the claimant) was an employee of the Macon Electronic Cooperative (the employer).
2. The parties were operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured through MECIP c/o CCMSI.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Macon County is proper.
5. A Claim for Compensation was timely.
6. Temporary disability benefits were paid in the amount of \$3,514.41, representing five and two-sevenths weeks of benefits for the period of January 16, 2008 through February 26, 2008.
7. Medical treatment was provided in the amount of \$3,141.88.
8. Notice is not an issue.

Employee: Andrew Lukowski

Injury No. 08-001945

Injury No. 09-045934

1. On or about June 24, 2009, claimant was an employee of the employer.
2. The parties were operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured through MECIP c/o CCMSI.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Macon County is proper.
5. A Claim for Compensation was timely filed.
6. No temporary disability benefits were paid.
7. No medical treatment was provided.
8. Notice is not an issue.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Accident arising out of and in the course of employment.
2. Medical causation.
3. Nature and extent of permanent partial disability.
4. Temporary total disability benefits.
5. Unpaid medical.
6. Future medical benefits.
7. Second Injury Fund Liability.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Deposition ¹ of Dr. Lichtenfeld.
Exhibit B	Deposition of Dr. Schlafly.
Exhibit C	Medical records from Moberly Medical Clinics.
Exhibit D	Medical records from Samaritan Hospital.
Exhibit E	Medical records from Kathleen Abernathy, physical therapist.
Exhibit F	Medical records from Dr. Deline.
Exhibit G	Medical records from Mid Missouri Physical Therapy.
Exhibit H	Medical records from Columbia Orthopedic Group (4/19/08).
Exhibit I	Medical records from Columbia Orthopedic Group (8/06/08).
Exhibit J	Medical records from Columbia Orthopedic Group (1/11/09).
Exhibit K	Medical records from Columbia Orthopedic Group (5/17/09).
Exhibit L	Medical records from Columbia Orthopedic Group (6/12/10).
Exhibit M	Medical bill exhibit.

¹ All depositions were received subject to the objections contained therein.

Employee: Andrew Lukowski

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Exhibit N Report of Injury form (1/15/08).
Exhibit O Demand for medical care letter.

The following exhibits were admitted on behalf of the employer/insurer:

Exhibit 1 Deposition of Dr. Nogalski.
Exhibit 2 Report of Dr. Nogalski - 11/30/11.
Exhibit 3 Medical bill summary with adjustments.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on January 3, 1961; at the time of the hearing he was 51 years old. He currently lives in Macon, Missouri. Claimant is a high school graduate. In addition, he completed some post-secondary education and training.
2. Claimant has worked for the employer since May 19, 1989. His current position is as a ground man operator. It is his job to set up sites for the linemen, including shoveling, running a truck, setting poles, pulling wires, etc.
3. While working on January 15, 2008, claimant stepped up into the cab of his truck (Injury No. 08-001945). The cab was rather high, and was reached by climbing up two steps. Claimant slipped as he stepped up. As he slipped, he grabbed for the steering wheel with his right hand and his left foot slipped off the step and nearly touched the ground. This left his right knee in an awkwardly bent position and some of his weight was hanging from his right arm. He felt pain and stiffness in his knee and shoulder, although the knee was worse.
4. Claimant reported the injury and was sent to Dr. Joseph Quaranto for medical care. The doctor evaluated claimant and also had him evaluated in the emergency room. Dr. Quaranto asked him which of his two problems was worse, the knee or the shoulder. Claimant indicated that the knee was worse, so Dr. Quaranto focused on that injury.
5. Claimant was then referred to Dr. Thornburg at the Columbia Orthopedic Group. Dr. Thornburg evaluated claimant, noting that he was authorized to treat the right knee but not the shoulder. Dr. Thornburg performed an MRI and a cortisone injection. When the symptoms continued, Dr. Thornburg referred claimant to an orthopedic surgeon in his practice, Dr. Tarbox.
6. On April 15, 2008, Dr. Tarbox performed arthroscopic surgery on the knee. At surgery, the doctor diagnosed a torn medial meniscus. The tear of the medial meniscus involved

the anterior horn of the medial meniscus, which the doctor treated with a partial medial meniscectomy. Dr. Tarbox also performed chondroplasty for treatment of the chondromalacia of the knee joint. The doctor noted that the ACL was no longer present; he apparently believed that the absent ACL was an old injury and was unrelated to the 2008 work injury. After the surgery, claimant had physical therapy and did well. On May 28, 2008, Dr. Tarbox released claimant to full duty as of June 16, 2008. He last saw claimant on July 2, 2008. After being discharged by Dr. Tarbox, claimant has had no further care on the right knee.

7. Claimant, however, still has some problems in the right knee, such as pain, swelling, and stiffness. He indicated that the complaints are worse the longer that he works on his knee. He felt that he had approximately 50% of the motion that he had before the injury.
8. Claimant also continues to have problems with his right shoulder since the January 2008 accident. Although the pain had largely gone away after his healing period, he still had stiffness, lost motion, and some popping in the shoulder.
9. After the 2008 accident; claimant was off work from January 16, 2008 through June 16, 2008. He was not offered light duty work during that time.
10. On June 24, 2009, claimant had another injury at work (Injury No. 09-045934). This accident occurred when he was replacing a broken utility pole. He removed one piece of the pole and set it on the ground; he later forgot about this piece of the pole and tripped over it. As he tripped, he fell backwards onto his outstretched right arm. He had an immediate and sharp, stinging pain in the right shoulder.
11. Claimant reported the injury and promptly received treatment. On or about June 25, 2009, he was seen in the emergency room at Samaritan Hospital; the diagnosis was soft tissue injury to the right shoulder caused by blunt trauma. Claimant was sent for an MRI scan and referred to Dr. Quinn, an orthopedic surgeon at the Columbia Orthopedic Group. Claimant was diagnosed with a full thickness tear of the supraspinatus tendon of the rotator cuff.
12. On July 28, 2009, Dr. Quinn performed surgery on claimant's right shoulder. Dr. Quinn noted that there was a massive tear of the rotator cuff present. Claimant subsequently underwent physical therapy, and was released from care on October 27, 2009. After the surgery, claimant had better motion in the arm but still has stiffness, lost strength, and pain with extension or heavy maneuvers (such as using a hammer). He takes over-the-counter medications for these complaints.
13. Due to the shoulder surgery, claimant was off work from July 28, 2009 until November 2, 2009. He was not offered light duty work during this time.
14. Claimant identified the various medical bills that were offered and admitted into evidence. He indicated that the bills were for the treatment of his 2008 and 2009 work injuries.

15. Before his 2008 and 2009 injuries, claimant had some pre-existing problems with his right knee. In 1986, he injured the right knee while playing Frisbee. He underwent surgery at the Columbia Orthopedic Group; the surgery consisted of an arthroscopic procedure for a torn meniscus, torn lateral meniscus, a partial tear of the cruciate ligament, and chondral fragmentation of medial and lateral femoral condyle. He indicated that after he recovered, he felt "95% better." Nonetheless, if he twisted the wrong way, his knee would feel as if it would "separate," and sometimes the knee would be painful or tender.
16. In 1991, claimant re-injured his knee when he was climbing out of a window and twisted the knee. He was again seen at the Columbia Orthopedic Group, but was fine after one visit.
17. In 2006, claimant saw Dr. Davis and Dr. Quaranto for right lower leg pain and swelling after slipping at work. He received conservative treatment.
18. Claimant testified that leading up to the January 2008 injury, his right knee was doing fairly well. He did not have much pain and felt that he was 95% better.
19. Claimant had a partial amputation of the tip of the left long finger at the first joint (the joint closest to the fingernail). This injury occurred when claimant was processing deer meat in his home.
20. In 2001, claimant had bilateral carpal tunnel surgery. Since then he has had only a little stiffness in his hands and wrists.
21. In the 1990s, claimant was diagnosed with hypertension. He continues to treat for this condition through his primary care physician, Dr. Deline, and takes medication for the condition.
22. Claimant is five feet nine inches tall and weighs approximately 280 pounds. In addition to his high blood pressure medication, he takes over-the-counter ibuprofen and aspirin on a regular basis.

Dr. Lichtenfeld

23. Dr. Lichtenfeld, a family physician, prepared reports on June 25, 2009 and July 26, 2010. As to the January 2008 injury, Dr. Lichtenfeld diagnosed claimant with the following: 1) right shoulder strain, 2) right shoulder subacromial bursitis, 3) right bicipital tendonitis, 4) probable tear of the right rotator cuff, 5) right knee strain, 6) tear of the anterior horn of the right medial meniscus, 7) complete tear of the right anterior cruciate ligament, 8) incitation, exacerbation and acceleration of pre-existing degenerative changes in the right knee, 9) status-post right knee arthroscopy, 10) status- post right partial medial meniscectomy, and 11) status-post chondroplasty of the trochlea and medial femoral condyle. Dr. Lichtenfeld opined that the prevailing factor in causing these diagnoses was the accident at claimant's workplace on January 15, 2008.

24. Dr. Lichtenfeld further opined that as a direct result of the 2008 injury, claimant has a 20% permanent partial disability of the right shoulder and 35% permanent partial disability of the right knee.
25. The doctor indicates that claimant would benefit from further treatment as a result of the 2008 work injury. Specifically, he would benefit from the following treatments: anti-inflammatory medication for his right knee and right shoulder, range of motion exercise for his right knee and right shoulder, physical therapy on his right shoulder, and possible iontophoresis with 10% hydrocortisone cream. Dr. Lichtenfeld noted that if his right shoulder symptoms persist, claimant might need a steroid injection in the right shoulder, an MRI, or surgery. As to the right knee, if the symptoms persist, the doctor felt that claimant might benefit from viscosupplementation, a series of three Synvisc injections, and surgery.
26. Dr. Lichtenfeld indicated that claimant should have the following restrictions as a result of his workplace injuries: avoid working with his arms outstretched and overhead; avoid lifting over the shoulder level; limit repetitive lifting; avoid operating gas, electric, or air powered tools with the right upper extremity; avoid kneeling, squatting, and stooping; avoid walking on uneven or slick surfaces; avoid working in awkward position; and avoid working at heights and on uneven surfaces such as pitched roofs.
27. The doctor opined that at the time of claimant's injury, claimant had the following pre-existing permanent partial disabilities: 15% of the body as a whole due to longstanding hypertension; 20% of the left wrist due to left long finger [partial] amputation; 25% of the left wrist due to prior carpal tunnel syndrome; 20% of the right wrist due to prior carpal tunnel syndrome; 15% load due to the bilateral carpal tunnel; and 25% of the right knee due to prior knee injury. Dr. Lichtenfeld added that the pre-existing disabilities combine and concur with one another, as well as with the primary disabilities, to form an overall disability greater than the simple sum of the disabilities combined. In addition, they create a significant obstacle and/or hindrance in obtaining employment and/or reemployment.
28. Dr. Lichtenfeld explained that claimant's hypertension was disabling in that claimant had hypertensive changes in his eyes showing AV nicking and narrowed and tortuous arteries.

Dr. Schlafly

29. On behalf of the claimant, Dr. Bruce Schlafly examined claimant on March 29, 2011. Dr. Schlafly is board-certified in orthopedics. As to the 2008 injury, Dr. Schlafly's diagnosis was torn meniscus of the right knee and strain of the right shoulder. He explained that the portion of the medical meniscus torn in the 2008 work injury was the anterior portion, whereas the 1986 injury affected the posterior portion of the meniscus. His diagnosis for the 2009 injury was massive tear of the rotator cuff of the right shoulder. He noted that although there is a history of previous injuries to the right shoulder and arm prior to June 2009, it is unlikely that claimant had, prior to 2009, a massive tear of the rotator cuff as it is unlikely that he would have been able to work the

Employee: Andrew Lukowski

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normal duties of his job prior to June 24, 2009, with a massive rotator cuff tear present in the right shoulder. Dr. Schlafly opined that the work injuries of January 15, 2008, and June 24, 2009, were the prevailing factors in both the knee and shoulder injuries.

30. Dr. Schlafly acknowledged that the operative report did not specify whether the shoulder injury was an acute tear of the rotator cuff or if it pre-existed the injury of June 2009.
31. Dr. Schlafly noted that claimant reported that the carpal tunnel releases were very effective; claimant was not complaining of numbness in his hands.²

Dr. Nogalski

32. Dr. Nogalski, a board-certified orthopedic surgeon, prepared a report and testified by deposition on behalf of the employer/insurer. Dr. Nogalski opines that neither the January 2008 nor the June 2009 events were the prevailing factor in the need for treatment other than some limited evaluation with respect to a strain. Dr. Nogalski did not feel that the description of the January 2008 injury would support an injury to the meniscus if the left leg slipped off a step and the right leg was pulled forward, as described by claimant.
33. Dr. Nogalski noted that claimant had pre-existing issues in regards to his shoulder and that he had a pre-existing biceps tendon injury or deficit and had findings consistent with a large, chronic tear of the rotator cuff.

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Claimant alleges that he sustained two separate accidents at work. The first occurred on January 15, 2008, and resulted in injury to claimant's right shoulder and right knee; the second one occurred on June 24, 2009, and left claimant with an injury to his right shoulder. The employer/insurer, however, contends that claimant did not sustain accidents that arose out of and in the course of his employment.

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.³ Proof is made only by competent and substantial evidence, and may not rest on speculation.⁴

Issue 1: Accident arising out of and in the course of employment

² Claimant's Exh. B.

³ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

⁴ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

The word “accident” as used by the Missouri workers’ compensation law means “an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.”⁵

An “injury” is 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.”⁶ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life.⁷

Claimant testified that he sustained a work-related injury on January 15, 2008, when he slipped while climbing up onto the running board/step of his work truck. He testified credibly that his fall was in a location where he was performing company business. The employer produced no contrary witnesses. Documents filed by the employer show that employer admitted being notified of an accident, on the date claimed by claimant.⁸ Employer initially directed claimant’s medical care and paid more than \$3,000 in medical benefits through its workers’ compensation insurance.

All of the medical records establish that claimant, slipped and fell on January 15, 2008. This evidence includes records from both of the providers chosen by the employer - Dr. Quaranto and the Columbia Orthopedic Group. Dr. Quaranto examined claimant on the day after the accident and found the right knee to be swollen, inflamed, effused, and tender. He diagnosed a strain of the medial collateral ligament, and a possible injury to the anterior cruciate ligament. Dr. Thornburg, at the Columbia Orthopedic Group, saw claimant on January 18, 2008, and took a similar history of injury. He found effusion, tenderness, laxity, and crepitation. He diagnosed a probable ACL disruption, a probable meniscal tear, and degenerative joint disease. The doctor initiated a program of conservative medical care before referring claimant to a surgeon within his practice.

Claimant produced the testimony of Dr. Lichtenfeld and Dr. Schlafly, both of whom established that the incident described by claimant was the prevailing factor in causing injury.

Based upon the evidence submitted at trial, I find that that claimant sustained accidental injury that arose out of and in the course of his employment with the employer on January 15, 2008, when he slipped while operating his truck.

⁵ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

⁶ Section 287.020.3(1).

⁷ Section 287.020.3(c).

⁸ Claimant’s Exh. N.

Issue 2: Medical causation

Claimant alleges that he sustained injury to his right shoulder and knee in the accident of January 15, 2008, and to his right shoulder in the injury of June 24, 2009. As noted above, Missouri law requires that claimant prove all essential elements of his claim, including the causal connection between the accident and the injury.⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁰ Expert testimony is essential where the issue is whether a pre-existing condition was aggravated by a subsequent injury.¹¹

Medical causation not within lay understanding or experience requires expert medical evidence.¹² When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹³ In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹⁴ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁵ The fact finder is encumbered with determining the credibility of witnesses.¹⁶ It is free to disregard that testimony which it does not hold credible.¹⁷

With regard to medical causation in the accident of January 15, 2008, Dr. Quaranto examined claimant on the day after the accident and found the right knee to be swollen, inflamed, effused, and tender. He diagnosed a strain of the medial collateral ligament and a possible injury to the anterior cruciate ligament. He also discussed the right shoulder problems, saying that they were less problematic. Dr. Thornburg, at the Columbia Orthopedic Group, saw claimant on January 18, 2008, and took a similar history of injury. He found effusion, tenderness, laxity, and crepitation. He diagnosed a probable ACL disruption, a probable meniscal tear, and degenerative joint disease. The doctor initiated a program of conservative medical care before referring claimant to a surgeon within his practice.

Several physicians offered testimony concerning the medical causal relationship between claimant's accident and his medical problems. Dr. Lichtenfeld testified that the accident of January 15, 2008, caused the following diagnoses: right shoulder strain; right shoulder subacromial bursitis; right bicipital tendinitis; probable tear of the right rotator cuff; right knee strain; tear of the anterior horn of the right medial meniscus; complete tear of the right anterior cruciate ligament; incitation, exacerbation, and acceleration of preexisting degenerative changes in the right knee; status-post right knee arthroscopy; status-post right partial medial meniscectomy; status-post chondroplasty of the trochlea and medial femoral condyle.¹⁸ Dr. Schlafly, a board-certified orthopedic surgeon, testified that the accident of January 15, 2008,

⁹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990);

¹⁰ *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹¹ *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5 (Mo. App. 1985).

¹² *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹³ *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹⁴ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁵ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

¹⁶ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

¹⁷ *Id.* at 908.

¹⁸ Claimant's Exh. A.

caused the following diagnoses: torn medial meniscus in the right knee, and a strain to the right shoulder. Dr. Nogalski, also a board-certified orthopedic surgeon, testified that the accident of January 15, 2008, was not the cause of any of claimant's shoulder or knee problems.

With regard to the right knee, Dr. Schlafly thoroughly and credibly explained why he believes that claimant sustained a torn medial meniscus in his work injury. He stated that a sudden hyperflexion of the knee is "notorious for causing a torn meniscus." In addition, he explained that while claimant had a prior injury to the right knee medial meniscus, it was shown that he had a new injury after the January 15, 2008 accident because in 1986 accident, the medial meniscus was torn in its *posterior* portion, whereas Dr. Tarbox in 2008 found a tear in the *anterior* portion. Dr. Schlafly therefore concluded that the accident caused the anterior tear to the medial meniscus of the right knee. Dr. Nogalski, on the other hand, explained why he believed that the work accident did not cause injury to claimant's right knee, testifying that the manner in which claimant slipped on the running board of his truck was "a mechanism of injury that would not support an injury to the right knee." Dr. Nogalski did not discuss the difference in the location of the tears to the medial meniscus, and it is unknown whether he fully appreciated the difference. Dr. Nogalski did not explain why claimant's knee would "swell up like a watermelon" after the accident, but have no injury associated with it. Dr. Lichtenfeld stated that the January 15, 2008 accident caused a tear of the anterior horn of the right medial meniscus, and a complete tear of the right anterior cruciate ligament, along with a strain and aggravation of degenerative changes. He said the injury was "classical for the findings on his examination." Dr. Thornburg, a board-certified physiatrist, stated that "I do believe [the] prevailing cause of his current pain is with the injury on January 15th with the understanding that he did have underlying degenerative changes prior to this." Three separate physicians have indicated that claimant's right knee was injured in the work accident of January 15, 2008. Dr. Nogalski did not seem to fully appreciate that a new tear had occurred to claimant's right knee, in the anterior aspect of the medial meniscus. Claimant testified to having a great deal of symptoms in the knee after the 2008 accident occurred. Upon a thorough review, I find that the testimony and opinions of Dr. Schlafly and Dr. Lichtenfeld are more credible than that of Dr. Nogalski.

Based upon the evidence presented, I find that claimant's accident of January 15, 2008, caused a tear to the medial meniscus, a torn anterior cruciate ligament, and aggravation of preexisting degenerative changes in the right knee.

With regard to the right shoulder and the January 2008 accident, the employer filed a Report of Injury with the Division of Workers' Compensation noting that claimant reported an injury to his right shoulder on the day of the accident.¹⁹ In addition, claimant did mention his right shoulder to Dr. Quaranto immediately after the accident. Claimant testified that Dr. Quaranto told him he was going to focus on the knee as that was where the most significant complaints were located. On March 12, 2008, Dr. Thornburg indicated that claimant was having shoulder problems that he related to the accident at work. Dr. Thornburg noted that he would treat claimant for the shoulder if he could get approval from the employer/insurer.²⁰ Dr. Lichtenfeld testified that the accident caused a right shoulder strain, subacromial bursitis, right bicipital tendinitis, and probable tear of the rotator cuff. Dr. Schlafly testified that the

¹⁹ Claimant's Exh. N.

²⁰ Claimant's Exh. H.

accident caused a strain to the right shoulder. Dr. Nogalski, however, testified that no shoulder injury was caused by a work injury.

I find that the testimony and opinions of Dr. Schlafly and Dr. Lichtenfeld are more credible than that of Dr. Nogalski. And based upon the evidence presented, I find that on January 15, 2008, claimant sustained an injury to his right shoulder during a work accident. The shoulder injury was a strain with bursitis and tendonitis.

Issue 3: Nature and extent of permanent partial disability

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.²¹ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.²² A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.²³ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.²⁴ The employee must prove the nature and extent of any disability by a reasonable degree of certainty.²⁵ The determination of the degree of disability sustained by an injured employee is not strictly a medical question, because while the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors which are both medical and non-medical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission.²⁶ The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony.²⁷

The only two physicians who provided ratings of disability were Dr. Nogalski and Dr. Lichtenfeld. Dr. Nogalski stated that the accident of January 15, 2008, caused disability of 5% of Claimant's right knee. He did not mention disability of the right shoulder. Dr. Lichtenfeld opined that this accident caused disability of 12.5% of the right shoulder and 35% of the right knee, also stating that they caused a greater overall sum due to their combination.²⁸

The opinions of Dr. Nogalski are less credible than those of Dr. Lichtenfeld regarding disability. Dr. Nogalski indicated in his testimony and his reports that claimant did not sustain injury as a result of his described accident on January 15, 2008, and yet he rates claimant as

²¹ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo. App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1999).

²² *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo. App. W.D. 2001).

²³ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo. App. E.D. 1998).

²⁴ *Rana* at 626.

²⁵ *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974)

²⁶ *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo. App. 1989).

²⁷ *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo. App. 1975)

²⁸ Claimant's Exh. A.

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having permanent disability in the right knee as a result of that accident. His opinions are contradictory and not well-explained. Dr. Nogalski apparently did not understand that the medical meniscus had sustained a new tear, in a different location than the pre-existing medial meniscus injury. Both Dr. Lichtenfeld and Dr. Schlafly understood these things. I find that the opinions of Dr. Lichtenfeld and Dr. Schlafly are more credible than that of Dr. Nogalski on this matter.

I find that due to the January 15, 2008 injury, claimant sustained permanent partial disability of 7% of the right shoulder and 22% of the right knee.

Issue 4: Temporary total disability benefits

Temporary total disability benefits are addressed in Section 287.170, RSMo. This section provides, in pertinent part, that “the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made.” The term “total disability” is defined in Section 287.020.6, 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.” The purpose of temporary total disability is to cover the employee’s healing period, so the award should cover only the time before the employee can return to work.²⁹ Temporary total disability (TTD) benefits are owed until the employee can find employment or the condition has reached the point of “maximum medical progress.”³⁰ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.³¹ This is reflected in the language that TTD benefits last only “during the continuance of such disability.”³²

Claimant testified credibly that he was off work on two periods due to his work injuries. He requests payment of temporary total disability benefits for those two periods.

With regard to the January 2008 accident, claimant testified that he was off work from January 16, 2008 through June 16, 2008, and that he was not offered light duty work during that time. The records of the treating doctors confirm this testimony, including that of Dr. Quaranto and the Columbia Orthopedic Group. I find that the employer paid temporary total disability benefits through February 26, 2008, which means that an additional 15 and 5/7 weeks of benefits are owed at a rate of \$664.89. Thus, the employer/insurer is responsible for additional temporary total disability benefits of \$10,452.07 (\$664.89 x 15 and 5/7 weeks).

Issue 5: Unpaid medical bills

Issue 6: Future medical treatment

²⁹ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).

³⁰ *Cooper* at 575.

³¹ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

³² Section 287.170.1, RSMo.

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

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

Once an employer has received notice of the employee's need for medical aid, the employer can waive its rights to select a health care provider by failing, refusing, or neglecting to provide the employee with necessary medical aid.³³ Courts have also said that once an employer refused to provide or tender necessary medical aid, the injured employee need not lie helpless or in pain.³⁴

If an employer denies the compensability of its employee's claim pursuant to the Missouri Workers' Compensation law, it therefore denies that it is liable for the provision of medical aid to the employee; under such circumstance, the employee may have the expense of the reasonable and necessary medical aid that the employee procures assessed against the employer if the employee's claim later proves to be compensable.³⁵

Claimant alleges that he is entitled to reimbursement for certain medical bills. Claimant was provided with initial medical care by the employer/insurer. Authorization for medical care was then terminated while claimant was in the midst of his treatment with Dr. Thornburg. No explanation for the termination was given by the employer/insurer, and the records of Dr. Thornburg do not indicate that he had issued an opinion that was contrary to claimant's claim. To the contrary, Dr. Thornburg, a board certified physiatrist, stated that "I do believe [the] prevailing cause of his current pain is with the injury on January 15th with the understanding that he did have underlying degenerative changes prior to this."

Claimant requested medical treatment after authority was terminated.³⁶ Requests for treatment were made on March 26, 2008, April 7, 2008, August 17, 2008, and June 29, 2009. There is no evidence which would indicate that employer/insurer complied with Claimant's requests.

Claimant identified his medical bills during his trial testimony. The employer/insurer also introduced into evidence a list of the same bills, with information showing adjustments having been made to the bills.³⁷

I find that claimant has proven he is entitled to payment of the medical bills which he submitted at trial. The workers' compensation law states that an injured worker is free to seek medical care from physicians of his own choosing if the employer fails or refuses to provide such

³³ *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816 (Mo. App 1995). See also *Shores v. General Motors Corp.*, 842 S.W.2d 929 (Mo. App. 1992).

³⁴ *Stevens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969).

³⁵ *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (App. 1983).

³⁶ Claimant's Exh. O.

³⁷ Employer/insurer Exh. 3.

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care.³⁸ That is exactly what happened in this case. Claimant proved that he was not tendered medical treatment, and he proved that he incurred medical bills in the amount of \$24,459.70 as a result of the injury of January 15, 2008. Claimant also established that he incurred medical bills of \$29,779.80 as a result of the injury of June 24, 2009. While the employer/insurer argued that claimant should not receive payment of the entirety of the bills - because of its interpretation of "adjustments" having been made - the law indicates that the employer has the burden of proving that claimant's liability for the bills was extinguished.³⁹ This burden requires a showing that claimant is not required to pay the bills, that claimant's liability for the bills is extinguished, and that the reason his liability is extinguished does not fall within the provisions of §287.270 of the Missouri workers' compensation law.⁴⁰ The employer/insurer did not offer any such proof.

I find that the employer/insurer is liable to claimant for medical treatment in the amount of \$24,459.70 as a result of the January 2008 injury.

As for future medical case, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]."⁴¹ This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care.⁴² "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.⁴³ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.⁴⁴ Moreover, the employer may be ordered to provide medical care to cure and relieve the effects of the injury even though some of such treatment may also give relief from pain caused by a pre-existing condition.⁴⁵

Claimant alleges that he is in need of further medical care to cure and relieve the effects of his accident. The employer/insurer alleges that claimant is not in need of further care.

Claimant testified that he continues to take a great deal of over-the-counter pain relievers to help with his knee complaints. Dr. Lichtenfeld testified that claimant would benefit from the following additional medical care due to this injury: anti-inflammatory medication; range of motion exercises; physical therapy, and steroid injections on the right shoulder; viscosupplementation and injections to the right knee; and probable additional surgery in the future.⁴⁶ Neither Dr. Schlafly nor Dr. Nogalski offered opinions concerning future medical care. Dr. Tarbox stated at the last appointment on July 2, 2008, that claimant should return on an "as

³⁸ *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo. App. 2001).

³⁹ *Farmer-Cummings v. Personnel Pool*, 110 S.W.3d 818 (Mo. banc 2003).

⁴⁰ *Id.*

⁴¹ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo. App. 2001).

⁴² *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo. App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo. App. W.D. 2000).

⁴³ *Rana at 622*, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo. App. 1995).

⁴⁴ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. 2004).

⁴⁵ *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

⁴⁶ Claimant's Exh. A, p. 59.

needed” basis.⁴⁷ He also gave claimant samples of the medication Celebrex to see if it would help with his on-going pain.

I find that claimant has met his burden of proof that he is entitled to future medical care regarding the 2008 work injury.

Issue 7: Second Injury Fund liability

The Second Injury Fund is a creature of statute, and benefits from the Fund are awarded only if the employee proves that under Section 287.220.1, RSMo (2000), he or she is entitled to such benefits. In order to recover against the Second Injury Fund, a claimant must prove that he had a pre-existing permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment should he become unemployed; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15% for major extremities.⁴⁸ Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability (PPD) that combines with a compensable injury to create a disability greater than the simple sum of disabilities.⁴⁹ When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.⁵⁰

Claimant has established a right to recover from the Second Injury Fund. As noted above, I find that on January 15, 2008, claimant sustained a compensable work injury that resulted in permanent partial disability of 22% of right knee and 7% of the right shoulder. Thus, the primary injury resulted in 51.44 weeks of disability.

I also find that at the time of the primary injury, claimant had pre-existing permanent partial disabilities that met the statutory requirements for Second Injury Fund liability. The only physician who provided ratings of disability on pre-existing conditions was Dr. Lichtenfeld. He stated that Claimant has the following disabilities which pre-existed the January 15, 2008 accident: 15% of the body due to hypertension; 20% of the left wrist due to left long finger amputation; 25% of the left wrist due to carpal tunnel syndrome; 20% of the right wrist due to carpal tunnel syndrome; 15% loading factor on the wrists due to their combined effect; and 25% of the right knee. Based upon the evidence presented, I find that claimant had the following pre-existing disabilities: 5% of the body due to hypertension; 50% of the left long finger at the 26-week level due to the partial fingertip amputation; 17.5% of each wrist due to the carpal tunnel syndrome; and 20% of the right knee. Thus, the pre-existing permanent partial disabilities result in 126.25 weeks of disability.

Based on the credible evidence presented, I find that the last injury combined with the pre-existing permanent partial disability to cause 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows:

⁴⁷ Claimant’s Exh. I.

⁴⁸ *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008) (Citations omitted).

⁴⁹ Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

⁵⁰ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

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51.44 weeks for the primary injury (right knee and right shoulder) plus 126.25 weeks for the pre-existing injuries (hypertension/body as a whole, fingertip injury, both wrists, and right knee) equals 177.69 weeks. I find that it is appropriate to multiply this figure, 177.69 weeks, by a 15% loading factor, resulting in 26.65 weeks of overall greater disability. Thus, the Second Injury Fund is liable for \$10,367.92 (26.65 weeks of overall greater disability x \$389.04 weekly compensation rate).

Any pending objections not expressly ruled on in this award are overruled.

This Award is subject to a lien in the amount of 25% of the payments hereunder (excluding future medical treatment) in favor of the claimant's attorney, Dean Christianson, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth

Administrative Law Judge

Division of Workers' Compensation