

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 09-045934

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. 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 supplemented herein.

Employer asserts that the administrative law judge did not credit the past medical expense award with amounts employer paid for treatment of this injury. The administrative law judge awarded the full amount of the medical expenses without credit for amounts the parties agreed were paid directly to providers by employer.

This case was tried with Injury No. 08-001945. 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 2008 expenses and none toward the medical expenses in this case.²

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.

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

¹ Statutory references are to the Revised Statutes of Missouri 2008, unless otherwise indicated.

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

AWARD

Employee: Andrew Lukowski

Injury No. 09-045934

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: June 24, 2009.
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 tripped over a pole and fell backwards onto his outstretched right arm.
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: 25% of the right shoulder.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? 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 (58 weeks x \$389.04): \$22,564.32.
 - TTD: \$ 9,308.46
 - Past Medical: \$29,779.80

TOTAL: \$61,652.58

- 22. Second Injury Fund liability: \$13,752.56.
- 23. Future medical awarded: No.

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. 09-045934

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Andrew Lukowski

Injury No: 09-045934

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. 09-045934

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.

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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

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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 June 24, 2009, when he tripped and fell backwards onto his outstretched right arm while working around a pole that was on the ground. He testified credibly that his fall was in a location where he was performing company business. The employer produced no contrary witnesses.

All of the medical records establish that claimant tripped and fell on June 24, 2009. This includes the physicians at Samaritan Hospital and the Columbia Orthopedic Group. The Samaritan Hospital records show that claimant was seen on the day after the accident, complaining of having injured his right shoulder in a fall at work. He gave a history of having tripped and fallen backwards onto his right hand. He also mentioned the other workers’ compensation injury to the right shoulder in 2008. He was diagnosed at the hospital with a soft tissue injury to the right shoulder and discharged with a sling. The next day he was back at the hospital for an x-ray, at the request of employer’s medical provider, Dr. Quaranto. On July 1, 2009, claimant was seen by Dr. Quinn at the Columbia Orthopedic Group, at the direction of Dr. Quaranto. Dr. Quinn believed that Claimant may have torn his rotator cuff in the injury. This diagnosis was confirmed with a MRI scan, which also indicated a suspected tear of the long head of the biceps. A surgical procedure was performed on July 28, 2009, which confirmed these diagnoses.

Based upon the evidence submitted at trial, I find that on June 24, 2009, claimant sustained accidental injury that arose out of and in the course of his employment with the employer.

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,

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).

Missouri law requires that claimant prove all essential elements of his claim, including the causal connection between the accident and the injury.⁸ Proof is made only by competent and substantial evidence, and may not rest on speculation.⁹ Expert testimony is essential where the issue is whether a pre-existing condition was aggravated by a subsequent injury.¹⁰

Medical causation not within lay understanding or experience requires expert medical evidence.¹¹ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹² In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹³ 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.¹⁴ The fact finder is encumbered with determining the credibility of witnesses.¹⁵ It is free to disregard that testimony which it does not hold credible.¹⁶

The Samaritan Hospital records from the day of the accident, June 24, 2009, show that claimant was diagnosed with a "soft tissue" injury to the right shoulder. On the next day, he was diagnosed with a torn right rotator cuff. Dr. Quinn, an orthopedic surgeon, ordered an MRI scan and diagnosed both a torn rotator cuff and possibly a torn long head of the biceps. Dr. Lichtenfeld testified that the following conditions were caused by the June 24, 2009 accident: right subacromial and subdeltoid bursitis; tear of the long head of the right biceps; full thickness tear of the right supraspinatus tendon with retraction; right shoulder impingement syndrome; incitation, exacerbation and acceleration of preexisting degenerative changes in the right shoulder and AC joint; status-post arthroscopy of the right shoulder; status-post right partial distal clavicle resection; status-post arthroscopic right rotator cuff repair; status-post right shoulder arthroscopic decompression; status-post right shoulder acromioplasty.¹⁷ Dr. Schlafly, an orthopedic surgeon, testified that the accident of June 24, 2009 caused a massive tear of the rotator cuff of the right shoulder.¹⁸ He said that a fall onto an outstretched hand and arm is the type of sudden injury that can cause such an injury. He did not attribute the torn biceps tendon to this accident, but rather, stated that he felt it was probably a pre-existing condition. Dr. Nogalski, an orthopedic surgeon, stated that the accident of June 24, 2009 was not the prevailing factor in the cause of claimant's right shoulder injury.¹⁹ He stated in his report that "the mechanism of injury as he describes on 6/26/09 (sic) would not be felt to be the prevailing factor in a massive rotator cuff tear nor biceps injury.

⁸ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990);

⁹ *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹⁰ *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5 (Mo. App. 1985).

¹¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁴ *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).

¹⁵ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

¹⁶ *Id.* at 908.

¹⁷ Claimant's Exh. A.

¹⁸ Claimant's Exh. B.

¹⁹ ER/INS Exh. 1.

Claimant testified to having a great deal of symptoms in the knee after the 2009 accident occurred. Claimant was credible.

Based upon the evidence presented, I find that claimant's accident of June 24, 2009, caused a massive tear to the right rotator cuff.

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.²⁰ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.²¹ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.²² 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.²³ The employee must prove the nature and extent of any disability by a reasonable degree of certainty.²⁴ 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.²⁵ 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.²⁶

In the 2008 case, the only 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.²⁷ 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 having permanent disability in the right knee as a result of that accident. His opinion is 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

²⁰ *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).

²¹ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo. App. W.D. 2001).

²² *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo. App. E.D. 1998).

²³ *Rana* at 626.

²⁴ *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)

²⁵ *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo. App. 1989).

²⁶ *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo. App. 1975)

²⁷ Claimant's Exh. A.

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that the opinions of Dr. Lichtenfeld and Dr. Schlafly are more credible than that of Dr. Nogalski on this matter. As to the 2008 injury, I find that claimant sustained permanent partial disability of 7% of the right shoulder and 22% of the right knee.

In the 2009 case, the only physicians who provided ratings of disability were again Dr. Nogalski and Dr. Lichtenfeld. Dr. Nogalski stated that the accident of June 24, 2009, caused disability of 3% of claimant's right shoulder.²⁸ Dr. Lichtenfeld, on the other hand, stated that this accident caused disability of 40% of the right shoulder.²⁹ Dr. Nogalski was operating under the assumption that the accident caused no tears to the internal structures of claimant's shoulder. Dr. Nogalski also found that the accident caused no injury but yet did cause permanent disability. He did not adequately explain his contradictory conclusion. Dr. Lichtenfeld testified that the accident caused bursitis, a tear of the long head of the right biceps, a full thickness tear of the right supraspinatus tendon with retraction, and right shoulder impingement syndrome. Dr. Schlafly, an orthopedic surgeon, testified that the June 2009 accident caused a massive tear of the rotator cuff of the right shoulder.³⁰

I find that the opinions of Dr. Lichtenfeld and Dr. Schlafly are more credible in their assessment of Claimant's injury and disability than the opinion of Dr. Nogalski. I find that claimant sustained disability of 25% of the right shoulder due to the accident of June 24, 2009.

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.³¹ Temporary total disability (TTD) benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."³² Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.³³ This is reflected in the language that TTD benefits last only "during the continuance of such disability."³⁴

Claimant testified credibly that he was off work on two periods due to his 2008 and 2009

²⁸ ER/INS Exh. 2.

²⁹ Claimant's Exh. A.

³⁰ Claimant's Exh. B.

³¹ *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).

³² *Cooper* at 575.

³³ *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.

³⁴ Section 287.170.1, RSMo.

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work injuries. He requests payment of temporary total disability benefits for those two periods.

Claimant testified that after the June 2009 injury, he was off of work from July 28, 2009 through November 2, 2009. He was not offered light duty work during that time. The records of the treating doctors at the Columbia Orthopedic Group confirm this testimony.³⁵ Employer paid no temporary total disability benefits during this time. I find that the employer/insurer owes TTD benefits for this period (14 weeks), in the amount of \$9,308.46 (14 weeks x \$664.89).

Issue 5: Unpaid medical

Issue 6: Future medical bills

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.³⁶ 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.³⁷

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.³⁸

Claimant alleges that he is entitled to reimbursement for certain medical bills in both the 2009 and the 2009 cases. With regard to accident of January 15, 2008, 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."

³⁵ Claimant's Exh. L.

³⁶ *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).

³⁷ *Stevens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969).

³⁸ *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (App. 1983).

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Claimant requested medical treatment after authority was terminated.³⁹ 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.⁴⁰

I find that claimant has proven an entitlement 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 care.⁴¹ 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.⁴² 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.⁴³ 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; I also find that the employer/insurer is liable to claimant for \$29,779.80 for medical treatment as a result of the June 2009 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]."⁴⁴ 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.⁴⁵ "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt.⁴⁶ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required.⁴⁷ Moreover, the employer

³⁹ Claimant's Exh. O.

⁴⁰ Employer/insurer Exh. 3.

⁴¹ *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo. App. 2001).

⁴² *Farmer-Cummings v. Personnel Pool*, 110 S.W.3d 818 (Mo. banc 2003).

⁴³ *Id.*

⁴⁴ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo. App. 2001).

⁴⁵ *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).

⁴⁶ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo. App. 1995).

⁴⁷ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. 2004).

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.⁴⁸

Claimant alleges that he is in need of further medical care to cure and relieve the effects of his accidents. The employer/insurer alleges that claimant is not in need of further care for his work injuries. Claimant testified that he continues to take over-the-counter pain relievers to help with his complaints from the 2009 injury. Dr. Lichtenfeld testified that claimant would benefit from the following additional medical care due to his 2009 injury: anti-inflammatory medication and range of motion exercises.⁴⁹ Claimant relies on a recent decision from the Labor and Industrial Relations Commission, *Hampton v. Champion Precast, Inc.*, Mo. LIRC (February 24, 2012), in which the Commission found that it was appropriate to award future medical care in a situation where the injured worker was taking over-the-counter medications. Dr. Schlafly, Dr. Nogalski, and Dr. Quinn did not offer opinions concerning future medical care. I find that Dr. Lichtenfeld's opinion as to future medical care is not credible. I further find that claimant has not met his burden of proof that he needs additional medical care for the 2009 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.⁵⁰ 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.⁵¹ 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.⁵²

Claimant has established a right to recover from the Second Injury Fund. As noted above, I find that on June 24, 2009, claimant sustained a compensable work injury that resulted in permanent partial disability of 25% of right shoulder. Thus, the primary injury resulted in 58 weeks of disability.

I also find that at the time of the primary injury, claimant had several 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

⁴⁸ *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

⁴⁹ Claimant's Exh. A.

⁵⁰ *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008) (Citations omitted).

⁵¹ Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

⁵² *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

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Dr. Lichtenfeld. Dr. Lichtenfeld stated that claimant has the following disabilities which pre-existed the June 24, 2009 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; 25% of the right knee; 15% of the left ankle, 12.5% of the right shoulder, and an additional 35% of the right knee.

Based upon the evidence presented, I find that at the time of the 2009 injury, 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; 20% of the right knee, 22% of the right knee (2008 case), and 7% of the right shoulder (2008 case). Thus, the pre-existing permanent partial disabilities result in 177.69 weeks of disability. Claimant did not meet his burden of proof that he had lasting disability to his left ankle.

I further find that the last injury (2009 case) combined with the pre-existing permanent partial disabilities to cause 15% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is calculated as follows: 58 weeks for the primary injury (right shoulder) plus 177.69 weeks for the pre-existing injuries (hypertension/body as a whole, fingertip injury, both wrists, right knee, additional right knee, and right shoulder) equals 235.69 weeks. I find that it is appropriate to multiply this figure, 235.69 weeks, by a 15% loading factor, resulting in 35.35 weeks of overall greater disability. Thus, the Second Injury Fund is liable for \$13,752.56 (35.35 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