

**FINAL AWARD ALLOWING COMPENSATION**

Injury No.: 07-053162

Employee: John F. Maness

Employer: City of DeSoto

Insurer: Missouri Intergovernmental Risk Management Association

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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. 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.

**Preliminaries**

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an accident or occupational disease arising out of and in the course of his employment; (2) whether employee's injury was medically causally related to the accident or occupational disease; (3) whether employee is entitled to past medical expenses in the amount of \$103,861.64 plus interest, including whether employee's past medical expenses were authorized, reasonable, necessary, and causally related to the alleged injury; (4) future medical expenses; (5) temporary total disability compensation from August 22, 2007, to November 19, 2007, in the amount of \$5,410.98; (6) the permanent partial disability liability of the employer; (7) the permanent total disability liability of the employer; (8) the liability of the Second Injury Fund for permanent partial or permanent total disability; and (9) whether the Second Injury Fund can be liable for compensation where the primary injury is an occupational disease.

The administrative law judge rendered the following findings and conclusions: (1) employee offered sufficient evidence meeting his burden of proof that he had a compensable accident; (2) employee's injury in June 2007 and the disabilities resulting therefrom are medically causally related to the accident where employee injured his neck when he was lifting decorative stones for his employer; (3) employer/insurer is liable for \$31,033.96 in satisfaction of the Des Peres Hospital bills, \$592.00 to reimburse employee's out of pocket medical costs, and \$49,813.00 in satisfaction of the Orthopedic Specialist/Dr. Rutz bills; (4) employer/insurer is ordered to provide ongoing treatment to cure and relieve employee from the effects of his accident; (5) employer/insurer is ordered to pay \$5,409.78 to employee for temporary total disability benefits during the period he was recovering from surgery and unable to work; (6) employee is not permanently and totally disabled; (7) employer/insurer are liable for \$60,248.00 in permanent partial disability benefits; (8) the Second Injury Fund is ordered to pay to employee \$12,990.98; and (9) repetitive motion/occupational diseases are compensable as to the Second Injury Fund, but the issue is moot, because employee sustained an accident.

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Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in finding employee is not permanently and totally disabled; (2) in failing to find employee entitled to the total of \$103,861.64 for past medical expenses; (3) in failing to award prejudgment interest on the past medical bills; and (4) in failing to order payment of all amounts directly to employee.

The Second Injury Fund filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in calculating the degree of permanent partial disability by including parts of the body whose weeks of disability are below the statutory thresholds contained in § 287.220.1 RSMo; and (2) in finding that an occupational disease is compensable as to the Second Injury Fund.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) in ruling employee sustained a compensable accident; (2) in ruling employee showed a medical-causal connection between the alleged accident and his cervical spine condition and need for medical treatment; (3) in ruling employee could recover his past medical expenses; (4) in awarding employee temporary total disability benefits; (5) in awarding future medical care; and (6) in finding employee sustained a 40% permanent partial disability as a result of the alleged accident.

For the reasons explained below, we supplement the findings and conclusions and modify the award of the administrative law judge as to the issues of: (1) medical causation; (2) past medical expenses; (3) permanent total disability; and (4) Second Injury Fund liability.

### **Findings of Fact**

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact on the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modifications, herein.

#### *Medical causation*

The factual question whether employee was suffering from neck pain leading up to the accident at work on June 2007 is heavily litigated by the parties on appeal. Employer paints a picture of an employee who never recovered from two separate incidents in 1996 and 2002 wherein he injured his neck, while employee suggests that his complaints resolved with short courses of treatment, and that he was asymptomatic in the two or three years leading up to the accident in 2007. The medical records reveal that employee was having neck pain after the 2002 injury for which he received treatment at least up until October 2002.

Turning to employee's own testimony, which (if credible) would seem to be the best source of evidence on the question, we find what appears at first blush to be a contradiction. On direct examination, employee testified, as follows:

Q. In the two or three years before June of '07, how was your neck and arms?

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A. I believe I was doing pretty good.

Q. Were you going to see any doctors for neck or arm complaints?

A. No, I don't believe so.

*Transcript, page 35.*

But then, on cross-examination by employer's counsel, the following exchange took place:

Q. Okay. Now, from time of that 2002 event up until the time of the '07 event, did you had [sic] any ongoing pain in your neck?

A. Yeah. I think I did.

*Transcript, page 97.*

Employer points to the foregoing as evidence that employee had neck problems all the way up until 2007, in contradiction of his earlier testimony. But this does not necessarily follow from the temporally ambiguous question posed by employer's counsel. We agree that in using the words "ongoing" and "up until," the question *could be* understood as asking whether employee was having problems immediately prior to the accident in 2007. But the question can equally be regarded as merely asking whether employee had any pain in his neck *between* the 2002 motor vehicle accident and the 2007 work accident. As employee concedes and the medical records demonstrate, he complained of pain in his neck up until at least October 2002, so employee's acknowledgment that he experienced ongoing pain in his neck between 2002 and 2007 does not necessarily conflict with employee's testimony that he didn't have problems in the two or three years before June 2007. This becomes even more apparent when we consider the following testimony, elicited on cross-examination by counsel for the Second Injury Fund:

Q. Regardless of the day that you hurt yourself, you didn't have the burning sensation in your neck the day before, correct?

A. Correct.

Q. And you didn't have it the week before, correct?

A. Correct.

Q. Or three months before?

A. Not that I can recall.

Q. Or six months before, correct?

A. Correct.

*Transcript, page 117.*

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After careful consideration, we credit employee's testimony (and so find) that he was not having pain or problems with his neck in the two or three years before the June 2007 accident.

With respect to the medical expert testimony, we specifically adopt the administrative law judge's determination that the opinions of Drs. Volarich and Kennedy are more credible than those of Dr. deGrange. In particular, we are persuaded by Dr. Volarich's testimony that the June 2007 accident is the prevailing factor causing a disc herniation at C6-7 to the left as well as causing the aggravation of underlying and previously asymptomatic degenerative disc disease and degenerative joint disease at C4-5 and C5-6. We find that employee reached maximum medical improvement on November 20, 2007.

Past medical expenses

We credit the testimony from Dr. Volarich (and so find) that the treatment employee received following the work injury in June 2007 was reasonable and necessary, and specifically that the cervical fusion was necessary owing to the symptoms employee experienced as a result of the work injury. From our review of the bills and the associated medical records provided by employee, in combination with employee's credible testimony that he received these bills in connection with treatment for his work injury, we find that employee incurred past medical expenses, as follows:

Des Peres Hospital	\$51,856.64
Dr. Rutz	\$49,813.00
Dr. Poepsel	\$ 100.00

Employee also submitted bills from Esse Health totaling \$2,092.00. But employee did not provide the medical records reflecting the treatment giving rise to the Esse Health bills, nor did he provide testimony or other evidence sufficient to allow us to parse the charges set forth in the bills. We find the charges set forth in the bills to be far from self-explanatory. Accordingly, we decline to make any findings with respect to the treatment giving rise to the bills from Esse Health.

We also decline to make any findings with respect to the amount of out-of-pocket costs incurred by employee. Employee indicated he paid co-pays every time he went for medical treatment, and sometimes sent in checks, but he conceded he was not sure of this, and he was unable to identify a specific dollar amount. We do not adopt the administrative law judge's finding that the bills themselves establish that employee paid \$592.00 in co-pays.

Permanent total disability

Employee appeals the administrative law judge's finding that he is not permanently and totally disabled. The administrative law judge determined that employee isn't credible regarding his limitations, noting employee's demeanor at the hearing, his hunting and fishing hobbies, some contradictory testimony, and his use of the phrase, "I think," to preface many of his answers.

We disagree with the administrative law judge's finding that employee is not credible regarding his limitations. Employee does appear to be a poor historian as to certain

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details of his medical timeline, and the overall tenor of his testimony is certainly not a model of clarity. But we note the testimony from Timothy Lalk that employee became frustrated and embarrassed during the reading and vocabulary portions of the Wide Range Achievement Test. Mr. Lalk opined that employee scored at the fourth grade level on that test. We note also that employee ultimately only completed the sixth grade, and this when he was sixteen years old, and never obtained a GED. When we review employee's testimony in light of these facts, it appears to us that employee's use of the phrase, "I think," and the noncommittal nature of certain portions of his testimony are more a product of his reaction to the sophisticated questions posed by the attorneys in this thoroughly litigated case, rather than some attempt to intentionally misrepresent his limitations. After careful consideration, we find employee's testimony regarding his limitations to be credible.

We note that Dr. Volarich and Timothy Lalk presented essentially uncontested testimony that employee is permanently and totally disabled as a result of a combination of his preexisting disabling conditions and the effects of the work injury. (Neither employer nor the Second Injury Fund provided an expert vocational opinion, and employer's medical expert Dr. deGrange did not opine that employee is capable of competing for work in the open labor market.) After careful consideration, we find the testimony from Dr. Volarich and Mr. Lalk credible on this point. Specifically, we credit Mr. Lalk's testimony that employee won't be able to work in any type of position given his symptoms and limitations. We also credit Dr. Volarich's testimony that, at the time of the June 2007 work injury, employee suffered from preexisting permanent partially disabling conditions affecting: (1) the body as a whole referable to degenerative disc disease; (2) the left shoulder referable to a torn rotator cuff and two surgeries; and (3) the right shoulder referable to impingement and rotator cuff tendinitis. Finally, we credit Dr. Volarich's testimony that employee is permanently and totally disabled as a result of the June 2007 work injury in combination with his preexisting disabling conditions.

## **Conclusions of Law**

### Medical causation

The administrative law judge resolved the issue of medical causation as follows: "Based on a consideration of all the evidence, the Court finds that the employee's injury in June 2007 and the disabilities resulting therefrom are medically causally related to the accident where the employee injured his neck when he was lifting decorative stones for his employer." *Award*, page 20. But the issue of medical causation does not turn on a showing of "medical causal relationship," but rather on a specific statutory test.

Section 287.020.3(1) RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

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.

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We have credited the testimony from Drs. Volarich and Kennedy over that offered by Dr. deGrange on the issue whether employee suffered a compensable injury by accident. Given our findings, we conclude that the June 2007 accident is the prevailing factor causing the resulting medical conditions (and associated disability) of a disc herniation at C6-7 to the left, as well as the aggravation of underlying and previously asymptomatic degenerative disc disease and degenerative joint disease at C4-5 and C5-6. We adopt the administrative law judge's finding that this injury represents a 40% permanent partial disability of the body as a whole referable to the cervical spine. We also adopt Dr. Volarich's opinion apportioning a 5% preexisting permanent partial disability of the body as a whole referable to employee's cervical spine problems predating the work injury.

Having rendered the foregoing conclusions, we briefly address the employer's legal arguments on appeal. In addition to arguing its experts are more credible, employer asserts that § 287.190.6(2) RSMo requires that we adopt the findings of Dr. deGrange. That section provides, in relevant part, that "[i]n determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures." Employer argues we are required by this language to adopt Dr. deGrange's findings, because he was the only doctor whose testimony was consistent with the 2002 and 2007 cervical spine MRIs.

We find employer's argument somewhat confusing, given that Dr. deGrange testified he didn't even see the actual MRI films but instead reviewed the radiologist reports, while Dr. Volarich testified that he did review the MRI films, and that his review revealed a new lesion at C6-7. If § 287.190.6(2) compels any particular result in this case (a proposition we do not accept), it would thus seem to favor the testimony from Dr. Volarich over Dr. deGrange, because Dr. Volarich relied on an "objective finding" derived from his review of the MRI films, whereas Dr. deGrange relied on his "subjective finding" as to what he believed was the more serious factor causing employee's problems. Given these circumstances, we are convinced that employer misstates both the law and the facts of this case when it says Dr. deGrange was the only expert to make or rely upon objective medical findings in reaching his opinions. Accordingly, we reject employer's argument that § 287.190.6(2) requires us to credit its expert "as a matter of law."

Employer also argues that this Commission must reject certain of Dr. Volarich's findings because aggravation of a preexisting condition is not compensable under the 2005 amendments to the Missouri Workers' Compensation Law. Employer cites *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo. App. 2008), wherein the issue was whether there was competent and substantial evidence to support a Commission decision to deny benefits to an employee claiming an acute injury to his shoulder. *Id.* at 458. The Court cited the applicable standard of review, noted that the Commission credited testimony from a doctor who opined that the employee's accident was not the prevailing factor in causing any acute injury, and upheld the Commission's denial of benefits. *Id.* at 458-60. The Court also provided the following comments:

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Case law preceding the 2005 amendments to the Worker's Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an "aggravated condition." See *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo. App. E.D. 2002). However, since *Rono* was decided, the legislature amended Section 287.020, changing the criteria for when an injury is compensable. In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the "employment" is a "substantial" factor in causing the injury, "can be seen to have followed as a natural incident of the work" and "can be fairly traced to the employment as a proximate cause." See S.B. Nos. 1 & 130, section A 93rd Gen. Assem., 1st Reg. Sess. (Mo. 2005). Thus, while *Rono's* approval of compensation where the claimant establishes a causal link between his aggravated condition and his job duties fits within the former version of section 287.020, we review causation in light of a new statutory standard. Under the current statute, a work injury "is compensable *only* if the accident was the prevailing factor in causing both the resulting medical condition and disability." Section 287.020.3 (emphasis added).

*Gordon*, at 459.

Employer argues that the foregoing comments mean that the Court held that aggravation of a preexisting condition is not compensable under the 2005 amendments. We disagree. Employer's reading of *Gordon* runs contrary to § 287.020.3(1) RSMo, which provides that an injury by accident is compensable where the accident was the prevailing factor in causing the resulting "medical condition and disability." We note that the word "aggravation" is not defined, and in fact, does not appear at all in Chapter 287. We note also that the Court in *Gordon* regarded "aggravation" as shorthand for "something less than a prevailing factor." But as used by Dr. Volarich in this case, the word "aggravation" describes a *medical condition*, not a *type of factor*. We conclude, therefore, that the above-quoted comments from the *Gordon* decision are inapplicable to the facts of this case.

We have credited Dr. Volarich's testimony that the accident was the prevailing factor causing a herniated disc at C6-7 and also causing the resulting *medical condition* of an aggravation of the preexisting degenerative problems in employee's neck. We conclude that employee's injuries are compensable for purposes of the Missouri Workers' Compensation Law despite the fact Dr. Volarich used the word "aggravation" in his diagnosis.

#### Past medical expenses

Both employee and employer appeal the administrative law judge's award of past medical expenses. We first address employer's "authorization" defense. Employer argues that employee is not entitled to any of his past medical expenses, because it lacked notice of his need for care when employee failed to make a demand that employer pay for his self-directed treatment after employer's authorized treating doctor told him he didn't suffer a work injury. Employer suggests that employee was required under the law to demand additional treatment from employer after Dr. Krewet released

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him, and that his failure to do so is conclusive on the issue of past medical expenses. We are not persuaded.

Employer's argument that the absence of a demand by employee is dispositive of the issue ignores the well-established case law holding that "[i]f the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof." *Reed v. Associated Elec. Coop., Inc.*, 302 S.W.3d 693, 700 (Mo. App. 2009). The rationale is that an employer "waives" its statutory right to direct care if it denies compensation for an injury that is later determined to have been compensable. *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo. App. 1992). Although an employee's making a demand for additional care would seem to provide the employer with unequivocal notice of the employee's need for treatment, nothing in Chapter 287 or the relevant case law suggests that a demand is the exclusive means whereby an employer may obtain such notice.

Employer cites *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81 (Mo. App. 1995), which stands for the proposition that where an employer had provided treatment following a work injury, but employee never returned to work after having been released by employer's authorized treating doctor, and thereafter never contacted employer at all, but instead pursued extensive additional treatment on his own, the employee was not entitled to an award of past medical expenses. *Id.* at 84-5. The Court specifically noted that: "[a]s far as [employer] was aware, [employee] was not in need of any further medical attention." *Id.* at 85. Subsequent decisions have followed the *Blackwell* rule in circumstances where the employee's conduct deprived employer notice and an opportunity to direct medical treatment. See, e.g., *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo. App. 2010).

The *Blackwell* facts are not present here. Notably absent from employer's argument is a citation to evidence that would suggest employer (or the relevant personnel with employer) were deprived notice of employee's need for treatment. We note that Dr. Krewet, employer's authorized treating doctor, specifically recommended that employee see an orthopedic spine specialist. Instead of providing employee with the additional treatment recommended by Dr. Krewet, employer chose to deny it, relying on Dr. Krewet's theory that employee's preexisting degenerative disc disease and arthritis were the prevailing factors causing his diagnosis and symptoms. Accordingly, we conclude that employer had notice and an opportunity to provide medical treatment, but that employer failed to take advantage of that opportunity.

Certainly employer was entitled to rely on the causation opinion of Dr. Krewet and deny treatment, but likewise, employee was entitled to disagree with that opinion and seek treatment for his work injury. At that point, both parties assumed the risk inherent in their respective positions. Employee assumed the risk a fact-finder would agree with Dr. Krewet or find that employee's additional treatment was not reasonably required to cure and relieve the effects of his work injury, with the result that he would have to pay for his own treatment. Employer, on the other hand, assumed the risk that Dr. Krewet's theory would be rejected and that it would be deemed to have waived its right to direct care and also be held liable for employee's self-directed care. As it turns out, we were

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not persuaded by the opinions from Dr. Krewet or Dr. deGrange identifying employee's preexisting degenerative conditions as the prevailing factor causing his neck injury.

Employer also argues that employee failed to meet his burden on the issue of past medical expenses when he conceded that he is not really able to read or understand the medical bills he put into evidence. The courts have consistently held that an award of past medical expenses is supported when the employee provides (1) the bills themselves; (2) the medical record reflecting the treatment giving rise to the bill; and (3) testimony identifying the bills. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. 1989). If employee does so, the burden shifts to employer to prove some reason the award of past medical expenses is inappropriate (such as employee's liability for them has been extinguished, the bills are not reasonable, etc.) *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 822-23 (Mo. 2003). We believe employer misstates employee's burden of proof under *Martin* in arguing that employee was required to testify that he could read and understand the medical bills. The *Martin* employee testified that she "received" the bills at issue in connection with treatment for her work injury, and the Court held this was sufficient to support an award. *Id.* at 111-12. This employee testified that he received the bills at issue in connection with his treatment for his work injury, and we have credited that testimony. We conclude that employer's argument that employee failed to satisfy the *Martin* elements fails.

Turning to employee's points of appeal, it appears that the administrative law judge awarded some of the expenses claimed by employee but, for unknown reasons, did not award the full amount reflected in the bills from Des Peres Hospital, and did not award employee's expenses incurred for treatment with Dr. Poepsel. Employee asks us to modify the award to reflect the total amount charged to employee for his medical expenses. Employer counters that it proved that employee is not actually liable for the bills with the testimony it provided from its finance director Brenda Grawe, who says that employee isn't obligated to pay more for medical expenses than the amount billed to employee's insurance with employer. Employer also points to the affidavit from Grace Ya, the custodian of records for medical billing at Des Peres Hospital, which describes certain adjustments and agreements between the provider and employee's insurance carrier, and asserts that employee has no further obligation to pay Des Peres Hospital.

We conclude that both the Ya affidavit and Ms. Grawe's testimony are irrelevant because they describe employee's liability in light of payments made by employee's insurance, and § 287.270 RSMo specifically provides that "[n]o savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder." We conclude that the administrative law judge erred to the extent he reduced employee's past medical award in reliance on testimony or an affidavit describing employee's liability having been reduced in connection with payments by "insurance of the injured employee." *Id.* Accordingly, we modify the administrative law judge's award of past medical expenses to award the full amount of the charges from Des Peres Hospital (\$51,856.64) and the charges from Dr. Poepsel (\$100.00). On the other hand, we agree with the administrative law judge and adopt his conclusion that employee is not entitled to his expenses from Esse Health (\$2,092.00), because employee did not provide the medical records, or any other evidence that would allow us to identify the

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nature of the treatments giving rise to the specific charges reflected in the bills. We also modify the administrative law judge's award to subtract the award of \$592.00 in out-of-pocket medical costs; employee did testify that he paid a co-pay every time he went for treatment, but conceded he was unable to identify a specific amount that he actually paid out-of-pocket for his medical care. It should be noted that, practically speaking, our award works the effect that employee will recover any such out-of-pocket expenses incurred with Des Peres Hospital, Dr. Poepsel, and Dr. Rutz, because in keeping with § 287.270, we have awarded the full amount of the charges billed to employee, rather than an amount that may have been reduced by payments from employee or employee's insurance.

Finally, employee asks for prejudgment interest on any past medical award. The pertinent case law requires employee to prove that the past medical expenses were "due" to support an award of interest. *McCormack v. Stewart Enters.*, 956 S.W.2d 310, 314 (Mo. App. 1997). As explained in *McCormack*, this means employee must show that he actually paid the bills, or received demands that he pay interest on the bills, or suffered some other loss, such as a doctor refusing to provide additional treatment until employee paid his bill. *Id.* Employee did not testify that he paid the bills or that he suffered any other loss as a result of employer's failure to provide medical care, other than paying some co-pays whenever he went for treatment. As noted above, employee was unable to identify a specific amount that he actually paid out-of-pocket for his medical care. Employee did not prove any of the other circumstances indicating the bills were "due," such as a doctor refusing care or a creditor demanding interest. We conclude employee failed to meet his burden of proving his entitlement to prejudgment interest.

Finally, employee asks that the award specifically provide that his past medical expenses be paid directly to him. There is no indication on this record that any hospital, physician, or other health care provider has provided notice to the Division of Workers' Compensation under § 287.140.13(6) RSMo of any claim for fees or other charges for services that were authorized in advance by the employer. We conclude that employee's past medical expenses are payable directly to employee. Employer is ordered to pay the sum of \$101,769.64 to employee for his past medical expenses.

#### Permanent total disability

We have modified the findings of the administrative law judge and provided our own credibility and factual findings as to the issue of permanent total disability. We have credited Dr. Volarich and Timothy Lalk on the issue. We have also credited employee's testimony with respect to his limitations. We turn now to the question whether employee is permanently and totally disabled for purposes of the Missouri Workers' Compensation Law.

Section 287.020.6 RSMo provides as follows: "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." Obviously, returning to employment requires not only the physical capacity to perform work, but the ability to *compete for* and *obtain* work in the open labor market:

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the

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ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

*Molder v. Mo. State Treasurer*, 342 S.W.3d 406, 411 (Mo. App. 2011).

We disagree with the administrative law judge's reasoning that the evidence regarding employee's hunting or fishing hobbies demonstrates that he is able to compete for work. There is no expert medical or vocational evidence on this record that would support a finding that the physical activity involved in sporadic hunting or fishing activities reasonably correlates to the demands of full-time employment in the positions for which employee's work history and level of education qualify him.

We also disagree that employee's returning to a job that he already had with his longtime employer demonstrates that employee will be able to compete for work in the open labor market. When employee returned to work for employer, he limited himself to activities that wouldn't increase his neck and shoulder pain, and let the younger workers do the heavy lifting and other strenuous activities. We will not penalize employee for his admirable attempt to keep working for his longtime employer after his cervical spine surgery; to do so would only serve to discourage injured workers from returning to employment. See *Molder*, 342 S.W.3d at 413.

The courts of this state have long held that "[t]he critical test for determining permanent total disability does not require the employee be completely inactive or inert; rather it requires an examination into whether any employer would reasonably be expected to hire the injured worker in the worker's present physical condition." *Underwood v. High Rd. Indus., LLC*, 369 S.W.3d 59, 67 (Mo. App. 2012). We have credited Dr. Volarich and Mr. Lalk on the issue. We are persuaded that no employer can reasonably be expected to hire employee given his age, limited education, and physical restrictions referable to the work injury in combination with his preexisting conditions. We conclude employee is permanently and totally disabled.

#### Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed ..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

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We have credited Dr. Volarich and found that employee suffered from preexisting permanent partially disabling conditions referable to degenerative disc disease and bilateral shoulder problems at the time he sustained the work injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of the condition. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained permanent partial disability as a result of the primary injury, and credited the expert opinions from Dr. Volarich and Mr. Lalk that employee is permanently and totally disabled owing to the combination of his preexisting disabilities in combination with the effects of the primary injury. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

The Second Injury Fund argues it cannot be liable for permanent total disability benefits because employee has low back problems that worsened after the primary injury. We are not persuaded. We note that Mr. Lalk was questioned about employee's low back pain and specifically testified that his opinion speaks to employee's symptoms and employability *prior to* his increase in low back pain.

We conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. We modify the award of the administrative law judge. The Second Injury Fund is not liable for permanent partial disability benefits. Instead, the Second Injury Fund is liable for permanent total disability benefits.

### **Award**

We modify the award of the administrative law judge as to the issues of medical causation, past medical expenses, permanent total disability, and Second Injury Fund liability.

Employer is ordered to pay to employee the sum of \$101,769.64 for his past medical expenses.

Employee: John F. Maness

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Beginning November 20, 2007, the date employee reached maximum medical improvement, the Second Injury Fund is liable for permanent total disability benefits at the differential rate of \$44.21 for 160 weeks, and thereafter at the stipulated permanent total disability rate of \$420.76 per week. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Gary L. Robbins, issued August 22, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 24<sup>th</sup> day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: John F. Maness

Injury No. 07-053162

Dependents: N/A

Employer: City of Desoto

Additional Party: Second Injury Fund

Insurer: Missouri Intergovernmental Risk Management Association

Hearing Date: May 24, 2012

Checked by: GLR/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes. The Court found the employee had a work related injury.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? On or about June 11, 2007.
5. State location where accident occurred or occupational disease contracted: Jefferson 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 happened or occupational disease contracted: The employee was lifting and moving stones when he injured his neck and body as a whole.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Neck and body as a whole.
14. Nature and extent of any permanent disability: The Court found that the employee incurred a 40% permanent partial disability to his cervical spine as a result of his primary accident.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: The employee is claiming \$103,861.64 plus interest.
18. Employee's average weekly wage: \$631.14.
19. Weekly compensation rate: The employee's rate for temporary total and permanent total disability is \$420.76 per week. His rate for permanent partial disability is \$376.55 per week.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: The employer-insurer was ordered to provide future medical care. See Award.

The Compensation awarded to the employee shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the employee: Dean L. Christianson.

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

On May 24, 2012, the employee, John F. Maness, appeared in person and with his attorney, Dean L. Christianson, for a hearing for a final award. The employer-insurer was represented at the hearing by Timothy M. Tierney. Assistant Attorney General Kevin N. Nelson represented the Second Injury Fund. The Court took judicial notice of all records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

### **UNDISPUTED FACTS**

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and was fully insured by Missouri Intergovernmental Risk Management Association.
2. On or about the day of the alleged accident or occupational disease the employee was an employee of the City of Desoto and was working under the Workers' Compensation Act.
3. The employer had notice of the employee's accident.
4. The employee's claim was filed within the time allowed by law.
5. The employee's average weekly wage is \$631.14 per week. His rate for temporary total or permanent total disability is \$420.76 per week. His rate for permanent partial disability is \$376.55 per week.
6. The employer-insurer paid \$0 in medical aid.
7. The employer insurer paid \$0 in temporary disability.
8. The employee has no claim for mileage or other medical expenses under Section 287.140 RSMo.

### **ISSUES**

1. Whether on or about June 11, 2007 the employee sustained an accident or occupational disease arising out of and in the course of his employment?
2. Whether the employee's injury was medically causally related to his accident or occupational disease?
3. Whether the employer-insurer is responsible to pay for past medical bills?
4. Whether the employer-insurer has the responsibility to provide future medical care?
5. Whether the employer-insurer is responsible to pay temporary total disability benefits?
6. Whether the employer-insurer is responsible to pay permanent partial disability benefits?
7. Whether the employer-insurer is responsible to pay permanent total disability benefits?
8. Whether the Second Injury Fund has any liability for permanent partial or permanent total disability?
9. Whether the Second Injury Fund can incur any liability in an occupational disease case?

**EXHIBITS**

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of David G. Kennedy, M.D.
- B. Deposition of David T. Volarich, D.O.
- C. Deposition of Timothy G. Lalk.
- D. Medical records of Philip R. Poepsel, D.O.
- E. Medical records of Kevin D. Rutz, M.D.
- F. Medical records from Des Peres Hospital.
- G. Medical records from the Department of Veterans Affairs.
- H. Medical records from Jefferson Memorial Hospital.
- I. Medical records from Occupational Medicine.
- J. Records from the Division of Workers' Compensation.
- K. Medical bills.
- L. Medical records of Kevin D. Rutz, M.D.
- M. Employee's accident report.
- N. Supervisors Investigation Report.

Employer-Insurer's Exhibits

- 1. Deposition of Donald A. deGrange, M.D.
- 2. Records from the Missouri Division of Workers' Compensation.
- 3. Records from the Missouri Division of Workers' Compensation.
- 4. Records from the Missouri Department of Conservation.
- 5. City of Desoto Payroll History Reports.
- 6. Orthopedic Specialists, PC Patient Financial History.
- 7. Affidavit of Grace Yu.

Second Injury Fund Exhibits

None.

**STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**

**STATEMENT OF THE FINDINGS OF FACT-**

The employee and Brenda Grawe were the only two witnesses to personally testify at trial. All other evidence was submitted in the form of written reports, medical records or deposition testimony.

Testimony of Brenda Grawe

Brenda Grawe testified on behalf of the employer-insurer concerning the provisions of, and member obligations under, the group health insurance plan for City of Desoto employees. Ms. Grawe is the Finance Director for the City of DeSoto, and has served in this capacity for last 12 years. As Finance Director she is also designated as the plan administrator for the group health insurance plan. She testified that she is the contact for both the insurance carrier and health plan members when issues arise concerning benefits and member obligations under the plan. This includes inquiries concerning EOB's and billing, co-pays and deductibles.

Ms. Grawe is familiar with the various provisions of the employee group health insurance plan, including obligations for payment and reimbursement to the insurance company by plan members and the City. Ms. Grawe confirmed that she was familiar with the group health insurance policies and contracts for insurance obtained by the City from 2000 forward. This includes the plans and contracts for health insurance with AETNA and Anthem Blue Cross/ Blue Shield in 2007 and 2008.

On direct exam, Ms. Grawe was questioned regarding amounts billed by providers, versus amounts actually paid by the insurance carrier to the providers under the group health plan. To illustrate, she reviewed billing records for services provided by Dr. Rutz to the employee. The billing records reflected adjustments received by AETNA, employee's group health carrier. After adjustments, the records reflected a total of \$11,811.70 billed to AETNA by Dr. Rutz's office, and current outstanding balance of \$0.00. According to Ms. Grawe, under the contract with the group insurance carrier, member employees and the City have no obligation to pay more than the amount billed to the insurance carrier. This was also true for the benefit plans in place in 2007 and 2008. With regard to the \$11,811.70 billed to AETNA by Dr. Rutz's office, Ms. Grawe confirmed the employee and the City had no obligation to pay more than the amount reflected in the EOB, or \$11,811.70.

Finally, Ms. Grawe confirmed there were no provisions in the 2007 and 2008 contracts for group health care that would bind or obligate the City to pay the insurance carrier more than the amount reflected in the EOB. This included the adjusted bill from Dr. Rutz's office in the amount of \$11,811.70. In the twelve years that Ms. Grawe has participated in the plan, no insurer has ever sought reimbursement for amounts beyond the adjusted bill, EOB or co-pay amount. In the employee's case, the insurance carriers have not indicated they are seeking, or plan to seek, payment for amounts beyond adjusted bills, EOBs or co-pays.

On cross-examination she testified that if the insurance company wanted more money, the city would not pay it and would refer the matter to the broker who would contact the insurance company. She indicated that she had no authority to bind the city or the insurance carrier. She further testified that he had not spoken to the insurance company and that she has received nothing indicating that the insurance company is not proceeding against the employee.

Ms. Grawe reported that in her twelve years as the finance director, no employee has ever approached her with a complaint that the insurance company is trying to collect more money from them.

Testimony of John F. Maness

At trial, the employee testified that he is sixty-three years old. He is six feet tall and weighs one hundred and eighty-five pounds. He takes medication for his heart and his blood pressure. He is not currently married and was not married in June of 2007. He does not have any children.

The employee only completed the sixth grade. When he was sixteen years old he had problems with his teacher, so he quit. He said that he can only read a little but is not bad at arithmetic.

He was in the Army from 1969 to 1996. He had some training in mechanics and electronics. He was a truck mechanic and worked on electronic systems. He indicated that he ran systems tests and replaced circuit boards if they were defective. He received an honorable discharge.

The employee is not currently working. His last job was with the City of Desoto. He worked for the city for approximately twenty-two years, beginning in 1986. His last day of working was sometime in April of 2009. His beginning position was that of a laborer. He continued working to the point where he became a "working supervisor". His department would take care of the city streets, sewer, water and parks. He did all of the work associated with maintaining those utilities. He frequently had to lift heavy weights. His job as a supervisor involved supervising a crew of three to five people. The extent of his "supervision" was limited to taking tools to the job and laying them out, before explaining to the employees what had to be done. He did not perform any hiring or firing. He also did not take care of any paperwork such as time sheets. As a supervisor he was still performing all of the heavy labor work that he performed as a laborer.

Mr. Maness described the problems he has had with his neck over the years, leading up to the 2007 work injury. He said that in 1996 he was involved in a vehicular accident while driving a company vehicle. He was rear-ended by another vehicle and thereafter had neck pain and headaches. He sought medical care at the Jefferson Memorial Hospital Occupational Medicine Center, where he was seen three or four times and prescribed medication. After a couple of months went past he was feeling much better but still may have had a headache every once in a while. The 1996 accident was a work related injury, though he did not seek or receive a settlement.

He also had a vehicular accident in January of 2002. He was again rear-ended, this time on a hunting trip in Hannibal, Missouri. After that he had some neck pain which was radiating to his arms. He sought medical care through Dr. Poepsel, his primary care physician, though after a year or two he was having no further complaints.

The employee testified that he injured his neck at work in June of 2007. He testified that the lifting occurred on June 11, 2007, though records from the employer showed he was not working on that date. An incident report from the employee's supervisor documents that it actually

occurred on June 12, 2007. On that day, the employee was advised by his supervisor to clean up an area in the yard. There were skids that had heavy manufactured stone on them, and approximately a dozen of them had fallen off. He estimated that they each weighed around sixty-five pounds. As he was moving them back onto the pallet he felt a burning sensation in his neck. He said that at first it simply felt like a pulled muscle, so he continued working and finished out the day. Over the next couple of days he realized that something more serious was wrong, so he dictated an incident report to his girlfriend, who wrote it out. He said that she wrote it because of his inability to read and write. He identified that Accident Report as Exhibit M, and said that it was given to his supervisor. He said that he submitted the Accident Report because he knew that his employer requires employees to report their injuries if they are hurt at work.

Mr. Maness indicated that when he submitted his Accident Report to his supervisor, approximately a day and a half after his symptoms developed, his symptoms were increasing and radiating into his left arm. His supervisor sent him for an evaluation at the Jefferson Memorial Hospital Occupational Unit, where he was seen by Dr. Krewet. Some testing was performed, including an MRI scan. At this point the employee was advised that no further treatment would be provided. He therefore sought medical care on his own through his primary care physician, Dr. Poepsel. Dr. Poepsel referred him to an orthopedic surgeon, Dr. Rutz, who performed surgery to fuse three separate disc spaces in his neck. He did not receive physical therapy thereafter, and he has seen no other doctors for this injury.

The employee identified the medical bills exhibit (Exhibit K). He stated that these were copies of bills that he had received for the work injury. He stated that he actually had to pay for some of the bills out of his own pocket, including co-pays and other bills.

The employee testified that he was off work from August 22, 2007 to November 19, 2007, at which time he was returned to work with a thirty pound weight restriction. He returned to his regular job but he did not perform as much of the heavier work such as heavy lifting or climbing into the equipment. He was able to continue working in this manner up to November of 2008 because he would use pain medications when he got home from work. He also “watched what he did” while at work so that he did not injure himself further, by modifying his activities such as cutting back on the weights that he was lifting. However, his symptoms continued, and worsened to the point where in November of 2008 he determined that he could no longer continue working. It had gotten to the point where he was having problems just moving his head, and he described an incident where the employer docked him a day’s pay because he knocked down a light pole with a piece of heavy equipment. He said this happened because he could no longer turn his head to look around him.

After the incident with the light pole, Mr. Maness stopped working. His employer approached him and asked him to consider working on a part-time basis. He was previously working four days per week, ten hours per day, so he attempted to continue working on a part-time basis in which he worked three days per week, eight hours per day. He again was performing the same type of work though he said the younger workers took over even more of the heavier activities. But as he worked on a part-time basis his cervical symptoms continued to get worse to the point, in April of 2009, where he could no longer work. He stated that when he went home from work

he was having severe neck pain and he was spending all of his time laying in a recliner, trying to obtain relief of his symptoms. He also had to sleep in the recliner.

Mr. Maness complained of constant neck pain. He testified that the more he moves the more it hurts. He indicated that he is not taking Tylenol or medications as they do not help that much. He said that his symptoms increase with activity, and he feels worse with basically any movement that he performs. He does do things such as cutting his grass, using a riding mower, and he said this takes him an hour and a half to perform. Afterwards he has to lie in his recliner to recuperate.

Prior to the work injury the employee had two separate injuries to his left shoulder. The first one resulted in a torn rotator cuff and required surgery through Dr. Howard to fix it. He then had a second shoulder injury, which occurred at work, and it was again fixed by Dr. Howard. He continues to have problems with the left shoulder in that he said he cannot raise his left arm above the horizontal level. He indicated that it was painful when he was still working, and it was not as strong as it had been. He found it made it difficult to lift heavy objects.

The employee has worn hearing aids for the last six or seven years. He said that he has difficulty hearing low tones. He also has ringing in his ears.

Mr. Maness testified that he tries to perform some activities around the home. In the morning he will get up and take his heart and blood pressure medication. He indicated that he has tried to mow the lawn, though he cannot use a push mower due to the increase in neck symptoms which follows. For the same reason, he cannot use a weed eater. His sleep is not well, as it is "off and on". He sleeps on the couch or in his recliner, as his neck pain prevents him from sleeping in a bed. He said that standing makes his neck hurt and that sitting increases his symptoms as well. Sometimes he will tinker in his yard with his fishing boat. He states that he will take his boat out two or three times per year. He does still drive, though after a couple of hours his pain is more increased in the neck and in the shoulders. He used to fish in tournaments but he no longer does that because the casting and reeling cause his symptoms to increase. He said that he went fishing one time in May of 2012 for a period of four or five hours. When he got home he got into his recliner and was there all night. He said that he does not do any fly fishing because of the movement of the arms, which increases his neck complaints.

Mr. Maness does continue to hunt three to four days per year. He hunts for deer. He has an ATV that he will ride into the hunting area. He did get a deer this past year. He did not lift the deer but tied a rope around it and drug it out of the woods. The employer-insurer introduced Missouri Department of Conservation records indicating that the employee has consistently obtained multiple hunting and fishing permits over the years.

The employee indicated that he was not tired of working. He said that he had not planned on retiring when he did, and that he had planned on working at least another five years, until age sixty-five. He said that if he had worked longer he could have received an increase in his retirement benefits.

## **Testimony of Rating/Evaluation/Medical Providers**

### Dr. deGrange

Dr. deGrange is a board certified orthopedic spine surgeon with a fellowship in spine surgery. He examined the employee at the request of the employer-insurer on March 8, 2010. He noted a history by the employee of pain in the neck and symptoms in the left arm after moving several decorative paving stones weighing fifty to sixty pounds each. The doctor noted a prior history of cervical injury following a car accident, surgery to the left shoulder, and a plan to proceed with right shoulder surgery as of March 8, 2010.

On physical exam, the doctor noted no spasm and no nerve root compression in the cervical spine. There was some stiffness and decreased range of motion in the neck, as well as some decreased sensation in the left forearm and hand. The doctor also found mild evidence of carpal tunnel symptoms in both hands.

In conjunction with his review, the doctor reviewed the October 17, 2002 MRI, the June 14, 2007 x-ray and the July 2, 2007 MRI of the cervical spine. X-rays of the cervical spine were also obtained at the time of the exam and they revealed a solid fusion from C4 to C7. With regard to the 2007 MRI, Dr. deGrange noted a large disc osteophyte complex at C5-6 and C6-7. This finding indicates a bone spur is associated with the disc, and the disc pathology is a longstanding chronic finding, rather than an acute herniation. The doctor also noted the 2007 MRI revealed pathology at C2-3, and bulges associated with bones spurs at C4-5, C5-6. The June 14, 2007 films demonstrated marked hypertrophic degenerative changes at C4-5 and C5-6.

With regard to his physical examination, Dr. deGrange diagnosed, (1) degenerative disc disease in the cervical spine at multiple levels with associated spinal stenosis; (2) possible cervical strain -resolved; (3) anterior cervical discectomy and fusion from C4 to C7; and (4) lumbar strain. He indicated that there was no evidence of acute injury on the July 2, 2007 MRI or the June 14, 2007 x-ray. The doctor concluded the June events may have caused a cervical strain, but the June 11, 2007 event was not the prevailing factor necessitating surgery. In fact, the doctor noted the need for surgery was multifactorial, but the longstanding and evolving degenerative changes in the cervical spine were the ultimate reason surgery was required. In his opinion, the employee should have had work restrictions leading up to June 11, 2007 given the amount of pre-existing degeneration in his cervical spine.

Dr. deGrange based his diagnosis of cervical strain on the employee's described mechanism of injury. He noted this condition would have resolved a month or two after the injury, and the employee could have returned to work without restrictions or modifications referable to the strain. No additional treatment was necessary to treat the strain. Dr. deGrange concluded no permanent partial disability should be assigned because the strain resolved.

Although the doctor did not believe the need for surgery was related to the June 11, 2007 event, he did conclude the restrictions assigned by Dr. Rutz following the cervical fusion were appropriate, and he did not disagree with the thirty pound lifting restriction. Dr. deGrange

assigned a twenty to twenty-five percent permanent partial disability referable to the degenerative process in the cervical spine necessitating the fusion, and the employee's condition post-fusion.

Dr. deGrange testified that he did not personally review any of the MRI scans.

#### Dr. Poepsel

The records of Dr. Poepsel reflect dates of service from 1998 to 2007. On January 15, 2002, the employee provided a history of a motor vehicle accident eight days prior. Neck pain and decreased range of motion were noted. An August 27, 2002 note discusses complaints in the cervical spine following a "MVA", and cervical sprain or spasm was noted by the doctor. An August 8, 2002 x-ray described pathology at C4-5 and C5-6, and noted narrowing with osteophytes that project into the neural foramina. Cervical spasm was noted again in a note of September 12, 2002.

Bilateral shoulder complaints were discussed on August 26, 2004 and January 3, 2007. A July 17, 2007 note describes pain in the left forearm and shoulder, as well as numbness in the fingertips. No complaints were described regarding the neck.

Dr. Poepsel's notes also include Dr. Howard's treatment notes concerning the bilateral shoulders. Dr. Howard's September 7, 2004 note discusses a bilateral shoulder MRI which revealed significant tendinopathy in the right shoulder and a full thickness tear in the left shoulder. According to the doctor's notes, two procedures were performed to repair the full thickness tear in the left shoulder. The last note of July 12, 2005 indicates some weakness with heavy lifting.

#### Jefferson Memorial Hospital

Records of Jefferson Memorial Hospital reflect dates of service from April 24, 1995 to July 2, 2007. Pertinent to this case are the dates of service on August 29, 2002, October 17, 2002, November 11, 2002, June 14, 2007 and July 2, 2007. The August 29, 2002 radiology report indicates neck and left shoulder pain following a motor vehicle accident in January 2002. Degenerative joint and disc disease at C4-5 and C5-6 were noted. An October 17, 2002 MRI of the cervical spine revealed disc bulges and osteophytes at C4-5 and C5-6.

The notes indicate the employee was referred for physical therapy in 2002 for neck and bilateral upper extremity complaints. A November 11, 2002 physical therapy note indicates a referral by Dr. Siddiqi for a diagnosis of cervical degenerative joint disease and cervical strain. At the time of that visit, the employee described neck pain with headaches, radiation and weakness in both arms.

X-rays taken on June 14, 2007, three days after the alleged date of injury, note "no history of injury." The x-rays revealed degenerative pathology at C4-C5, and advanced degenerative narrowing with anterior and posterior spurring, left greater than right, at C5-6. A July 2, 2007 MRI revealed left-sided C5-6 and C6-7 disc osteophyte complexes and moderate foraminal stenosis. A probable left-sided disc herniation was also noted at C6-7.

Records of Occupational Medicine and Dr. Krewett

Records from Occupational Medicine Specialty Center reflect dates of service from 1992 to 2007. A note of December 16, 1992 reflects treatment for a middle back strain. A note of October 2, 1996 reflects treatment for a cervical strain following a car accident.

Dr. Krewett saw the employee on June 14, 2007 for complaints of numbness in the 2<sup>nd</sup> and 3<sup>rd</sup> fingers, and pain in the shoulder and back of the arm. The employee described symptoms beginning "on or about" June 11, 2007, between 9:00 and 10:00 a.m. The doctor notes the employee was operating a front end loader that day. Dr. Krewett notes significant degenerative spine disease following the June 14, 2007 x-ray and July 2, 2007 MRI. After three weeks of conservative measures, Dr. Krewett referred the employee to Dr. Rutz for further care.

Dr. Rutz

Dr. Rutz's records reflect dates of service from July 19, 2007 to January 17, 2008. On July 19, 2007, the employee complained of neck and left upper extremity pain, weakness and paresthasias. The doctor's report notes a history of lifting heavy objects at work with pain in the neck with radiation in the left arm the following day. He denied prior symptoms in the neck, but reported two prior left shoulder surgeries and cancer in the right cheek. He did not mention any prior issues with the lumbar spine.

Dr. Rutz reviewed the June 14, 2007 films and July 2, 2007 MRI from Jefferson Memorial Hospital. A probable left-sided disc herniation was noted at C6-7. He diagnosed cervical stenosis, cervical disc herniation and cervical radiculopathy. Prescription medication and a nerve root block at C7 were prescribed.

On August 8, 2007, Dr. Rutz noted the nerve root blocks were of little benefit, and discussed proceeding with an anterior cervical decompression and fusion from C4 to C7. The employee was advised to stop smoking to decrease the risk of non-union. Surgery was performed on August 22, 2007. No complications were noted on September 4, 2007, but the employee did complain of neck and left shoulder pain. He was diagnosed with left shoulder bursitis and an injection was provided. Continued use of Vicodin for pain complaints in the neck was also noted.

Dr. Rutz released the employee to return to work at limited duty with a thirty pound lifting restriction on November 19, 2007. A December 7, 2007 note indicates complaints of decreased range of motion, some headaches and aching in the neck and between the shoulders. An x-ray taken the same day revealed proper hardware alignment and a healing fusion.

The final treatment note of January 17, 2008 indicates his neck is sorer and he takes pain pills when he has a more active day. He does not take pain pills otherwise. He complained of aching near the base of the neck radiating to the base of the skull. There was no pain in the arms, but some persistent numbness in the left index and middle fingers. X-rays revealed good alignment and progression to solid fusion. Dr. Rutz indicated he would arrange for a CT if the employee's

“symptoms move to a negative direction.” Vicodin was prescribed. There are no records evidencing a CT scan, or any other additional care, following this visit.

Billing records from Orthopedic Specialist, PC and Dr. Rutz reflect dates of service from September 2, 2004 to March 17, 2008. The records reflect charges for treatment related to the shoulder and cervical spine. The name of the treating or ordering physician is not listed in the billing records. No treatment records were offered to correlate to the dates of January 24, 2008 to March 17, 2008. The billing summary appears to indicate total charges in the amount of \$60,020.00 for the dates of September 2, 2004 to March 17, 2008. A total adjusted amount of \$11,811.70 is also listed for those dates. No outstanding balance is noted in the May 22, 2012 certified billing statement.

#### Records of the Veterans Administration

Records from the VA reflect dates of service in 2009 for neck pain, hearing loss and elevated blood pressure. A June 2, 2009 note gives a history of a successful surgery a year prior, and discusses employee's return to construction work for a year before retiring. Employee described some pain in the upper back and neck after strenuous activity. It was also noted that he was not experiencing cervical pain at the time of his June 9, 2009 visit. Of note, the employee gave a history of pain complaints in the neck after fishing for three hours. The notes indicate the employee was evaluated for hearing loss and assigned a disability percentage of 10%. The employee's hearing loss was attributed to his military service.

#### Dr. Kennedy

Dr. Kennedy testified on September 7, 2011. He is a physician board certified in neurosurgery. He evaluated the employee on one occasion on December 4, 2007. On examination, the employee was found to have residual numbness in the index and middle finger of the left hand, as well as aching pain in the cervical spine. The doctor found a well-healed incision in the neck area, consistent with the surgical procedure described by Dr. Rutz. He said the range of motion in the cervical spine was significantly reduced, and there was sensory loss in the hand.

Dr. Kennedy personally reviewed both sets of the MRI films. He said that the 2002 MRI showed osteophyte formation with a mild amount of foraminal encroachment at C5-6, but at C4-5 there were only minimal changes. He said the C6-7 level was basically normal. He then reviewed the 2007 MRI and found a large disc herniation with significant canal foraminal encroachment at C5-6 and C6-7.

Dr. Kennedy provided a diagnosis of acute cervical radiculopathy from disc abnormalities at C4-5, C5-6 and C6-7, most prominent at 5-6 and 6-7. He testified that the work of June 11, 2007 is the prevailing cause in the cervical disc herniations, and he said that the treatment the employee received for these conditions was reasonable and necessary.

Dr. Kennedy indicated that when he saw the employee the employee did not provide any history of prior problems with his neck. In addition to films, Dr. Kennedy reviewed the records of Dr. Volarich and Dr. deGrange.

#### Lumbar Complaints post June 11, 2007

The employee reported increasing low back complaints after his return to work in November 2008. He noted limited range of motion and increased difficulty when attempting to get in and out of machinery on the job. When questioned at the hearing, he denied telling Tim Lalk at the time of his vocational exam that his primary problem was the low back.

#### Dr. Volarich

Dr. Volarich is a medical doctor who evaluated the employee on January 18, 2010. The employee admitted to a prior car accident in 1996 and "some neck pain in 2002," but denied ongoing difficulties or symptoms with the neck leading up to June 11, 2007. The employee reported that his neck conditions resolved and did not give him any problems up to the accident. The employee gave a history of injury on June 11, 2007 after picking up a dozen decorative paving stones weighing sixty pounds. He described an immediate onset of pain in the neck with radicular symptoms in the left arm. According to Dr. Volarich, the employee had underlying degenerative changes in the neck that became symptomatic to some degree after the June 11, 2007 injury.

On physical exam of the cervical spine, the doctor found abnormal muscle reflex response in the left upper extremity and diminished range of motion in the neck. He attributed these findings to the primary injury and August 22, 2007 surgery by Dr. Rutz. The doctor also evaluated the employee's shoulders and noted positive impingement in both shoulders and twenty percent loss of motion with the Apley Scratch test. The impingement in the shoulders was not related to the June 11, 2007 injury.

Dr. Volarich reviewed a June 14, 2007 x-ray of the cervical spine, as well as October 17, 2002 and July 2, 2007 MRI studies of the cervical spine. He also reviewed a September 7, 2004 MRI of the right and left shoulders. Review of the October 17, 2002 MRI showed degenerative changes and mild bulging at C4-5 and C5-6. The 2007 x-ray showed progressive degenerative changes and facet arthritis throughout the cervical spine-C4 to C7. A bridging osteophyte at C4-5 and disc space narrowing at C5-6 were also noted in the 2007 x-ray. According to Dr. Volarich, the July 2, 2007 MRI showed larger osteophyte complexes at C4-5 and C6-7, a new lesion at C6-7 that appears to be partly an osteophyte complex, but also a left-sided disc bulge. In the doctor's opinion, the pathology at C6-7 represented a significant change from 2002 to 2007.

His pre-existing diagnoses included:

- Degenerative disc disease and degenerative joint disease of the cervical spine at C5-5, C5-6 that was asymptomatic prior to June 11, 2007.
- Historic thoracolumbar strain resolved and essentially asymptomatic.

- Right wrist fracture, resolved and asymptomatic.
- Mild right knee degenerative arthritic changes, asymptomatic.
- Left shoulder rotator cuff tear, post arthroscopic surgery.
- Recurrent left shoulder rotator cuff tear, open revision.
- Right shoulder impingement and rotator cuff tendonitis with no surgery.

Dr. Volarich testified the osteophyte complex at C6-7 was a long standing condition, but it did not become symptomatic until after the June 11, 2007 incident. The doctor also thought the lesion C6-7 could be due to the June 11, 2007 event, but also noted lesions can be attributed to a variety of conditions. With regard to the cervical spine, the doctor diagnosed a herniated nucleus pulposus at C6-7 causing left arm radiculopathy as well as aggravation of underlying degenerative disc disease and degenerative joint disease at C4-5, C5-6; status post three-level fusion. He concluded the “work accident” of June 11, 2007 was the prevailing factor causing the herniation at C6-7, as well as the aggravation of underlying previously asymptomatic degenerative disc disease at C4-5 and C5-6, and ultimate need for a three-level fusion. He conceded that his opinions regarding medical causation for the August 22, 2007 surgery were based on the history provided by the employee denying treatment and complaints prior to June 11, 2007.

Dr. Volarich assigned a forty-five percent permanent partial disability to the cervical spine referable to the June 11, 2007 work accident. He also identified several pre-existing conditions. He assigned five percent permanent partial disability to the cervical spine although he considered the degenerative cervical condition to be asymptomatic leading up to June 11, 2007. He also assigned forty percent permanent partial disability to the left shoulder and twenty percent permanent partial disability to the right shoulder. In the doctor’s opinion, the combination of disabilities was greater than the simple sum.

With regard to the shoulders, Dr. Volarich agreed the limitations he assigned to the shoulders are permanent in nature, and would pre-exist the June 11, 2007 injury. In his opinion, the employee should have worked with restrictions prior to June 11, 2007. On cross-examination, Dr. Volarich was asked a series of questions regarding the degenerative process in the employee’s cervical spine leading up to June 11, 2007. The doctor agreed the osteophyte complex and canal narrowing could produce symptoms with even minor change or movement. He agreed that the degenerative process in the employee’s cervical spine was severe enough that he would have recommended additional limitations to prevent injury to the neck prior to June 11, 2007. Dr. Volarich agreed the progression of the degenerative process in the spine from 2002 to 2007 was normal and expected.

Dr. Volarich testified his opinions regarding permanent partial disability were based on the employee’s description of limited physical capabilities. The doctor was not aware the employee hunted, fished or participated in meat shoots. In assessing the disability of forty-five percent the doctor assumed that the employee had fairly limited ability to engage in physical activities. The doctor agreed that the employee told him he could not carry a six pack of soda into his house. He couldn’t cast a rod and reel to fish for more than an hour; he was very limited in his day to day activities.

Dr. Volarich said that the employee was doing better when he was released by Dr. Rutz. He said when he examined the employee he still had strength; he still could do many things.

Dr. Volarich indicated that based on his assessment alone, the employee was permanently and totally disabled as a result of the June 11, 2007 injury in combination with his pre-existing medical conditions, age and education. Dr. Volarich believed the employee would benefit from ongoing pain management as needed. The doctor discussed possible use of narcotics, muscle relaxants and physical therapy for flare ups. Despite this recommendation, he also noted the employee's current use of Advil as needed to control occasional pain was sufficient.

### Timothy Lalk

Mr. Lalk testified by deposition on July 29, 2011. He is a certified vocational rehabilitation counselor who evaluated the employee. He met with the employee and reviewed the medical records and reports in this matter. The employee advised him that before the work accident he had right and left shoulder pain, such that he had to limit his overhead work. Mr. Lalk said that these complaints would limit his employment potential. The employee also advised him that after a couple of hours of sedentary activity he would have to spend at least forty-five minutes in a recliner to relieve his symptoms. At the time of his vocational exam, the employee believed he could be "active at a sedentary level," but also needed to sit in a recliner to relieve symptoms in the neck and shoulders after two hours of activity. Mr. Lalk considered the need to recline when determining the employee's ability to obtain and maintain employment. He conceded this limitation was not present in any doctor's report, or the employee's April 2008 deposition. Mr. Lalk's 2011 vocational opinion was the first time this limitation was mentioned.

Mr. Lalk discussed the employee's education and training. He said that the employee is hampered by the fact that he has neither a high school diploma nor a GED, as some employers would be reluctant to hire him. He said that the employee does not have any transferable skills. He administered vocational testing, and found that the employee became embarrassed and frustrated because he was unable to pronounce the words that were written on paper. He was scored at the fourth grade level. When the reading comprehension test was performed he did better, scoring at the tenth grade level. On testing of his arithmetic skills, he was found to be at the fifth grade level.

Mr. Lalk testified that the employee is hampered by where he resides, as there are fewer sedentary jobs in his area. He also testified that the employee is hampered by his age, because employers are reluctant to hire older workers into positions in which they are going to be expected to be trained on the job with very specific and technical skills, because employers don't want to invest time and energy in training an individual who might be very close to retirement.

Mr. Lalk testified that if he simply assumes the thirty pound lifting restriction provided by Dr. Rutz, then the employee would be able to return to a position where he supervised a road crew. On the other hand, if he assumed the employee's description of his activities, then the employee is not functioning at the level described by Dr. Rutz. He said that the employee's complaints are more closely aligned with the restrictions of Dr. Volarich, such that if he assumes those

restrictions, with the employee's symptoms and limitations in his day-to-day activities, then the employee is not even functioning at the sedentary level. That means that the employee is not employable in any sort of position.

Mr. Lalk stated:

The labor market now is making it more difficult for many individuals to find employment, especially individuals with his background and experience. The types of jobs that a person with his experience would look for or would -- when there is an opening, there's a lot of competition for those positions because very few of them are [coming open] at this time. There are very few jobs being created in his areas of work.

And:

I think that he would do fairly poorly in -- in competing for positions, a combination of age and obviously the medical conditions that he has, but assuming that he was physically able to do those jobs, he -- he, again, would still have difficulty because of his age.

Of note, the employee reported increased low back symptoms at the time of Mr. Lalk's evaluation in 2011. The employee reported decreased movement and identified his low back as his primary limiting condition. Despite this assertion by the employee, Mr. Lalk testified he did not consider the subsequent deterioration of the back when forming his conclusions.

Mr. Lalk agreed the employee returned to work following his August 22, 2007 surgery and worked on a full and part-time basis. He agreed the employee self-terminated his employment with the City due to problems with the neck, low back, and shoulders, and further reported problems getting in and out of machinery because of the low back. At the time of Mr. Lalk's 2011 exam, the employee believed he could work at a job that allowed him to alternate between sitting and standing. He has not attempted to find a job that would meet those physical guidelines.

### Bills

A billing statement was prepared and offered by the employee's attorney (Exhibit K). Bill and payment summaries for Dr. Poepsel, Dr. Rutz, Esse Health and Des Peres Hospital were also attached. The summary reflects dates of service from July 19, 2007 to January 17, 2008. The summary reflects total charges in the amount of \$103,861.64. Employer-insurer counsel objected to the introduction of Exhibit K pursuant to *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989). Counsel argued that the summary and attached bills lacked foundation and did not meet the established standard for proof for past medical bills.

Employer-insurer also specifically objected to the July 24, 2007 and July 31, 2007 bills from Esse Health attached to Exhibit K because no medical records were offered to substantiate the services provided.

The certified billing records of Dr. Rutz and Orthopedic Sports Specialists were also offered. They reflected dates of service or activity dates from September 4, 2004 to March 17, 2008 (Exhibit 6). The billing records reflect \$60,020.00 in charges from September 4, 2004 to March 17, 2008, an adjusted amount of \$11,811.70 that was paid by the group health insurer and a remaining balance of \$0.00.

The employer-insurer also offered the affidavit of Grace Ya, custodian of records for medical billing at Des Peres Hospital. Through her affidavit Ms. Ya reviewed billing records for dates of service from August 13, 2007 to August 22, 2007 and confirmed the employee had no obligation to reimburse Des Peres Hospital for the total amount billed or reduced amount of \$31,033.96

With regard to the June 11, 2007 injury, Mr. Maness could not quantify the amount of his co-pays, and could not recall if he paid co-pays to any providers. The billing records in Exhibits K, 6 and 7 suggest \$592.00 in co-pays were paid to various providers.

The Court observed the employee's actions and movement during the time that he was present at trial. After trial the Court noted that while the employee stated that he was in discomfort, he gave no indications of discomfort at all.

## **RULINGS OF LAW-**

### **Accident/Occupational Disease**

The issue that was presented to the Court is whether "On or about June 11, 2007 the employee sustained an accident or occupational disease arising out of and in the course of his employment".

The parties took polar positions on whether or not there was a compensable accident or incident of occupational disease at all; and if there was a compensable incident, whether it was an accident or incident of occupational disease within the meaning of Chapter 287.

Section 287.020 RSMo. provides definitions relevant to this case. An accident is defined to mean "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time observable symptoms of an injury caused by a single event during a single workshift". 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". An injury shall be deemed to arise out of and in the course of employment only if "it is reasonably 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".

Section 281.067 defines an occupational disease, however the statute is not reproduced here.

The employee is certain that he hurt his neck when he was lifting and moving approximately twelve decorative stones, each weighing about sixty pounds. The stones are the type that would be used to construct a retaining wall. He was performing this task as part of his job responsibilities while working for the City of Desoto. He testified that as he was lifting the stones he felt pain or burning in the area of his neck. His immediate thought was that he had pulled a muscle. This employee has consistently reported to his employer and all medical providers that he hurt his neck as he was lifting the decorative stones. Even at trial the employee's initial testimony was that the date that he injured himself was June 11<sup>th</sup>. After being challenged on the accuracy of June 11<sup>th</sup>, he still felt he injured himself on that date. He said he would be affected by the accuracy of his statement if the records showed otherwise. He testified that he did not report the injury on the day he actually injured himself as his initial impression was that he had pulled a muscle. He indicated that he told his supervisor "Kevin" that he injured himself when lifting the decorative stones a couple of days after it happened. The records confirm that the employee told his supervisor that he injured himself as he was moving the stones. At trial the employee ultimately reported that he must have been mistaken on the date but he remained steadfast that he injured his neck when he was moving the stones.

The parties have labored over the point of whether the event took place on June 11, 2007 or June 12, 2007, and whether the employee incurred an accident or an incident of occupational disease. The employee was very sure about what happened, but when pressed about the specific date ultimately indicated that it could have been the 11<sup>th</sup> or the 12<sup>th</sup>. He testified that he was hurt the day he moved the stones. There is no evidence that has been offered that credibly challenges the employee's position that he injured his neck when he was moving the stones. The employee's testimony on how he was injured has been consistent throughout this case. The Court was charged with determining whether the employee sustained an accident or occupational disease on or about June 11<sup>th</sup> 2007. Counsel for the employee advocated an occupational disease in his proposed findings suggesting that the event took place on June 12, 2007. In its proposed findings, the employer-insurer alleges that the employee attempted to explain the inconsistencies as to whether the accident took place on June 11<sup>th</sup> or June 12<sup>th</sup> by alleging an occupational disease rather than an accident. The employer-insurer suggests that there is no expert testimony to support a finding that the employee's cervical condition was due to occupational disease or trauma. The employer-insurer concludes by indicating that if the employee's testimony regarding his job duties was credible then it is only appropriate to find an accident. The Second Injury Fund focuses most of their argument on the lack of liability of the Second Injury Fund irrespective of whether the employee sustained an accident or occupational disease.

Other than the inconsistency concerning the date of the accident, the employee's testimony that he injured his neck while moving decorative stones for his employer was found by the Court to be entirely credible. The issue that the Court considered asks whether "on or about" and "accident or occupational disease". It is the Court's prerogative to determine if the employee sustained an accident or occupational disease irrespective of the arguments of the parties. It is the Court's prerogative to determine whether the employee has offered credible evidence meeting the criteria required by Section 287.020 irrespective of the arguments of the parties.

The Court has carefully reviewed the stipulations agreed to and the issues presented by the parties. The Court has analyzed the employee's evidence in light of Section 287.020 and Section 287.067 RSMo. The Court has reviewed the medical records and considered the credibility of the employee's testimony as to accident standing alone and in comparison to all of the evidence. The Court paid specific attention to what the totality of the evidence disclosed as to when and if the employee injured his neck and body as a whole while working for his employer and moving decorative stones.

After due consideration of all of the evidence in the case, that Court finds that the employee injured his neck while he was performing his job responsibilities moving stones. This event occurred on or about June 11 or June 12, 2007. The Court finds that the employee has offered sufficient evidence meeting his burden of proof that he had a compensable accident under the provisions of Section 287.020.

### **Medical Causation**

The Court had determined that the employee had a compensable accident/work related injury when he was moving decorative stones for his employer. Once it has been established that a compensable injury was caused by an employee's work activities, the inquiry then turns to determining whether there is a medical causal relationship between those activities and the various injuries which the employee asserts resulted from that injury.

The employee bears the burden of proving that his injury was medically causally related to the accident. **Irving v. Missouri State Treasurer**, 35 S.W.3d 441, 445 (Mo. App. W.D. 2000). The burden of proof is on the employee to prove not only that an accident occurred and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation. **Dolen v. Bandera's Café and Bar**, 800 S.W.2d 163 (Mo. App. E.D. 1990). The employee has the burden of proving that there is a medical causal relationship between the accident, the injuries and the medical treatment for which compensation is being sought. **Griggs v. A. B. Chance Company**, 503 S.W.2d 697 (Mo. App. 1973). In order to prove a medical causation relationship between the alleged accident and medical condition, the employee in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. **Brundige v. Boehringer Ingelheim**, 812 S.W.2d 200 (Mo. App. 1991).

On August 22, 2007 Dr. Rutz performed a three level cervical fusion on the employee. The employee had been involved in two prior motor vehicle accidents wherein he injured his neck. As a result of these problems, an MRI was performed on the employee's cervical spine on October 17, 2002. Among other degenerative findings, the radiologist specifically noted that at C6-7 the disc was normal size and shape with no evidence of protrusion or spinal stenosis identified. The employee testified to the development of significant cervical and radicular symptoms following the work injury in June 2007. Another MRI was performed on July 2, 2007. The radiologist again noted degenerative problems. He also reported that there was a disc osteophyte complex at C6-7 with moderate to moderately severe narrowing of the neural foramina bilaterally and anterior indentation upon the thecal sac.

These same MRI films were reviewed by multiple physicians: Dr. Rutz, Dr. Kennedy and Dr. Volarich. All three of them found that the films taken after the employee's work activities in June 2007 show the development of a herniated disc in the cervical spine. Dr. Rutz, the operating surgeon, said "[h]e appears to have a disc herniation in addition on the left at C6-7". Dr. Kennedy, said "there were disc herniations noted at several levels, C4-5, 5-6 and C6-7, but most prominently at C5-6 and C6-7". Dr. Volarich said:

I did indentify a new lesion at C6-7 that appears to be maybe partly an osteophyte complex, but there was also a foraminal herniation of that disc to the left side. That was a significant change from the first one.

Both Dr. Kennedy and Dr. Volarich attributed the herniation to the workplace duties. Dr. Rutz did not provide an opinion. The only doctor who did not diagnose a herniated disc was Dr. deGrange. His opinion is not found to be credible.

Perhaps the best way to determine whether a herniated disc was present is to review the statements made by Dr. Rutz in his operative report, because he was the only person to have actually seen the cervical spine with his own eyes. He said this:

[a]ttention was then turned to the C6-7 level. Once again, an annulotomy disk space preparation and trial interbody spacing was performed. At this level, the posterior longitudinal ligament was taken down, and a herniated disk fragment was identified and removed.

The Court specifically finds that the opinions of Dr. deGrange concerning the employee's diagnosis, and causation of same, are not credible. The opinions of Drs. Kennedy and Volarich are found to be credible. Drs. Kennedy and Volarich personally reviewed the MRI films, whereas Dr. deGrange did not.

Based on a consideration of all of the evidence, the Court finds that the employee's injury in June 2007 and the disabilities resulting therefrom are medically causally related to the accident where the employee injured his neck when he was lifting decorative stones for his employer.

### **Previously Incurred Medical Bills**

The employee is claiming \$103,861.64 in medical bills. In addition, the employee is claiming interest in the amount of \$52,320.73. The employer-insurer is disputing these bills with regard to authorization, reasonableness, necessity and causal relationship.

The Court has found that the employee sustained an accident on or about June 11, 2007 and that Dr. Rutz was required to perform a cervical fusion surgery on August 22, 2007. The evidence is clear that the employer-insurer initially provided limited medical care but terminated further medical care requiring the employee to obtain medical care on his own. The evidence is also clear that that medical care provided was reasonable, necessary and causally connected to the accident where the employee injured his cervical spine when he was lifting decorative stones for his employer.

Based on the evidence the Court specifically finds that as a result of the June 11, 2007 accident the employee had to seek medical care on his own, the medical services provided were reasonable and necessary and that the medical care provided was casually related to the accident.

Further controversy exists as to what responsibility, if any, the employer-insurer has regarding the medical services that were provided.

Section 287.140.1 RSMo. provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. **Martin v. Mid-America Farm Lines, Inc.**, 769 S.W.2d 105 (Mo.banc 1989).

Since the employee sustained a compensable injury, it was therefore imperative upon the employer-insurer to offer and provide medical care to cure and relieve. The employer-insurer did not do so. 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. **Farmer-Cummings v. Future Foam, Inc.**, 44 S.W.3d 830 (Mo.App. 2001).

Once claimant establishes his liability for the medical bills, employer then has the burden of proving that claimant's liability for the bills was extinguished. **Farmer-Cummings v. Personnel Pool**, 110 S.W.3d 818 (Mo.banc 2003). 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. *Id.*

Medical aid is a component of the compensation due to an injured worker. **Mathia v. Contract Freighters**, 929 S.W.2d 271,277 (Mo.App.S.D.1996). It is the employee's burden to prove that he is entitled to receive compensation for past medical expenses. **Sams v. Hayes Adhesives**, 216 S.W.2d 815,820 (Mo.App.E.D.1953). The medical fees for which reimbursement is sought must be reasonable and necessary to treat a work-related injury. **Jones v. Jefferson City School District**, 801 S.W.2d 486-490 (Mo.App.W.D.1990). For past medical expenses to be awarded, the medical care must flow from a work-related accident or injury. **Modlin v. Sunmark**, 699 S.W.2d 5,7 (Mo.App.E.D.1985).

A sufficient factual basis is created for an award of past medical expenses where the medical bills are introduced into evidence, and the employee testifies that those bills were incurred in connection with treatment for a compensable injury, and when the bills relate to the professional services rendered, as shown by the medical records in evidence. Where an employee fails to offer into evidence the itemized medical bills in question, or to testify that those bills were related to his work injury, the employee fails to make a sufficient factual showing to recover his past medical expenses. **Martin v. Mid-America Farm Lines**, 769 S.W.2d 105, 111-112 (Mo.banc.1989).

To be recoverable, medical fees and charges must be fair and reasonable. **RSMo.** §287.140.3. The medical fees and charges compensable under Section 287.140 refer only to an employee's actual expenses – those paid out-of-pocket by the employee, expenses for which the employee will actually be held responsible in the future, and fees for which a Medicare or Medicaid lien exist. Write offs and adjustments that extinguish the liability of an injured employee are not fees and charges within the contemplation of Section 287.140. **Farmer-Cummings v. Personnel Pool of Platte County**, 110 S.W.3d 818,820 (Mo.banc.2003).

The employee introduced Employee's Exhibit K as the documentary evidence supporting his claim for medical bills. The employee was shown Exhibit K. He indicated that it was a copy of the bills that he received for the treatment he got on his own. He testified that he did not know if he paid for medical care or not. He indicated that he thought he paid some co-pays and sent a check a couple of times.

The employer-insurer presented the testimony of Brenda Grawe and the sworn statement of Grace Ya on this matter. Ms. Grawe is the finance director for the City of Desoto who handles insurance matters for the city. Ms. Ya is the custodian of records for medical billing for Des Peres Hospital. She testified that she personally reviewed the billing for John Maness and he has no further obligations to Des Peres Hospital.

The employer-insurer's actions in denying this case and initially in denying additional medical care caused the employee to have to go out on his own and seek medical care to cure and relieve him from the affects of his June 11, 2007 accident. It would be a windfall if the employer-insurer did not bear responsibility for medical care that was necessary to treat the employee for his injuries.

After reviewing all of the evidence on this matter, the Court makes the following rulings:

- The employer-insurer shall pay \$31,033.96 in satisfaction of the Des Peres Hospital bills.
- The employer-insurer shall pay \$592.00 to reimburse the employee's out of pocket medical costs.
- The employer-insurer shall pay \$49,813.00 in satisfaction of the Orthopedic Specialist/Dr. Rutz bills.

At this time the Court does not find that the employer-insurer has any responsibility to pay any interest payments regarding medical bills.

### **Future Medical Care**

Under Section 287.140.1 RSMo., "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".

Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician

at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. **Emert v. Ford Motor Company**, 863 S.W.2d 629 (Mo.App. 1993); **Shores v. General Motors Corporation**, 842 S.W.2d 929 (Mo.App. 1992) and **Hendricks v. Motor Freight**, 520 S.W.2d 702, 710 (Mo.App. 1978).

The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. **Modlin v. Sunmark, Inc.**, 699 S.W.2d 5, 7 (Mo.App. 1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. **Sifferman v. Sears Roebuck and Company**, 906 S.W.2d 823, 838 (Mo.App. 1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. **Dean v. St. Luke’s Hospital**, 936 S.W.2d 601 (Mo.App. 1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. **Landers v. Chrysler Corporation**, 963 S.W.2d 275 (Mo.App. 1997).

Dr. deGrange testified that the employee is not in need of further medical care. However, he clarified this to mean that he is assuming that the employee’s only injury from the work accident is a cervical strain. Dr. Volarich testified that the employee is in need of further pain management treatment, including medications, physical therapy, etc.

Based on a consideration of all of the evidence, the Court finds that sufficient credible evidence exists to establish that the employer-insurer is liable for providing future medical care to the employee to cure and/or relieve the effects of his injury. The opinion of Dr. deGrange is not credible because he did not appreciate the nature of the employee’s injury. Dr. deGrange was operating under the assumption that the employee had only a cervical strain. This is not the case. The employer-insurer is therefore ordered to provide ongoing treatment to cure and relieve that employee from the effects of his accident.

### **Temporary Total Disability**

The clear evidence is that Dr. Rutz performed a cervical fusion on the employee on August 22, 2007. The employee was injured in June 2007 but continued to work up until the date of his surgery. He returned to a light duty position as of November 20, 2007.

The Court finds that the employee was unemployable in the open labor market during this period as he was recovering from a work related accident. The employer-insurer is ordered to pay \$5,409.78 to the employee for temporary total disability benefits during the period he was recovering from surgery and unable to work.

### **Liability of the Employer-Insurer and the Second Injury Fund for Permanent Total Disability**

The employee maintains that he is permanently and totally disabled in such a manner that he is entitled to compensation under the provisions of Chapter 287 RSMo. The Court disagrees.

The employee has not presented credible evidence entitling him to permanent total disability benefits against the employer-insurer as a result of the last accident alone. Neither has the employee presented credible evidence entitling him to permanent total disability benefits against the Second Injury Fund due to the combination of the disabilities from his last accident and his pre-existing accidents and disabilities. The employee had not testified consistently therefore his testimony is not credible as to his disabilities.

Virtually the employee's entire working career has been involved in performing physical labor. He began working for the City of Desoto in the 1980s as a laborer and finally quit working for them in April 2009. The employee testified that he worked for the City of Desoto for twenty-two years. He described his job duties as involving hard physical labor. By the time he quit he had been promoted to a working supervisor. He worked full time up to his June 2007 accident. He continued to work until he had surgery. He did not work from August 22, 2007 to November 19, 2007 as he was recovering from his neck surgery. As of November 20, 2007 he returned to his job full time performing all of his duties. He worked ten hours a day four days a week. After his surgical recovery the employee worked for about one year at the same job he had before his accident. He worked from November 2008 until April 2009 in a part time capacity. In this period he worked eight hour days three days a week. As of April 2009, the employee voluntarily retired.

The employee has several pre-existing accidents prior to the June 2007 neck injury. The employee had two motor vehicle accidents prior to June 11, 2007. He reported that he injured his neck on both occasions. One occurred in 1996 and the second occurred in 2002. As part of his claim that he is permanently and totally disabled, the employee claims that the disabilities that he received as a result of his June 11, 2007 accident combined with the disabilities to his neck that existed prior to June 11, 2007. Several factors work against this theory. Despite any testimony to the contrary, the employee was working fulltime at a physically demanding job prior to June 11, 2007. He had no restrictions or accommodations. Records indicate that the employee reported that he had no problems or symptoms with his neck prior to the June 11, 2007 accident. However, at trial the employee testified that he thinks he had prior neck problems but he does not recall the problems. He certainly had pre-existing cervical degenerative problems, but the credible evidence shows they were mostly asymptomatic prior to June 11, 2007.

Prior to his June 11, 2007 accident the employee had two surgeries on his left shoulder. The employee testified that prior to June 11, 2007 he really did not have any problems with his left shoulder. He said it got a little sore and that he could not pick up as heavy items as he used to. Presently he is not getting any medical treatment for his left shoulder.

The employee testified that prior to his 2007 accident he had no active treatment for his shoulder and was taking no medications.

The employee testified that he injured his low back in the 1980s. He never had back surgery. Prior to 2007 he was taking no prescriptions for his back and was not under any active care. He indicated that prior to June 2007, his back might flare up now and then but then it would go away. He said that after he injured his neck in June 2007 he returned to full duty. During this period he said that his back problems got worse. He indicated there was no specific accident, his back problems just got worse. On cross examination he disputed telling Mr. Lalk that his back problems were presently his "worse" problems. On this topic he testified that he would dispute the records if this is what was reported.

The employee testified that he has not seen any doctors about his medical problems since 2007. After his fusion surgery he was returned to full duty and the only restriction he had was a thirty pound lifting restriction. He indicated that he returned to the same job and his duties changed very little. He testified that he was able to limit his duties to his position and that he did not do as heavy work as before and did not crawl in and out of the equipment as much. Mr. Maness testified that he worked from November 2007 to November 2008 and work was not too bad. He said he was careful and watched what he did so as not to reinjure himself.

The employee decided to retire in November 2008. He indicated that the reason was that his ability to turn his head was restricted and he could not turn his head as far as he needed to operate equipment safely. He also testified that his back gave him problems and it was harder to get in and out of the equipment. It was at this time that he worked part time and worked until April 2009. Even in this part time capacity he worked over twenty hours a week with some overtime and basically did the same things as he did when he worked full time. He said on one occasion he worked a sixteen hour day. He testified that he quit working totally in April 2009 due to pain in his neck and shoulders and back combined. He agreed he took a normal retirement, not a disability retirement. He testified that during this period his symptoms gradually got worse to the point he felt he could not do it anymore.

On cross-examination, when questioned about his prior neck and arm pain, the employee testified that he believes that he had neck pain and arm pain in the past before. He indicated that he did not tell Dr. Rutz of any of his problems as he was concerned about what was bothering him at that time and not what occurred in the past. He also indicated that during the year that he returned to full duty he may have reported he had no problems but he is not sure. During his questioning he agreed that he used the term "I think" a lot and that he is not sure of everything.

The employee had his deposition taken in 2008. At trial, he testified that he tries to avoid standing for a long period as it hurts his back and neck. He then agreed that he said he had no limitations with standing if that is what his deposition reported. The employee agreed that in 2008 he reported that he had no limitations about sitting and he could sit and stand as he wanted. However, he testified that his ability to sit and stand have gotten worse since then. He also agreed that when his deposition was taken he testified that he could lift forty to fifty pounds. He now claims that he cannot lift that much as he does not want to hurt himself.

The employee testified that he has had heart problems since his 2007 accident. The VA did stress testing in 2009 and as of July 2001 he had surgery and stents were inserted. He is now taking heart medication. He testified that when he saw Dr. Volarich he did not advise him of his heart problems.

Despite the employee's prior trial testimony and his earlier statements about his back, he claims that his current "worse" problem involves his neck.

The employee testified about the activities that he continues to do despite any of his problems. The most immediate event prior to trial was that the employee testified that he went fishing for 4 1/2 hours in May 2012. He testified that he has a twenty foot bass boat and a seventeen foot river boat that are on trailers. He indicated that he hooks up the trailers, hauls the boats and puts them in and out of the water one or two times a month. He likes to fish at the Lake of the Ozarks as he has a permanent camper at that location. The employee testified that he continues to hunt. He indicated that he has all kinds of guns and shoots every chance he gets. He testified that he goes to "meat shoots" weekly when they are open. He also has an ATV that he uses for hunting. He indicated that he transports the ATV in his pickup and drives in and out of the truck. Mr. Maness testified that he continues to hunt deer. Records show that he purchases multiple deer tags, turkey permits and trout permits up to and including 2012.

The employee's testimony is not credible or consistent. The testimony that he provided at trial is different than the information he has given over the course of his case. The employee's testimony at trial is not even totally consistent on several levels:

- On one hand the employee complains that his prior motor vehicle accidents have continued to cause him neck problems that have affected his work. Yet at other times he reports that his neck was totally asymptomatic and he had no problems with his neck prior to June 11, 2007.
- The employee had two prior left shoulder surgeries prior to 2007 and indicated some problems with his right shoulder. On one hand the employee indicates these prior problems affected his job and then indicated that he had no problems that affected his job.
- The employee claims prior back problems. Mr. Lalk reported that the employee told him that his back problems are the most severe of his problems. At trial, the employee denied this statement and testified that his neck problems are the worse of his problems. The evidence is that the employee's back problems have deteriorated since the 2007 accident. The employee did not injure his back in the 2007 accident. This evidence causes one to question whether the employee's back or his neck is his most serious problem. This uncertainty affects the credibility of the employee's overall evidence as to his actual disability.
- On multiple occasions during his testimony, the employee used the term "I think" when describing his disabilities and when he had them.
- The employee had indicated that he did not disclose all of his problems to his treating or rating doctors. For example he did not tell Dr. Rutz about his prior neck and arm problems and he did not tell Dr. Volarich about his heart problems.
- The employee has testified that he has had heart problems since his accident and had stents inserted into his heart.

- While an employee does not have to be inert to be permanently totally disabled, his disability should clearly indicate that the employee is unable to perform the physical activities that are necessary for work and therefore be unemployable in the open labor market. At trial, the employee suggested that he had to spend a lot of time in his recliner and that any activity that he does makes his problems worse. This is contradicted by the activity levels that the employee still maintains. He routinely engages in physical activities that should aggravate his problems. The varied activities, the frequency and physical nature of the employee's hobbies and activities is not consistent with his position that his disabilities are so bad that he is unable to maintain any kind of employment.

Based on a consideration of all of the evidence in this case, the Court finds that the employee is not permanently and totally disabled due to his accident of June 11, 2007. The Court further finds that the employee is not permanently and totally disabled as a result of his June 11, 2007 accident in combination with any of his prior disabilities. Neither the employer-insurer nor the Second Injury Fund are ordered to pay permanent total disability benefits to the employee.

### **Liability of the Employer-Insurer for Permanent Partial Disability**

While the Court found that the employee was not permanently and totally disabled as a result of the last accident alone, the employee has presented competent and credible evidence that he is entitled to permanent partial disability benefits. On August 22, 2007, Dr. Rutz performed a three level cervical fusion on the employee as a result of the injury that the employee sustained while moving decorative stones.

The Court finds that the employee sustained a 40% permanent partial disability as a result of his work accident. The Court orders that the employer-insurer pay \$60,248.00 to the employee as permanent partial disability benefits ( $400 \times .40 = 160$ .  $160 \times \$376.55 = \$60,248.00$ ).

### **Liability of the Second Injury Fund for Permanent Partial Disability**

While the Court found that the Second Injury Fund had no liability for permanent total disability, the Court finds that the employee has presented credible evidence documenting pre-existing injuries and disabilities that synergistically combine with the disabilities that resulted from the June 11, 2007 accident.

The Court finds the following additional disabilities:

- The employee has two prior left shoulder surgeries. The Court finds that the employee sustained a twenty percent permanent partial disability to his shoulder as a result of his prior injuries.
- Five percent permanent partial disability of the body as a whole due to the degenerative problems to the employee's neck.
- Five percent permanent partial disability of the body as a whole due to the employee's prior problems with his back.
- Ten percent permanent partial disability due to the employee's hearing loss.

- Five percent permanent partial disability due to the employee's prior right shoulder problems.

The Court finds that the employee's pre-existing disabilities are a hindrance or obstacle to employment. The Court imposes a twelve and one-half percent load in this case.

The Second Injury Fund is ordered to pay to the employee \$12,990.98.

### **Liability of the Second Injury Fund Where the Primary Injury is an Occupational Disease**

A legal issue involved in this case is whether, under the concept of strict construction, the employee has a claim against the Second Injury Fund when the employee has repetitive motion injuries. The Court is also aware that this specific issue is already in the system and is pending before tribunals that are reviewing this decision.

The primary specific statutes that apply when considering this issue are Sections 287.020, 287.067, 287.220 and 287.800 RSMo:

- Section 287.020(2) defines accident.
- Section 287.020(3) defines injury.
- Section 287.067(3) states "An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter".
- Section 287.220 sets out Second Injury Fund liability.
- Section 287.800 is about strict construction.

It is clear that when you consider the definitions of accident and injury and the fact that Section 287.067 specifically states that injuries due to repetitive motion are compensable under Chapter 287 there is no inconsistency in Section 287.220 because the term repetitive or occupational disease is not used in conjunction with injury. This Court does not believe that the term strict construction means that you ignore the language in one section of Chapter 287 in favor of another. Repetitive motion/occupational diseases are clearly compensable as to employers and in this Court's opinion as to the Second Injury Fund.

In addition to the above statements, this issue is moot as the Court determined that the employee sustained a work related accident.

### **ATTORNEY'S FEE**

Dean L. Christianson, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

**INTEREST**

Interest on all sums awarded hereunder shall be paid as provided by law.

Made by:

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Gary L. Robbins  
*Administrative Law Judge*  
*Division of Workers' Compensation*