

**FINAL AWARD ALLOWING COMPENSATION**  
(Modifying the Award of the Administrative Law Judge)

Injury No. 09-054072

Employee: Calvin Marshall

Alleged Employers/Insurers:

Job Finders Employment Service/Uninsured  
Curators of the University of Missouri/Self-Insured  
Optima Staffing, Inc./National Union Fire Insurance  
ACEO, LLC/Guarantee Insurance Company

Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is pending before the Labor and Industrial Relations Commission (Commission) on an application for review filed by alleged employer, the Curators of the University of Missouri (MU). We have read the briefs, reviewed the evidence, and considered the whole record. We find that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law, except as modified herein.

**Discussion**

Are we precluded from considering the liability of Ann Williams?

Ann Williams is the President of Job Finders Employment Services (Job Finders). Employee never named Ms. Williams in a claim for compensation. Still, the administrative law judge found that "Ann Williams is personally liable for Calvin Marshall's workers' compensation benefits due to her complete domination of [Job Finders] and her failure to abide by their legal and statutory duty to purchase workers' compensation insurance." Ms. Williams filed an application for review challenging the administrative law judge's award of liability against her. Because Ms. Williams filed her application for review more than twenty days after the mailing of the award, we dismissed her application.

MU challenges our jurisdiction and/or authority to consider issues other than those raised by MU's application for review. In particular, MU challenges our authority to review the propriety of the administrative law judge's award of personal liability against Ann Williams. MU cites *Stonecipher v. Poplar Bluff R1 School District* for the proposition that 8 CSR 20-3.030(3)(A) prohibits us from considering any issue not included in a timely application for review.<sup>1</sup> That is contrary to the Court's own understanding of its holding in *Stonecipher*.

In *Stonecipher*, the Commission specifically found it was not limited to review of the errors complained of by the moving party. 205 S.W.3d at 331. We did not render a decision on whether the applicable regulations limit the Commission's review to issues raised in the application for review, but instead found that even if the Commission could properly consider non-appealed matters "an issue we do not yet decide--the Commission exceeded its power in [considering non-appealed matters] without [first] affording appropriate notice and opportunity to be heard." *Id.* at 332. We reiterated this same conclusion in Nolan, and noted "[d]ue process, in

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<sup>1</sup> 205 S.W. 3d 326, 332 (Mo. App. 2006).

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Missouri workers' compensation cases and elsewhere, contemplates the opportunity to be heard at a meaningful time and in a meaningful manner." *Nolan*, 246 S.W.3d at 5.<sup>2</sup>

We do not read *Stonecipher* to prohibit this commission from considering issues not raised by a valid application for review, nor do we believe such an interpretation would survive a strict construction analysis. The court decided *Stonecipher* under the Missouri Workers' Compensation Law (Law) as it existed in 2000. The *Stonecipher* court did not rely upon any explicit provision of the Law. The 2005 amendments to the Law apply to the instant case. Section 287.800.1 RSMo mandates that we construe the provisions of the Law strictly.<sup>3</sup> We decide this matter pursuant to § 287.480 RSMo, which reads, in relevant part:

If an application for review is made to the commission within twenty days from the date of the award, the full commission, if the first hearing was not held before the full commission, shall review the evidence, or, if considered advisable, as soon as practicable hear the parties at issue, their representatives and witnesses and shall make an award and file it in like manner as specified in section 287.470.

We have reviewed § 287.480 and the whole of Chapter 287 and find no language setting forth mandatory content for applications for review. Nor do we find language restricting the extent of our review by the contents of an application for review.

*Stonecipher* does not preclude us from considering Ms. Williams' liability. We proceeded just as the *Stonecipher* court directed we must. We specifically put all parties on notice that we would consider the propriety of the award against Ms. Williams. Our May 6, 2014, Order stated:

Our conclusion that the application for review will not lie does not necessarily mean we conclude the award against Anne Williams is proper. The parties are put on notice that, as we do in every case, we will consider whether we have jurisdiction and/or statutory authority to address the subject matter of the award, including the piercing of the corporate veil of Job Finders. We will also consider whether we have personal jurisdiction over those against whom the administrative law judge awarded compensation, including Anne Williams. Any party wanting us to conclude that we have authority to award compensation against Anne Williams should devote a portion of their brief to establishing such authority.<sup>4</sup>

We provided the parties with the opportunity to be heard at a meaningful time and in a meaningful manner on the issue of Ms. Williams' liability.

Finally, as administrative tribunals, the administrative law judge and this commission are creatures of statute and exercise only that authority invested by legislative enactment.<sup>5</sup>

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<sup>2</sup> *Payne v. Treasurer of Mo.*, 417 S.W.3d 834, 846-847 (Mo. App. S.D. 2014), citing *Stonecipher*, supra, and *Nolan v. Degussa Admixtures, Inc.*, 246 S.W.3d 1 (Mo. App. S.D. 2008).

<sup>3</sup> Statutory references are to the Revised Statutes of Missouri 2008, unless otherwise indicated.

<sup>4</sup> We apologize to Ms. Williams for misspelling her name as "Anne" in our order dated May 6, 2014. We picked up the spelling from the first page of her application for review.

<sup>5</sup> *Farmer v. Barlow Truck Lines*, 979 S.W.2d 169, 170 (Mo. 1998).

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Regardless of whether any party raises the issue of our authority to rule on a particular issue, we have an affirmative obligation to examine Chapter 287 to determine if we have such authority.<sup>6</sup>

Is Ann Williams liable to employee?

The administrative law judge concluded that “Ann Williams is personally liable for Calvin Marshall’s workers’ compensation benefits due to her complete domination of [Job Finders] and her failure to abide by their legal and statutory duty to purchase workers’ compensation insurance.” We have doubts whether we or the administrative law judge have authority to pierce the corporate veil under a strict construction of the Workers’ Compensation Law because we find no provision of the Law authorizing an award ordering that workers’ compensation benefits be paid by a corporate officer or principal or any other person or entity not a party to the case and/or not found to be an employer or insurer therein.

The award against Ms. Williams is invalid for other reasons. Employee did not name Ms. Williams as a party to the claim and even opposed the effort by MU to add Ms. Williams as a party. Consequently, the Division never provided Ms. Williams with notice of the hearing as required by § 287.520 RSMo. Such notice is jurisdictional and, as such, renders the award against Ms. Williams void.<sup>7</sup> In addition, the Division never notified Ms. Williams that an award might be entered against her. Due process requires notice reasonably calculated to apprise interested persons of the pendency of the action and to afford them an opportunity to present their objections.<sup>8</sup> The Division did not afford Ms. Williams due process in this matter.

Is MU a joint employer, a statutory employer or both?

Section 287.030.1 RSMo provides:

The word ‘employer’ as used in this chapter shall be construed to mean...**every person**, partnership, association, corporation, limited liability partnership or company, trustee, receiver, the legal representatives of a deceased employer, and every other person, including any person or corporation operating a railroad and any public service corporation, **using the service of another for pay...**

(Emphasis ours).

The evidence clearly establishes that MU used the service of employee for pay. At MU’s direction, employee performed custodial work for MU. MU paid Job Finders for using employee’s service. We affirm the administrative law judge’s finding that MU was employee’s employer for purposes of the Missouri Workers’ Compensation Law.

<sup>6</sup> *Id.* This obligation is analogous to the obligation of an appellate court to determine its jurisdiction to hear an appeal. See, for example, *Eldrige v. Barnes*, 189 S.W.3d 182, 183 (Mo. App. 2006).

<sup>7</sup> *Woodruff v. Tourville Quarry, Inc.*, 381 S.W.2d 14, 18 (Mo. App. 1964) (“[W]here notice is jurisdictional, and it is in the instant case, it must affirmatively appear of record, unless waived, or the proceedings are void.”)

<sup>8</sup> *Forms World v. Labor & Indus. Rels. Comm’n*, 935 S.W.2d 680, 684 (Mo. App. 1996) (“Notice is ‘an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality.’ Division of Employment Sec. v. Smith, 615 S.W.2d 66, 68 (Mo. banc 1981) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950)). The notice must be ‘reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.’” See also, *Stonecipher, Payne, and Nolan*, supra.

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We agree with the administrative law judge's finding that employee was in the joint service of Job Finders and MU at the time of his injury and, as such, Job Finders and MU are jointly and severally liable for the compensation owed to employee.

We do not adopt the administrative law judge's conclusion that MU was employee's statutory employer. Having found MU was employee's *direct* employer with primary liability for employee's compensation, there is no need to consider whether MU was deemed an employer under § 287.040 RSMo.

Motion to Submit Additional Evidence

Guarantee Insurance Company (GIC) filed a Motion to Submit Additional Evidence requesting leave to offer evidence concerning: 1) GIC's alleged lack of notice of the proceedings, 2) whether or not GIC carried workers' compensation coverage for ACEO, LLC, and 3) the employment relationship (presumably between ACEO, LLC and employee). Neither we nor the administrative law judge found ACEO, LLC to be an employer of employee. Neither we nor the administrative law judge awarded compensation from ACEO, LLC. GIC has no liability under this award. We deny GIC's Motion to Submit Additional Evidence as moot.

**Award**

We reverse the administrative law judge's award of benefits against Ann Williams. We reverse the administrative law judge's conclusion that MU was employee's statutory employer. In all other respects, we affirm and adopt the administrative law judge's award.

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

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

We attach the award and decision of Administrative Law Judge Vicky Ruth, issued February 28, 2014, and we incorporate it to the extent it is not inconsistent with our findings, conclusions, award and decision herein.

Given at Jefferson City, State of Missouri, this 10<sup>th</sup> day of February 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## AWARD

Employee: Calvin Marshall Injury No. 09-054072

Dependents: N/A

Employers: Job Finders Employment Service;  
(alleged) Curators of the University of Missouri;  
Optima Staffing, Inc.; ACEO, LLC;

Insurers: Self-insured (for Curators of the University of Missouri);  
(alleged) National Union Fire Insurance (for Optima Staffing, Inc.);  
Guarantee Insurance Co. (for ACEO, LLC);

Add'l Party: Second Injury Fund

Medical Fee  
Dispute: The Surgical Center of the Columbia Orthopaedic Group

Hearing Date: November 19, 2013 Checked by: VR/cs

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

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: July 1, 2009.
5. State location where accident occurred or occupational disease was contracted: Boone County, Missouri.
6. Was above employee in the employ of above employer at the time of the alleged accident or occupational disease? Yes as to Job Finders and the Curators of the University of Missouri.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was mopping and felt his right shoulder pop.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: right shoulder.

14. Nature and extent of any permanent disability: As to the employers/insurers, 25% of the right shoulder. As to the Second Injury Fund, permanent and total disability benefits.
15. Compensation paid to-date for temporary disability: See Award.
16. Value necessary medical aid paid to date by employer/insurer? See Award.
17. Value necessary medical aid not furnished by employer/insurer? \$26,140.02.
18. Employee's average weekly wages: \$300.15.
19. Weekly compensation rate: \$200.10.
20. Method of wages computation: by Award.

**COMPENSATION PAYABLE**

21. Amount of compensation payable from employer (s) to claimant:

58 weeks of permanent partial disability x \$200.10 = \$11,605.80	
<u>Unpaid medical benefits</u>	<u>= \$26,140.02</u>
TOTAL:	\$37,745.82.

22. Second Injury Fund liability: permanent and total disability (see Award).
23. Future medical awarded: N/A.
24. Medical fee dispute: No, see Award.

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

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

Employee: Calvin Marshall

Injury No. 09-054072

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

Employee:	Calvin Marshall	Injury No. 09-054072
Dependents:	N/A	Before the <b>DIVISION OF WORKERS' COMPENSATION</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Employers: (alleged)	Job Finders Employment Service; Curators of the University of Missouri; Optima Staffing, Inc.; ACEO, LLC;	
Insurers: (alleged)	Self-insured (for Curators of the University of Missouri); National Union Fire Insurance (for Optima Staffing, Inc.); Guarantee Insurance Co. (for ACEO, LLC).	
Add'l Party:	Second Injury Fund	
Medical Fee Dispute:	The Surgical Center of the Columbia Orthopaedic Group	
Hearing Date:	November 19, 2013	

On November 19, 2013, the following parties appeared in Columbia, Missouri, for a hearing in this matter: Calvin Marshall (the claimant), Job Finders Employment Services; Curators of the University of Missouri, Optima Staffing, National Union Fire Insurance Company of Pittsburgh, Pennsylvania; Curators of the University of Missouri; the Second Injury Fund, and the Surgical Center at the Columbia Orthopaedic Group. Alleged employer ACEO, LLC, did not appear at the hearing. The parties that appeared were represented by the following attorneys:

- Claimant was represented by attorney Robert Hines.
- Alleged employer Job Finders Employment Services was represented by attorney Matthew Murphy.
- Alleged employer/insurer The Curators of the University of Missouri was represented by attorney Rick Montgomery;
- Alleged employer Optima Staffing, Inc. was represented by attorney Hans Amann.
- Alleged insurer National Union Fire Insurance Company of Pittsburgh, Pennsylvania was represented by attorney Patrick McHugh.
- The Surgical Center of the Columbia Orthopaedic Group (also referred to as the Surgical Center or the Healthcare Provider) was represented by attorney Melissa Faurot.
- The Second Injury Fund was represented by attorney Leslye Winslow.

ACEO, LLC, and the Guarantee Insurance Company did not appear at the hearing.

Claimant testified in person at the hearing and by deposition. Dr. Eli Shuter, Gary Weimholt, Roy Holms, and Ann Williams testified by deposition. National Union Fire Insurance Company submitted late-filed exhibit B on November 21, 2013. At the hearing, the administrative law judge set a deadline of January 3, 2014, for the filing of briefs. The Surgical Center filed a brief on January 2, 2014. Claimant and Optima Staffing, Inc. submitted briefs on January 3, 2014. On that date, the Curators of the University of Missouri requested an extension to Monday, January 6, 2014; the extension was granted for all parties. On that date, however, National Union Fire Insurance requested an extra day due to weather conditions. The administrative law judge granted the request, making the final deadline January 7, 2014, for all parties. National Union Fire Insurance, Job Finders, the Curators of the University of Missouri, and the Second Injury Fund submitted their briefs on January 7, 2014, and the record closed at that time.

At the start of the hearing, National Union Fire Insurance of Pittsburg, PA (National Union) submitted a *Motion to Stay* this workers' compensation proceeding. At the hearing, the administrative law judge set a deadline of December 6, 2013, for the filing of responses to the *Motion to Stay*. In the meantime, the hearing proceeded as scheduled. On December 5, 2013, the claimant filed *Employee's Brief Regarding Why National Union Fire Insurance Company of Pittsburg, PA's Motion to Stay Final Hearing Should and Must Be Denied*. Claimant indicated that National Union is requesting a stay as a result of a California case in which National Union filed a request for a declaratory judgment that its workers' compensation policy with Optima is not valid. Claimant noted that the Los Angeles Superior Court issued a summary judgment determining that National Union could not rescind its policies as to third parties. Claimant further noted that the California order in question is now on appeal and is not a final judgment. On December 6, 2013, the Curators of the University of Missouri filed its brief in support of the *Motion to Stay*. On December 27, 2013, the administrative law judge issued an order denying the motion to stay.

### **PRELIMINARY MATTER**

On February 13, 2014, the Curators of the University of Missouri filed a *Notice of Abandonment of Issues by the Parties and Suggestions in Support*. On the same date, February 13, 2014, Job Finders filed its response to the motion. In essence, the University of Missouri argues that various parties abandoned certain issues or position by not fully briefing those matters. This argument is without merit. Although the administrative law judge requested briefs and set a deadline for the filing thereof, there is no legal requirement that a party file a post-hearing brief.<sup>1</sup> Instead, 8 CSR 50-2.010(14)(C) addresses post-hearing briefs by noting that briefs *may* be submitted within the time set by the administrative law judge. Although this administrative law judge is quite appreciative of well-reasoned and thorough briefs, briefs are not required and the failure to address all issues in a brief in a workers' compensation case does not necessarily indicate that a party has abandoned those matters.

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<sup>1</sup> During an off-the-record discussion of a proposed briefing schedule, the administrative law judge (ALJ) stated that she would appreciate it if parties would brief all issues for which they are advocating a position. The ALJ, however, explicitly stated that she could not make any party brief a particular issue.

### **STIPULATIONS**

The parties stipulated to the following:

1. Claimant *alleges* that on or about July 1, 2009, he sustained an injury by accident.
2. The accident *allegedly* occurred while Claimant was working on the property of the University of Missouri Hospital.

### **ISSUES**

At trial, the parties identified the following issues for resolution in this proceeding:

1. Jurisdiction.
2. Accident or occupational disease arising out of and in the course of employment.
3. Medical causation.
4. Whether certain facts have been admitted by any of the alleged employers/insurers by the late-filing of an Answer or the failure to file an Answer.
5. Who was the employer or co-employers of Claimant at the time of the alleged injury?
6. If there are co-employers, is there any right of contribution pursuant to Section 287.130, and if so, what is the amount?
7. Whether the employer had workers' compensation insurance, and if so, who was the insurer.
8. If the employer did not have workers' compensation insurance, should the owners be personally responsible.
9. Notice.
10. Average weekly wage and compensation rates.
11. Whether Claimant is permanently and totally disabled.
12. Nature and extent of permanent partial disability.
13. Liability of the Second Injury Fund.
14. Liability for unpaid medical bills (specifically, from the Surgical Center of the Columbia Orthopaedic Group and from The Work Center).
15. If there is statutory employment, the University of Missouri requests fees and expenses from the primarily liable party (pursuant to Section 287.040).

### **EXHIBITS**<sup>2</sup>

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

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<sup>2</sup> All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.

- Exhibit 1 Deposition of Dr. Eli Shuter.
- Exhibit 2 Report of Dr. Shuter (1/28/11).
- Exhibit 3 *Curriculum Vitae* of Dr. Shuter.
- Exhibit 4 Medical bills.
- Exhibit 5 Deposition of Gary Weimholt.
- Exhibit 6 *Curriculum Vitae* of Gary Weimholt with attached Medical Source statement of Dr. Shuter.
- Exhibit 7 Report of Gary Weimholt (12/05/11).
- Exhibit 8 Amended Notice of Deposition – Gary Weimholt.
- Exhibit 9 Medical records from Boone Hospital Center.
- Exhibit 10 Medical records from Advanced Radiology.
- Exhibit 11 Medical records from Columbia Orthopaedic Group.
- Exhibit 12 Medical records from Columbia Orthopaedic Group.
- Exhibit 13 Medical records from Family Health Center.
- Exhibit 14 Certified copy from the Division of Workers' Compensation regarding workers' compensation insurance/Optima Staffing.
- Exhibit 15 Certified copy from Secretary of State regarding Job Finders Employment Service, Inc.
- Exhibit 16 Certified copy from the Division of Workers' Compensation regarding no records of Insurance for Job Finders Employment Service, along with a letter from Robert Hines.
- Exhibit 17 Certified copies from the Division of Workers' Compensation of Claimant's workers' compensation settlements.
- Exhibit 18 Deposition of Roy Hombs.
- Exhibit 19 Optima Staffing Employment Agreement/Job Finders.
- Exhibit 20 Certificate of liability insurance (Optima Staffing, Inc.).
- Exhibit 21 Claimant's employment record.
- Exhibit 22 Job Finders fax from Susan Wallace to Jeff Noblin.
- Exhibit 23 Report of Injury.
- Exhibit 24 Supervisor's Report of Injury (Jeff Noblin).
- Exhibit 25 Supervisor's Report of Injury (Tom Andert).
- Exhibit 26 Claimant's wage statement.
- Exhibit 27 Employee Input Form.
- Exhibit 28 Medical bills and copies of checks of payment.
- Exhibit 29 Correspondence – Optima Staffing to Jeff Noblin.
- Exhibit 30 Verification of benefit commencement and termination.
- Exhibit 31 Letter from Greg Hurd, FARA Insurance Services, to Robert Hines.
- Exhibit 32 Deposition of Ann Williams.
- Exhibit 33 Letter from Robert Hines (7/13/11) and Notice of Deposition (Dr. David Shuter).
- Exhibit 34 Letter from Robert Hines (4/06/11) and Notice of Deposition (David Jatho).
- Exhibit 35 Subpoena – David Jatho.
- Exhibit 36 File purported to be from David Jatho and Roy Hombs that was delivered to the Hines Law Firm.

Employee: Calvin Marshall

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On behalf of the alleged employer Curators of the University of Missouri (hereinafter the University of Missouri), the following exhibits were admitted into the record:

- Exhibit 1      *Motion to Join Additional Parties and Request for Continuance of Hearing.*
- Exhibit 2      *Order adding AECO/Guarantee Insurance Co. (from Judge Dierkes).*
- Exhibit 3      *Withdrawn.*
- Exhibit 4      *Claims and Answers filed in this case.*
- Exhibit 5      *Deposition of Claimant.*
- Exhibit 6      *Withdrawn.*
- Exhibit 7      *Late-filed exhibit regarding attorney's fees and expenses.*

On behalf of alleged employer Optima Staffing, Inc. (Optima) , the following exhibits were admitted into the record:

- Exhibit 1      *Deposition of Ann Williams.*

On behalf of alleged insurer National Union Fire Insurance Company of Pittsburgh, Pennsylvania, (hereinafter National Union), the following exhibits were admitted into the record:

- Exhibit A      *Letter dated 10/4/2010 from Mona Carpenter.*
- Exhibit B      *Late-filed exhibit – Answer to Claim for Compensation by alleged employer Optima Staffing, Inc., originally date-stamped by the DWC on 9/07/10 (late-filed on November 21, 2013).*

On behalf of the Surgery Center of the Columbia Orthopaedic Group and The Work Center (hereinafter the Healthcare Providers), the following exhibit was admitted into evidence:

- Exhibit 1      *Records from the Surgical Center /Columbia Orthopaedic Group.*

Pursuant to a request at trial, the administrative law judge agreed to take judicial notice of *Job Finders Employment Services, C. Ann Williams; and Charles E. Williams Objection to Curators of the University of Missouri's Motion to Join Additional Parties and Request for Continuation of Hearing*, which was filed with the Division in 2013.

### **FINDINGS OF FACT**

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

#### Background

1. Claimant was born on July 10, 1952; at the time of the hearing, he was 61 years old. He

Employee: Calvin Marshall

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lives in Columbia, Missouri.

2. Claimant attended school through the ninth grade.<sup>3</sup> After obtaining his GED, he went into the Army around 1972.<sup>4</sup> While in the Army, he worked as a military police officer and then ended his time in the military as a combat engineer.<sup>5</sup> He was discharged from the Army in 1975.
3. After leaving the Army, Claimant worked in a factory, in the construction industry, and doing custodial work.<sup>6</sup> He worked for Oscar Mayer in Columbia, Missouri, for about ten years as an operational technician.<sup>7</sup>
4. On November 11, 2008, Claimant applied for temporary employment with Job Finders Employment Services; Job Finders was located at 1729 W. Broadway, Suite 4, Columbia, Missouri. He does not remember the name or title of the person he spoke with. Later that day, he was notified that he was hired and was assigned to work at the University of Missouri Hospital. It was Claimant's understanding that he was working for Job Finders at the University Hospital.
5. Job Finders had entered into a contract with the University of Missouri to provide temporary employees to the University.
6. Claimant began working at the University Surgery Department on November 12, 2008, as a custodian. Claimant does not recall whether he completed additional paperwork when he appeared for work at the University Hospital. He testified that he was scheduled to work 40 hours per week. He was paid \$8.00 per hour. Initially, his shift was 3:00 p.m. to 11:00 p.m. He would work five days in a row and then have two days off work. At some point, he started on a new shift that required that he work less than five days. That new schedule required that he take a day off work and then return to work for a few more days. He does not recall whether there was change in the total number of hours he worked under this schedule.
7. Claimant testified that his job duties involved cleaning surgery rooms. He would clean, sanitize, and mop operating rooms, empty trash, and wipe down walls. He would clean between 18 and 30 rooms per eight-hour shift. Claimant testified that he was supervised by University Hospital employees named Tom<sup>8</sup> and Bill, whose last names he could not remember, along with a woman, whose first and names he could not remember. They would instruct him on what activities to perform and how to perform those activities properly.
8. When Claimant started this job, there were three people assigned to clean the surgery rooms. Shortly after he started, the staff was reduced to two people during his shift.

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<sup>3</sup> The University of Missouri Exh. (hereinafter referred to as MU Exh.) 5, p. 7.

<sup>4</sup> MU Exh. 5, p. 9.

<sup>5</sup> MU Exh. 5, p. 11.

<sup>6</sup> MU Exh. 5, p.13.

<sup>7</sup> MU Exh. 5, p. 14.

<sup>8</sup> From later evidence, it appears that Claimant is referring to Tom Andert.

9. Claimant testified that he received his work uniforms (scrubs) though the University Hospital. He was required to wear this uniform, which included scrubs, protective covers for his shoes, a hair net, and rubber gloves, when cleaning. He would need to change his scrubs once or twice per shift. Claimant also testified that the supplies for cleaning the rooms were supplied by the University Hospital.
10. Claimant clocked in and out at the University and then picked up his check weekly at Job Finders. Claimant testified that when he was sick or needed to miss work he would contact both Job Finders and the University Hospital.
11. Claimant understood that either Job Finders or the University could terminate his employment.

#### The July 1, 2009 Injury

12. On July 1, 2009, Claimant was working at the University Hospital performing his usual duties. He was working with another employee, but he did not remember her name. As he used a long, heavy mop to clean a wide swath of floor, he hurt his right shoulder. He was using long, sweeping strokes with his right arm to obtain maximum coverage of the area. As he swung the mop out and extended his arm, he felt a pop in his right shoulder, which was painful briefly. He stated that because he was already in a lot of pain due to his other medical conditions, he continued working; however, his arm gave out while he was attempting to clean the walls. Claimant's injury and treatment will be discussed more thoroughly later in this Award.
13. Claimant testified that he was performing his job the way he always did. While the room may have been messier that day, there was nothing unusual about the way he was working.
14. Claimant reported his injury to his supervisor at the University, Tom Andert, that day and filled out some paperwork. He testified that he reported this July 1, 2009 incident to Job Finders the next day, on July 2, 2009. Claimant stated that the only reason he did not report the injury to Job Finders on the same day was because his injury occurred later in the day, and he did not believe anyone was at the Job Finders' office. Job Finders directed Claimant to see Dr. Robert Herting at Boone Occupational Medicine.
15. A report of injury was filed with the Division of Workers' Compensation by Optima Staffing, Inc. That document reflects that the injury of July 1, 2009, was reported to the alleged employer on July 2, 2009.
16. Four alleged employers have been made parties to this case: Job Finders Employment Services, ACEO, LLC, Optima Staffing, Inc., and the Curators of the University of Missouri. The Curators of the University of Missouri is an alleged statutory employer. None of the alleged employers agree that Claimant was their employee. Some of the alleged employers were apparently uninsured on the date of the accident. One alleged employer, ACEO, LLC, did not appear at the hearing.

Medical Treatment/Evaluations, TTD, and Medical Bills

17. Claimant testified that after advising Job Finders of his injury on July 2, 2009, Job Finders sent him to Dr. Herting at the University of Missouri Hospital & Clinics. An X-ray was taken on July 2, 2009, which showed no evidence of a fracture but did show severe degenerative changes, most notably in the acromion, clavicle, and AC joint. Dr. Herting initially diagnosed Claimant with a right shoulder strain, put him on light duty, and prescribed some medication and home exercises.
18. When Claimant's shoulder did not improve, Dr. Herting ordered an MRI on July 30, 2009, which showed that Claimant had a large partial thickness tear of the supraspinatus. Dr. Herting referred Claimant to Dr. William Quinn of the Columbia Orthopaedic Group.
19. An MRI report, dated July 30, 2009, from Advanced Radiology of Columbia indicates the interpreting radiologist, Dr. Mark Monroe, had the following impression of the study:
  - 1) Significant partial-thickness tear of the supraspinatus with tendinopathy of the infraspinatus.
  - 2) Hypertrophic changes of the acromioclavicular joint with lateral acromial spurring.
  - 3) Subacromial bursitis.
  - 4) Subcortical cysts at the margin of the humeral head.
  - 5) No confluent axillary adenopathy.
  - 6) Mild tendinopathy of the upper biceps tendon.
  - 7) Degenerative changes of the glenohumeral joint.<sup>9</sup>
20. On August 10, 2009, Claimant saw Dr. Quinn with a chief complaint of right shoulder pain.<sup>10</sup> Claimant provided a history of a work injury where he was mopping and felt his shoulder go out. He indicated that this problem had been going on since July and was getting worse.
21. On September 15, 2009, Claimant underwent arthroscopic surgery on his right shoulder. The surgery was performed at the Surgery Center of the Columbia Orthopaedic Group. Dr. Quinn performed a repair of the rotary cuff, supraspinatus tendon tenoplasty, decompression of the acromion, and partial clavicle resection. Post operatively, Claimant underwent physical therapy and work hardening at The Work Center. Claimant testified that this was all authorized treatment.
22. On October 23, 2009, physical therapist Liam Mahoney noted in the records that Claimant's subjective complaints were not always consistent with the objective data and that Claimant was not consistently exhibiting maximum effort. On November 20, 2009, Kathy Nelson, an occupational therapist, noted that Claimant had a greater range of motion during informal observation rather than formal measurements and that he exhibited extremely exaggerated pain behaviors. On December 7, 2009, Laura Jones,

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<sup>9</sup> Claimant Exh. 10.

<sup>10</sup> Claimant Exh. 11.

another occupational therapist, noted that Claimant demonstrated improvements in shoulder range of motion, load handling, and functional tolerances, but had a decline in manual muscle strength. Ms. Jones, however, stated that Claimant exhibited consistent reports of pain with palpitation, exaggerated pain behaviors, and outward demeanor inconsistent with subjective pain ratings. Nevertheless, Claimant testified that his right shoulder pain got much better following his physical therapy.

23. On or about December 8, 2009, Claimant was released by Dr. William Quinn to full duty; he was to return to the doctor on an "as-needed" basis.<sup>11</sup> At that December 2009 visit, the doctor found that Claimant had excellent motion and that he had consistently been performing his work hardening, but the doctor also noted the therapists' reports of "some significant exaggeration and inconsistency."<sup>12</sup> Even though Claimant was released, he had too much pain to return to his job. His pain was not only in his right shoulder; it was also in other parts of his body.
24. On March 9, 2010, Claimant returned to Dr. Quinn for a final evaluation and rating of his right shoulder. Dr. Quinn noted that although Claimant has some irritability and weakness at times, he also had full range of motion. Dr. Quinn again released Claimant at maximum medical improvement.
25. Claimant testified that after his accident and during the course of his treatment, he had some issues with getting treatment authorized and receiving his temporary total disability payments. He testified that when he began experiencing these difficulties, he contacted Job Finders, who referred him to a man named Jeff Noblin. Jeff Noblin worked for Optima Staffing. Claimant testified that he believed his temporary total disability checks were provided by Optima Staffing. Optima Staffing was located on Broadway Street in Columbia, Missouri, but later relocated to Vandiver Drive in Columbia.
26. Claimant testified that while he still had some medical bills outstanding, some of his bills had been paid. Upon examination by counsel for The Surgical Center at Columbia Orthopaedic Group, Claimant testified that he recognized some of the providers' names on the outstanding bills, and stated that Optima Staffing was listed as one of the providers who paid the anesthesiologist.
27. Claimant's total medical bills for his right shoulder treatment were approximately \$38,951.27. Optima Staffing, Midwest Diagnostic Management, and F. A. Richard & Associates, Inc. (a/k/a FARA, the claims administrator for National Union Fire Insurance) each paid a portion of these bills, but a significant amount has never been paid.
28. There are still unpaid bills totaling approximately \$26,139.02. This amount consists of bills from The Surgery Center at Columbia Orthopaedic Group for \$18,034.77<sup>13</sup> and bills

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<sup>11</sup> Claimant Exh. 11.

<sup>12</sup> Claimant Exh. 11.

<sup>13</sup> Surgery Center Exh. 1 (\$12,513.88 + \$5,520.89 = \$18,034.77). There are other references that suggest that this number is actually \$18,035.77 or \$18,035.

from The Work Center for \$8,104.25. Claimant testified that he understood his medical treatment and resulting medical bills were authorized by his employer and that all of the bills incurred were because of his work injury of July 1, 2009.

29. The Surgery Center of the Columbia Orthopaedic Group submitted evidence indicating that its outstanding bills total \$18,034.77 for treatment of Claimant's July 2009 injury.<sup>14</sup>

#### Preexisting Conditions and Injuries

30. Claimant testified that prior to his injury on July 1, 2009, he had several pre-existing conditions.

##### Right and left knee

31. Claimant had a right knee scope performed in the early 1990s, and he still experiences difficulties with his knee. He injured his right knee in March 1997 in a work-related fall. He settled that workers' compensation case for 6.11% of the left knee.

32. On or about June 15, 2007, an MRI showed chondromalacia of the left knee and right knee, with more degenerative changes noted in the right knee. Claimant currently sees Dr. Bus Tarbox for knee treatment, and Dr. Tarbox has opined that Claimant likely needs a right total knee replacement. Claimant has not yet undergone this surgery. Claimant testified that he has difficulty walking and that going up steps increases his pain. He testified that his left knee pain is now worse than his right knee pain.

##### Left Shoulder

33. In approximately April 1997, Claimant experienced a fall at his previous employer and suffered a left shoulder torn rotator cuff. An MRI confirmed that in addition to his torn rotator cuff, he also had tendinosis in the shoulder.<sup>15</sup> On or about January 18, 1999, Dr. Quinn performed an acromioplasty and rotator cuff repair of the left shoulder.<sup>16</sup> Dr. Quinn released Claimant to full duty on May 4, 1999. Claimant settled this workers' compensation case for 20% of the left shoulder. Claimant stated that he constantly experiences more pain in his left shoulder than his right shoulder, and he has to undergo therapy every so often because of his pain complaints

##### Right hand/wrist

34. Claimant suffered a right wrist dorsiflexion injury at work in approximately 1999. On February 28, 2000, Dr. James Eckenrode performed surgery, an excision of a metacarpal boss of the right hand.<sup>17</sup> Dr. Eckenrode released Claimant on or about May 11, 2000. Dr. Eckenrode provided a rating of 7% "permanent physical impairment and loss of physical function at the right wrist level."<sup>18</sup> Claimant indicated at the trial that as a result of this injury, his right hand is very weak. Claimant settled this workers' compensation

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<sup>14</sup> Surgery Center Exh. 1.

<sup>15</sup> Claimant Exh. 11.

<sup>16</sup> Claimant Exh. 13.

<sup>17</sup> Claimant Exh. 11.

<sup>18</sup> Claimant Exh. 11.

case for approximately 7% of the right wrist.

### Hips

35. Claimant also experiences difficulty with his hips. In August 2004, Claimant underwent an MRI of his pelvis. The MRI revealed a subcortical cyst in his right hip secondary to generative joint disease. Dr. Benjamin Holt performed injections in Claimant's right hip, but then Claimant began experiencing increased left hip symptoms.<sup>19</sup> Dr. Holt diagnosed Claimant with significant degenerative joint disease in both of his hips, with the right being more symptomatic. Because Claimant did not respond well to conservative treatment, Claimant underwent a right total hip replacement with Dr. Holt on September 14, 2005.<sup>20</sup> Dr. Holt released Claimant to return to work with a lifting restriction of 50 pounds.<sup>21</sup> Claimant testified that he still has some pain and that his hip will give out occasionally. When asked about his left hip, Claimant testified that it is "bad" and he experiences debilitating pain and feels like the left side of his body sometimes gives out. His hip pain causes him to have trouble walking and climbing steps.

### Low back

36. Claimant reported low back pain around the time he first presented for right hip pain.<sup>22</sup> Following his right hip replacement, Dr. Benjamin Holt referred Claimant to Dr. John Miles for chronic low back pain. Dr. Miles diagnosed Claimant with diffuse spondylosis of the lumbar spine. Claimant testified that he has had several epidural injections in his back. He stated that Dr. Miles has opined that he needs a fusion surgery, but Claimant testified that he does not want to undergo this surgery. He stated that he mainly has pain when he lifts, squats, walks, or sits too long. Claimant testified that he deals with his low back pain by trying to stretch. Claimant testified that at his previous place of employment, and during his employment with Job Finders/University of Missouri, he would stretch his lower back on his breaks. Claimant testified that his back pain is typically at an 8 on a 10-point scale, with 10 being the worst pain.

### Gout & Asthma

37. Claimant suffers from gout. He has had to get injections into his big toe because of his gout. He has to miss work a couple of times per year due to gout. Claimant also has asthma and uses an inhaler daily.

### Miscellaneous regarding pre-existing conditions

38. Claimant testified that prior to his 2009 work accident, he was taking muscle relaxers, ibuprofen, and Vicodin to deal with his knee, back, and hip pain. Claimant testified that he continues to take these medications.
39. Although Claimant testified that he was able to work up until the time of his accident, he stated that he regularly missed work due to his preexisting pain. Dr. Miles' records from

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<sup>19</sup> Claimant Exh. 11.

<sup>20</sup> Claimant Exhs. 5 and 11.

<sup>21</sup> Claimant Exh. 5.

<sup>22</sup> Claimant Exh. 11.

2007 confirm that Claimant was missing work due to low back pain around that time.<sup>23</sup> Claimant testified that he missed work as often as one time per week depending upon his level of pain.

40. Claimant testified that the University was able to accommodate his preexisting pain levels because he worked with another employee who was able to do most of the mopping, and he also had the opportunity to lie down and stretch his lower back in the locker room while on his breaks. Claimant testified that following his alleged work accident on July 1, 2009, he has not attempted to return to work and he has not applied for any other jobs.

***Dr. Eli Shuter***

41. On January 28, 2011, Dr. Eli Shuter examined Claimant at the request of his attorney.<sup>24</sup> Dr. Shuter specializes in neurology. He is now semi-retired and is employed as an Associate Professor of Clinical Neurology with Washington University School of medicine, teaching one day per week. Outside of this, Dr. Shuter performs independent medical examinations, mostly for Claimants, for workers' compensation cases.<sup>25</sup>

42. Dr. Shuter took a history from Claimant, performed a physical examination, and reviewed various medical records from Family Health Center, Boone Hospital Center, Advanced Radiology, and the Columbia Orthopaedic Group. Claimant provided a history of the work incident that is consistent with his testimony at trial and with the medical records. Upon examination, Dr. Shuter found no atrophy, tenderness, or impingement signs with respect to Claimant's shoulders.<sup>26</sup> The doctor did find crepitation at the right shoulder with some mild weakness due to pain. Claimant's shoulder extension was 160 degrees on the right and 170 degrees on the left; a normal finding is 180 degrees.<sup>27</sup> Claimant had no limitation of shoulder extension. His shoulder abduction was limited to 170 degrees on the right; a normal finding is 180 degrees.<sup>28</sup> He had 80 degrees external shoulder rotation on right shoulder compared to 90 degrees on the left, which is normal. He had normal internal rotation on both shoulders. Dr. Shuter noted Claimant had pain when conducting this examination at the described limitations of movement. Ultimately, Dr. Shuter opined that Claimant's right shoulder range of motion is close to normal.<sup>29</sup>

43. Dr. Shuter observed that Claimant walked with a normal gait and had no signs of ankle weakness, lumbar spasms, or tenderness. Claimant had no weakness in either lower extremity and no atrophy.<sup>30</sup> He had no right hip tenderness but did have some left hip tenderness over his proximal medial thigh, but no tenderness over either of his hip joints

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<sup>23</sup> Claimant Exh. 11.

<sup>24</sup> Claimant Exhs. 1 and 2.

<sup>25</sup> Claimant Exh. 1.

<sup>26</sup> Claimant Exh. 2, p. 3.

<sup>27</sup> Claimant Exh. 2, p. 3.

<sup>28</sup> Claimant Exh. 2, p. 3.

<sup>29</sup> Claimant Exh. 1.

<sup>30</sup> Claimant Exh. 1.

and no hip weakness.<sup>31</sup> Claimant had significant bilateral limitation of hip movement. With respect to Claimant's knees, Dr. Shuter found no effusion, tenderness, crepitation, weakness, or instability.<sup>32</sup> The doctor did find some limited knee flexion and some mild limitation of right ankle movement, but no tenderness. Dr. Shuter also noted that Claimant had constant pain in the middle of his low back radiating into his right buttock.<sup>33</sup>

44. Ultimately, Dr. Shuter opined that Claimant's work activities on July 1, 2009, are the prevailing factor in causing his right shoulder condition and he opined that as a result, Claimant has suffered a 35% permanent partial disability of his right shoulder.<sup>34</sup> Dr. Shuter understood that Claimant had been released without restrictions by Dr. Quinn.<sup>35</sup> Dr. Shuter agreed that Claimant had significant degenerative problems in his right shoulder prior to the July 1, 2009 incident. He opined that Dr. Quinn's September surgery of the right shoulder was medically necessary as a result of Claimant's July 1, 2009 injury.
45. With respect to Claimant's preexisting injuries and conditions, Dr. Shuter opined that Claimant had the following pre-existing permanent partial disabilities:
- 20% of the left shoulder for a torn rotator cuff;
  - 7% of the right wrist for an excised boss and chronic straining;
  - 25% of the body as a whole for low back degenerative arthritis and disc disease with annular tear and radiculitis;
  - 25% of the right hip due to hip replacement;
  - 50% of the left hip for degenerative arthritis;
  - 30% of the right knee for internal derangement and osteoarthritis;
  - 25% of the left knee for degenerative arthritis; and
  - 10% of the body as a whole for gout.<sup>36</sup>
46. Dr. Shuter indicated that his ratings take into account Claimant's subjective complaints of pain; he agreed that his ratings would be lower if Claimant were without pain.<sup>37</sup>
47. Dr. Shuter opined that all of Claimant's disabilities are a hindrance to his employment; he also indicated that the combination of these injuries render Claimant permanently and totally disabled.<sup>38</sup> The doctor indicated that Claimant's right shoulder injury alone was not significant enough to cause Claimant to be permanently and totally disabled.<sup>39</sup> Dr. Shuter acknowledged that he was not a vocational expert, however, and would defer to a vocational expert's opinion regarding whether Claimant could perform jobs in the

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<sup>31</sup> Claimant Exh. 1.

<sup>32</sup> Claimant Exh. 2, p. 4.

<sup>33</sup> Claimant Exh. 2, p. 3.

<sup>34</sup> Claimant Exhs. 1 and 2.

<sup>35</sup> Claimant Exh. 1, p. 29.

<sup>36</sup> Claimant Exh. 2, pp. 4-5, and Exh. 1.

<sup>37</sup> Claimant Exh. 1, p. 27.

<sup>38</sup> Claimant Exh. 2, p. 4, and Exh. 1, p. 25.

<sup>39</sup> Claimant Exh. 1, p. 31.

open labor market.<sup>40</sup>

***Gary Weimholt – Vocational Expert***

48. On or about August 22, 2011, Gary Weimholt, a vocational expert, evaluated Claimant at the request of his attorney. Mr. Weimholt prepared a report dated December 5, 2011.<sup>41</sup> He interviewed Claimant, reviewed various medical records, and administered certain vocational tests. Mr. Weimholt noted that Claimant dropped out of high school in the 9<sup>th</sup> grade and later obtained his GED. Claimant reported that he cannot use a broom at home and has aching in his shoulders that prevents him from lying comfortably. He has trouble stooping and believes he has a bad memory. Mr. Weimholt indicated that on the Wide Range Achievement Test, Claimant scored as reading at the high school level and was at the 8<sup>th</sup> grade level for math. Mr. Weimholt noted that Claimant's past work history has been in the Light to Medium levels of physical demand. Mr. Weimholt classified Claimant's work history as mostly unskilled manual work. He also noted that Claimant is not computer literate.

49. Mr. Weimholt indicated that the restrictions imposed by Dr. Shuter indicate functioning that puts Claimant below the sedentary level for lifting, sitting, and standing capabilities. Mr. Weimholt opined as follows: "If [Claimant] is able to perform the full range of Light work or Medium work, he would continue to be employable. However, in view of limitations to less than sedentary work and limited ability to complete a full work day, I do not believe he is either employable or placeable in the open competitive labor market."<sup>42</sup> Mr. Weimholt further opined that "there is no reasonable expectation that an employer, in the normal course of business, would hire [Claimant] for any position, or that he would be able to perform the usual duties of any job that he is qualified to perform."<sup>43</sup> Mr. Weimholt does not believe Claimant's employability will change with time, and he opined that Claimant is not a good candidate for a rehabilitation program.<sup>44</sup>

50. Mr. Weimholt believed it would be a combination of conditions that render Claimant unemployable, including his most recent right shoulder injury, left shoulder rotator cuff surgery, lumbar degenerative arthritis and degenerative disc disease, his right total hip replacement, and degenerative processes in Claimant's left hip and left knee. Mr. Weimholt believed the gout and the asthma could be controlled in certain environments. Overall, Mr. Weimholt considered Claimant's shoulder, hip, back and knee problems to be the most significant.<sup>45</sup> Mr. Weimholt indicated that he does not believe that Claimant's last injury alone (right shoulder) is what rendered him unemployable. Mr. Weimholt acknowledged that there was some exaggeration of complaints noted in the records.

51. In his deposition, Mr. Weimholt also acknowledged that Dr. Herting and Dr. Quinn

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<sup>40</sup> Claimant Exh. 1, p. 34.

<sup>41</sup> Claimant Exh. 7.

<sup>42</sup> Claimant Exh. 7, p. 15. See also Exh. 5, p. 27.

<sup>43</sup> Claimant Exh. 7, p. 15.

<sup>44</sup> Claimant Exh. 5.

<sup>45</sup> Claimant Exh. 5, p. 27.

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released Claimant to return to work without restrictions with respect to his last right shoulder injury.<sup>46</sup>

#### Current Symptoms Related to the Right Shoulder

52. Claimant testified that prior to his injury on July 1, 2009, he did not have any problems with his right shoulder. His current complaints include on and off pain at the top of his shoulder. He stated that house cleaning and lifting aggravates his pain. He indicated that he can only lift up to 25 pound and that pushing and pulling aggravates his pain. He struggles to lift his arm over his shoulder. On a day to day basis, his pain is at a 3 to 4 on a scale of 1 to 10, and his worst shoulder pain gets up to a 7. Claimant also testified that he has difficulty sleeping due to his pain, but he admitted that this difficulty is not just due to his right upper extremity but is also due to his other pre-existing medical conditions. During his deposition, Claimant testified that his right shoulder was better, but it was not as good as it was before his injury.<sup>47</sup>

#### The Alleged Employers and Insurers

53. In the employee's initial Claim for Compensation, "Job Finders" was the only employer alleged, and its address was noted to be "1729 West Broadway, Columbia, MO 65201." Job Finders was named the same way and with the same address in both subsequently-filed Amended Claims for Compensation. When Job Finders finally filed its late Answer, it listed its name as "Job Finders Employment Services (Alleged)" and listed its address as virtually the same as alleged by the Claimant: "1729 West Broadway, Suite #4, Columbia, MO 65201." In its Answer, Job Finders Employment Services (hereinafter Job Finders) listed National Union Fire Insurance of Pittsburg as its insurance carrier.<sup>48</sup>

#### Ann Williams

54. On January 14, 2013, Ann Williams testified by deposition.<sup>49</sup> Ms. Williams is employed by Job Finders Employment Services; her title is president of the company.<sup>50</sup> She testified that Job Finders is a Sub S corporation and that she is the only principal of the company. Job Finders is located at 1729 West Broadway, Columbia, Missouri 65203. Ms. Williams stated that Job Finders is a staffing company that "located employees to place on assignment with our clients."<sup>51</sup> She testified that she now has six or seven employees. Initially, she indicated she could not recall how many employees she had in July 2009, but upon further questioning indicated it would be fewer employees than she has now, "maybe five."<sup>52</sup> Ms. Williams's attorney then pointed out that Ms. Williams may have misunderstood the question, because "she [Ms. Williams] doesn't believe she employed any of those folks."<sup>53</sup> Ms. Williams then changed her answer, stating that

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<sup>46</sup> Claimant Exh. 5, p. 29.

<sup>47</sup> MU Exhibit 50.

<sup>48</sup> MU Exh. 4.

<sup>49</sup> Optima Exh. 1.

<sup>50</sup> Optima Exh. 1, pp. 7-8.

<sup>51</sup> Optima Exh. 1, p. 8.

<sup>52</sup> Optima Exh. 1, p. 9.

<sup>53</sup> Optima Exh. 1, p. 9.

those five employees that worked in her office were employed by ACEO.<sup>54</sup> Those employees applied for their jobs with Ms. Williams; she agreed to have them work in her office, and then she entered into “an employee leasing agreement with ACEO or whatever their name was at the time.”<sup>55</sup> She further testified that she had an agreement with ACEO to provide workers compensation insurance for her office. Ms. Williams testified that she did not have separate insurance coverage for Job Finders.<sup>56</sup>

55. Ms. Williams testified that she has never met Claimant. She stated that Claimant applied for a job with Job Finders by filling out an application and being interviewed by Job Finders.<sup>57</sup> Job Finders checked his references and sent his paperwork to ACEO.<sup>58</sup> ACEO maintained Claimant’s personnel file. Ms. Williams testified that Job Finders then leased Claimant from ACEO, and Job Finders placed him on an assignment with the University of Missouri, the client of Job Finders.<sup>59</sup> In Claimant’s case, the University sent out a bid request, Job Finders submitted a bid, and the University of Missouri accepted the bid.<sup>60</sup> The University required a Certificate of Insurance before the bid from Job Finders would be accepted.<sup>61</sup> ACEO submitted the Certificate to the University on the behalf of Job Finders.<sup>62</sup> At the time of Claimant’s injury on July 1, 2009, there was a Certificate of Insurance on file stating that “coverage is limited to Optima Staffing employees placed with Job Finders Employment Services.”<sup>63</sup>

56. After hiring people, Job Finders gives the people a handbook with policies, regulations, and instructions regarding their employment placement.<sup>64</sup> Job Finders gave such a handbook to Claimant. According to Ms. Williams, the University had no say in the hiring process.<sup>65</sup> She also indicated that Job Finders called people like Claimant “staffers” – not employees; she believes such people were employees of ACEO.<sup>66</sup>

57. Ms. Williams indicated that Job Finders retained the right to terminate the employment relationship between Claimant and the University.<sup>67</sup> If Claimant was unable to appear for work, he was to contact Job Finders and the University.<sup>68</sup>

58. According to Ms. Williams, Job Finders had the authority to make contact with the University to check on staffing issues, deal with complaints, and such.<sup>69</sup> Job Finders

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<sup>54</sup> Optima Exh. 1, p. 10.

<sup>55</sup> Optima Exh. 1, p. 10.

<sup>56</sup> Optima Exh. 1, p. 30.

<sup>57</sup> Optima Exh. 1, p. 11.

<sup>58</sup> Optima Exh. 1, p. 11.

<sup>59</sup> Optima Exh. 1, pp. 11-12, 15.

<sup>60</sup> Optima Exh. 1, pp. 17-18 and deposition exh. 1.

<sup>61</sup> Optima Exh. 1, p. 19.

<sup>62</sup> Optima Exh. 1, p. 20.

<sup>63</sup> Optima Exh. 1, p. 28 and deposition exh. 8.

<sup>64</sup> Optima Exh. 1, p. 16 and Claimant’s testimony at trial.

<sup>65</sup> Optima Exh. 1, p. 15.

<sup>66</sup> Optima Exh. 1, p. 12.

<sup>67</sup> Optima Exh. 1, p. 16.

<sup>68</sup> Optima Exh. 1, pp. 16-17.

<sup>69</sup> Optima Exh. 1, p. 19.

would also have some say in the discipline of staff like Claimant.<sup>70</sup>

59. Ms. Williams provided a copy of a Staffing Vendor Agreement between Job Finders Employment Services and ACEO, LLC d/b/a Optima Staffing, Inc.<sup>71</sup> The document indicates Job Finders is the “client” and ACEO d/b/a Optima is the “Staffing Firm.”<sup>72</sup> Ms. Williams testified that she understood that this agreement was an agreement with ACEO, and she did not know who Optima Staffing, Inc. was.<sup>73</sup>
60. Ms. Williams was shown a document that was marked as deposition exhibit 8 and which was attached to her deposition; the document was a certificate of insurance like the one the University required under the bid proposal.<sup>74</sup> That particular Certificate of Insurance indicates that coverage was limited to Optima Staffing employees placed with Job Finders Employment Services; it was for a coverage period that encompasses the date on which Claimant was injured.<sup>75</sup>
61. Ms. Williams indicated that if a staffer had a work injury they would deal with ACEO.<sup>76</sup> She indicated that she did not receive or pay medical bills, nor did she pay for any time off.
62. Ms. Williams was questioned about a document titled “Optima Staff, Inc. Co-employment Agreement.”<sup>77</sup> That document purports to be an agreement between Optima Staffing, Inc. and “co-employer” Job Finders Employment Services. The agreement is dated January 1, 2009, but it is not signed by anyone on behalf of Optima. When asked whether she understood the relations between Job Finders and Optima to be that of co-employers, she answered “Not truly, no.”<sup>78</sup>
63. Upon cross examination, Ms. Williams was asked how many people she approved for work that ACEO or Optima hired and who then were placed with the University or in other jobs. She indicated she was uncertain how many people fit those parameters in 2009, but she thinks it was between 1 and 75 people.<sup>79</sup> She later suggested that the number might be 200 to 300 but she was not certain. She also indicated that she believed that in 2010, ACEO produced over 300 W-2s as the employer.<sup>80</sup>
64. Ms. Williams testified about a letter, dated July 2, 2009, from Susan Wallace to Jeff Noblin of Corporate Management.<sup>81</sup> The letter is on letterhead for Job Finders Employment Services and it indicates that Claimant came into the office that afternoon and was headed over to Occupational Therapy, who would be sending “both of us

<sup>70</sup> Optima Exh. 1, p. 19.

<sup>71</sup> Optima Exh. 1, deposition exh. 6.

<sup>72</sup> Optima Exh. 1, deposition exh. 6.

<sup>73</sup> Optima Exh. 1, pp. 25-26.

<sup>74</sup> Optima Exh. 1, p. 28.

<sup>75</sup> Optima Exh. 1, pp. 28-29.

<sup>76</sup> Optima Exh. 1. P. 36.

<sup>77</sup> Optima Exh. 1, deposition exh. 7.

<sup>78</sup> Optima Exh. 1, p. 38.

<sup>79</sup> Optima Exh. 1, pp. 39-40.

<sup>80</sup> Optima Exh. 1, p. 40.

<sup>81</sup> Optima Exh.. 1, p. 44 and deposition exh. C.

paperwork.”<sup>82</sup> Ms. Williams testified about this document as follows:

Q. Is that a letter to Corporate – Jeff Noblin, Corporate Management from Susan Wallace, staffing manager?

A. It looks like.

Q. Did she work for you?

A. She did.

Q. She worked for you?

A. Yes.

Q. And she was a staffing manager. What does that mean?

A. She placed people on assignment.<sup>83</sup>

65. Ms. Williams further testified that although Claimant picked up his checks at Job Finders, his employer was ACEO and that name “was on every paycheck.”<sup>84</sup>

66. Ms. Williams testified that at the time Claimant was hurt, “[t]he University would do a report of injury and they would have either sent it to ACEO, Corporate management of Job Finders. job [sic] Finders then mailed it or probably faxed it in those days to Jeff Noblin at Corporate Management or ACEO.”<sup>85</sup>

67. Ms. Williams agreed that people would come to Job Finders to submit a job application, she would turn them over to ACEO to become ACEO’s employees, and then she would assign the people over to their job.<sup>86</sup> Workers like Claimant would turn in their hours worked to Job Finders, who would forward the number of hours worked to ACEO.<sup>87</sup> ACEO then calculated the wages and withholding amounts. The money for payroll was billed to Job Finders, who gave ACEO the money for gross payroll along with a fee. ACEO sent the withholding money to Optima for processing and for the filing of related paperwork with the government. Ms. Williams further indicated that the people would get paid with a check from ACEO that they would pick up at the Job Finders location.<sup>88</sup> If people got sick or had to miss a day of work, they would report this to Job Finders and to the University. It is her understanding that the call to Job Finders was a courtesy call and that “the University has the assigned person fill out their own time card and then the supervisor, who would have been Tom Ander, signed it verifying the hours and they would either fax it or the person assigned would bring it to our office [Job Finders].”<sup>89</sup>

68. Ms. Williams acknowledged that she never had any communication with Optima Staffing.<sup>90</sup> Her contact with Optima was limited to the “co-employment” agreement that was attached to her deposition as deposition exhibit 7. That document was given to her

<sup>82</sup> Optima Exh. 1, deposition exh. C.

<sup>83</sup> Optima Exh. 1, p. 44.

<sup>84</sup> Optima Exh. 1, p. 45.

<sup>85</sup> Optima Exh. 1, p. 46. g

<sup>86</sup> Optima Exh. 1, pp. 57-58.

<sup>87</sup> Optima Exh. 1, p. 58.

<sup>88</sup> Optima Exh. 1 and Claimant Exh. 18.

<sup>89</sup> Optima Exh. 1, pp. 58-59. The individual mentioned actually spells his name Andert, according to deposition exh. D.

<sup>90</sup> Optima Exh. 1, p. 60.

by Roy Homes and Natalie Finke of Alliance Group.<sup>91</sup>

69. ACEO had an employee leasing agreement with ACEO, LLC. Ms. Williams explained that ACEO, LLC was a subsidiary of a parent company called Alliance Companies. Ms. Williams testified that Alliance Companies was also known as National HR. Prior to January 2009, they were known as Total HR Employer Services. She also indicated that ACEO/National HR/Alliance Companies answered their phone as Corporate Management, Inc.

70. David Jatho and Roy Hombs have some involvement with these companies.<sup>92</sup>

Ray Hombs

71. The deposition of Roy Hombs was taken on or about August 3, 2011.<sup>93</sup> Mr. Hombs testified that he had appeared for the scheduled deposition pursuant to a subpoena duces tecum served on David Jatho of National HR on or about July 21, 2011. Mr. Hombs testified that David Jatho was one of the owners of National HR. Mr. Hombs also indicated that he was employed by Corporate Management Company and not by National HR.

72. In his deposition, Roy Hombs explained that Corporate Management is a business while National HR is a fictitious name and not a company.<sup>94</sup> Corporate Management has workers' compensation.<sup>95</sup> Corporate Management works for a company called Optima Staffing<sup>96</sup> Corporate Management had a contract with Optima to process payroll, accept Claims information, and forward tax information onto Optima.<sup>97</sup> Mr. Hombs explained that his company "processed" information for Optima, so paperwork was sent to his office.

73. On Claimant's Report of Injury, "Optima Staffing" is listed in the left hand corner with Mr. Hombs's former office location listed as the address.<sup>98</sup>

74. Mr. Hombs explained that whenever someone files a Claim for Compensation, the matter is handled by Optima.<sup>99</sup> Mr. Hombs explained that Job Finders would send him the Claim for Compensation, and he would send that on to Optima.<sup>100</sup> Although Ms. Williams testified that she had never heard of Optima, Mr. Hombs produced an agreement entitled the Optima Staffing Co-Employment Agreement; this agreement purports to be between Optima Staffing and Job Finders as a co-employer.<sup>101</sup> On page 2, paragraph 7, of this agreement, the document indicates that Optima is responsible for

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<sup>91</sup> Optima Exh. 1, p. 61.

<sup>92</sup> Claimant Exh. 18, pp. 9-16.

<sup>93</sup> Claimant Exh. 18.

<sup>94</sup> Claimant Exh. 18.

<sup>95</sup> Claimant Exh. 18.

<sup>96</sup> Claimant Exh. 18.

<sup>97</sup> Claimant Exh. 18.

<sup>98</sup> Claimant Exh. 18, p. 69, and Exh. 23.

<sup>99</sup> Claimant Exh. 18, p. 19.

<sup>100</sup> Claimant Exh. 18, p. 22.

<sup>101</sup> Claimant Exh. 18, p. 24, and deposition exh. 2.

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administering workers' compensation benefits for the employees.<sup>102</sup>

75. Mr. Hombs testified that he was not the custodian of records for National HR or ACEO. He did testify about an agreement (Claimant's Exh. 19) between Optima Staffing and Job Finders. That agreement was not signed by either Job Finders or Optima Staffing. Mr. Hombs did not know whether an agreement was ever reached between the parties.

Miscellaneous

76. On July 1, 2009, ACEO, LLC was insured for its workers' compensation liability by Guarantee Insurance Company<sup>103</sup> and Optima Staffing, Inc. was insured by National Union Fire Insurance Co.<sup>104</sup>

**CONCLUSIONS OF LAW**

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

**Issue 1: Jurisdiction**

It has long been settled by case law that in Missouri that the Commission and the Division of Workers' Compensation have the jurisdiction to decide issues in a worker's compensation case, including insurance coverage. In *Mikel v. Pott Industries*, the Missouri Property and Casualty Guaranty Association asserted that the Commission did not have jurisdiction to determine whether it had insurance coverage in the claim made against them.<sup>105</sup> It further asserted that the declaratory judgment action in the circuit court would be an appropriate method of determining coverage issue. The Court held that the legislature had granted the Commission those powers necessary to discharge its duties under the worker's compensation law. It then continued to cite a long line of cases that held: (1) In a worker's compensation proceeding, liability is not fixed until it is determined from whom the employee can recover; (2) That the Commission has subject-matter jurisdiction to determine which of two insurers is liable to an injured worker; (3) The Commission is authorized to determine the validity of the insurance policies; and (4) The Commission is authorized to determine whether to give full faith and credit to the judgment of a court in a sister state. The Court further held that a determination of whether Missouri Casualty was liable to the injured employee was essential to the Commission's function and the Commission had jurisdiction to do so. The Court pointed out that to not do so would result in worker's compensation cases being needlessly delayed pending outcome of the declaratory judgment action and such piecemeal actions would lead to delay, confusion, and inconsistency in the administration of the workers' compensation system.

Section 287.650 RSMo grants the Division of Workers' Compensation such powers as may be necessary to carry out the provisions of this Chapter. In *Harris v. Pine Cleaners, Inc.*, the Court made it clear that the Commission has the right and duty to receive evidence, to pass upon

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<sup>102</sup> Claimant Exh. 18, p. 26, and deposition exh. 2.

<sup>103</sup> MU Exh. 2.

<sup>104</sup> Claimant Exh. 20.

<sup>105</sup> 896 S.W.2d 624 (Mo. banc 1995).

its probative effect, and to rule upon every issue presented which pertains to a determination of liability under the Missouri Workers' Compensation Act.<sup>106</sup>

I find that the Division of Workers' Compensation has exclusive jurisdiction to hear this workers' compensation case and address all issues raised.

**Issue 2: Accident or occupational disease arising out of and in the course of employment**  
**Issue 3: Medical causation**

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.<sup>107</sup> Proof is made only by competent and substantial evidence, and may not rest on speculation.<sup>108</sup> Medical causation not within lay understanding or experience requires expert medical evidence.<sup>109</sup> When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.<sup>110</sup>

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.<sup>111</sup> Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.<sup>112</sup> In addition, the fact finder is encumbered with determining the credibility of all witnesses.<sup>113</sup> It is free to disregard that testimony which it does not hold credible.<sup>114</sup>

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."<sup>115</sup>

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."<sup>116</sup> An injury shall be deemed to arise out of and in the course of

<sup>106</sup> 296 S.W.2d 27 (Mo. banc 1956).

<sup>107</sup> *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

<sup>108</sup> *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

<sup>109</sup> *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

<sup>110</sup> *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

<sup>111</sup> *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

<sup>112</sup> *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

<sup>113</sup> *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

<sup>114</sup> *Id.* at 908.

<sup>115</sup> Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

<sup>116</sup> Section 287.020.3(1).

employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.<sup>117</sup>

I find that Claimant was a credible and convincing witness. I find that at the time of the injury, Claimant was working with one other employee and they were hurrying to complete the cleaning and sanitizing of the operating room. Claimant was mopping with a heavy mop that had a long handle. Claimant was using long, sweeping strokes with his right hand to obtain maximum coverage and when he swung out, he felt a painful pop in his right shoulder. He kept working, switching to the task of sanitizing the walls, but his arm became so painful he had to stop working.

Claimant made a report of injury that night to Tom Andert, his supervisor at the University. Claimant was referred by his alleged employer, Job Finders, to Dr. Robert Herting at Boone Hospital, whom he saw July 2, 2009. Dr. Herting noted that Claimant was mopping in the operating room at the University Hospital using a heavy mop and that he had swung out his arm in an abducted position with his right shoulder to try and minimize the amount of walking he had to do while maximizing the area he was covering with the mop. When Claimant swung his arm this way, he felt a painful pop in his right shoulder (at the top). Dr. Quinn's records also reflect a history of Claimant swinging a mop and feeling pain.

Claimant had no prior problems or injury to his right shoulder. The MRI taken by Dr. Herting and the surgery by Dr. Quinn verified that Claimant sustained a rotary cuff tear in his right shoulder as a result of this accident. Even though Claimant was doing a job he normally performed, in this case he was hurrying to cover a larger area by making long, sweeping strokes with the heavy mop and this work activity can be traced to his employment as a proximate cause.

This case is distinguishable from the case of *Miller v. Missouri Highway and Transportation*, where the claimant was walking briskly and felt a pop in his knee.<sup>118</sup> The Court in *Miller* pointed out that the employee's job did not require him to walk briskly and he walked briskly at home. It is also distinguishable from *Johme v. St. John's Mercy Healthcare*, where the employee was making a pot of coffee in the office kitchen and turned and fell; in that case, the Court found that the employee failed to show the risk was related to her employment as opposed to a risk she was equally exposed to in her normal, non-employment life.<sup>119</sup>

As previously noted, the claimant in this case was using a long, heavy mop to clean a floor in an operating room; in addition, he was making long, sweeping strokes to cover a large area. He was also hurrying to complete the job because there were only two workers on the job that night, including himself. While making a sweeping stroke and extending his arm, he felt his shoulder pop and felt pain. These facts reasonably support a finding that Claimant's injury was causally connected to his work activity. I find that this was a risk related to Claimant's employment as opposed to a risk to which he was equally exposed to in his normal non-

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<sup>117</sup> Section 287.020.3(c).

<sup>118</sup> 287 S.W.3d 671 (Mo. banc 2009).

<sup>119</sup> 366 S.W.3d 504 (Mo. banc 2012).

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employment life. Claimant did not sanitize the floor with a heavy long mop at his home. He did not have to clean 18-30 operating rooms a night. He did not have to use a mop with his right hand and arm by reaching out with a sweeping motion to cover a larger area. He testified credibly that he mainly used his right arm to work because of previous surgery to his left shoulder that caused pain when he used it. In *Jason Pope v. Gateway to the W. Harley Davidson*, the Court found that the claimant in *Pope* was required to wear a motorcycle helmet at work and was required to descend stairs to a lower level, and in doing so, had to carry his helmet.<sup>120</sup> The employee in *Pope* fell and injured himself while completing this work task. The employer/insurer claimed that the employee in *Pope* was equally exposed to the risk outside his employment of walking down stairs while carrying a helmet and thus, the injury did not arise out of employment. The Court rejected that argument and held that the employee was injured at work because he was performing work activities. In this case, Claimant Calvin Marshall was injured at work because he was performing his work activities.

I find that Claimant sustained an accident arising out of and in the course and scope of his employment on July 1, 2009, while mopping a surgical room at the University of Missouri Hospital. As for medical causation, I note that Claimant testified credibly that he had no prior problems with the right shoulder prior to July 1, 2009. Dr. Shuter testified that when he examined Claimant on July 27, 2010, Claimant denied any history of injury or symptoms referable to his right shoulder prior to the July 2009 work injury. Dr. Herting, in his intake note of July 2, 2009, shows no past history of right shoulder pain or problems. His history regarding the accident was consistent with Claimant's testimony at trial and with the other medical records. Likewise, Dr. Quinn's history was also that Claimant was swinging a mop and felt pain in his right shoulder.

Dr. Shuter testified credibly that he was of the opinion, based upon reasonable medical certainty, that his diagnosis in regard to the right shoulder was a tear and tendinopathy of the right rotary cuff and that these were caused by the [work] occurrence on July 1, 2009. Specifically, the doctor believed the injury occurred when Claimant was using a heavy mop to clean the floor of the operating room and was using long strokes to obtain maximum coverage, and then felt a pop in his shoulder. This pop was briefly painful but became more painful as Claimant continued to clean walls that night.

There is no medical evidence or other evidence that Claimant had a pre-existing condition of his right shoulder that could or did cause a rotary cuff tear or for that matter, even cause shoulder pain or limitation of movement. The only cause of Claimant's severe disability to the right shoulder is the work injury of July 1, 2009, which necessitated the treatment by Dr. Herting and Dr. Quinn.

I find Dr. Shuter's testimony - that the work injury of July 2009 was the prevailing factor in the resulting medical condition - to be credible and convincing. I also note that there was no medical expert testimony to the contrary. Claimant has met his burden of proof as to accident arising out of and in the course of employment and has met his burden of proof as to medical causation.

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<sup>120</sup> No. ED 98108 (Mo.App. 2012).

**Issue 4: Whether certain facts have been admitted by any of the alleged employers or alleged insurers by the late-filing of Answer or the failure to file an Answer?**

In his claim, filed December 21, 2009, Claimant named Job Finders as the sole employer; Claimant also alleged an average weekly wage of \$320.<sup>121</sup> Claimant filed an Amended Claim for Compensation on April 22, 2010, naming Job Finders and Optima Staffing, Inc., as the employers and again listing the average weekly wage of \$320. Optima submitted a timely answer to the Claim for Compensation on May 18, 2010. Job Finders did not file an Answer to the Amended Claim for Compensation.

Claimant filed a Second Amended Claim for Compensation on August 11, 2010, naming Job Finders, Optima Staffing, Inc., and University of Missouri Hospital and Clinics as employers. Optima Staffing, Inc. filed a timely answer on August 24, 2010, and the Curators of the University of Missouri filed a timely Answer on August 25, 2010. Job Finders again did not file an Answer to Second Amended Claim for Compensation.

Finally, on November 14, 2012, Job Finders Employment Services filed an Original Answer to Claim for Compensation, more than two years after the last Amended Claim for Compensation was filed, and over three years after the Original Claim was filed.

Pursuant to 8 CSR 50-2.010(8)(B), unless the Answer to Claim for Compensation is filed within thirty (30) days from the date the Division of Workers' Compensation acknowledges receipt of the claim or any extension previously granted, the statements of fact in the Claim for Compensation shall be deemed admitted for any further proceedings. Failure to file an Answer within the appropriate time limits is deemed to have admitted the facts stated in the claim for compensation.<sup>122</sup> As found in the case of *Lumbard-Bock v. Widhell's Donut Shop*, this includes the wage rate.<sup>123</sup> Employment questions are factual issues, and a claimant's employment status must be determined on the peculiar facts of each case.<sup>124</sup> By not filing a timely Answer, Job Finders has admitted to an average weekly wage of \$320; nevertheless, the average weekly wage will be discussed more thoroughly later in this Award. And by not filing a timely Answer, Job Finders is also deemed to have admitted that Calvin Marshall was an employee of Job Finders, and as stated in box 9 of the Claims for Compensation, that Job Finders was "the employer in whose employment the injury or occupational disease occurred."

Counsel for Job Finders argued at the hearing that Job Finders was not properly named in the Claim for Compensation or in any of the Amended Claims, suggesting that because the claim

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<sup>121</sup> On the Claim for Compensation form, Claimant described the work accident as follows: "Claimant was mopping with a large mop, he did a long stroke to the right, right shoulder gave out and felt a pop and then went over to sanitize a wall, went up the wall with right arm it gave our again resulting in permanent injury."

<sup>122</sup> 8 CSR 50-2.010(8)(B). See also *Anderson v. Veracity Research Co.*, 299 S.W.3d 720, 726, 728 (Mo. App. W.D. 2009).

<sup>123</sup> 939 S.W.2d 456 (Mo.App.W.D. 1996, overruled in part on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

<sup>124</sup> *Viselli v. Mo. Theatre Bldg. Corp.*, 234 S.W.2d 563 (Mo. 1950), abrogated by *Bass v. Nat'l Super Mkts., Inc.*, 911 S.W.2d 617 (Mo. banc 1995); *Hutchison v. St. Louis Altenheim*, 858 S.W.2d 304 (Mo. App. E.D. 1993), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). See also 8 CSR 50-2.010(8)(B).

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listed “Job Finders” instead of the exact technical name “Job Finders Employment Services,” it was not even a party to the case. This argument is without merit. As the Court stated in *Wiele v. Nat’l Super Mkts., Inc.*, procedural technicalities are not to be employed in an imperious manner to frustrate and defeat substantively meritorious claims.<sup>125</sup>

In her deposition, Ann Williams admitted that she is the principal and only shareholder of Job Finders Employment Services; that she is familiar with Claimant and knew that he had applied for a job with Job Finders and was subsequently hired; and that Job Finders Employment Services is located at 1729 West Broadway, Columbia, Missouri, which is the address listed on every Claim filed by Calvin Marshall. In addition, throughout her deposition, Ms. Williams even referred to her company as Job Finders, just as alleged in the Claims for Compensations.

Ann Williams and Job Finders were obviously aware of whom Claimant was; Ann Williams and Job Finders received a timely report of injury; and Ann Williams and Job Finders received the Claims for Compensation. They just chose not to answer them and cannot now claim surprise as if they are a different employer that knew nothing of a Claim by Calvin Marshall against Job Finders.

By choosing to ignore all of the three Claims for Compensation it received, Job Finders admitted Calvin Marshall is its employee and is therefore liable as his employer for payment of all workers’ compensation benefits that Claimant is entitled to under the law as a result of this incident.

**Issue 5: Who was the employer or co-employers of Claimant at the time of the work injury?**

**Issue 6: If there are co-employers, is there a right of contribution pursuant to Section 287.130, and if so, what is the amount?**

The employer is defined (in part) by the Workers’ Compensation Law, Section 287.030.1 RSMo, as any entity (including a person, partnership, corporation, association, and others) that uses the service of another for pay. An employee is defined by Section 287.020.1 RSMo as a person in the service of an employer under any contract, express or implied, oral or written. Even ignoring the argument discussed above that Job Finders is deemed to have admitted its status as employer because it failed to timely file an Answer, Job Finders Employment Services was still an employer of Claimant and was still an employer required to have worker’s compensation insurance coverage. Ann Williams admitted in her deposition that in 2009, it provided jobs for 1 to no more than 75 people and it also caused to be produced through ACEO, approximately 200-300 W-2s in 2009.<sup>126</sup> She also testified that in 2009 she usually had four or five people working for her in her office, although she did not consider them to be her employees.

Whether a person is an employee is usually decided in cases where there is a question of the worker being an independent contractor or employee. The Courts in those cases first apply a

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<sup>125</sup> 948 S.W.2d 142, 146 (Mo.App. 1997), overruled in part on other grounds by *Hampton*, 121 S.W.3d at 223, 226. See also *Jones v. GST Steel Co.*, 272 S.W.3d 511, 518 (Mo.App. 2009).

<sup>126</sup> Claimant Exh. 32.

two factor test. They look first at controllable services and if that test fails, they consider factors included in the relative practice of the work test. In *State v. Turner*, Mr. Turner was convicted of failing to insure his employees under worker's compensation and he appealed on the grounds he was not an employer because he did not have 5 or more "employees."<sup>127</sup> The Court considered the test as to when an employer-employee relationship exists. In this analysis, several factors must be considered and those are: (1) extent of control, (2) actual exercise of control, (3) duration of employment, (4) right to discharge; (5) method of payment, (6) degree to which alleged employer furnished equipment, (7) extent to which work is regular business of alleged employer, and (8) the employment contract.

Upon careful consideration, it is clear that Claimant was an employee of Job Finders Employment Services. Job Finders took employee's job application, hired him, determined his rate of pay, and then assigned him to the University Hospital as a temporary employee pursuant to its contract with the University to furnish temporary employees. Claimant testified that if he needed to miss a day of work he had to contact both Job Finders and the University. Job Finders as well as the University had the right to terminate him. Claimant picked up his payroll checks every week at Job Finders, although he did not know who issued the checks. When he was injured, he reported his injury to both his supervisor at the University and to Job Finders. Job Finders directed which physician he was to go to for medical treatment after his injury. These facts meet the test of an employer under Section 287.030.1 RSMo and the *State v. Turner* case (and other cases cited therein).<sup>128</sup>

Optima Staffing, Inc., however, does not meet the test as an employer. Although Job Finders Employment Services attempted to enter into an arrangement whereby Optima Staffing was a co-employer, it failed to do so. The statute does not require that the proposed co-employer agreement be signed, but the acts of the parties in this case do not meet the level required under the tests to make Optima Staffing an employer of the claimant. Optima Staffing did not hire Claimant. Optima Staffing did not have any control over Claimant's job at the University. Optima Staffing did not have the right to terminate Claimant. Optima Staffing may have issued checks for Claimant's payroll, and it did issue checks for his TTD. In addition, Claimant did contact Optima Staffing when he had problems with TTD checks and Optima did pay a small portion of his medical bills. Payment of wages is one of the factors relevant to the existence of an employee relationship, but it is not determinative.<sup>129</sup> It is apparent from the deposition testimony of Roy Hombs that the arrangement Corporate Management worked out was one that essentially made Optima Staffing nothing more than a payroll company for Job Finders Employment Service; in this relationship, Optima would issue payroll checks, file federal tax forms, pay TTD claims, and give an accounting to Job Finders of disbursements. Ann Williams, President of Job Finders Employment Services, even denied that Optima Staffing was a co-employer. She testified that the temporary employees such as Claimant were actually employees of ACEO and those employees were leased to Job Finders and then Job Finders placed them on assignment. Ms. Williams' testimony, however, is not entirely credible in light of the overall facts in this case. Nevertheless, in her deposition, Ms. Williams was asked whether a staffing agreement (exhibit 7) provides that Optima Staffing and Job Finders are co-employers, and she

<sup>127</sup> 952 S.W.2d 354 (Mo.App. W.D. 1997).

<sup>128</sup> Job Finders liability as an employer is also discussed under Issue 4.

<sup>129</sup> *Hill v. 24<sup>th</sup> Judicial Circuit*, 765 S.W.2d 329 (Mo.App. ED 1989).

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answered “Not truly, no.” Thus, even Ms. Williams, on behalf of Job Finders, denies that there was an arrangement between Optima and Job Finders making them co-employers.

I also find that The University of Missouri is liable in this case to Claimant as a statutory employer. Section 287.040.1 RSMo provides that any person who has work done under contract on its premises, which is an operation of the usual business he carries on, shall be deemed an employer and shall be liable to the contractor’s employees when injured while doing work in the usual course of business.<sup>130</sup> The deposition Exhibits 1, 2, 3, and 4 that were attached to Ann Williams deposition<sup>131</sup> show that the University entered into a contract to obtain temporary employees on its premises. Cleaning the operating rooms and recovery rooms is a job that is the usual business of the University Hospital. Claimant was injured on the University Hospital’s premises while cleaning an operating room. This was work he performed approximately 5 days a week, 8 hours per day. He had been doing this same job since November 2008. He clocked in and clocked out of the University Hospital. A University supervisor directed what he would do each day. The University supplied his work uniforms. The University had the right to terminate his employment. All these circumstances resulted in the University being a statutory employer under Section 287.040.1, RSMo.

Since Job Finders Employment Services, Claimant’s employer, did not have worker’s compensation coverage, the University is liable to Calvin Marshall as a statutory employer for his compensation for his injury of 2009 and the unpaid medical bills. As discussed above, ACEO d/b/a Optima Staffing was not an employer under the facts in this case and has no liability. Job Finders Employment Services would be liable to the University under Section 287.040.3 as a primary liable party.

As to the question regarding the right of contribution, Section 287.130, RSMo, provides as follows:

If the injury or death occurs while the employee is in the joint service of two or more employers, their liability shall be joint and several, and the employee may hold any or all of such employers. As between themselves such employers shall have contribution from each other in the proportion of their several liability for the wages of such employee but nothing in this chapter shall prevent such employers from making a different distribution of their proportionate contributions as between themselves.

I have found that the co-employers in this case are Job Finders and the Curators of the University of Missouri. I further find that their liability shall be joint and several and that each employer’s contribution is one-half of the total Award for permanent partial disability and unpaid medical expenses.

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<sup>130</sup> See also *Olendorff v. St. Luke’s Hospital*, 293 S.W.3d 47 (Mo.App. E.D. 2009), *McGrath v. VRA I, Ltd. Partnership*, 244 S.W.3d 220 (Mo.App. E.D. 2008).

<sup>131</sup> Claimant’s Exh. 32.

**Issue 7: Whether the employer or employers had workers' compensation insurance and if so, with what company?**

Claimant's Exhibit 14, a certified copy of a document from the Missouri Division of Workers' Compensation, indicates that there were no records of insurance found for Job Finders Employment Services for the date of July 1, 2009. Ann Williams admitted in her deposition testimony that Job Finders Employment Services has had a workers' compensation policy since 2011, but did not have one in 2009. I find that employer Job Finders Employment Service did not have workers' compensation insurance at the time of Claimant's 2009 work accident.

The University of Missouri is liable in this case to Claimant as a statutory employer under Section 287.040.1, RSMo, as discussed previously. The University was self-insured for purposes of workers' compensation liability.

Since Job Finders Employment Services, Claimant's employer, did not have worker's compensation coverage, the University is liable to Claimant Calvin Marshall as a statutory employer for Claimant's compensation for his injury of 2009, including the permanent partial disability benefits and the unpaid medical bills.

**Issue 8: If an employer did not have workers' compensation insurance, should the owners be held personally responsible?**

I have found that Job Finders and the Curators of the University of Missouri are co-employers in this case. Job Finders, however, failed to insure its workers' compensation liability. Job Finders is responsible as an uninsured employer. I also find that Ann Williams, the sole principal owner and president of Job Finders, is personally liable for Claimant's workers' compensation benefits (subject to the discussion on co-employers above).

A court may pierce the corporate veil or disregard the separate corporate entity if the separateness is used as a device to defraud a creditor.<sup>132</sup> A Missouri court will disregard the corporate entity and hold the corporate owners liable if the following can be shown: (1) control, not mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practices in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; (2) such control must have been used by the corporation to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or dishonest and unjust act in contravention of claimant's rights; and (3) the control and breach of duty must proximately cause the injury or unjust loss that is the subject of the complaint.<sup>133</sup>

In this case, there was a complete domination of Job Finders by Ann Williams, as the sole owner or principal of the corporation. She completely and single-handedly dominated and controlled Job Finders' finances, policy and business practices. Job Finders as a corporation had no separate mind, will, or existence of its own. Job Finders is the alter ego of Ann Williams.

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<sup>132</sup> *Sansone v. Moseley*, 912 S.W.2d 666, 669 (Mo. App. 1995).

<sup>133</sup> *Collet v. American National Stores, Inc.* 708 S.W.2d 273 (Mo.App. 1986). See also *66 Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

When a corporation is so dominated by a person as to be a mere instrument of that person, and indistinct from the person controlling it, the court will disregard the corporate form if its retention would result in injustice.<sup>134</sup>

Ann Williams chose not to purchase workers' compensation insurance for Job Finders on the alleged basis that the employees she was hiring were not her own, but another entity's and she just leased or rented them from that other entity in order to staff clients and make a profit off of them for herself. This was so even though the evidence clearly showed that Claimant and the other 200-300 people she hired that year were employees of Job Finders. Ann Williams devised a complicated plan to label her 200-300 employees "staffers" instead of "employees," claim that they were employees of a different company, and entered into Leasing and Co-Employer agreements for the purpose of avoiding workers' compensation liability to her employees. Ann Williams chose to ignore, at least initially, three formal Claims filed against Job Finders by Calvin Marshall.<sup>135</sup> She chose to ignore depositions that she received notices to attend and then even at the hearing, still claimed, through counsel, that she did not have to Answer the Claims or allow evidence in because technically, the name of her company was stated as an abbreviated "Job Finders" instead of "Job Finders Employment Services, Inc." Ann Williams chose not to participate in the case until finally being subpoenaed to testify herself. She chose to not allow Job Finders to pay its workers' compensation debt to Claimant and instead ignored the matter, perhaps hoping that it would go away. It did not go away, however, and she must now be held personally liable.<sup>136</sup>

Ann Williams' conduct resulted in a violation of a statutory duty to provide workers' compensation insurance to her employees, and her actions were in contravention of Claimant's legal rights. The statute required that Ann Williams purchase workers' compensation insurance for the corporation. She, however, chose not to purchase workers' compensation insurance for Job Finders. Her decision not to purchase workers' compensation insurance for Job Finders was in contravention of her legal and statutory duty and proximately caused Claimant's loss.

Claimant sustained a serious injury at work that required surgery, and even today, significant medical bills remain outstanding. If Job Finders had purchased workers' compensation insurance there would have been a means to pay for Claimant's medical treatment and other workers' compensation benefits. As the Commission found in *Guinnip v. Bannister Electrical and HVAC, LLC*,<sup>137</sup> based on this evidence, Ann Williams is personally liable for Calvin Marshall's workers' compensation benefits due to her complete domination of the corporation and her failure to abide by their legal and statutory duty to purchase workers' compensation insurance.

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<sup>134</sup> *Saidawi v. Giovanni's Little Place, Inc.*, 987 S.W.2d 501, 504-5 (Mo.App. E.D. 1999).

<sup>135</sup> Job Finders eventually did file an Answer out of time.

<sup>136</sup> *Collet v. American National Stores, Inc.*, 708 S.W.2d 273 (Mo. App. 1986); *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999).

<sup>137</sup> Injury No. 05-032672 2012 MOWCLR LEXIS 149 (Mo. LIRC 2012).

### Issue 9: Notice

It has been alleged that the Claimant did not provide timely notice of his accident as required by section 287.420, RSMo. 2005. This section provides, in relevant part, as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.<sup>138</sup>

The purpose of Section 287.420 is to give the employer a timely opportunity to investigate the facts surrounding the accident and to provide the employee with medical attention in order to minimize the disability.<sup>139</sup>

Failure to comply with the workers' compensation law requirement as to notice may be excused either for good cause or if the employer was not prejudiced by the failure to receive the notice. Notice or knowledge of an employee's potentially compensable injury that is given to or acquired by an employer's supervisory employee is imputed to the employer, even if the person to whom the notification is furnished is not the injured employee's direct supervisor.<sup>140</sup>

I find that Claimant met the requirements of Section 287.420 by giving written notice on the date of injury to Tom Andert, his supervisor at the University (Exhibit 8) and by giving oral notice to Job Finders Employment Services the next day. Notice or knowledge of the time, place and nature of worker's compensation, Claimant's injury is imputed to the employer Job Finders Employment Services when such notice is given to supervisory employee.<sup>141</sup>

The report of injury (Exhibit 7), which was prepared and filed by Optima Staffing through Jeff Noblin, Risk Coordinator, shows Claimant notified employer on July 2, 2009 of the injury. Jeff Noblin was an employee of Corporate Management, which acted as an agent for Job Finders as well as for Optima Staffing. Even if Claimant had not given notice, it would be excused in this case because it would not have prejudiced his employer, Job Finders Employment Services.<sup>142</sup> Job Finders Employment Services sent Claimant to Dr. Herting. Dr. Herting referred Claimant to Dr. Quinn, who did the surgery. I find that the employer Job Finders actually directed Claimant's medical care.

Further, notice is an affirmative defense and must be raised in the Answer. An Answer that states it is without knowledge to affirm or deny is insufficient to assert a defense of lack of proper notice.<sup>143</sup> Job Finders Employment Services, Optima Staffing, National Fire Insurance Company of Pittsburg, and the Second Injury Fund did not assert or raise lack of notice in their

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<sup>138</sup> Section 287.420, RSMo 2005.

<sup>139</sup> *Messersmith v. University of Missouri-Columbia*, 43 S.W.3d 829, 832 (Mo. banc 2001).

<sup>140</sup> *Gillam v. General Motors Corp.*, 913 S.W.2d 81 (Mo.App. 1995); *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652 (Mo.App. 1994); and *Ford v. Bi-State Development Agency*, 677 S.W.2d 899 (Mo.App. 1984).

<sup>141</sup> *Doerr v. Teton Trans. Inc.*, 258 S.W.3d 514 (Mo.App. S.D. 2008).

<sup>142</sup> *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo.App. W.D. 2001).

<sup>143</sup> *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121 (Mo.App. S.D. 1991).

Answers. The only party that raised a lack of notice in its Answer was the University of Missouri. I find, however, that actual written notice was given to Tom Andert, the University's employee and Claimant's supervisor, the night of the injury. The argument that Claimant did not provide notice is without merit as to all parties. Claimant has met his burden of proof as to the issue of notice.

### **Issue 10: Average Weekly Wage and Compensation Rates**

As noted above, Job Finders, by its failure to file a timely Answer to the Claims for Compensation, is deemed to have admitted the facts contained in the Claims. This includes the claimed average weekly wage of \$320. However, Claimant did provide sufficient evidence such that the average weekly wage could be calculated and I find that it should be calculated, to apply against all employers/insurers, pursuant to Section 287.250.1(4), RSMo. This statutory provision provides the method for calculating the average weekly wage as follows: "If the wages were fixed by the day, *hour*, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured...."<sup>144</sup> [Emphasis added.]

Claimant was an hourly employee. According to the wage statement admitted into evidence, Claimant's Exhibit 26, he was paid \$8.00 per hour worked. He was injured on July 1, 2009, and his total wages paid for the thirteen weeks prior totaled \$3,902.00. Dividing this amount by 13 produces an average weekly wage of \$300.15 and a compensation rate of \$200.10. I find it is appropriate to use these computations to arrive at the average weekly wage and compensation rate against all parties.

### **Issue 11: Whether Claimant is permanently and totally disabled, or**

### **Issue 12: Nature and extent of permanent partial disability.**

### **Issue 13: Liability of the Second Injury Fund.**

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.<sup>145</sup> The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.<sup>146</sup> A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.<sup>147</sup> It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.<sup>148</sup>

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was

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<sup>144</sup> Section 287.250.1(4), RSMo.

<sup>145</sup> *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

<sup>146</sup> *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

<sup>147</sup> *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

<sup>148</sup> *Rana* at 626.

engaged at the time of the accident.<sup>149</sup> The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.<sup>150</sup> The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.<sup>151</sup> When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.<sup>152</sup> If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.<sup>153</sup>

That is, Second Injury Fund liability exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities.<sup>154</sup> When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities.<sup>155</sup> In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.<sup>156</sup> Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.<sup>157</sup> In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.<sup>158</sup> If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.<sup>159</sup> Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

Various factors have been considered by courts attempting to determine whether or not an employee is permanently and totally disabled. An employee's ability or inability to perform simple tasks such as sitting,<sup>160</sup> bending,<sup>161</sup> and walking<sup>162</sup> may prove that the employee is permanently and totally disabled.

Claimant testified credibly about his 2009 work injury and the ongoing problems he has

<sup>149</sup> See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

<sup>150</sup> *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

<sup>151</sup> *Id.*

<sup>152</sup> Section 287.200.1, RSMo.

<sup>153</sup> *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

<sup>154</sup> Section 287.220.1, RSMo.; *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

<sup>155</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990).

<sup>156</sup> Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

<sup>157</sup> *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo. App. 1992).

<sup>158</sup> *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

<sup>159</sup> *Id.*

<sup>160</sup> *Brown v. Treasurer of Missouri*, 795 S.W.2d 478 (Mo.App. E.D. 1990).

<sup>161</sup> *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

<sup>162</sup> *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

from that injury. Dr. Shuter testified that Claimant sustained a 35% permanent partial disability of the right shoulder. Although I have previously found Dr. Shuter's opinion as to causation to be credible, I disagree with respect to his assessment of permanent partial disability. Instead, I assign a 25% permanent partial disability at the level of the right shoulder due to the July 2009 work injury.

Moreover, I find the opinions of Dr. Shuter and Mr. Weimholt persuasive with respect to Claimant's allegation of permanent and total disability against the Second Injury Fund. In fact, the overwhelming evidence in this case is that Claimant is permanently and totally disabled and unable to compete on the open labor market. The evidence also demonstrates that Claimant's permanent and total disability is a result of the July 1, 2009 injury *combined* with Claimant's many pre-existing disabilities – specifically, disabilities to his left shoulder, right wrist, lumbar spine, right hip, left hip, right knee, left knee, and gout. In making this determination, I note that Dr. Shuter provided credible testimony as to Claimant's medical condition. Dr. Shuter testified as to the nature and extent of Claimant's disability to his right shoulder as a result of the accident of July 1, 2009. Dr. Shuter is the only physician who examined and rated all disabilities for workers' compensation purposes. In fact, he is the only physician who rated Claimant's injury for the July 1, 2009 accident. It was Dr. Shuter's opinion that Claimant had a permanent partial disability of 35% of the right upper extremity at the level of the shoulder as a direct result of the July 1, 2009 accident. It is his opinion that Claimant had multiple pre-existing disabilities, as follows:

- 20% of the left shoulder for a torn rotator cuff;
- 7% of the right wrist for an excised boss and chronic straining;
- 25% of the body as a whole for low back degenerative arthritis and disc disease with annular tear and radiculitis;
- 25% of the right hip due to hip replacement;
- 50% of the left hip for degenerative arthritis;
- 30% of the right knee for internal derangement and osteoarthritis;
- 25% of the left knee for degenerative arthritis; and
- 10% of the body as a whole for gout.<sup>163</sup>

Dr. Shuter opined that the present disability to the right shoulder combined with the pre-existing disabilities shown above, results in the Claimant being totally and permanent disabled and unable to compete on the open labor market.

Likewise, Gary Weimholt, a vocational counselor, testified credibly that Claimant is totally and permanently disabled and that no employer in the normal course of business would hire him. He also indicated that Claimant would not be able to perform the duties of the class of jobs that constitute his labor market. These jobs are mainly production labor and cleaning occupations or similar occupations. It was Mr. Weimholt's opinion that Claimant's loss of access to the open labor market is due to the injury of July 2009 to the right shoulder **in combination with** his pre-existing problems (referred to above and diagnosed and rated by Dr. Shuter).

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<sup>163</sup> Claimant Exh. 2, pp. 4-5, and Exh. 1.

As previously noted, Claimant's testimony was credible and was consistent with his complaints to his treating physicians and to Dr. Shuter and Gary Weimholt. Claimant testified in regard to his right shoulder, indicating that he has pain the top of the right shoulder, now off and on, that is aggravated by house cleaning, lifting more than 25 pounds, and that he can no longer push or pull. He testified that although he can raise his arm up, this causes popping and pain. He indicated that when he performs actions that aggravate his shoulder, the pain is 7 or 8 on a 10-point scale. He can only sleep three to four hours at a time. In regard to his left shoulder's pre-existing problems, he now has more pain in that shoulder than in the right shoulder. He testified that his right knee was scoped in the early 1990s and it is his understanding that he needs a right knee replacement. Claimant indicated that both his knees cause problems when he walks or goes up stairs. Both knees give out, but the left knee is worse than the right knee. In regards to the right wrist, he has had weakness in that wrist ever since his surgery. In regard to his low back problems, Claimant testified that he has had low back and buttocks pain since 2000. He testified that he has pain when he lifts, sits a long time, or squats. On a scale of 1 to 10, the pain is an 8 when he does things that aggravate his back. Claimant testified he had a total right hip replacement in 2005 and since then has suffered from hip pain when he gets up. His right hip also gives out on occasion. In addition, Claimant has problems with his left hip giving out. His left hip contributes to his problems walking and climbing stairs. He testified that the left hip is worse now than the right hip.

Claimant testified that he missed work at the University due to pain in his back, hips, and knees; in addition, he arranged with another worker to do most of the mopping. He would lie down on breaks to relieve his pain. He testified that his gout would make him miss work a day or two each year.

For several years before the July 2009 accident, Claimant has been taking Vicodin for pain caused by his pre-existing conditions. He testified he has not worked since the July 2009 injury to his right shoulder because his right shoulder and his other disabilities all hurt too much.

I find that Claimant is permanently and totally disabled as a result of his July 1, 2009 injury to his right shoulder combined with his previous disabilities to the left shoulder, right wrist, lumbar spine, right hip, left hip, right knee, left knee, right ankle, and gout. As such, the Second Injury Fund is liable for permanent total disability (PTD) benefits to Claimant. However, the Second Injury Fund is entitled to a credit for the permanent partial disability assessed against the employers/insurers (i.e. 25% of the right shoulder, which is 58 weeks). The employers/insurers shall pay to Claimant the amount of \$11,605.80 (58 weeks x \$200.10) for the permanent partial disability from the July 2009 work injury. I find that Claimant reached maximum medical improvement as to the July 2009 injury on December 8, 2009, when he was first released by Dr. Quinn. Therefore, the liability of the Second Injury Fund for PTD benefits begins 58 weeks later, on January 19, 2011. From that date forward, the Second Injury Fund is liable for PTD benefits of \$200.10 per week for Claimant's lifetime or until modified pursuant to statute.

### **Issue 14: Unpaid Medical Bills**

Section 287.140.1 RSMo requires an employer to provide an employee who sustains a work related injury with medical treatment as may be reasonably be required. Subsection 1 of RSMo Section 287.140 states in pertinent part as follows:

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

Section 287.140.13(5) provides that if an employer or insurer fails to pay for authorized services provided to the employee by a hospital, physician, or other health care provider pursuant to this chapter, that health care provider “may proceed pursuant to subsection 4 of this section with a dispute against the employer or insurer for any fees or other charges for service provided.”<sup>164</sup> Pursuant to this statute, the Surgery Center of the Columbia Orthopaedic Group filed a medical fee dispute against “Optima/Job Finders” and “National Union Fire Insurance Company” for the direct payment of a bill (\$18,035.00).

The evidence shows that employer Job Finders referred Claimant to Dr. Robert Herting for treatment and he referred Claimant to Dr. William Quinn. Dr. Quinn performed the surgery at the Columbia Orthopaedic Surgical Center that resulted in an unpaid bill of \$18,035.77. Both Dr. Herting and Dr. Quinn referred Claimant to the Work Center for physical therapy, which resulted in an unpaid bill of \$8,104.25. The physical therapy bills were for treatment authorized by Job Finders Employment Services. Optima Staffing also authorized some of Claimant’s treatment. In addition, some medical treatment was authorized by National Union Fire Insurance Company. All of this medical treatment was necessary to cure and relieve Claimant of the effects of the July 2009 work injury.

Claimant requests that it be paid \$8,104.25 for the unpaid medical bill from The Work Center and \$18,035.77 for the unpaid medical bill from the Surgery Center of the Columbia Orthopaedic Group. As noted above, the Surgery Center of the Columbia Orthopaedic Group filed a medical fee dispute, requesting direct payment of its unpaid bill.

I find that Job Finders and the Curators of the University of Missouri are liable to Claimant for the unpaid medical bill of \$8,104.25 (The Work Center bill); accordingly, they are ordered to pay this amount to Claimant. I also find that Job Finders and the Curators of the University of Missouri are liable for the unpaid medical bill of \$18,035.77 from the Surgical Center of the Columbia Orthopaedic Group. Whether Job Finders and the Curators of the University of Missouri should pay that bill directly the health care provider (the Surgical Center) or to Claimant is a more difficult question. However, I find it is appropriate that Job Finders and the Curators of the University of Missouri pay Claimant directly for this unpaid bill (in the amount of \$18,035.77). As noted above, I have found that Optima Staffing, Inc. is not

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<sup>164</sup> Section 287.140.13(5), RSMo.

Employee: Calvin Marshall

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Claimant's employer under Missouri Workers' Compensation law in this case. Likewise, I have found that National Union Fire Insurance Company is not a responsible insurer in this case.

**Issue 15: If there is statutory employment, the University of Missouri requests fees and expenses from the primary liable party (pursuant to Section 287.040).**

The University of Missouri requests that should it be found liable for payment of compensation to Calvin Marshall as a statutory employer, then pursuant to §287.140.3, RSMo., it wants those employers primarily liable, namely Job Finders/Ann Williams, to be ordered to pay the University of Missouri the entire amount of benefits it pays (or paid) to Calvin Marshall, along with the entire amount of the University's attorney's fees and the expenses of the suit. The University submitted documentation of its requested fees and expenses as its Exhibit 7.

Upon review and consideration, the University's request for fees and expenses is denied.

**SUMMARY**

A brief summary of the issues and their resolution is as follows:

1. **Whether the Division/Commission has jurisdiction?** Yes.
2. **Whether Claimant sustained an accident arising out of and in the course of employment?** Yes.
3. **Medical causation.** Yes, Claimant's injury was medically causally related to the work accident.
4. **Whether certain facts have been admitted by any of the alleged employers/insurers by the late-filing of an Answer or the failure to file an Answer?** Some facts were so admitted; see discussion in Award.
5. **Who was the employer or co-employers of Claimant at the time of the alleged injury?** Job Finders Employment Services and the Curators of the University of Missouri (statutory employer) were co-employers.
6. **If there are co-employers, is there any right of contribution pursuant to Section 287.130, and if so, what is the amount?** Yes, see discussion in Award.
7. **Whether the employer had workers' compensation insurance, and if so, who was the insurer?** Job Finders did not have workers' compensation insurance; the University of Missouri was self-insured.
8. **If the employer did not have workers' compensation insurance, should the owners be personally responsible?** Yes, Ann Williams should be personally liable in this case.
9. **Whether Claimant sustained his burden of proof as to notice.** Yes.
10. **What was Claimant's average weekly wage and compensation rates?** The average weekly wage was \$300.15, yielding a compensation rate of \$200.10.
11. **Whether Claimant is permanently and totally disabled?** Yes, due to the primary shoulder injury combined with Claimant's pre-existing disabilities.
12. **Nature and extent of permanent partial disability?** 25% of the right shoulder.

Employee: Calvin Marshall

Injury No. 09-054072

13. **Liability of the Second Injury Fund.** The Second Injury Fund is liable for permanent and total disability benefits (see Award).
14. **Liability for unpaid medical bills (specifically, from the Surgical Center of the Columbia Orthopaedic Group and from The Work Center).** The co-employers are liable to Claimant for the unpaid medical bills from The Work Center (\$8,104.25) and the Surgical Center of the Columbia Orthopaedic Group (\$18,035.77).
15. **If there is statutory employment, the University of Missouri requests fees and expenses from the primarily liable party (pursuant to Section 287.040).** This request is denied.

Any pending objections not expressly ruled on in this award are overruled. This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of Claimant's attorney, Robert Hines, for necessary legal services rendered to the claimant.

Made by: \_\_\_\_\_

Vicky Ruth  
*Administrative Law Judge*  
*Division of Workers' Compensation*