

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No. 09-095579

Employee: Scott Noblin
Employer: McBride and Son Contractors, LLC
Insurer: ACIG Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge denying compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Discussion

Medical causation

The parties asked the administrative law judge to resolve the issue of medical causation. Employee alleges he suffered an injury by accident at work on July 17, 2009, when he was lifting shingles. His evaluating medical expert, Dr. Robert Poetz, opined that an accident on that date was the prevailing factor causing employee to suffer the resulting medical conditions of a paramedian and lateral lumbar disc displacement at L4-5, with lumbar radiculitis and exacerbation of lumbar disc disease, as well as a right lateral extraforaminal disc protrusion with advancement of moderate to severe lumbar stenosis at L3-4. We are not persuaded by the medical causation opinion from Dr. Poetz for the following reasons.

First, Dr. Poetz failed to persuasively distinguish between employee's history of preexisting severe low back pain and the low back symptoms purportedly referable to the July 2009 accident. The record reveals that on July 7, 2008, employee complained to his chiropractor, Dr. Charles Klinginsmith, of low back pain so severe he was having trouble straightening up. Employee testified his preexisting low back symptoms were serious enough that he had to miss work approximately every six months to rest his back. Employee had received prescriptions for the narcotic pain medication Vicodin and the muscle relaxant Flexeril for his preexisting low back complaints.

In light of this history, we would expect employee's evaluating expert to persuasively distinguish between employee's preexisting low back complaints and those specifically referable to the claimed work injury. But apart from the conclusory causation opinions and disability ratings rendered in his report and recited at deposition, Dr. Poetz provided no real discussion or explanation that would assist the fact-finder in distinguishing the preexisting pathology in employee's low back from that specifically referable to the July 2009 accident.

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Second, Dr. Poetz failed to persuasively rule out an intervening injurious event occurring on or about October 19, 2009. According to the August 2009 treatment records from Dr. Klinginsmith, employee was improving with chiropractic care after the claimed July 2009 work injury, to the extent that on August 17, 2009, he told Dr. Klinginsmith that he was “50% better,” even after having worked that day. *Transcript*, page 317. Thereafter, employee did not seek any further chiropractic treatment for his low back until October 22, 2009, when he reported to Dr. Klinginsmith that he had low back pain at a level of an 8 or 9 out of 10. Employee told Dr. Klinginsmith that he had been doing well since the last treatment, and denied any intervening injury or activity.

On the other hand, the October 20, 2009, records from the St. Clare Health Center emergency room suggest employee had “twisted wrong yesterday while carrying some siding and has had pains since then.” *Transcript*, page 254. The records further suggest the “last episode was about 3 months ago that lasted about 1 month.” *Id.* It appears to us from a careful review of the St. Clare records that employee endorsed a *new* onset of low back pain as of October 19, 2009, which was distinguishable from the earlier bout of low back pain lasting about a month from mid-July to mid-August. In his testimony, employee denied that he ever carried siding, but also suggested that he told the St. Clare personnel that he had been in pain for the “past two days.” *Transcript*, page 42. The records from the treating surgeon Dr. Paul Matz confirm that employee endorsed a worsening of low back symptoms in October 2009.

Given the strong indication that employee suffered (at the very least) a substantial worsening in his low back symptoms in mid-to-late October 2009, we would expect his evaluating expert to either distinguish this medical condition from that referable to the claimed work injury, or demonstrate how the October 2009 symptoms and treatment flowed from that injury. Again, though, Dr. Poetz provided only conclusory opinions that fail to acknowledge or explain the October 2009 exacerbation in employee’s symptoms as memorialized in the records from Dr. Klinginsmith and St. Clare Health Center.

Third, Dr. Poetz failed to persuasively distinguish between employee’s recurrent symptoms following his March 2010 slip on ice from the symptoms referable to the alleged accident. According to employee, he was doing better following surgery until this event, after which he felt as if he had returned to his pre-surgical symptomatology. Dr. Poetz opined that the slip on ice was a mere soft tissue injury, but on cross-examination, he acknowledged that even a soft tissue injury can result in the development of new pain complaints. We do not find Dr. Poetz’s testimony to persuasively rule out the occurrence of a new and permanent low back injury when employee slipped on ice in March 2010.

Finally, Dr. Poetz assigned causation of a right lateral extraforaminal disc protrusion at L3-4 to the alleged July 2009 accident, but the pre-surgical MRI of October 29, 2009, did not suggest any disc protrusion then existed at L3-4, and Dr. Matz did not identify any pathology at L3-4 in either his operative report or his discharge summary. See *Transcript*, pages 250, 268-71. Instead, it appears that the L3-4 disc protrusion was first seen on the MRI study of March 9, 2010, which suggested employee then had “a right lateral extraforaminal disc protrusion” at L3-4; this mirrors the language used by Dr. Poetz in his

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causation opinion. See *Transcript*, pages 289, 175. We note that it appears that the March 9, 2010, MRI study followed employee's slip on ice in March 2010.

In other words, Dr. Poetz assigns causation of a new, subsequent pathology with respect to the L3-4 disc to the alleged accident, where the treating orthopedic surgeon did not diagnose this pathology or address it in the surgery he performed. As above, Dr. Poetz fails to provide any explanation whatsoever for this aspect of his opinions. We find that this circumstance weakens the persuasive value of all of Dr. Poetz's testimony and opinions in this case.

For all of the foregoing reasons, we are not persuaded by the testimony from Dr. Poetz to render a finding that the alleged accident of July 17, 2009, was the prevailing factor causing any resulting medical condition or disability. We find, rather, that the alleged accident on that date was not the prevailing factor causing any identifiable medical condition or disability. Because employee has failed to meet his burden of proof with respect to the dispositive issue of medical causation, we must deny the claim.

All other issues are moot.

Conclusion

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 2, 2015, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

Given at Jefferson City, State of Missouri, this ___1st___ day of December 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Scott Noblin

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe employee suffered a compensable work injury.

The Commission majority painstakingly dissects the opinions from Dr. Poetz to justify their decision to deny benefits to this employee. Yet, noticeably absent from the majority's decision is any mention of the competing testimony from employer's expert, Dr. Frank Petkovich. As noted by employee in his brief, Dr. Petkovich conceded that the L4-5 disc herniation seen on the October 2009 MRI could have occurred as a product of employee's July 2009 accident, and crucially, he stated that he could not opine otherwise. As a result, the essentially uncontested expert medical opinion evidence on this record compels a finding that (at the very least) the accident of July 17, 2009, was the prevailing factor causing employee to suffer a herniated L4-5 disc, the pathology that prompted Dr. Matz to perform surgery. I strongly disagree with the majority's choice to disregard this uncontested expert medical opinion evidence.

With regard to employee's preexisting low back pain, the majority fails to mention that employee has been a roofer for 20 years. Of course employee had preexisting back problems; his daily job duties for two decades involved prolonged bending at the waist combined with frequent and awkward heavy lifting. But preexisting problems alone are not sufficient to defeat a workers' compensation claim, as it is well-settled in Missouri that where a work accident is the prevailing factor causing aggravation or exacerbation of a preexisting disabling condition, the resulting aggravation is compensable; this is true even following the 2005 amendments to Chapter 287. *Maness v. City of De Soto*, 421 S.W.3d 532 (Mo. App. 2014). The majority says they expected more discussion of this issue from Dr. Poetz, but I deem Dr. Poetz's opinions sufficient to meet employee's burden in the absence of any relevant contrary opinion from Dr. Petkovich.

The same is true regarding the majority's concerns as to employee's recurrent symptoms in October 2009 and his March 2010 slip on ice. Implicit in the majority's analysis is the suggestion that they are inclined to believe employee suffered an intervening injury in October 2009 and a subsequent injury in March 2010, unless Dr. Poetz is able to persuade them otherwise. The critical flaw in the majority's reasoning is that this record contains no expert medical testimony in the first place that would support affirmative findings that employee suffered an intervening injury in October 2009 or a subsequent injury in March 2010, because Dr. Petkovich did not so opine.

It seems to me especially unjust to fault employee's expert for these perceived deficiencies where employer did not even procure relevant competing testimony. It seems to me that the Commission majority has effectively appointed itself the de facto medical expert in this case, dictating what the experts should have deemed important and what they should have addressed in their reports and depositions. This is clear error, because the fact-finder in a workers' compensation case is not permitted to substitute their own opinions on medical causation for those of an uncontradicted expert. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

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Again, Dr. Petkovich does not contradict Dr. Poetz's opinion with regard to causation of the L4-5 herniation.

With regard to employer's notice defense, I am convinced employer had actual notice of this work injury, and was not prejudiced by employee's failure to provide the written notice prescribed by statute. As employee points out in his brief, the testimony and written statements from the supervisory employees Chris Counts and Mike Ross are so contradictory as to what they knew and when as to undermine the credibility of both. As employee persuasively testified, Mr. Counts was there when the accident occurred and he saw it happen. It's clear to me that Mr. Counts subsequently denied his awareness of this work injury because he knew he violated employer's policies by failing to report it. Employer did not suffer any prejudice in this case, because there is no evidence employer would have acted differently if employee had reported the injury in writing. Employer denied this claim on the basis that the accident never happened; it strikes me as disingenuous for employer to now argue it could have provided employee medical treatment to minimize his disability if only he'd provided a written notice.

Because I am convinced that the evidence persuasively demonstrates that employee is now permanently and totally disabled as a result of the July 2009 injury, I would reverse the award of the administrative law judge and enter an award of permanent total disability benefits, past medical expenses, temporary total disability benefits, and future medical treatment.

Because the majority has determined otherwise, I respectfully dissent.

Curtis E. Chick, Jr., Member

AWARD

Employee:	Scott Noblin	Injury No.:	09-095579
Dependents:	N/A		Before the
Employer:	McBride and Son Contractors, LLC		Division of Workers'
			Compensation
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
Insurer:	ACIG Insurance Company		Jefferson City, Missouri
Hearing Date:	February 18, 2015	Checked by:	EJK/lsn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? See Additional Findings of Fact and Rulings of Law
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: July 17, 2009
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The claimant, a roofer, testified that he suffered a lumbar spine disc injury while carrying heavy bundles of roofing shingles.
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: Low Back
14. Nature and extent of any permanent disability: 25% permanent partial disability to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

- 17. Value necessary medical aid not furnished by employer/insurer? \$47,784.43
- 18. Employee's average weekly wages: \$798.59
- 19. Weekly compensation rate: \$532.39/\$422.97
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

None

TOTAL:

None

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be 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: Gary S. Wolfe, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Scott Noblin

Injury No.: 09-095579

Dependents: N/A

Employer: McBride and Son Contractors, LLC

Additional Party: Second Injury Fund

Insurer: ACIG Insurance Company

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri
Checked by: EJK/lsn

This workers' compensation case raises several issues arising out of an alleged work-related injury in which the claimant, a roofer, testified that he suffered a lumbar spine disc injury while carrying heavy bundles of roofing shingles. The issues for determination are (1) Accident arising out of and in the course of employment, (2) Notice, (3) Medical causation, (4) Liability for Past Medical Expenses, (5) Temporary Disability, (6) Permanent disability, and (7) Second Injury Fund liability. The evidence compels an award for the defense, because the claimant failed to timely notify the employer of his accident.

At the hearing, the claimant testified in person and offered depositions of Robert P. Poetz, D.O., and James E. Israel, the claimant's telephone records, and various medical records and bills. The defense offered depositions of Frank O. Petkovich, M.D., Mike Ross, and Cris Counts, and business records of the employer. The defense also had Division of Workers' Compensation records from a prior injury marked for identification but did not offer them into evidence.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On December 7, 2009, this 49-year-old claimant, a roofer, filed a Claim for Compensation with the Division of Workers' Compensation alleging that "while in the course and scope of employment, the claimant injured his low back while lifting" on "07/19/09". He also alleged that he gave timely notice of injury and request for medical treatment.

The claimant is a high school graduate with no post high school education. He is currently not actively employed and was last employed on October 19, 2009, by this employer. In July 2009, the claimant had worked for this employer for two or three years as a residential roofer. The claimant has worked exclusively as a roofer in the last 20 years and is a member of the Carpenters' labor union and a participant in the union's Health and Welfare Fund for medical and short-term disability benefits. His job required him to climb onto roofs and to lift and carry bundles of shingles weighing between 70 to 90 pounds.

The claimant worked for this employer in a two-person roofing crew with Cris Counts on Friday, July 17, 2009, but did not work for this employer on Sunday, July 19, 2009. The employer's supervisor over Cris Counts was Mike Ross. Both Cris Counts and Mike Ross worked for this employer from July 2009 to the end of December 2009.

The claimant testified that on Friday, July 17, 2009, he was working as a roofer, and he twisted wrong and his back popped so loudly that his foreman, Cris Counts, heard it. The claimant testified that he verbally reported the injury to Cris Counts, his foreman on the site, but he did not report it to anyone else.

On July 20, 2009, the claimant went to his family chiropractor, Dr. Klinginsmith, and reported that he injured his low back at work on the prior Friday while moving shingles. The claimant received chiropractic treatment on four more occasions in August 2009 and once on October 22, 2009. The claimant testified that he missed a couple of days after the July 19, 2009, injury to rest his back and then went back to work until October 19, 2009, the claimant's last day of work for any employer.

On October 20, 2009, the claimant went to the St. Clare Health Center emergency room with intractable low back pain. The claimant reported

“complaints of left-sided lower back/gluteal pains radiating down to the left thigh and leg. Pt states that he twisted wrong yesterday while carrying some siding and has had pains since then. States has had similar [symptoms] in the past and always with heavy lifting or twisting. Has had chiropractor in the past and last episode was about three months ago that lasted about one month. ... Primary symptoms include back pain. The history is provided by the patient and spouse. This is a recurrent problem. The current episode started yesterday. The problem has been occurring constantly. The problem has been gradually worsening since onset. The pain is associated with remote injury, twisting, and lifting. There have been prior injuries to these areas. ... The incident occurred at work.” See Exhibit 3.

He was admitted to St. Clare Hospital from October 26 to October 30, 2009, for his low back condition where he underwent pain management treatment. On October 29, 2009, an MRI revealed multilevel degenerative disc changes and posterior central paramedian and lateral disc protrusion and extrusion at L4-5 resulting in left neural foraminal and lateral recess narrowing and mild central canal stenosis. See Exhibit 3. On October 29 and November 16, 2009, Dr. Gheith administered transforaminal epidural steroid injections into the low back. See Exhibit 3.

On December 1, 2009, the claimant consulted Dr. Matz, a neurosurgeon, who took a medical history of sudden onset of low back and leg pain in July 2009 while moving a stack of tiles. “With the combination of both, he had been going to a chiropractor for alternative treatments and seemed to be doing okay to some degree. However, he developed a pop in his back and severe pain and was found to have severe left leg pain. It seemed to worsen in October of 2009. He had been undergoing shots with intermittent relief, but was not lasting relief.” See Exhibit 4. Dr. Matz opined that the claimant “has had long-standing problems and at this

juncture has failed nonoperative treatment.” See Exhibit 4. Dr. Matz recommended surgery and the surgical date was set for January 14, 2010.

On December 7, 2009, the claimant filed his Claim for Compensation for a July 19, 2009 injury while working for this employer. Prior to filing the claim, the claimant’s attorney sent a letter to the employer advising of the filing of the claim for a July 19, 2009, accident and the letter was received by the employer on December 3, 2009. After receiving the attorney’s letter, the employer conducted an investigation of the work injury by taking statements from Cris Counts and Mike Ross who were both still employed by the employer at the time. After taking statements from its employees, the employer denied the claimant’s claim and did not provide any compensation or medical benefits for the alleged work injury.

On January 14, 2010, Dr. Matz performed a left L4-5 laminotomy, foraminotomy, and discectomy and had follow-up care from Dr. Matz until he was released at maximum medical improvement on July 9, 2010. See Exhibits 4, 5. Following surgery and while he was still under treatment with Dr. Matz, the claimant slipped on some ice in his driveway which caused a shooting pain through his leg. The claimant testified that prior to his slip on the ice, most of his symptoms had gone away after the surgery and he was able to move and walk around. Since the slip on the ice he feels how he did prior to the surgery. The claimant reported this incident to Dr. Matz who then ordered additional testing to see if there was any further injury to the claimant’s low back. Dr. Matz found no recurrent disc injury. Following this additional testing, which included an MRI, Dr. Matz recommended no further medical treatment other than the normal surgical follow-up. See Exhibit 5. At Dr. Matz’ final evaluation, he found no leg pain on that date, but reflected that the claimant had been consuming pain medication. He opined that the claimant had post-laminectomy syndrome, that it would be difficult for the claimant to return to his occupation that requires a lot of strenuous work, and recommended vocational rehabilitation. See Exhibit 4. After being released from treatment by Dr. Matz, the claimant had follow-up with additional pain management specialists in the Fall of 2013. See Exhibit 9.

The claimant’s last day of work was October 19, 2009 and he has not returned to work for this or any other employer. His source of income is his union disability pension and Social Security Disability benefits.

Pre-existing Conditions

Before July 17, 2009, the claimant suffered from longstanding chronic low back pain which he related primarily to work and a motor vehicle accident. The claimant received medical care for his low back condition from a family chiropractor, Dr. Klinginsmith, and would occasionally miss work for 1 or 2 days due to his low back condition. The claimant testified that before July 17, 2009, he missed very little work due to back issues. On March 16, 2001, Dr. Klinginsmith examined the claimant and diagnosed traumatic cervical thoracic lumbar sacroiliac syndrome with cephalgia. See Exhibit 6. On March 23, 2007, Dr. Klinginsmith examined the claimant and diagnosed lumbar lumbosacral sacroiliac syndrome with disc involent (sic) with muscle spasm. See Exhibit 6. On July 7, 2009, ten days before the alleged accident, the claimant reported to Dr. Klinginsmith that he had constant, sharp, shooting lower back pain without radiation to lower extremities that he rated at 7/10. He reported that the pain had gotten much worse over the weekend and that he couldn’t straighten up. He reported that the pain was mainly

on the right side but he could feel it all the way across the lower back. Dr. Klinginsmith found that “dermatomes, DTR’s, and muscle testing are all negative B/L for lower extremities.” See Exhibit 6. Dr. Klinginsmith used diagnostic codes 724.4 and 724.6 as his diagnosis. See Exhibit 6. The claimant had consumed prescription medications such as Flexeril, Naproxen, and Tramadol HCL for his low back condition for a substantial period before the alleged occurrence. See Exhibit 8.

Robert P. Poetz, D.O.

On March 13, 2012, and April 21, 2014, Dr. Poetz, a board certified family medicine osteopathic physician and surgeon, examined the claimant, reviewed medical records, and took a medical history from the claimant. Dr. Poetz opined that the “lumbar disc displacement at L4-5 paramedian and lateral with lumbar radiculitis and exacerbation of lumbar degenerative disc disease as a result of the 7/19/09 injury, status-post left L4-5 laminectomy and discectomy, and an L3-4 lateral extraforaminal disc protrusion” resulted from “the 7/19/09 injury.” See Dr. Poetz deposition, page 18. He also testified that the claimant had a “pre-existing lumbar strain with lumbar degenerative disc disease preexisting.” See Dr. Poetz deposition, page 18. Dr. Poetz recommended a pain management regiment, consider a series of repeat epidural steroid injections, and avoid pushing and pulling, avoid heavy lifting and strenuous activity. See Dr. Poetz deposition, page 19. Dr. Poetz’ medical history reflects a 2001 automobile accident causing back issues and a 2010 accident on ice causing soft tissue damage to the claimant’s back. Dr. Poetz’ prognosis was guarded due to the length of time since the injury and the claimant’s continuation of symptoms. See Dr. Poetz deposition, page 18.

Dr. Poetz attributed a majority of the claimant’s disability to the 2009 alleged accident as opposed to the claimant’s pre-existing degenerative disc disease and lumbar strain prior and the 2010 intermediate injury on the ice. Dr. Poetz evaluated the claimant in March 2012 and again in April 2014, and opined that the claimant suffered from a 35% permanent partial disability to his low back from the alleged 2009 accident based on his 2012 evaluation and a 40% permanent partial disability to his low back at the lumbar spine from the July 19, 2009 accident based on his 2014 evaluation. See Dr. Poetz deposition, pages 21, 26. He also opined that the claimant suffered from a 10% pre-existing permanent partial disability to his low back. See Dr. Poetz deposition, page 21. Apparently, Dr. Poetz changed his opinion after the April 2014 evaluation. Dr. Poetz testified that he had no knowledge whether the claimant informed his employer of his claimed work-related injury.

Frank O. Petkovich, M.D.

On December 9, 2014, Dr. Petkovich, a practicing orthopedic surgeon, reviewed the claimant’s medical records, took a medical history from the claimant, and examined the claimant. X-rays on that date revealed significant degenerative disc disease throughout the lumbar spine, most severe at the L3-4, L4-5 levels consistent to the October 27, 2009, MRI which showed degenerative disc disease throughout the lumbar spine from L1-2 through L5-S1 with spondylitic changes. Dr. Petkovich opined that the spondylitic changes on the October 27, 2009, MRI take several years to develop. He opined that they are not acute and they have nothing to do with the alleged injury nor were the degenerative issues accelerated or aggravated by the alleged injury.

Dr. Petkovich opined that the claimant suffered from a disc herniation at the L4-5 level which is consistent with his history of pain. Dr. Petkovich did not know when that herniation occurred but it could have occurred as the claimant alleged. He opined that the other findings throughout the lumbar spine were chronic degenerative conditions having nothing to do with the alleged 2009 accidental injury.

Dr. Petkovich opined within a reasonable degree of medical certainty that the claimant should be able to go back to the work that he was doing before July 19, 2009, without any restrictions. Dr. Petkovich opined that the claimant suffered from a 7% impairment related to the disc herniation at L4-5 level, using the criteria of the AMA Guides to the Evaluation of Permanent Impairment Sixth Edition.

James E. Israel, C.R.C, L.P.C.

On February 25, 2014, Mr. Israel, a vocational rehabilitation counselor and consultant, reviewed the claimant's medical records and interviewed the claimant. Although there is a potential that the claimant could obtain marginal work, Mr. Israel testified that the claimant would not be able to sustain gainful work as defined by the U.S. Department of Labor due to the combination of his limitations in the aftermath of his 2009 accident based on Dr. Poetz' restrictions. Mr. Israel had no information on whether the claimant was almost back to normal before his slip on the ice in 2010, was not aware how frequently the claimant took off time due to back pain before the alleged 2009 injury, and was not aware of the effects of the intermittent slip on the ice after his back surgery in 2010. Mr. Israel testified, "All I can say is in the light of new information I could reassess how I would view it vocationally". Mr. Israel had no information whether the claimant informed his employer of the alleged work-related injury.

ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

The claimant has the burden to establish that he has sustained an injury by accident arising out of and in the course of his employment, and the accident resulted in the alleged injuries. Choate v. Lily Tulip, Inc., 809 S.W.2d 102, 105 (Mo.App. 1991).

Claimant must establish a causal connection between the accident and the injury. Claimant does not, however, have to establish the elements of his claim on the basis of absolute certainty. It is sufficient if he shows them by reasonable probability. "Probable means founded on reason and experience which inclines the mind to believe but leaves room for doubt." The Commission's awards on disability claims are not solely dependent on medical evidence given by expert witnesses, but its findings are to be judged on the basis of the evidence as a whole. The testimony of the claimant, or other lay witnesses, as fact within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of the disability, especially when taken in connection with, or where supported by, some medical evidence. The Commission is authorized to base its findings and awards solely on the testimony of the claimant; his testimony alone, if believed, constitutes substantial evidence. Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 198, 199 (Mo.App. 1990).

Section 287.120.1 RSMo provides, in pertinent part, as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment, and shall be released from all other liability therefor whatsoever, whether to the employee or any other person.

The definition of "accident" as defined in Section 287.020.2 RSMo and related subsections provide:

2. The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment.

An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability.

"The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

The following interpretative guides contained in § 287.020.10 RSMo Supp. 2005 state:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of "accident", "occupational disease", arising out of", and in the course of the employment" to include, but not be limited to, holdings in: Bennett v. Columbia Health Care and Rehabilitation, 80 S.W.3d 524 (Mo. App. W.D. 2002); Kasl v. Bristol Care, Inc., 984 S.W.2d 852 (Mo.banc 1999); and Drewes v. TWA, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Lastly, §§ 287.800.1 RSMo and 287.800.2 RSMo, respectively, provide, as follows:

287.800. 1. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, the division of workers' compensation, and any reviewing courts shall construe the provisions of this chapter strictly.

2. Administrative law judges, associate administrative law judges, legal advisors, the labor and industrial relations commission, and the division of workers' compensation shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Pursuant to these statutes, in order to establish a compensable case, the claimant must have proven he sustained an injury due to an accident. The first step is to see if the claimant met the burden of proving that the claimant suffered an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.

The claimant testified that on Friday, July 17, 2009, he was working as a roofer, and he twisted wrong and his back popped so loudly that his co-worker, Cris Counts, heard it. The claimant testified that he verbally reported the injury to Cris Counts a co-employee on the site but he did not report it to anyone else. On July 20, 2009, the claimant went to his family chiropractor, Dr. Klinginsmith, and reported that he injured his low back at work on the prior Friday while moving shingles. See Exhibit 6. The claimant had pre-existing severe low back pain that did not appear to have pain radiating into his legs. See Exhibit 6. The pain after the alleged occurrence reflects pain radiating into the claimant's legs although the level of pain (7 out of 10) was substantially similar to that reported on numerous occasions before the occurrence. See Exhibit 6. Dr. Klinginsmith used the same diagnosis on July 20, 2009, as he did on prior occasions but labeled the condition as acute. On subsequent treatments he used the same diagnostic codes after the occurrence as he did before the occurrence, 724.4 and 724.6. In August 2009, he added diagnostic code 739.3 and described the diagnosis as acute lumbar lumbosacral sacroiliac syndrome with sciatica and possible disc involvement. His reports suggested that the pain became constant rather than episodic. By October 2009, both Dr. Klinginsmith and an MRI confirmed that the claimant suffered from multilevel degenerative disc changes and posterior central paramedian and lateral disc protrusion and extrusion at L4-5 resulting in left neural foraminal and lateral recess narrowing and mild central canal stenosis. See Exhibits 3, 6.

The testimony in the case pits the claimant and members of his household against employees of the employer with substantial inconsistencies among the witness's accounts. Frequently, the cold medical records are reasonably reliable for information that is recorded soon after the events based on the assumption that patients tend to reveal the most reliable information available to their treating medical provider shortly after the event with the hope that the medical provider will be able to render the best medical care to remedy the medical condition.

Using this analysis, the claimant suffered a low back injury on July 17, 2009, while lifting roofing materials at work aggravating his pre-existing chronic low back condition resulting in constant pain radiating into his legs.

Dr. Poetz, a board certified family medicine osteopathic physician and surgeon, examined the claimant, reviewed medical records, and took a medical history from the claimant. Dr. Poetz diagnosed "lumbar disc displacement at L4-5 paramedian and lateral with lumbar radiculitis and exacerbating of lumbar degenerative disc disease as a result of the 7/19/09 injury." See Dr. Poetz deposition, pages 17, 18. He also testified that the claimant "had pre-existing lumbar strain with lumbar degenerative disc disease preexisting" for over 20 years and was part of normal wear and tear of his body. See Dr. Poetz deposition, pages 18, 31. Dr. Petkovich testified that the degenerative condition in the claimant's low back pre-existed the occurrence, but he did not know for sure what happened, but "it could have happened as he described it lifting. ... I think that Mr. Noblin could have sustained a lumbar disc herniation, in this case at the L4-5 level, as a

result of an injury that he described as occurring July 2009.” See Dr. Petkovich deposition, page 15.

The evidence supports a finding that the claimant suffered a substantial increase in his low back pain and suffered radiating pain in to his legs from the occurrence with resulting disability on that single work shift on July 17, 2009. The implication is that the accident occurred and was the prevailing factor causing the claimant’s radiating pain into his leg, a disc injury, and disability from that condition. The record supports a finding that the accident was not the prevailing factor for the claimant’s pre-existing severe low back pain and degenerative disc disease. Thus, the claimant has proven that he suffered an accident arising out of and in the course of employment resulting in disability and the need for medical care.

MEDICAL CAUSATION

“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job.” Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). “Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission.” Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, “[a]n 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. § 287.020.2. On the other hand, “[a]n injury is not compensable because work was a triggering or precipitating factor.” Id. Awards for injuries ‘triggered’ or ‘precipitated’ by work are nonetheless proper *if* the employee shows the work is the prevailing factor in the cause of the injury. Thus, in determining whether a given injury is compensable, a work-related accident can be both a triggering event and the prevailing factor.”

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ's personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the

cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995). This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

Based on the findings above, the claimant has proven that he suffered a lumbar disc herniation and disability from lifting shingles at work on July 17, 2009.

NOTICE

Section 287.420, RSMo 1994, requires that written notice be given to the employer as soon as practical but not later than 30 days after the accident. The purpose underlying the notice requirement is twofold. Saylor v. Spiritas Industrial, 974 S.W.2d 536 (Mo.App. E.D. 1998). First, the notice requirement is designed to ensure that the employer will be able to conduct an accurate and thorough investigation of the facts surrounding the injury. Id. The second purpose of the notice requirement is to ensure that the employer has the opportunity to minimize the employee's injury by providing prompt medical treatment. Id. Thus, in cases where the employer does not have actual notice of the accident, courts have examined whether the claimant has proffered evidence on both the employer's ability to investigate the accident and the minimization of the employee's injury in determining whether the employer was prejudiced by the claimant's failure to provide written notice. See Id.; Klopstein v. Schroll House Moving Co., 425 S.W.2d 498, 504-05 (Mo. App. 1968).

Claimant has the burden of showing that the employer was not prejudiced. Hannick v. Kelly Temporary Services, 855 S.W.2d 497, 499 (Mo.App. E.D. 1993). One way a claimant may meet claimant's *prima facie* burden of showing that an employer was not prejudiced by the failure to give written notice within thirty days is to demonstrate that the employer had actual notice of the accident. Saylor, Id. Missouri Courts have held that no prejudice exists where the evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact finder. Id.

The claimant in this case did not give timely written notice to the employer. The record shows the first written notice to the Employer was from Claimant's attorney on December 3, 2009. Therefore, the claimant has the burden to show that the employer was not prejudiced by the lack of notice or had "actual knowledge" of the injury.

The claimant presented evidence claiming that the employer had actual knowledge of the accident. He testified that on Friday, July 17, 2009, he was working as a roofer, and he twisted wrong and his back popped so loudly that his foreman, Cris Counts, heard it. The claimant testified that he verbally reported the injury to Cris Counts, the claimant's foreman, on the site

but he did not report it to anyone else. The claimant also testified that Cris Counts stated at a meeting at the claimant's house some time ago that he heard the claimant's back pop on the date of injury. The claimant, the claimant's spouse, and his grandson's mother and son's girlfriend, Michelle Seeko, testified that they remember the meeting with Mr. Counts at the claimant's house in September 2010 in which Mr. Counts allegedly stated that he knew the claimant was injured at work. Ms. Seeko testified that this was the first and only time she met Mr. Counts. None of them remember the exact date of the meeting, but testified that the conversation took place in September 2010, sixteen months after the occurrence. The claimant's spouse testified that Mr. Counts was delivering a magnet to the claimant to pick up nails around a new roof and that Mr. Counts just showed up. Mr. Counts denied the allegation that he knew about any work-related injury and that the claimant did not report any work-related injury to him. See Counts deposition, pages 17-20. He testified that the claimant suffered from chronic low back pain during his association with the claimant. Mr. Counts did not corroborate the alleged conversation at the claimant's house in September 2010 in his 2013 deposition. In fact, no one asked him about it. The claimant did not present any testimony at the hearing to corroborate the conversation beyond members of his family and household.

The claimant's spouse presented the claimant's telephone call records from August 23, 2009, through December 15, 2009, and testified that each telephone call to the employer in August and November was her verbal report to the employer's compensation coordinator, Doris Hauschild, stating that the claimant was injured at work and demanding medical care and disability benefits for a work-related injury. The dates of the telephone conversations listed were August 24, August 25, November 9, and November 10, 2009. See Exhibit 10. The August telephone conversations ranged from .9 minutes to 1.52 minutes and were well over thirty days after the occurrence. See Exhibit 10. Doris Hauschild testified that she did not talk to the claimant's spouse in August 2009. Ms. Hauschild testified, based on a note in her file, that the call in November reflected that the claimant or his spouse inquired regarding income replacement and did not mention a work place injury. She testified that she referred the claimant to the Carpenters' Union for disability benefits. Apparently, the claimant's union has a program offering disability benefits for its members. In addition, Ms. Hauschild testified that she would have started an investigation as soon as she found out of an allegation of a work-related injury as her normal practice.

In regard to actual notice, the testimony in the case pits the claimant and members of his household against employees of the employer with substantial inconsistencies among the witness's accounts. Frequently, the cold written records are reasonably reliable for information when they are recorded soon after the events. This is one reason that the statute requires a written notice of the accident within thirty days of the accident. The testimony of the claimant, his family, and members of his household are not credible given their selective memory relating to the events and the testimony to the contrary. Further, the written notice given to the employer in December 2009, five months after the alleged occurrence, stated that the work-related accident occurred on July 19, 2009, a date that the claimant did not work for this employer. Therefore, the employer denied the claim, because the claimant did not work for this employer on that date. See Exhibit 4. However, the notice does not support a finding of credibility on the claimant for finally reporting the accident in writing and not correcting the alleged date of the accident in writing.

There is no question in this case that the claimant failed to submit a timely written notice of the accident within thirty days of the accident. The question is whether the defense had actual notice of the occurrence or whether the defense was not prejudiced for lack of notice. The claimant's allegation that the employer had actual notice of the occurrence are based exclusively on the claimant's testimony and the testimony of members of his household based on events that occurred five years ago and are not corroborated by the employer's foreman or compensation coordinator. In addition, those individuals denied any knowledge of the alleged occurrence until almost five months after that date. In addition, the notice presented in December 2009, stated that the claimant suffered the accident on a date that the claimant did not even work. The claimant's allegation of actual notice does not present a conclusion that the proposition is more likely to be true than not true.

The next question is whether the claimant has met his burden of proving that the defense was not prejudiced by lack of written notice. The employer's witnesses testified that they were prejudiced by lack of timely notice, because timely notice is essential to investigating the incident and providing medical care to reduce the extent of the disability resulting from the accident. The employee had the burden to prove that the defense was not prejudiced. None of the evidence suggests that the defense interest in reducing the claimant's disability was not prejudiced by the delay in treatment by medical providers authorized by the employer. No inquiry to Dr. Poetz or Dr. Petkovich on this issue appears in the record. The claimant's allegation of lack of prejudice does not present a conclusion that the proposition is more likely to be true than not true based on the evidence presented in the record.

Based on the weight of the credible evidence, the claimant did not provide a written or oral notice of the occurrence within thirty days and did not prove that the employer had actual notice of the accident within the time set forth by law or that the defense was not prejudiced by lack of notice. Based on the evidence submitted, the claim is denied for failure to provide timely notice to the employer as required by law.

LIABILITY FOR PAST MEDICAL EXPENSES

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that

unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

As stated in Sickmiller v. Timberland Forest Products, Inc., 407 S.W.3d 109, 121 (Mo. App. S.D. 2013), “[S]ection 287.140.1 ‘does not require a finding that the workplace accident was the prevailing factor in causing the need for particular medical treatment.’” (quoting Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511, 517 (Mo. App. W.D. 2011)). “Where a claimant produces documentation detailing his past medical expenses and testifies to the relationship of such expenses to the compensable workplace injury, such evidence provides a sufficient factual basis for the Commission to award compensation.” Id. (quoting Treasurer of Missouri v. Hudgins, 308 S.W.3d 789, 791 (Mo. App. W.D. 2010)).

The claimant testified that he has outstanding medical bills for treatment to his low back to Dr. Klinginsmith (\$630), St. Clare Health Center (\$2,382), Dr. Matz (\$55), St. Luke’s Hospital (\$125) and medical and short-term disability benefits to the Carpenters’ union (\$21,699.32). The claimant also testified that he had out-of-pocket expenses for prescription medications and a co-pay to his surgeon in the amount of \$84.30.

However, looking at the documentary evidence (Exhibits 13, 14), the claimant incurred the following medical expenses:

Provider	Services	Amount Billed	Amount Outstanding
Before Claim and Answer to Claim			
Dr. Klinginsmith	Chiropractic Services	\$ 630.00	\$ 630.00
St. Clare Health Center	Hospital Services	\$19,799.10	\$ 2,382.00
Medical Arts Pharmacy	Prescription Mediation	\$ 34.91	\$ 34.91
After Claim and Answer to Claim			
Dr. Matz	Surgical Services	\$ 9,744.00	\$ 55.00
St. Luke’s Hospital	Hospital Services	\$17,513.15	\$ 125.00
St. Luke’s Pharmacy	Prescription Mediation	\$ 27.27	\$ 27.27
Total		\$47,748.43	\$ 3,254.18

Two important issues require additional analysis in this case. First, the claimant can recover past medical expenses only when the employer has denied a request for medical services. This means that the claimant must prove that the employer knew of the need for medical care or refused to provide the medical treatment. The filing of the claim for compensation on December

7, 2009, clearly provided notice to the employer that the claimant sought medical care, and the defense Answer to Claim provides a general denial. Thus, the employer would be liable for medical expenses related to the injury after December 2009 if the claim is compensable.

The second issue relates to whether the defense can take advantage of the discount for medical services that the claimant received through his union health and welfare program or has liability for the billed amount. This question has been discussed at length by our courts. Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 820 (Mo.banc.2003), held an employer was only obligated to reimburse an employee for those medical expenses for which the employee will actually be held liable. The medical fees and charges compensable under Section 287.140 refer only to an employee's *actual* medical expenses – those expenses employee pays out of pocket, expenses for which employee will actually be held responsible in the future, and fees for which a Medicare or Medicaid lien exist. Id. The fees or charges recoverable by an employee are the amounts the care provider actually requires employee to pay, initially or thereafter, for medical services provided. Farmer-Cummings, 110 S.W.3d at 821. Thus, an employee's recoverable fees and charges include only those amounts which have to be paid for her treatment, and for which employee will otherwise be held liable. Farmer-Cummings, 110 S.W.3d at 822.

In the Farmer-Cummings case, the claimant developed work-related asthma, which required treatment. Farmer-Cummings, 110 S.W.3d at 819. While Farmer-Cummings sought compensation for her medical expenses, her employer refused to pay the charges. Farmer-Cummings, 110 S.W.3d at 819-820. The Commission held the defense liable for \$118,581.99 in medical expenses. Farmer-Cummings' total medical charges were \$158,291.71. From this amount, the Commission subtracted \$39,637.72 in fees that the medical care providers either wrote off or adjusted from the total medical charges. The amount remaining after write-offs and adjustments, \$118,581.99, was comprised of charges either paid by Medicaid, Farmer-Cummings, her private health insurer, or charges which were still outstanding. Farmer-Cummings, 110 S.W.3d at 820.

The claimant appealed and argued that the Commission erred in refusing to award compensation for those amounts written off or adjusted from the total medical charges. Id. The issue before the court was whether the original bills remained "fees and charges" collectible by the claimant, if they were reduced or written off by the provider. Farmer-Cummings, 110 S.W.3d at 821. Missouri courts previously determined an employee was not entitled to compensation for provider write-offs. Mann v. Varney Construction, 23 S.W.3d 231,233 (Mo.App.E.D.2000), held an employee was not entitled to compensation for Medicaid write-off amounts, when the total amount submitted had never been sought from him. Similarly, Lenzini v. Columbia Foods, 829 S.W. 2d 482,487 (Mo.App.W.D.1992), reduced a compensation award by an amount which had been written off by care providers. Id.

The Supreme Court noted that inherent in both Mann and Lenzini was the requirement of actual liability on the employee's behalf. Write-offs or adjustments which extinguished the liability of an employee were not fees and charges, within the contemplation of Section 287.140. Farmer-Cummings, 110 S.W.3d at 821. Thus, the claimant's fees and charges included only those amounts which had to be paid for her treatment, for which she would otherwise be liable. Id. On reviewing the medical bills, the court could not determine with certainty whether she

remained liable for write-offs or adjusted fees. Farmer-Cummings, 110 S.W.3d at 823 n.9. The Supreme Court reversed, and remanded the claim for determination of the claimant's continuing liability for the medical expenses. If the claimant remained personally liable for any of the reductions, she was entitled to recover them. However, if the defense established that the claimant was not subject to further liability, she was not entitled to a windfall recovery. Farmer-Cummings, 110 S.W.3d at 823.

Ellis v. Treasurer, 382 S.W.3d 217,223-224 (Mo.App.S.D.2009), held the claimant could recover her entire medical charges where she testified that she had actual liability for her total medical expenses, and some of the medical charges were paid by an ERISA-qualified health insurer, which the claimant was contractually required to reimburse.

In Maness v. City of Desoto, 421 S.W.3d 532 (Mo.App.E.D.2014), the Court clarified the claimant's burden of proof to recover an award of past medical expenses, and the circumstances under which an employer can take credit for deductions and offsets taken against an employee's total medical charges. Section 287.140.1 required an employer to provide such care as may reasonably be required after the injury to cure and relieve from the effects of the injury. An employee seeking past medical expenses had to prove the need for treatment and medication flowed from the work injury. A sufficient factual basis existed for an ALJ to award past medical expenses where employee's medical bills were introduced into evidence, employee testified those bills were related to and the product of the work injury, and the bills related to the professional services rendered, as shown by the medical records in evidence. An employer could challenge the reasonableness or fairness of the bills, or show the medical expenses incurred were not related to the injury in question. Maness, 421 S.W.3d at 544. The evidence showed, and the defense did not dispute, the claimant's health insurer paid a portion of his medical bills. Since the employer did not assert those payments came from it or its workers' compensation insurer, it could not take a credit for amounts paid by the claimant's health insurer. Thus, the Commission did not err in awarding these amounts to the claimant. Maness, 421 S.W.3d at 545.

However, when a claimant carried his burden under Martin by producing documentation detailing past medical expenses, and testifying to the relationship of the expenses to the compensable injury, the employer can raise a defense. Specifically, the employer can establish the employee was not required to pay the billed amounts, the employee's liability for the disputed amounts was extinguished, and the reason employee's liability was extinguished did not otherwise fall within the provisions of Section 287.270. If the employee remained personally liable for any write-offs or fee reductions taken against the total medical expenses, he was entitled to recover them as "fees and charges" within the meaning of Section 287.140. But if the employee was not subject to further liability for those amounts, he was not entitled to a windfall recovery. Maness, 421 S.W.3d at 545-546. The employer could not take advantage of fee reductions or discounts against the total medical charges. In so holding, the Court relied on the fact the injured employee had signed documents, wherein he agreed to be responsible for the total charges for medical services rendered to him by certain care providers. Id.

Based on the above, the claimant received medical services related to his accident billed at \$27,284.42 after he notified the employer of his need for medical care and the defense denied the claim. He remains liable for \$207.27 after write-offs from payments made by his union health and welfare plan. He did not testify that he would be liable for the entire amount billed

regardless of write-offs by the medical providers at the request of the union health and welfare plan.

FUTURE MEDICAL CARE

Pursuant to section 287.140.1, an employer is required to provide care "as may be reasonably required to cure and relieve from the effects of the injury." This includes allowance for the cost of future medical treatment. Pennewell v. Hannibal Regional Hospital, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013) citing Poole v. City of St. Louis, 328 S.W.3d 277, 290-91 (Mo. App. E.D. 2010). An award of future medical treatment is appropriate if an employee shows a reasonable probability that he or she is in need of additional medical treatment for the work-related injury. Id. Future care to relieve [an employee's] pain should not be denied simply because he may have achieved [maximum medical improvement]. Id. Therefore, a finding that an employee has reached maximum medical improvement is not necessarily inconsistent with the employee's need for future medical treatment. Id.

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present "evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible" for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

In determining whether medical treatment is "reasonably required" to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

"It is not necessary that the claimant seeking future medical benefits produce conclusive evidence to support that claim." Williams v. City of Ava, 982 S.W.2d 307, 311 (Mo.App. 1998). "The fact that a claimant may have a 'possible' need for future medical care does not constitute substantial evidence to support such an award." Id., at 312. "Testimony that can be construed as based on reasonable probability, however, will support an award for future medical care." Id., at 312. "Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App.1996).

On July 9, 2010, Dr. Matz, the claimant's treating surgeon, opined the claimant was at maximum medical improvement but still required a functional capacity evaluation and a rating.

See Exhibit 4. He also opined that the claimant should be slowly weaned off his pain medications and muscle relaxants over a six-month period and recommended a six-month follow-up visit that never happened. See Exhibit 4. On March 13, 2012, and April 21, 2014, Dr. Poetz examined the claimant and opined that the claimant requires pain medication, managed weight loss, and, if symptoms persist, a repeat MRI followed by additional surgery, if indicated. See Dr. Poetz deposition, page 19. He did not specify whether the additional medical care was a result of the work-related injury, the claimant's severe pre-existing condition, or the claimant's subsequent accident when he slipped on ice. Dr. Petkovich examined the claimant on December 9, 2014, and opined that the claimant required no future medical treatment. See Dr. Petkovich deposition, page 17.

Based on the evidence, the weight of the evidence is that the claimant requires no additional medical care that flows from this occurrence. The two surgeons made no recommendation for additional radiological testing, surgical procedures, or pain medications. No additional medical care is awarded.

TEMPORARY DISABILITY

Compensation must be paid to the injured employee during the continuance of temporary disability but not more than 400 weeks. Section 287.170, RSMo 1994. Temporary total disability benefits are intended to cover healing periods and are unwarranted beyond the point at which the employee is capable of returning to work. Brookman v. Henry Transp., 924 S.W.2d 286, 291 (Mo.App. E.D. 1996). Temporary awards are not intended to compensate the Employee after the condition has reached the point where further progress is not expected. Id.

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

The claimant's last day of work was October 19, 2009 and he has not returned to work for this employer or any other employer since that date. The parties stipulated that the claimant reached maximum medical improvement on July 9, 2010. He was temporarily totally disabled for 37 4/7 weeks.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's

duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

The claimant appears to have had three severe events that contributed to his low back condition. First, the claimant had chronic severe low back pain for many years before the accident at work according to Dr. Klinginsmith's records. Dr. Petkovich found significant degenerative disc disease throughout the lumbar spine, most severe at the L3-4, L4-5 levels consistent with the October 27, 2009, MRI which showed degenerative disc disease throughout the lumbar spine from L1-2 through L5-S1 with spondylitic changes. Dr. Petkovich opined that the spondylitic changes on the October 27, 2009, MRI take several years to develop. He opined that they are not acute and they have nothing to do with the alleged injury nor were the degenerative issues accelerated or aggravated by the alleged injury. Dr. Poetz opined that the claimant had a "pre-existing lumbar strain with lumbar degenerative disc disease preexisting." See Dr. Poetz deposition, page 18. Dr. Poetz opined that the claimant suffered from a 10% pre-existing permanent partial disability to his low back. See Dr. Poetz deposition, page 21. None of the other medical experts opined as to the extent of the claimant's pre-existing permanent partial disability. Therefore, Dr. Poetz' evaluation of the claimant's pre-existing permanent partial disability appears to be supported by the medical records and is unchallenged.

Looking at the claimant's work-related injury in 2009, Dr. Poetz opined that the "lumbar disc displacement at L4-5 paramedian and lateral with lumbar radiculitis and exacerbation of lumbar degenerative disc disease as a result of the 7/19/09 injury, status-post left L4-5 laminectomy and discectomy, and an L3-4 lateral extraforaminal disc protrusion" resulted from "the 7/19/09 injury." See Dr. Poetz deposition, page 18. Dr. Poetz' medical history reflects a 2001 automobile accident causing back issues and a 2010 accident on ice causing soft tissue damage to the claimant's back. Dr. Poetz attributed a majority of the claimant's disability to the 2009 alleged accident as opposed to the claimant's pre-existing degenerative disc disease and lumbar strain prior and the 2010 intermediate injury on the ice. Dr. Poetz evaluated the claimant in March 2012 and again in April 2014, and opined that the claimant suffered from a 35% permanent partial disability to his low back from the alleged 2009 accident based on his 2012 evaluation and a 40% permanent partial disability to his low back at the lumbar spine from the July 19, 2009 accident based on his 2014 evaluation. See Dr. Poetz deposition, pages 21, 26. Apparently, Dr. Poetz changed his opinion after the April 2014 evaluation.

Dr. Petkovich opined that the claimant suffered from a disc herniation at the L4-5 level which is consistent with his history of pain. Dr. Petkovich did not know when that herniation occurred but it could have occurred as the claimant alleged. He opined that the other findings throughout the lumbar spine were chronic degenerative conditions having nothing to do with the alleged 2009 accidental injury. Dr. Petkovich opined that the claimant suffered from a 7% impairment related to the disc herniation at L4-5 level, using the criteria of the AMA Guides to the Evaluation of Permanent Impairment Sixth Edition.

Based on the weight of the evidence, the claimant suffered from a 10% pre-existing permanent partial disability to his low back. The evidence is that the claimant suffered an

additional 40% permanent partial disability to his low back at the lumbar spine after July 16, 2009 and that he now has a total 50% permanent partial disability to his low back.

The difficulty with Dr. Poetz' evaluation is that he did not place the significance of Dr. Matz' findings that reflected a credible evaluation of the relationship between the disability from the accident and any damage to the claimant's low back that occurred after the surgery. After the surgery and while he was still under treatment with Dr. Matz, the claimant slipped on some ice in his driveway which caused a shooting pain through his leg. The claimant testified that prior to his slip on the ice, most of his symptoms had gone away after the surgery and he was able to move and walk around. Since the slip on the ice, the claimant returned to the condition he had prior to the surgery. The claimant reported this incident to Dr. Matz who then ordered additional testing to see if there was any further injury to the claimant's low back. Dr. Matz found no recurrent disc injury. After this additional testing, which included an MRI, Dr. Matz recommended no further medical treatment other than the normal surgical follow-up. See Exhibit 4. At Dr. Matz' final evaluation, he found no leg pain on that date, but reflected that the claimant had been consuming pain medication. He opined that the claimant had post-laminectomy syndrome, that it would be difficult for the claimant to return to his occupation that requires a lot of strenuous work, and recommended vocational rehabilitation. See Exhibit 4.

Based on the weight of the evidence, the claimant suffered a 25% permanent partial disability to his low back from the July 2009 accident and a 15% permanent partial disability to his low back from the February 2010 accident that eventually resulted in additional severe low back pain radiating into the claimant's leg.

SECOND INJURY FUND

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

- (1) The claimant has a preexisting permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment;
- (2) The percentage of disability attributable to the preexisting disability equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury. There must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability;
- (3) The combination of the preexisting disability and the disability resulting from the last injury equals a minimum of 50 weeks of compensation for a body as a whole injury or 15 percent for a major extremity injury; and
- (4) The combined disability is substantially greater than the disability that would have resulted from the last injury considered alone. Treasurer of the State of Missouri, etc., v Witte, Slip Op., 414 S.W.3d 455, 462 (Mo.Banc 2013).

When these requirements are met, the employer at the time of the last injury is liable for only the degree of disability that would have resulted from the last injury if there was no preexisting

disability. Id at 462, 463. All preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable. However, there is no threshold requirement *for* the last injury. Id at 463. In that case, the court found that there must be a single preexisting permanent partial disability that meets the thresholds to trigger the fund's liability and there is no threshold requirement *for* the last injury. Additionally, all preexisting injuries must be considered in calculating the amount of compensation for which the fund is liable. Id.

Section 287.220.1, RSMo 1994, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered;
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and
4. The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997). Generally, where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991).

As discussed above, the claimant suffered from a 10% pre-existing permanent partial disability to his low back and a 25% permanent partial disability to his low back from the 2009 accident at work. In addition, he suffered from a 15% permanent partial disability to his low back from a soft tissue injury in February 2010, when he slipped on the ice after most of the symptoms from the work-related injury had disappeared according to his treating surgeon. At the conclusion of Dr. Matz' course of treatment, Dr. Matz opined that the claimant had post-laminectomy syndrome, that it would be difficult for the claimant to return to his occupation that

requires a lot of strenuous work, and recommended vocational rehabilitation. See Exhibit 4. Dr. Poetz opined that the combination of the claimant's pre-existing permanent partial disability combined with the permanent partial disability from his work-related accident to result in an overall greater disability than the simple sum of the two disabilities considered alone. He also opined that the claimant "is permanently and totally disabled as a direct result of his July 19, 2009 work-related injury."

Dr. Petkovich opined that the claimant could return to his prior occupation based on only the result of the 2009 accident. See Dr. Petkovich deposition, pages 27, 28. He did not opine whether the claimant could return to this or any other occupation given the disability from pre-existing or subsequent permanent partial disabilities. See Dr. Petkovich deposition, page 28. On the other hand, Dr. Poetz and Mr. Israel reviewed the claimant's condition from all occurrences and opined that the claimant is permanently and totally disabled. Their finding is compatible with that of Dr. Matz.

However, the Second Injury Fund is only responsible for permanent and total disability benefits where the work injury combines with some preexisting condition to render the individual permanently and totally disabled. Section 287.220 RSMo 2000. The nature and extent of the preexisting disabilities are determined as of the date of the primary injury. Garcia v. St. Louis County, 916 S.W. 2d 263, 267 (Mo. App.1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363 (Mo.App. 1992); Anderson v. Emerson Electric Co., 698 S.W.2d 574, 577 (Mo. App 1985). The Fund is not liable for any post accident worsening of an employee's preexisting disabilities that are not caused or aggravated by the last work-related injury, or for any conditions that arise after the work-related injury. Garcia v. St. Louis County, supra; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789,793 (MO. App. S.D.1992).

Deterioration of a preexisting condition or the development of an entirely new condition cannot be considered in determining Fund liability. After the 2009 work-related accident, the claimant suffered a significant accidental injury in February 2010 that significantly impaired his ability to function. The Fund provides compensation for previously existing disabilities, not increased disabilities caused by post-accident worsening of preexisting diseases when that worsening was not caused or aggravated by the last injury. Therefore the claimant is not entitled to permanent total benefits from the Fund.

In this case, the claimant has not established that he is entitled to recovery against the Second Injury Fund, because the evidence does not establish that the claimant suffered from a permanent partial disability meeting the threshold preexisting disability equal to a minimum of 50 weeks of compensation for a body as a whole injury or 15% for a major extremity injury in effect at the time of the 2009 accident. The only medical expert that evaluated the claimant's pre-existing permanent partial disability to his low back opined that the permanent partial disability equaled 40 weeks for a body as a whole injury. Based on the above, the claim is denied.

Made by: /s/ EDWIN J. KOHNER
EDWIN J. KOHNER
Administrative Law Judge
Division of Workers' Compensation