

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 14-019253

Employee: Daniel Payton

Employer: Maryville RII School District

Insurer: Missouri Rural Services Workers' Compensation Insurance Trust

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 10, 2016. The award and decision of Administrative Law Judge Robert Miner, issued February 10, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms 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.

Given at Jefferson City, State of Missouri, this 17th day of August 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Daniel L. Payton

Injury No.: 14-019253

Employer: Maryville RII School District

Additional Party: The Treasurer of the State of
Missouri as Custodian of the Second Injury Fund

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri

Insurer: Missouri Rural Services Workers'
Compensation Insurance Trust, c/o Cannon
Cochran Management Services, Inc.

Hearing Date: November 13, 2015

Checked by: RBM

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: March 10, 2014.
5. State location where accident occurred or occupational disease was contracted:
Maryville, Nodaway County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.

11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee injured his left shoulder when he and a co-worker were lifting a soccer goal that weighed approximately 200 pounds.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Left shoulder.
14. Nature and extent of any permanent disability: Permanent total disability as a result of Employee's March 10, 2014 injury considered alone.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$204.00.
17. Value necessary medical aid not furnished by employer/insurer? \$35,048.30.
18. Employee's average weekly wages: \$649.20.
19. Weekly compensation rate: \$432.82 for temporary total disability, permanent partial disability, and permanent total disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$35,048.30.

27 2/7 weeks of temporary total disability for the period March 11, 2014 through September 17, 2014 at the rate of \$432.82 per week = \$11,809.80.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Employee from the effects of his March 10, 2014 work injury, in accordance with section 287.140, RSMo.

Permanent total disability benefits from Employer beginning September 18, 2014, and thereafter, at the weekly rate of \$432.82 for claimant's lifetime.

22. Second Injury Fund liability: None. Employee's claim against the Second Injury Fund is denied.

23. Future requirements awarded: As awarded.

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: John E. McKay.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Daniel L. Payton

Injury No.: 14-019253

Employer: Maryville RII School District

Additional Party: The Treasurer of the State of
Missouri as Custodian of the Second Injury Fund

Before the
**Division of Workers'
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Department of Labor and Industrial
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Insurer: Missouri Rural Services Workers'
Compensation Insurance Trust, c/o Cannon
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PRELIMINARIES

A final hearing was held in this case on Employee's claims against Employer and the Treasurer of the State of Missouri as Custodian of the Second Injury Fund on November 13, 2015 in St. Joseph, Missouri. Employee, Daniel L. Payton, appeared in person and by his attorney, John E. McKay. Employer, Maryville RII School District, and Insurer, Missouri Rural Services Workers' Compensation Insurance Trust, c/o Cannon Cochran Management Services, Inc., appeared by their attorney, Clinton D. Collier. The Second Injury Fund appeared by its attorney, Maureen T. Shine. John E. McKay requested an attorney's fee of 25% from all amounts awarded. It was agreed that post-hearing briefs/proposed awards would be due on December 14, 2015.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following:

1. On or about March 10, 2014, Daniel L. Payton ("Claimant") was an employee of Maryville RII School District ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about March 10, 2014, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by Missouri Rural Services Workers' Compensation Insurance Trust, c/o Cannon Cochran Management Services, Inc., ("Insurer").

3. On or about March 10, 2014, Claimant sustained an accident in Maryville, Nodaway County, Missouri, arising out of and in the course of his employment.
4. Employer had notice of Claimant's alleged injury.
5. Claimant's Claim for Compensation was filed within the time allowed by law.
6. The average weekly wage was \$649.20, and the rate of compensation for temporary total disability, permanent partial disability, and permanent total disability is \$432.82 per week.
7. No compensation has been paid by Employer for temporary disability.
8. Employer/Insurer has paid \$204.00 in medical aid for treatment on March 11, 2014 at St. Francis Health Care.
9. The medical expenses incurred to treat Claimant's condition were fair and reasonable and usual and customary.
10. Claimant reached maximum medical improvement on September 17, 2014.

ISSUES

Claimant and Employer agreed there are disputes on the following issues:

1. Was Claimant's March 10, 2014 accident the prevailing factor in causing an injury, and is Claimant's current condition medically causally related to the alleged work accident of March 10, 2014?
2. What is Employer's liability, if any, for permanent partial disability benefits, or in the alternative, permanent total disability benefits?
3. What is Employer's liability, if any, for past temporary total disability benefits from March 10, 2014 through and including September 17, 2014?
4. What is Employer's liability, if any, for past medical expenses in the claimed amount of \$35,048.30?
5. What is Employer's liability, if any, for future medical aid?

Claimant and the Second Injury Fund agreed there is a dispute on the issue of the Second Injury Fund's liability, if any, for permanent total disability benefits.

Claimant testified in person. Raymond Gebhart, Jr., Herb Andrews, Richard S. Payton, and Debbie Payton also testified on behalf of Claimant. In addition, Claimant offered the following exhibits which were admitted in evidence without objection (the depositions were admitted subject to any objections contained in the depositions):

- A—Medical Records of Advanced Surgery Center
- B—Records of Clarinda Regional Health Center
- C—Records of St. Francis Hospital
- D—Records of Orthopedics Sports Medicine
- E—Records of Dr. Rodney Smith
- F—Medical Bills of Clarinda Regional Health Center
- G—Medical Bills of Advanced Surgery Center
- H—Records of Miller Orthopedic – Dr. Thomas Atteberry
- I—Records of Clarinda Regional Health Center – MRI Films
- J—Bills of Miller Orthopedic
- K—Deposition of Claimant taken November 17, 2014
- M—Medical Report of Dr. P. Brent Koprivica dated January 12, 2015
- N—Deposition of Dr. P. Brent Koprivica taken May 22, 2015
- O—Report of Michael Dreiling dated May 8, 2015
- P—Deposition of Michael Dreiling taken on July 21, 2015
- Q—Deposition of Terry Cordray taken on September 14, 2015 with Deposition

Exhibits

- R—Attorney/Client Contract
- S—Exhibit Index identifying Claimant's Exhibits

Exhibit L was not offered in evidence.

Employer offered the following exhibits which were admitted in evidence without objection:

- 1—Curriculum Vitae of Dr. Thomas DiStefano
- 2—Report of Dr. Thomas DiStefano dated March 11, 2014
- 3—Report of Dr. Thomas DiStefano dated June 1, 2015
- 4—Deposition of Terry Cordray taken on September 14, 2015 with Deposition

Exhibits

The Second Injury Fund did not offer any exhibits.

Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those

markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

The Post-Hearing Briefs of Employer and the Second Injury Fund and the proposed Award of Claimant have been considered.

Findings of Fact

Claimant was employed by Employer on March 10, 2014 as Assistant Supervisor Building and Grounds. He worked for Employer continuously on March 10, 2014 until 2:00 p.m. when a co-worker asked Claimant for help lifting a soccer goal that weighed about 200 pounds. Claimant had been doing his regular work and had been lifting 50 pounds before 2:00 p.m. on March 10, 2014.

The soccer goal came in three pieces. The pieces had to be assembled on a field and were stored 40 to 50 yards away. Claimant and the co-worker picked up the pieces, one at a time, and put them in place to start putting the goal together. After the pieces had been moved and assembled, they used a Makita cordless vibrating drill to tighten bolts. The soccer goal was nine to ten feet high at the top.

Claimant and the co-worker then had to stand the goal upright in order to hang a net. The goal was lying in the grass on uneven ground. They each got on a side of the goal and raised it to the top of their heads. They had to push the goal over their heads. Claimant was not fully extended when he was lifting. He did not use his legs to lift.

When Claimant got the goal to the top of his head, he heard a loud pop and felt excruciating pain in his left shoulder. He intended to push the goal further when he felt the pain. He was pushing with his left hand when it happened.

Claimant then grabbed his left shoulder. He could not use his left arm or left shoulder after the incident occurred. He had no pain in his left shoulder immediately before the March 10, 2014 work injury. He was not in balance at the time he felt the pain. He believed he felt the pain because he was probably out of balance when he was lifting.

Claimant said a dirty word and waived at his co-worker. The co-worker helped Claimant get to the office in a Gator in order that Claimant could report to the shop. Claimant's boss was gone that afternoon. Claimant was in charge at the time.

Claimant reported the injury to Sharon Strueby at the Supervisor's Office on March 10, 2014 after the injury. Ms. Strueby takes care of insurance, and injuries are to be reported to her.

Claimant told Ms. Strueby that “he really screwed up.” Ms. Strueby called the Emergency Room at St. Francis Hospital in Maryville, Missouri and set up an appointment for Claimant.

Claimant did not see the company doctor, Dr. DiStefano, on March 10, 2014. He saw Dr. DiStefano on March 11, 2014. Claimant told Dr. DiStefano on March 11, 2014 about a pop he had in his shoulder a week before. Employer did not authorize an MRI of Claimant’s left shoulder after March 10, 2014. Dr. DiStefano reported that Claimant did not hurt himself at the school. Sharon of Employer told Claimant that Dr. DiStefano had denied his claim.

Employer denied further treatment for the March 10, 2014 injury. Workers’ Compensation did not provide any more treatment or pay any more bills. They did not pay any weekly benefits while Claimant was off work.

Claimant sought his own medical help when Employer refused to provide treatment.

Claimant went to an orthopedic doctor, Thomas Atteberry, in Iowa on his own on March 13, 2014. He had an MRI done of the left shoulder. Dr. Atteberry performed left shoulder surgery on May 12, 2014.

Claimant had a second MRI on the left shoulder on September 3, 2014. That MRI showed a complete tear on the left side of the shoulder and a partial tear on the other side of the shoulder. Claimant has not had a second left shoulder surgery.

Dr. Atteberry released Claimant on September 17, 2014 with a five-pound lifting restriction and no overhead work. Employer could not accommodate Dr. Atteberry’s restriction, and Claimant was terminated by Employer.

Claimant has a lot of pain in his left shoulder. He has discussed having a second left shoulder surgery with Dr. Atteberry, but he has not had it done because there is no guarantee that he would get any mobility back and Dr. Atteberry did not say how much pain would be alleviated from a second surgery.

Claimant testified he has not been able to go back to any work since March 10, 2014. Claimant has not worked since March 10, 2014.

Claimant had some left shoulder pain in January 2014. He had talked to nurse Effie Martinez about that pain. He did not recall what he told her. X-rays were taken, but were negative for damage to the left shoulder. Claimant’s left shoulder pain in January 2014 was a 1 to 2. He never went to the Emergency Room for left shoulder pain in

January 2014. He did not take any medication or miss any work in January 2014 due to his left shoulder. His left shoulder pain went away before March 2014.

On March 4, 2014, Claimant lifted a tote at home that weighed between 20 and 25 pounds. The tote was a plastic object that held knick knacks. He lifted the tote with two hands. He felt a little pain in his left shoulder while lifting the tote. His pain was a 0 to 1 on a scale of 0 to 10. He did not go to the Emergency Room at that time. He did not schedule an appointment to see a doctor. He did schedule an appointment to see a nurse on March 14, 2014.

Claimant went to work on March 5, 2014. He lifted a refrigerator tank at work on March 5, 2014 that weighed between 60 and 70 pounds. He was able to lift that by himself. The lifting of the refrigerator tank did not cause any more shoulder pain. Claimant worked eight hours on March 5, March 6, and March 7, 2014. March 7 was a Friday. Claimant did not see a doctor or go to the Emergency Room over the weekend of March 8 or 9, 2014. An MRI was not done between March 4 and March 10, 2014.

Claimant started having problems with his knees in 2009. He had a meniscus repair of his left knee on March 23, 2009. He was not off work for very long after surgery.

Claimant had right knee pain after the left knee surgery in 2009. Dr. Atteberry told Claimant he had osteoneurosis, a bone disease, in his right knee. Claimant had a right knee meniscus repair in December 2010 and holes were drilled in Claimant's knee. He was off work for eight weeks after that surgery. Dr. Atteberry said the osteoneurosis could affect other joints.

Claimant agreed that the September 10, 2010 record of Effie Martinez stating that he had complained of bilateral knee discomfort, he had trouble standing, and he was unable to bend his knees, is accurate.

Claimant has continued to have pain in his knees in 2011. The pain was severe at times.

Claimant read a June 22, 2011 note of Dr. Atteberry that references follow-up on both knees, both remained painful, and Claimant complained of pain in both shoulders, the right more bothersome than the left.

Claimant read an October 3, 2012 note of Dr. Atteberry. The note includes a History Present Illness stating Claimant was seen in follow-up for his knees. The note states that both knees were quite bothersome for him. The note also states Claimant had to sit for a couple of hours after work to try to get the knees to calm down.

Claimant took Naprosyn that did not relieve all of the knee symptoms. He had frequent popping in his knees. He had trouble climbing ladders at work. He had trouble kneeling and bending due to his knees. He did not get help from co-workers. He told co-workers about his knees. His work required that he be in awkward positions.

Claimant testified his pre-existing knee injuries hindered him at work. He had pain, but he worked through the pain. His prior knee injuries made it more difficult for him to work. It was more difficult to crawl up a ladder, get down on his knees, and get in tight spots. He looked for easier and better ways to do things so as not to injure himself again. He worked regular work with his knees prior to March 10, 2014.

Claimant testified he was planning to go forward with a knee replacement in the winter of 2015.

Claimant began to have right shoulder pain in 2011. Dr. Atteberry operated on Claimant's right shoulder on November 7, 2011. He was off work for 12 weeks after the surgery.

Claimant's prior right shoulder injury hindered him at work. His right shoulder was weaker. He changed the way that he performed some work tasks after his right shoulder surgery on November 7, 2011. He used a come-along to lift. He used a bucket truck to lift things onto a roof. He had co-workers help with things like lifting a compressor. He used the bucket truck to change lights to make it easier for him to do the work. He used a cable and ratchet so it did not hurt his knees and shoulder. He could raise his right arm above his head before March 10, 2014.

Claimant's prior surgeries did not prevent him from working before March 10, 2014.

Claimant saw a chiropractor twice for back spasms in May 2009. He received a shot at the ER in 2009 that made him feel better. He had only one injection in his lower back. He did not miss time from work due to his low back. He did not receive accommodations due to his low back. He has had back spasms once in a while since then.

Claimant had a left index finger laceration with a cracked bone at the first joint in 1986. He settled that workers' compensation claim.

Claimant treated for hypothyroidism and high blood pressure before March 10, 2014. He continues to treat for those conditions. Claimant was also treated for sleep apnea prior to March 10, 2014 because he stopped breathing during his sleep. Claimant's sleep apnea and hypothyroid does not cause problems on the job.

Claimant hurt his left shoulder in 2005 when he grabbed a deer. He did not receive treatment for that injury. He had a full recovery after that injury and had no problems at work after that incident.

Claimant did not have any restrictions after his finger laceration injury and his left knee and right knee surgeries. He returned to full-time work after release from those injuries. He did not receive work accommodations after those injuries. He did not take prescription pain medication for his right knee.

Claimant was never disciplined on the job prior to March 2014. He always had good evaluations and received regular raises. He worked five days a week despite his prior surgeries.

Claimant graduated from high school in 1975. He took special education classes in grade school. He does not think he had a class for ADD.¹ He was not diagnosed with ADD. He was never diagnosed with a learning disability. He did not have problems with reading, writing, or math.

Claimant has not had any formal education in the last forty years. He types with two fingers and types about five words per minute. He has not had any computer training.

All of Claimant's jobs since high school have required that he be able to lift 50 pounds, use his upper extremities unrestricted, and work in awkward positions. When Claimant worked for Employer, he lifted more than 50 pounds during the day, he worked in awkward positions, he worked with air-conditioning, and he used vibrating power tools. He has had no jobs ordering people around.

Claimant's primary pain now is in his left shoulder. His left shoulder pain is constant. It averages between a 3 and 7. The pain is excruciating when it gets to hurting. His left shoulder pain increases when he moves, when he reaches out, and when he rolls over at night. It is better when he gets up and moves around. He has weakness and loss of motion in his left shoulder.

Claimant uses his right hand for most of his driving. He normally does not drive long distances. His wife drives the long distances. Claimant is afraid that he could not react to an incident. He avoids heavy traffic and limits his driving to shorter distances.

¹ "ADD" is an abbreviation for attention deficit disorder. *Stedman's Medical Dictionary (28th Edition)*.

Claimant's father died on October 24, 2014. Claimant tried to help him before he died. After March 10, 2014, Claimant's father started to fall. Claimant reached out with his right hand, but could not reach with his left hand, and his father fell onto his head.

Claimant's left arm pain increases with activity. He cannot lift a gallon of milk with his left arm. He steers with his left arm under the steering wheel. He cannot put his left arm on the armrest without pain.

Claimant and his wife arrived at a motor vehicle accident scene in November, 2014. A car was on its side in a ditch. Claimant and his wife were the first at the scene. Claimant could not help get the driver out of the car. He knew he could not open the door due to his left shoulder.

Claimant has difficulty putting on his pants since March 10, 2014. He puts his belt on before putting his pants on one leg at a time. He wears crocs because they are easy to get on his feet. On the day of the November 13, 2015 hearing, Claimant took forty-five minutes from the time he started his shower until he left the house. Before the March 2014 accident, it would have taken fifteen minutes.

Claimant can put clothes into the washer and take clothes out of the washer with his right hand. He uses a grabber with his right hand to remove clothes from the dryer. He is not able to help fold clothes.

Claimant is not able to get his t-shirt on and off by himself when it is hot. Before March 10, 2014, he cut his own hair. Now his wife helps trim his hair.

Claimant cannot open a pickle jar. Since March 10, 2014, Claimant's wife opens jars. Claimant cannot lift a stack of dishes. He cooks a little at home.

Claimant was not having left arm problems prior to March 10, 2014.

Claimant's left shoulder pain interrupts his sleep. Sharp pains in his left shoulder waken him during the night. Claimant slept an average of seven hours per night before the March 2014 accident. Claimant averages about four hours sleep per night since the March 10, 2014 accident. During an average night, his left shoulder pain wakes him three to four times per night. He walks around to take his mind off the pain. His left shoulder pain has been so intense at night that he has urinated. He uses a CPAP² to help breathe.

² "CPAP" is an abbreviation for continuous positive airway pressure. *Stedman's Medical Dictionary (28th Edition)*.

Claimant takes Tylenol 3 and Tramadol for left shoulder pain. He takes a prescription sleeping pill. He takes the maximum dose of Tylenol and Naproxen with very little relief. He no longer takes Hydrocodone. He takes a low-dose anti-depressant medication. He did not have any treatment for depression prior to March 10, 2014.

Claimant's left arm causes him to lie down during the day. He sometimes nods off during the day due to lack of sleep. He sometimes has difficulty concentrating. He lies down or sits in a recliner and closes his eyes three to four times a day between 8:00 a.m. and 5:00 a.m. on an average day. He dozes off a couple times per day between 8:00 a.m. and 5:00 a.m. He did not lie down or doze off during the day before the March 10, 2014 injury.

Claimant cooked chickens for the Elmo Fish Fry before the March 10, 2014 injury. He normally cooked 35 to 45 pounds of chicken per night. Since the injury, he has stopped cooking at the Elmo Fish Fry. He did not want to lift the five gallons of oil needed to cook.

Since March 10, 2014, Claimant uses a weed eater with his right hand only. Since then, he sold a garden tiller because he could not control it. Since then, his old mower has been left in the shed. He has bought a new zero-turn mower and has put a knob on it. It is difficult to steer the riding lawn mower. He did not have problems with riding the lawn mower before March 10, 2014.

Since March 10, 2014, Claimant has not been able to use a concrete mixer. He has three projects, but he will have to hire help to finish the work. Since March 10, 2014, Claimant has not been able to use his chain saw. He had a walk-behind snow blower, but he is not able to use it because it requires two hands. He has had someone else use the snow blower.

Before March 10, 2014, Claimant went fishing frequently in his fishing boat. Since March 10, 2014, he has only tried fishing once. He caught a fish, but it hurt to pull it in. He has not used his boat since March 10, 2014. He did not have problems hunting or fishing before March 10, 2014.

Claimant has not sighted in a rifle or hunted with a gun or bow since March 10, 2014. He bird watches, but he holds his binoculars with his right hand.

Claimant makes bird feeders. He has sold a few bird feeders at flea markets and has earned between \$300.00 and \$400.00. He works at his own pace and takes rest breaks. It hurts to build the feeders. He goes antiquing once a month. His wife buys and sells.

Currently Claimant's left knee needs to be replaced. He has bone on bone. He has grinding and aching in his knees. His right knee aches less than his left knee. He has no plans for having a knee replacement, but he anticipates having it done. He currently has no appointment set with Dr. Atteberry for his knees.

Claimant currently has weakness in his right shoulder. His right shoulder hurts a little because he uses it all the time. He stretches his right shoulder to keep motion in the shoulder. Claimant is right-handed.

Claimant lives in Elmo, Missouri. He has been driving to and from his brother's automobile repair shop in Maryville, Missouri since March 2014. It is 22 miles from Elmo to Maryville. He goes to his brother's shop every day during the week. Claimant answers the phone, picks up tools, and pulls carburetors apart. He goes in as he pleases. He does not clock in or out. There is no set schedule. He does not always answer the phone. He is not an employee of his brother. He is not on his brother's insurance. He receives no payment from his brother. A paid employee would do the things Claimant does at his brother's shop.

Claimant helps care for his 80-year-old mother who has Alzheimer's. He does not provide care to her full-time. He tries to see her every day. She stays home alone at night. She lives next door to Claimant's younger brother.

Claimant has five grandchildren ranging in ages from five to eighteen. He does not see his grandchildren very often.

Claimant has not been employed since March 10, 2014. He has not applied for work since then. He does not feel he is able to do anything. He does not feel he is able to work in any employment. He testified he would still be working if he had not had the March 10, 2014 injury.

Claimant signed Exhibit R, the Attorney Fee Contract. He is satisfied with the services of his attorney, John McKay. He asked the Court to approve the fee contract.

Claimant incurred the medical bills represented in Exhibits F, G and J that total \$35,048.30 for treatment of his left shoulder injury. He is liable for payment of those bills. Claimant testified the medical bills are related to and are a product of his left shoulder injury on March 10, 2014.

Claimant agrees to the need for future treatment of his left shoulder. He would consent to future pain management. He would consent to a possible surgery on his left shoulder.

Claimant was born on May 18, 1957 and was 58-years-old at the time of the hearing. He moved from the state of Washington to Missouri in 2003 to be with his parents. He started working for Employer in April 2004.

I find Claimant's testimony to be credible.

Testimony of Raymond Gebhart, Jr.

Raymond Gebhart, Jr. is Claimant's uncle. He works for the Missouri Department of Transportation.

Claimant helped Mr. Gebhart with home remodeling. Claimant worked without problems before March 10, 2014. Claimant painted and worked on ceilings. Since the injury, Claimant has not been able to help Mr. Gebhart.

Before the March 2014 injury, the two of them went fishing together. Both had boats. They fished for catfish and caught between 100 and 400 pounds of fish.

Since March 2014, he and Claimant have not gone fishing together. Since the injury, Claimant cannot pick up his grandkids.

I find Mr. Gebhart's testimony to be credible.

Testimony of Herb Andrews

Herb Andrews is 83-years-old. He has been a neighbor of Claimant for eight to nine years. Before March 2014, he and Claimant went deer hunting together. Claimant helped sight in a gun, helped field dress deer, and helped do projects around the house. Since March 2014, Claimant has not hunted with Mr. Andrews or helped him with house projects.

I find Mr. Andrew's testimony to be credible.

Testimony of Richard S. Payton

Richard S. Payton is Claimant's brother. Prior to March 10, 2014, he and Claimant went canoeing on the Nodaway River in a canoe that weighed 220 pounds. Claimant helped lift the canoe onto and off of on a car. Claimant used both shoulders to paddle. Claimant did not have trouble paddling the canoe. Claimant never complained when they went paddling together. He and Claimant have not canoed together since March 10, 2014.

Mr. Payton operates the Auto Doc business. Richard Payton does not pay Claimant to be at the business. Claimant helps answer the phone. Claimant hands him a tool every once in a while. Claimant is not an employee of Mr. Payton. He is not carried under Mr. Payton's insurance. Claimant is not ACS certified.

Since March 10, 2014, Claimant comes and goes as he pleases. He can go home whenever he wants. He has no set hours. Since March 10, 2014, Richard Payton has seen Claimant doze off two to three times per day while Claimant is in a chair. Richard Payton never saw Claimant doze off in a chair prior to March 10, 2014.

Richard Payton now has two employees.

Claimant does not go to the shop every Monday through Friday. He sometimes goes to his mother's house to stay with her.

I find Mr. Richard Payton's testimony to be credible.

Testimony of Debbie Payton

Debbie Payton is Claimant's wife. Before March 10, 2014, Claimant put up Christmas decorations on their house. He climbed on a ladder when he put up Christmas ornaments. After March 10, 2014, she did most of the work putting up the decorations. The decorations have stayed up since then. Claimant could not help take them down.

Before the March 10, 2014 injury, Claimant drove long distances. Since the injury, the longest trips they have taken have been to Kansas City and Omaha. She has driven on those trips.

Debbie Payton and Claimant have a stove that needs to be repaired or replaced. Before the March 10, 2014 injury, Claimant would have done that work. Now, they will have to have that work done by someone else. There is also painting that needs to be done and a rug that needs to be replaced. They will have to have that work done. Before the injury, Claimant would have done that work. Before the injury, Claimant would have done recycling. She does the recycling now. Before the injury, Claimant did not drop and break things. Since the injury, he drops plates, food, and ice.

Claimant had trouble with his knees when he worked around the house. He had problems with his right shoulder once in a while.

Claimant's left shoulder surgery was a lot worse than the three surgeries he had before March 10, 2014. The left shoulder makes Claimant feel useless and helpless.

I find Debbie Payton's testimony to be credible.

Exhibit C contains records of St. Francis Hospital. A March 10, 2014 Emergency Department note of 4:31 PM states in part: "History Chief Complaint Patient presents with Injury Shoulder Patient was picking up a soccer goal when his left shoulder popped. He felt immediate pain and is unable to lift his arm up. He denies any numbness or tingling, but the pain radiates down to his wrist." The note also states: "The incident occurred less than 1 hour ago."

Exhibit H contains records of Dr. Thomas Atteberry. Dr. Atteberry treated Claimant's left shoulder from March 14, 2014 until September 17, 2014. Dr. Atteberry performed a left rotator cuff repair on May 12, 2014.

Dr. Atteberry 9-17-14 Note states:

HISTORY OF PRESENT ILLNESS: Dan is seen in follow-up for his left shoulder. Really no change in his symptoms. He has obtained an MRI and is here to go over that.

ROS: Review of systems remains positive for left shoulder weakness. No significant pain at this time. No numbness or tingling. No fevers or chills.

EXAM: Patient has about 90 degrees of active elevation of his arm. Passively I can achieve 165 degrees. Continues to have significant weakness with supraspinatus testing. Neurovascular exam is normal.

Review of MRI shows evidence of a recurrent full thickness tear of the rotator cuff. This involves the supraspinatus and the anterior aspect of the infraspinatus. There is retraction back to the level of the glenoid.

ASSESSMENT:

1. Recurrent rotator cuff tear, left shoulder.

PLAN: Reviewed the findings with Dan. It looks like his cuff tore medial to the repair site. Again, it is significantly retracted. I discussed further treatment options with him. Given the fact that we are going to have less tendon to work with due to the site of the recurrent tear and the amount of retraction, I think that repair at this time is going to be extremely difficult and may not be possible. Certainly his function in his current state is not very good. He is

going to take some time and talk things over with his wife. They will get back to me regarding further treatment.

Evaluation of Dr. P. Brent Koprivica

The deposition of P. Brent Koprivica taken on May 22, 2015 was admitted as Exhibit N. Dr. Koprivica is licensed to practice medicine in Missouri and Kansas. (Koprivica deposition, page 4). He thought he had performed post-accident physical examinations to determine whether a person is physically able to return to work after an accident “tens to maybe 100,000 times.” (Koprivica deposition, page 5). He does IMEs primarily on behalf of claimants and their attorneys in workers’ compensation cases. (Koprivica deposition, page 43).

Dr. Koprivica examined Claimant on January 12, 2015. He identified Exhibit M, his January 12, 2015 report. The opinions in the report are based on reasonable medical certainty. He reviewed Exhibits A through K. (Koprivica deposition, page 5).

Dr. Koprivica testified that Claimant did not have any disability of his left shoulder before the work incident of March 10, 2014. (Koprivica deposition, page 8).

Claimant described the history of the March 10, 2014 accident to Dr. Koprivica. Dr. Koprivica reported that Claimant and a co-worker were assembling a soccer goal that weighed about 200 pounds. As they were trying to lift the goal overhead, Claimant’s left shoulder popped and that was associated with him having severe pain in the left shoulder from which he did not recover. (Koprivica deposition, page 9). Claimant described that the weight was not evenly distributed between the two, and that he was using his left arm more than his right as he was trying to lift the soccer goal erect, and that is what Claimant felt led to him being injured. (Koprivica deposition, page 10).

Claimant saw Dr. Atteberry and had an MRI done on April 8, 2014 that showed a massive tear of the rotator cuff and involved a thickness tear of the supraspinatus and infraspinatus, partial tear of the subscapularis of the biceps, and joint effusion involving the glenohumeral joint that would be consistent with having an acute tear. (Koprivica deposition, page 11). Dr. Koprivica felt that the mechanism of injury was competent to result in a rotator cuff tear and that is what was objectively determined. (Koprivica deposition, pages 11-12). Dr. Atteberry performed left shoulder surgery on May 12, 2014. (Koprivica deposition, page 12).

Dr. Koprivica performed a physical examination of Claimant. Claimant had atrophy of both the supraspinatus and the infraspinatus of the left shoulder. (Koprivica deposition, page 13). Those objective findings of atrophy were consistent with the work injury of March 10, 2014. (Koprivica deposition, page 14). Claimant had a failed repair

that had not been fixed and had atrophy as a result of that. (Koprivica deposition, page 14).

Dr. Koprivica did impingement testing of the right shoulder that revealed pain on the right. Dr. Koprivica found that testing of the right shoulder revealed glenohumeral pain that is usually a sign of labral pathology. (Koprivica deposition, page 15). Dr. Koprivica did not do testing on the left shoulder because Claimant had such severe pain on exam. (Koprivica deposition, page 15).

Claimant had demonstrated active abduction on the left shoulder of 55 degrees. The norm is 170. Dr. Koprivica noted that is a 67 percent relative loss of motion of the left shoulder actively compared to what the norm would be. (Koprivica deposition, page 16). Claimant had an 82 1/2 percent relative loss of adduction on the left. (Koprivica deposition, page 16). He had a 69 percent loss on the left reflexion and a 14 percent relative deficit on the right. (Koprivica deposition, page 17). Claimant had a relative 30 percent deficit on extension testing on the left shoulder. He had an 85 percent relative deficit on the left on internal rotation testing. (Page 17). Claimant had a 52 1/2 percent relative deficit on the right shoulder for internal rotation. (Koprivica deposition, page 17). He had a relative 85 percent deficit when he did external rotation testing on the left. (Koprivica deposition, page 18).

Dr. Koprivica documented that Claimant had degenerative deformity in both knees. (Koprivica deposition, page 18). It was significantly greater on the left than the right. He stated there is some greater disability on the left knee than the right, and both were very severe for those disabilities that were ongoing prior to the work injury. (Koprivica deposition, page 20). Claimant had pain in his knees with motion. His motion deficits were really not that bad but he had severe pain in both knees. (Koprivica deposition, page 20). He had a relative deficit of 19 percent loss of motion in the left knee and 15 percent of the right knee. (Koprivica deposition, pages 20-21).

Dr. Koprivica testified Claimant was not able to lie supine for any duration of time on the examination table because his left shoulder hurt so bad. (Koprivica deposition, pages 21-22). Dr. Koprivica testified that sleep interruption is medically consistent with Claimant's left shoulder injuries due to the prevailing factor of the March 10, 2014 work incident. (Koprivica deposition, page 23). He stated Claimant did not have any pre-existing permanent partial left shoulder disability before March 10, 2014. (Koprivica deposition, page 23).

Dr. Koprivica was asked the following question and gave the following answer at the Koprivica deposition, pages 23-24:

Q. Based on reasonable medical certainty - - I realize we have discussed this, but this is the question. Based on reasonable medical certainty, what is your diagnosis due to the prevailing factor of the March 10, 2014, work incident?

A. That incident resulted in a massive rotator cuff tear on the left that included the supraspinatus [*sic*], infraspinatus [*sic*] and subscapularis along with involvement of the footprint with tearing of the biceps as a direct result of that injury. In giving the diagnosis that's a result of that condition, he had undergone an attempted repair with failure. So, he has got a failed rotator cuff tear at this point.

Dr. Koprivica was asked the following questions and gave the following answers at pages 24 through page 27:

Q. Based on reasonable medical certainty, list the limitations and restrictions due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation?

A. My opinion is that he is restricted to essentially one-armed type of work. So, vocationally he really can't use his left arm based on this injury. He can use it for balance or support purposes, but it needs to be very restricted. I would say it would be on a rare basis. He can't really lift with the left arm, and he needs - - in terms of positioning the arm when he is using it, he needs to have it where his arm is adducted which means he has his upper arm and elbow against his side when he is using the arm for that purpose.

He has a limitation of needing to recline and take naps on an unpredictable basis, and that's because of his sleep interruption that he has that's directly due to this injury that he can't sleep and get restorative sleep at night. So, during the day he is going to have to nap during the day unpredictably which is part of the limitation that I thought was profoundly disabling from the injury.

Q. And these limitations and restrictions are due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton medically, reliably able to work eight hours a day, five days a week, 52 weeks a year at any employment?

A. Not in my opinion.

Q. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton?

MR. COLLIER: Let me just object to the extent it calls for a vocational opinion, and Dr. Koprivica has not been qualified as a vocational expert, and I think he even mentions that in his report. So, I will have that objection as to the foundation.

A. In my opinion he is not able to - - it would be unrealistic to expect any ordinary employer to employ him with the severity of the restrictions and limitations that are necessary from the March 10th, 2014, work injury.

Q. (By Mr. McKay) Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton medically, totally disabled from all employment?

A. In my opinion he is.

Q. Dan Payton has not returned to work since March 10, 2014. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident, on what date did Dan Payton reach maximum medical improvement? And I believe you have indicated the answer on page 28 of your report.

A. September 17th, 2014.

Q. And why did you pick that date?

A. That is the date where the discussion was whether or not he was going to have any further revision surgery and a decision was made that he was not at that point. I thought that was medically a reasonable decision, that he has a likely irreparable tear, and if he is not going to pursue surgery, there really isn't any other treatment that would be afforded to him that is going to change his underlying function.

Dr. Koprivica testified that the dates of Claimant's temporary total disability are from the last day of work until September 17, 2014, the date he was at maximum improvement. (Koprivica deposition, page 29).

Dr. Koprivica was asked the following questions and gave the following answers at Koprivica deposition, pages 29 through 31:

Q. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, what are Dan Payton's dates of temporary total disability?

A. From the last date of work - - and for some reason I have down here May 9th of 2014. And I think that may be the date of the surgery.

Q. I think he worked on March 9th and then the incident he worked part of the day on March 10th, 2014.

A. So, it should be - - instead of May 9th it should be March 9th. That may be a typographical error. From that date until September 17th, 2014, then the determination is made that he is at maximum improvement.

Q. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton in need of open and ongoing medical treatment, and if so, please give us a list of the types?

A. In my opinion it's medically probable he is going to have future treatment needs. They are going to be dictated by pain and dysfunction based on that pain. That includes monitoring by an appropriate surgeon or doctor that can provide him medication to deal with those pain issues. Ultimately the question is going to be that with intractable pain to pursue a reverse shoulder arthroplasty would be an approach.

Again, it's not something that is predictably going to improve his function that I would say he is going to be employable, but in terms of reduction of pain it's a reasonable approach and that you have to leave that up to the patient to make that decision as to when that's going to be performed.

Q. Based on reasonable medical certainty more likely than not due to the prevailing factor of the March 10, 2014, work accident at some point is Dan Payton going to have a level of pain that justifies doing this reverse total shoulder arthroplasty?

MR. COLLIER: Let me just object to the extent that it calls for the doctor to speculate as to how much pain the patient is going to have down the road.

A. Yeah. I would say it's more probable than not that he would reach that point that a reverse total shoulder arthroplasty would be pursued.

Q. (By Mr. McKay) Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, are Dan Payton's medical bills in Exhibit A through J reasonable and necessary?

A. Yes.

Q. If the division finds that Dan Payton is not permanent totally disabled due to the prevailing factor of the March 10, 2014, work accident, then based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, what percent of permanent partial disability do you assign to the left shoulder?

A. A 50 percent permanent partial disability of the left upper extremity at the 232-week level.

Dr. Koprivica testified regarding Second Injury Fund liability at Koprivica deposition, pages 31 through 42. His testimony is consistent with his January 12, 2015 report. Dr. Koprivica's conclusions regarding Second Injury Fund liability contained in his report are set forth in pages 29-32 of this Award.

Dr. Koprivica was asked the following questions and gave the following answers at pages 65-66:

Q. And it is your opinion that it's the last accident of March 10th, 2014, that is the prevailing factor in rendering claimant permanently and totally disabled in isolation without consideration of anything prior, correct?

A. That's my opinion.

Q. And that's based on the restrictions resulting from the injury, the pain, the functional limitations, the failed left shoulder surgery, the poor sleep and the fact that he has to lie down during the day at unpredictable times for unpredictable periods, those factors is what you are basing your opinion that the March 10, 2014, injury is what is rendering claimant unemployable and permanently and totally disabled in isolation, correct?

A. Yes.

Dr. Koprivica did not have information that suggested Claimant's sleep apnea was industrially disabling prior to March 10, 2014. (Koprivica deposition, page 67-68).

Dr. Koprivica was asked the following question and gave the following answer at pages 72-73:

Q. Based on reasonable medical certainty, could Dan Payton carry 65-pound parts of a soccer goal, assemble them with tools that vibrate and then lift the assembled soccer goal that weighed a combined weight of 200 pounds with one of his co-workers from the ground to the knee level, to the waist level, to the chest level, to the chin level and then get it somewhere between the chin and the top of his head if Dan Payton had a preexisting massive full thickness tear of the left supraspinatous [*sic*] tendon, a massive full thickness tear of the left infraspinatous [*sic*] tendon, a partial tear of the subscapular left tendon, a partial tear of the left biceps and joint effusion of the left glenohumeral joint area?

MR. COLLIER: Let me just object to the extent it calls for Dr. Koprivica to speculate that some patients may or may not to do certain things.

A. Within a reasonable degree of medical certainty, I don't believe that he would have been able to do that with that - - if that pathology existed before March 10th of 2014.

Dr. P. Brent Koprivica's January 12, 2015 Report

Dr. Koprivica's January 12, 2015 report addressed to Claimant's attorney describes the documents he reviewed. Dr. Koprivica's report notes Claimant treated with an

orthopedic surgeon, Dr. Atteberry, in early 2009 with a several month history of worsening left knee pain. An MRI performed on February 2009 revealed degenerative changes and a complex tear of the posterior horn of the medial meniscus. Dr. Atteberry performed a partial medial meniscectomy and removal of loose bodies on March 23, 2009. Treatment records note that Claimant had disabling symptoms in the left knee from post-traumatic degenerative disease. Claimant was in a motor vehicle accident on April 9, 2010. He was seen at St. Francis Hospital with complaints regarding the left elbow and left knee.

Dr. Koprivica's report notes Dr. Atteberry saw Claimant on June 16, 2010 and noted Claimant had a contusion on the left knee from the automobile accident. Dr. Atteberry ordered an MRI on Claimant's right knee on October 24, 2010 that revealed a complex posterior horn tear of the medial meniscus and osteonecrosis involving the medial tibial plateau and patellar chondromalacia with joint effusion. Dr. Atteberry performed a partial medial meniscectomy, medial femoral condyle chondroplasty, patellar chondroplasty, trochlear chondroplasty and drilling of the medial plateau osteonecrosis on December 10, 2010 of Claimant's right knee.

Dr. Koprivica's report notes Claimant had discussed having a potential need for total knee arthroplasty prior to March 10, 2014.

Dr. Koprivica's report notes Claimant was hindered in his work because of his knees. Claimant had difficulty doing tasks where he would get down on the ground and had an obstacle performing work which required any extensive squatting, crawling, kneeling or climbing. He was limited on how long he could work on a ladder.

Dr. Koprivica's report notes Claimant had an MRI scan on the right shoulder on June 25, 2011 which revealed a complete tear of the supraspinatus. Dr. Atteberry performed a right subacromial decompression and mini open rotator cuff repair surgery on the right shoulder on November 7, 2011.

Claimant reported to Dr. Koprivica that he relied on his left upper extremity in doing overhead activities because of the deficits of the right shoulder until he had the March 10, 2014 work injury.

Dr. Koprivica's January 12, 2015 report states in part:

In summary, the prior history of disability involving the operatively treated right shoulder was to a level of significance that it has the potential to trigger enhanced disability when combined with the work-related injury claim disability, in my opinion.

Separately, in terms of significant pre-existent industrial disabilities, Mr. Payton had pre-existent industrial disability involving both knees with end stage disease at a level where considerations were being made for total knee arthroplasty before the claim date.

Dr. Koprivica’s January 12, 2015 report notes Claimant was having severe ongoing pain in the left shoulder that was constant. The pain varied from three to seven and was three most of the time. Dr. Koprivica’s report notes the pain level was such that Claimant’s sleep was interrupted. He currently wakened every one and one-half to two hours. The report states in part:

. . . . His sleep interruption is to a point that he has ongoing need to take naps during the day. These are unpredictable, but he is doing it frequently. He has tired [*sic*] to take two Tylenol P.M. with limited success. He does this typically from one to two times per month when he is totally exhausted. He has ongoing weakness in the left shoulder. He has ongoing loss of motion in the left shoulder. He will rarely take his narcotic pain medications. He has not taken any for four weeks and reserves it for when his situation is so overwhelming that it is not tolerable.

Dr. Koprivica’s January 12, 2015 report states in part:

1. Mr. Payton’s work injury of March 10, 2014, is felt to represent the direct, proximate and prevailing factor in his development of a massive rotator cuff involving the left shoulder that was identified post-injury.

It was medically reasonable and a direct necessity of that permanent injury on March 10, 2014, that Mr. Payton underwent the surgical repair involving the massive rotator cuff tear that involved the supraspinatus and infraspinatus with partial injury to the subscapularis on May 12, 2014.

Unfortunately, Mr. Payton has had failure of that repair with evidence on the repeat MRI with contrast on September 3, 2014, of having a recurrent full-thickness tear.

.

2. With the degree of retraction and the chronicity of his rotator cuff tear at this point, it is probable that Mr. Payton has an irreparable rotator cuff tear.

I would consider Mr. Payton to be at maximal medical improvement if a decision is made not to pursue the risk of attempting a revision surgery for the repeat tear with likely need for augmentation.

3. In terms of the determination of a date of maximal medical improvement, assuming that he is not going to pursue a revision surgery, I would consider the last visit date with Dr. Attebury [*sic*] on September 17, 2014, to represent the appropriate date to consider him to be at maximal medical improvement.

4. As I have already referenced, it is my opinion that the care and treatment received by Mr. Payton for the March 10, 2014, work injury, as summarized in the text above and contained in the treatment records provided, was medically reasonable and a direct necessity in an attempt to cure and relieve Mr. Payton of the effects of that permanent injury.

5. Mr. Payton was temporarily totally disabled from his last date of work on or about May 9, 2014, until the date of maximal medical improvement of September 17, 2014.

This period of temporary total disability is felt to be medically reasonable and a direct necessity of the permanent injuries sustained on March 10, 2014, and the subsequent care and treatment necessitated by that work injury.

I would consider the March 10, 2014, work injury and the subsequent care and treatment necessitated by that work injury to be the prevailing factor resulting in this period of temporary total disability.

.....

In Mr. Payton's case, it is my opinion that Mr. Payton's limitations that are attributable to his work injury claim are consistent with the severity of his objective physical impairment.

Mr. Payton’s description of sleep interruption based on his left shoulder impairment is felt to be consistent with the failed repair with which he presents at this point.

His need to recline and take naps during the day on an unpredictable, but frequent basis, is felt to be consistent with the severity of that disability.

I would restrict Mr. Payton vocationally from using the left upper extremity vocationally except with his arm adducted to his side and on a very limited basis as a support only.

When one realistically looks at the severity of his presentation as he would make to any ordinary employer, it is my opinion that it would be unrealistic to believe that any ordinary employer would employ Mr. Payton.

My opinion is that Mr. Payton would not be medically and reliably able to work eight hours a day, five days a week and fifty-two weeks a year at any substantial gainful employment as he presents.

I would suggest consideration of a formal vocational evaluation.

With the data that is available to me as an occupational physician, assuming support from a vocational expert, my opinion is that, in fact, Mr. Payton is permanently totally disabled based on the primary injury of March 10, 2014, when considered in isolation, in and of itself.

This permanent total disability is felt to exist despite the presence of profound pre-existent industrial disability as I have already outlined in the text above.

.....

7. The medical bills listed in Exhibits A through J represent medical bills which are reasonable in amount, medically necessary and due to the prevailing factor of the work accident of March 10, 2014.

8. It is medically probable that Mr. Payton has ongoing indefinite treatment needs based on the March 10, 2014, work injury.

I would consider the March 10, 2014, work injury to be the prevailing factor in terms of the necessity of the future treatment needs.

Regarding that issue, Mr. Payton is currently a candidate for an attempt at a revision surgery with attempt at revision repair of the recurrent complete rotator cuff tear that is currently present.

I would note that there is an expectation that Mr. Payton will have need for physician monitoring. As part of that physician monitoring, it will include the need for medications to deal with chronic pain issues.

At his current age and with the rotator cuff insufficiency that is present, it is my opinion that it is probable that he will develop a rotator cuff arthropathy.

The end state of rotator cuff arthropathy is the necessity for a reverse total shoulder arthroplasty.

9. Pre-dating the March 10, 2014, work injury, Mr. Payton did have pre-existent disabilities which were of such significance that they did constitute a hinderance [*sic*] or obstacle to his employment or to his obtaining re-employment if he had become unemployed, as I have outlined in the text above.

In looking at these pre-existent industrial disabilities, it is my opinion that his history of prior right shoulder decompression and rotator cuff repair was a significant pre-existent industrial disability.

In reference to the prior operative treatment on the right shoulder, Mr. Payton's subjective history is one of a hindrance in the use of the right shoulder to a point that he relied on the left shoulder and upper extremity to perform work tasks to accommodate for that deficit until suffering the March 10, 2014 work injury.

Clinically, Mr. Payton would be advised to avoid frequent or constant overhead lifting activities using his right upper extremity at the shoulder before March 10, 2014.

Mr. Payton would be advised to avoid repetitive or sustained activities above shoulder girdle level on the right, even for unweighted activities.

The other two pre-existent industrial disabilities that I have outlined in the text above are in reference to the end stage degenerative joint disease involving both knees.

In reference to his bilateral knee disabilities, Mr. Payton would be restricted from frequent or constant squatting, crawling, kneeling or climbing.

The ability to accommodate where he does not have to work on a sustained basis on ladders would also be a restrictions [*sic*].

10. In the event that trier of fact were to determine that Mr. Payton is not totally disabled based on the primary injury in isolation, I would apportion a fifty (50) percent permanent partial disability of the left upper extremity at the level of the shoulder, (232-week level) for the primary injury of March 10, 2014, in isolation.

11. Under the same hypothetical that it is determined that Mr. Payton is not totally disabled based on the primary injury of March 10, 2014, in isolation, for the pre-existent disability involving his opposite right upper extremity, I would apportion a twenty (20) percent permanent partial disability of the right upper extremity at the level of the shoulder (232-week level) as representing that pre-existent industrial disability for the operatively treated rotator cuff repair.

12. Under this same hypothetical that Mr. Payton is not permanently totally disabled based on the primary injury claim of March 10, 2014, in isolation, it is my opinion that there is a significant synergistic effect when one combines the pre-existent industrial disability involving the opposite right shoulder with the additional disability attributable to the March 10, 2014, injury regarding the left shoulder.

Under this hypothetical and assuming support of a vocational expert that, in fact, Mr. Payton is permanently totally disabled, it is my opinion that that synergism of combining those disabilities results in Mr. Payton being permanently totally disabled.

This permanent total disability would arise based on Second Injury Fund liability under the new considerations for work injury claims following January 1, 2014.

13. There is another hypothetical that if it were determined by the trier of fact that Mr. Payton is not permanently totally disabled when one considers Second Injury Fund liability from the synergism of combining the right shoulder disability with the additional disability involving the left shoulder attributable to the March 10, 2014, claim.

Under this hypothetical, there is still a synergistic effect when one considers that combination.

Separately, there is also pre-existent industrial disability involving both knees.

With the data that is available and the greater degenerative involvement of the left knee, I would assign a pre-existent thirty (30) percent permanent partial disability of the right lower extremity at the level of the knee (160-week level) along with a pre-existent thirty-five (35) percent permanent partial disability of the left lower extremity at the level of the knee (160-week level).

Under this hypothetical, when one combines the pre-existent industrial disability of the right shoulder, the disability of the left shoulder and the additional disability involving both knees, there is further synergistic effect.

Clinically, under this hypothetical, again assuming support by a vocational expert that he is totally disabled, the synergism of this combination results in permanent total disability against the employer.

I would note this hypothetical is based on the assumption that the two prior statements of total disability are not present.

14. There is a final determination disability which I do not believe is present. However, if I assume that Mr. Payton is not permanently totally disabled, the employer would be responsible for not only the fifty (50) percent permanent partial disability of the left upper extremity at the level of the shoulder (232-week level), but also the additional disability attributable to the synergism from combining with the additional identified pre-existent industrial disabilities.

Under this hypothetical, in addition to the fifty (50) percent permanent partial disability of the left upper extremity at the level of the shoulder

(232-week level), there is a 15 percent enhancement factor above the simple arithmetic sum of the disability of the left shoulder with the pre-existent industrial disability involving both knees along with the pre-existent disability involving the right shoulder.

I would note the above opinions have all been given within a reasonable degree of medical certainty.

Evaluation of Dr. Thomas DiStefano

Dr. Thomas DiStefano's March 11, 2014 report (Exhibit 2) notes Claimant presented in his clinic that day with left shoulder pain, degenerative joint disease, AC joint, impingement syndrome, and SLAP tear versus subluxation. The report notes Claimant reported that on March 10, 2014, he was lifting an aluminum soccer goal with a co-worker. He stated it weighed approximately 200 pounds. Claimant stated he felt a pop in his left shoulder.

Claimant was seen in the emergency room at St. Francis where x-ray showed moderate to severe degenerative joint disease of the AC joint and mild degenerative joint disease of the humeral joint. Dr. DiStefano's report notes Claimant stated about a month ago, he had been antiquing when he bent over to pick up a tote and felt a pop in the shoulder with mild pain. Claimant stated the pain was much worse now. Claimant already had an appointment scheduled with Effie Martinez on March 13, 2014 for evaluation prior to this incidence.

Dr. DiStefano's March 11, 2014 report states in part:

Based on the information I have available to me at this time, including the history of previous injury, approximately one month prior, I do not feel the incident as described by the patient on March 10, 2014, is the prevailing cause of his current condition. I state my opinion with a reasonable degree of medical certainty.

A Workers' Compensation evaluation of Dr. DiStefano attached to Exhibit 2 states at the bottom, "Not Work Comp. MMI."

Exhibit 3 is Dr. DiStefano's letter dated June 1, 2015 addressed to Employer's attorney. The June 1, 2015 letter states Dr. DiStefano was in receipt of Employer's attorney's letter dated May 12, 2015 which included additional medical records. The additional medical records were not identified.

Dr. DiStefano's June 1, 2015 report states in part:

Based on the information I had available to me at the time, I did not feel a prevailing cause of the condition of his left shoulder was due to the injury [*sic*] alleged work injury.

After reviewing all of the enclosed records, since the last time I evaluated him, I still feel that my decision is unchanged in that the March 10, 2014 accident, is not the prevailing factor in the cause of his left shoulder injury. I state my opinion with a reasonable degree of medical certainty.

Dr. DiStefano's Curriculum Vitae, Exhibit 1, notes that Dr. DiStefano is an orthopedic surgeon, St. Francis Hospital and Health Services, 09/1992 to present.

Vocational Evaluation of Michael Dreiling

The deposition of Michael Dreiling taken on July 21, 2015 was admitted as Exhibit P. Mr. Dreiling's May 15, 2015 report addressed to Claimant's attorney (Exhibit O) notes he met with Claimant on April 28, 2015. Mr. Dreiling's report identifies medical records and reports he reviewed which are identified in his report as Exhibits A through M.

Mr. Dreiling's report describes functional limitations of Dr. Koprivica dated January 12, 2015. Mr. Dreiling's report describes Claimant's educational background, social background, prior medical information, military history, work background, individual prospective of injury, vocational testing results.

Mr. Dreiling testified that he is a vocational consultant. He has performed in excess of 5,000 pre-employment vocational evaluations to determine whether a person is able to do a job and approximately in excess of 5,000 post-accident rehabilitation evaluations to determine whether a person is vocationally able to return to work after an accident. He testified he reviewed Exhibits A through M. (Dreiling deposition, page 5.)

Mr. Dreiling was asked the following questions and gave the following answers at Dreiling deposition, pages 5-6:

Q. Based on reasonable vocational certainty, please list the limitations and restrictions due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation which you identified?

A. The need to recline and take naps during the day on an unpredictable but frequent basis. No use of left upper extremity

vocationally except with arm adducted to his side on a very limited basis as a support only. Medically not reliably able to work eight hours a day, five days a week and 52 weeks a year at any substantial gainful employment.

Q. Based on reasonable vocational certainty, due to the prevailing factor of the March 10, 2014, accident considered alone and in isolation, what is the significance of the March 10, 2014, limitations and restrictions?

A. They would represent substantial vocational barriers for this gentleman.

Mr. Dreiling testified Claimant graduated from high school with average grades and had not had any formal classroom education in the last 40 years. Claimant had no typing skills. Claimant's educational background would represent a substantial vocational barrier for him. (Dreiling deposition, pages 6-7). Claimant's age, 58-years-old, would represent a substantial vocational barrier for him. Claimant lives in Elmo, Missouri, a rural labor market, that would represent a substantial vocational barrier for him. (Dreiling deposition, page 7). Claimant has not returned to work since March 10, 2014, and that would represent a substantial vocational barrier for him. (Dreiling deposition, pages 7-8).

Claimant's primary pain is in the left shoulder area. The left shoulder is basically non-functional in his ability to use it. His pain impacts his ability to get a good night's sleep. (Dreiling deposition, page 9). Claimant quit participating in deer hunting and turkey hunting since the March 2014 injury and has limited his driving to shorter distances. (Dreiling deposition, page 10). Claimant scored in the bottom 40 percent of the adult working population in the Wonderlic test. That would represent a substantial vocational barrier for him. (Dreiling deposition, page 11). Claimant is not a realistic candidate for any further formal academic or vocational training. (Dreiling deposition, page 12).

Mr. Dreiling was asked the following questions and gave the following answers at Dreiling deposition, pages 12-16:

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton able to compete in the open labor market?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton vocationally able to work eight hours a day, 40 hours a week, 52 weeks a year at any job?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton vocationally permanently totally disabled from all employment?

A. Yes.

Q. For Fund liability, I have a new set of questions. Based on reasonable vocational certainty, please list the limitations and restrictions before the work accident of March 10, 2014, to his right shoulder?

A. Avoid frequent or constant overhead lifting activities using right upper extremity at the right shoulder before 3/10/14. Avoid repetitive or sustained activities above shoulder girdle level on right, even for unweighted activities.

MS. SHINE: Let me object here. Are these the restrictions that Dr. Koprivica had; is that what you're talking about?

MR. McKAY: Yes.

MS. SHINE: Okay.

Q. (By Mr. McKay) For Fund liability, when Dan Payton's left shoulder restrictions and limitations for the work injuries of March 10, 2014, combined with the pre-existing right shoulder restrictions and limitations, vocationally is Dan Payton reliably able to work eight

hours a day, five days a week, 52 weeks a year at any substantial gainful employment?

MS. SHINE: I'm going to object, improper hypothetical. The law has changed effective January 1st, 2014. Any prior injury has to be either based on a military-related disability or acute - - an adjudicated work-related disability and the prior right shoulder does not qualify for either one of those. Also, to qualify for Fund liability on a new claim starting January 1st, 2014, the prior disability, if it was adjudicated, even if it wasn't adjudicated, needs to be 50 weeks, and based upon Dr. Koprivica's assessment of 20 percent on a partial disability to the right shoulder, that only comes to 46.4 weeks. So I think the question is not based on the new law, and it just assumes facts not in evidence and is improper.

Q. (By Mr. McKay) Do you remember the question.

A. I do.

Q. Okay.

A. My answer is no.

Q. Considering the combination of the left shoulder March 10, 2014, restrictions and limitations, and the pre-existing right shoulder restrictions and limitations, vocationally would any employer in the ordinary course of business reasonably be expected to employ Dan Payton in his present physical condition?

MS. SHINE: Same objection.

A. No.

Q. (By Mr. McKay) Considering the combination of the March 10, 2014, left shoulder restrictions and limitations with the pre-existing right shoulder restrictions and limitations, is Dan Payton vocationally totally disabled from all employment?

MS. SHINE: Same objection.

A. Yes.

Q. (By Mr. McKay) Based on reasonable vocational certainty for employer liability considering all the restrictions and limitations, please list the bilateral knee restrictions and limitations before March 10, 2014, that you identified from the records.

A. Left knee pre-existing 30 percent permanent partial disability. Difficulty getting down on the ground, obstacle to extensive squatting, crawling, kneeling or climbing. Right knee pre-existing 35 percent permanent partial disability. Difficulty getting down on the ground, obstacle to extensive squatting, crawling, kneeling or climbing.

MS. SHINE: I'm going to object there and just add these are Dr. Koprivica's restrictions, which he imposed after the primary injury.

Q. (By Mr. McKay) For employer liability for all restrictions and limitations, including the March 10, 2014, left shoulder, the pre-existing right shoulder and the bilateral knee restrictions, is Dan Payton vocationally able to reliably work eight hours a day, five days a week, 52 weeks a year at any substantial gainful employment?

MS. SHINE: Same objection as I stated earlier.

MR. COLLIER: I'll have an objection to that as well.

A. No.

Q. (By Mr. McKay) Considering all of the bilateral shoulder and bilateral knee restrictions and limitations, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton in his present physical condition?

MS. SHINE: Same objection.

A. No.

Q. (By Mr. McKay) Considering all restrictions and limitations, including the bilateral shoulder and bilateral knee conditions, is Dan Payton vocationally permanently totally disabled from all gainful employment?

MS. SHINE: Same objection.

A. Yes.

Mr. Dreiling has worked in vocational rehabilitation for 40 years. He has achieved board certification with the American Board of Vocational Experts. (Dreiling deposition, page 17). Seventy-five percent of the evaluations he does are referred by the attorney for the employee and 25 percent represent the insurance carrier or employer. That breakdown has been for the last one and one-half to two years. (Dreiling deposition, page 19).

Claimant told Mr. Dreiling that he had treatment to both of his knees before March 10, 2014 and that he had been working with on-going pain in both knees. (Dreiling deposition, page 23). Mr. Dreiling was aware that Claimant had treatment in his right shoulder before March 10, 2014. (Dreiling deposition, page 24). He did not document any difficulties he had with his work for the right shoulder other than he told Mr. Dreiling he went back and worked with pain. (Dreiling deposition, page 25).

Mr. Dreiling was aware that Claimant studied water maintenance and later HVAC training at a technical college. (Dreiling deposition, page 25). Claimant maintained a backflow certification when working for Employer that dealt with backflow prevention to prevent waste water from coming back into the drinking water system. (Dreiling deposition, page 26). Claimant did have a basic understanding of personal computers. (Dreiling deposition, page 26).

Claimant supervised six individuals when he worked at Allenmore Hospital from 1994 to 2004. (Dreiling deposition, page 28). Working supervisors usually have to evaluate the performance of people they are supervising and Claimant was doing hand written record keeping. (Dreiling deposition, pages 28-29). Claimant had past experience hauling lime and grain and operating a belly-dump truck. (Dreiling deposition, page 30).

Mr. Dreiling was asked the following questions and gave the following answers at pages 33-34:

Q. (By Mr. Collier) Well, for the last injury alone with regard to the left shoulder in isolation, he could perform work as a truck dispatcher, correct?

A. Well, the problem you'd have, though, I think Dr. Koprivica is recommending that he basically keep that left upper extremity to his

side and not really reach out with it. So if he's on a keyboard quite a bit of the time, he may have some problems with doing that activity.

Q. But he wouldn't have to lift 50 pounds in that job?

A. Right. In terms of lifting, no. Dispatching or I call them freight agents now, that is a sedentary work environment.

Q. Given his supervisory experience, he could work in a job where he supervised other HVAC technicians if he didn't have to do the physical HVAC work? He could supervise them and assign work, do record keeping, he could - - with regard to any restrictions to the left shoulder, he could do that type of work?

A. I would imagine theoretically if that would exist.

Mr. Dreiling was asked the following question and gave the following answer at Dreiling deposition, page 35:

Q. Given his work experience and his supervisory experience, could he be in a position where he would teach other workers, maybe younger workers, various technical skills?

A. Based upon his work background, based upon his educational background, I doubt that he would qualify to become an instructor. Obviously he can't teach in a high school setting. I doubt that he would qualify for vocational technical instructor training because those people usually have to demonstrate out in the shop area in addition to classroom training.

Mr. Dreiling was asked the following questions and gave the following answers at pages 36—38:

Q. Okay. He also talks about his requirement to take naps during the day on an unpredictable but frequent basis. Dr. Koprivica states that it's felt to be consistent with the severity of his disability to his left shoulder and his pain. The need for someone to lie down unpredictably on a frequent basis during the day, doesn't that tend to render one unemployable in isolation for that reason alone?

A. Yes.

Q. Okay. And as far as you know, he was not having any sleep interruption or needing to lie down during the day before this injury of March 10th, 2014, correct?

A. Correct.

Q. And so the restrictions that Dr. Koprivica gave from using the left upper extremity vocationally except with his arm abducted to his side and on a very limited basis and for support only, that restriction was given exclusively as a result of this March 10th, 2014, injury to the left shoulder, correct?

A. I believe so.

Q. Okay. And you note here that it is Dr. Koprivica's opinion that 'When one realistically looks at the severity of his presentation as he would make to any ordinary employer, it is my opinion that it would be unrealistic to believe that any ordinary employer would employ Mr. Payton.' He goes on to state, 'My opinion is that Mr. Payton would not be medically and reliably able to work eight hours a day, five days a week, 52 weeks a year at any substantial gainful employment as he presents.' And then he also goes on to state that 'as an occupational physician, assuming support from a vocational expert, it is my opinion that, in fact, Mr. Payton is permanently totally disabled based on the primary injury of March 10th, 2014, when considered in isolation, in and of itself.' And he says, 'This permanent total disability is felt to exist despite the presence of profound pre-existent industrial disability as I have already outlined in the text above.'

And so you agree with Dr. Koprivica, that it is this last accident of March 10th, 2014, to the left shoulder which is rendering Mr. Payton unemployable in an open labor market, correct?

A. Correct.

Mr. Dreiling agreed that Claimant's right shoulder injury in 2011 was not a work-related injury. (Dreiling deposition, page 39). He agreed there were no restrictions imposed on his work by the treating doctors after he was released from treatment on that surgery. (Dreiling deposition, page 39). He understood that Claimant was able to return to his heavy exertion level of work after the MMI release for the right shoulder injury. (Dreiling deposition, page 39).

Mr. Dreiling agreed that Claimant had no restrictions placed on his work after he was released from treatment of his knee injuries, and that he was able to return to his regular full-time full heavy duty work. (Dreiling deposition, page 40). He agreed that Claimant did not miss any time from work and did not have any accommodations from his Employer from either knee prior to the left shoulder injury. (Dreiling deposition, page 40).

Mr. Dreiling was aware that Claimant was required to lift and carry 50 pounds several times during the day at his job at Employer, and also in a lot of his prior jobs. (Dreiling deposition, page 41).

Mr. Dreiling agreed Claimant was not taking any narcotic pain medication before the injury of March 2014 and was not having poor sleep or having to lie down during the day before that injury. (Dreiling deposition, page 43).

Mr. Dreiling was asked the following question and gave the following answer at Dreiling deposition, pages 46-47:

Q. Okay. All right. But it is your opinion - - you agree with Dr. Koprivica that it is the injury of March 10th, 2014, that renders Mr. Payton unemployable in the open labor market, correct?

A. Right. If he has those restrictions and limitations and the problems that have been described, it would be that injury.

Mr. Dreiling's May 8, 2015 report (Exhibit O) sets forth the following Conclusions:

CONCLUSIONS:

This individual's vocational profile is represented by an individual who is 57-years-old; is a high-school graduate; has vocational-technical training in boiler repair and HVAC; is not a candidate for any further formal academic or vocational-retraining program; has no typing skills; has basic use of personal computers; has a work history of performing physically oriented work in the labor market with special emphasis in boiler repair and HVAC repair; has no transferable job skills consistent with the medical restrictions; has significant medical restrictions advised for his non-dominant upper extremity; has medical restrictions advised for the dominant upper extremity; has medical restrictions for bilateral knee disabilities; was terminated from his job after the left-shoulder surgery, due to his inability to return back to his job duties; does identify having ongoing

severe pain in the left shoulder; due to poor sleep at night because of pain, he has the ongoing need to take naps during the day at unpredictable times; has not participated in any formal vocational return-to-work services; and is unaware of what he would be capable of doing in the labor market since the work injury of March 2014.

The following is in response to the nine vocational questions, which were posed from the referral letter, pertaining to this individual's vocational capacity to return to work in the labor market.

1. Due to the prevailing factor of the March 10, 2014, work injury, medical restrictions and limitations, this individual would not be reliably able to work eight hours a day, five days a week, 52 weeks a year at any substantial, gainful employment.
2. Due to the prevailing factor of the March 10, 2014, work injury, medical restrictions and limitations, no employer in the ordinary course of business would reasonably be expected to employ this individual in his present physical condition.
3. Due to the prevailing factor of the March 10, 2014, work accident, medical restrictions and limitations considered alone, this individual is vocationally permanently totally disabled from all employment.
4. When considering the left-shoulder restrictions and limitations for the work injury of March 10, 2014, combined with the pre-existing right-shoulder restrictions and limitations, this individual would not vocationally be reliably able to work eight hours a day, five days a week, 52 weeks a year at any substantial, gainful employment.
5. When considering the combination of the left shoulder March 10, 2014, medical restrictions and limitations and the pre-existing right shoulder medical restrictions and limitations, no employer in the ordinary course of business would reasonably be expected to employ this individual in his present physical condition.
6. When considering the combination of the March 10, 2014, left shoulder medical restrictions and limitations with the pre-

existing right shoulder medical restrictions and limitations, this individual is vocationally totally disabled from all employment.

7. When considering all restrictions and limitations, including the March 10, 2014, left shoulder, the pre-existing right shoulder and bilateral-knee restrictions, this individual would not vocationally be able to reliably work eight hours a day, five days a week, 52 weeks a year at any substantial, gainful employment.
8. Considering all of the bilateral shoulder and bilateral-knee restrictions and limitations, no employer in the ordinary course of business would reasonably be expected to employ this individual in his present physical condition.
9. Considering all restrictions and limitations including the bilateral shoulder and bilateral-knee conditions, this individual is vocationally permanently totally disabled from all gainful employment.

Vocational Evaluation of Terry Cordray

The deposition of Terry L. Cordray taken September 14, 2015 was admitted in evidence as Exhibit 4, with Cordray Deposition Exhibit 1, Terry Cordray's Curriculum Vitae, and Cordray Deposition Exhibit 2, Mr. Cordray's August 6, 2015 report addressed to Employer's attorney. Mr. Cordray's deposition was also admitted in evidence as Exhibit Q.

Mr. Cordray's Curriculum Vitae notes he received an MS in Rehabilitation Counseling from Emporia State University 1973. He is a Certified Rehabilitation Counselor and is a Diplomat with the American Board of Vocational Experts.

Mr. Cordray's August 6, 2015 report notes he performed a vocational assessment of Claimant on July 15, 2015. Mr. Cordray's report notes that he reviewed records of Dr. Koprivica, Dr. Atteberry, St. Francis Orthopedic and Sports Medicine, Dr. Thomas DiStefano, Clarinda Regional Health Center, deposition of Dr. Koprivica, and deposition of Claimant. Mr. Cordray's report summarizes portions of the deposition of Dr. Koprivica, the January 12, 2015 report of Dr. Koprivica, records of Dr. Thomas Atteberry, report of Dr. DiStefano dated March 11, 2014, record of M. L. Peterson-Jones, M.D. dated October 24, 2010, and record of Elisa C. Morgan, M.D. dated February 2009.

Mr. Cordray's report discusses Claimant's education and military background, social background, labor market information, current work status, previous medical conditions, work background, Claimant's perspective of injury, activities of daily living, vocational testing, test results, and Wonderlic personnel test results.

Mr. Cordray testified he understood Dr. Atteberry had done a left shoulder rotator cuff repair on Claimant on May 12, 2014. Mr. Cordray was aware that prior to March 2014, Claimant had right shoulder and bilateral knee pre-existing disabilities. He had left and right knee injections by Dr. Atteberry, left knee surgery by Dr. Atteberry in 2010, right knee surgery by Dr. Atteberry in 2009, planned to have a total knee replacement, was diagnosed as having end-stage disease of both knees when he had Sinvisc injections in 2011, and had significant diagnoses and treatment to both knees and the right shoulder prior to 2014. (Cordray deposition, pages 10-11).

Mr. Cordray was aware that Dr. Koprivica stated Claimant relied on his left shoulder upper extremity in doing overhead activities because of the deficits in his right shoulder and would have limitations on how long he could work on a ladder, more to the knees. Claimant was using the left more in overhead work and relying more on the left to do overhead activities because of deficits in his right shoulder. (Cordray deposition, page 12). Claimant told Mr. Cordray that when he returned to work full-duty after his right and left knee surgeries, his knees were difficult for him. (Cordray deposition, page 12). Mr. Cordray noted that Dr. Koprivica commented on problems with doing anything from the ground, kneeling, squatting, crawling and extensive climbing on how long he could work on ladders. (Cordray deposition, page 13).

Mr. Cordray discussed Claimant's educational background. He noted Claimant graduated from high school in 1975 and had vocational training and training in things that would be associated with refrigeration mechanic. Claimant was certified as a Boiler Class 2 licensure after training in 1983 and 1984. (Cordray Deposition, page 13).

Mr. Cordray was aware that Claimant was not working, and that following his surgery, Dr. Atteberry gave Claimant a five-pound lifting restriction as of September 2014. The School District could not accommodate that restriction. Claimant had not applied for other jobs. (Cordray deposition, page 14).

Mr. Cordray discussed Claimant's work history, including the last ten years working for the School District as Assistant Supervisor Building and Grounds for four school buildings. He did supervisory work and did inventory, scheduling, training, hiring and hands-on work in the boilers and air conditioning, roof top HVAC, small boilers, and pumps. (Cordray deposition, page 16).

Claimant described his perspective of his injury and activities of daily living. Claimant had pain in both shoulders and knees. He could sit for an hour to an hour and one-half, stand for 30 to 45 minutes, walk for 30 minutes, and climb stairs, but not as well. He could not climb ladders because of his knees and shoulders. He avoided bending because of his back. He could drive 45 minutes and his left shoulder would have pain. He slept poorly. During the day, Claimant went to his brother's auto shop and answered the phone, got tools, and would "piddle with a carburetor." (Cordray deposition, pages 18-19). He watched over his mother who had Alzheimer's. He could not bow hunt or rifle hunt because of the recoil. He sold his fishing boat. (Cordray deposition, page 19). He liked to build bird feeders and sell them at flea markets. (Cordray deposition, page 20).

The results of the Wide Range Achievement Test showed Claimant performed poorly in spelling but did well in math. (Cordray deposition, page 21). The Wonderlic Test showed Claimant's IQ is 93, which is in the average range. (Cordray deposition, page 22).

Mr. Cordray thought that if you took out the prior injuries and just had the left shoulder injury, Claimant might have been able to do the supervisory work he had done before assigning other work to others. He may have been able to do cashiering work or some type of light retail sales or light assembly work. He would have to do something very light. He might have been able to work in a store during some kind of retail sales if he did all the lifting with the right and cradled with the left, and he might have been able to stock shelves and work in a hardware store. (Cordray deposition, pages 24-25).

Mr. Cordray did not think Claimant was employable in the open-labor market if you take the left shoulder injury from the March 10, 2014 accident and combine that with his prior right shoulder injury and his prior bilateral knee injuries. (Cordray deposition, pages 25-26).

Claimant would have had problems with the right shoulder before 2014 with lifting overhead on the right or repetitive or sustained activities above the shoulder and would have difficulties with things like changing light bulbs or painting with the right. He would have needed help with those activities. (Cordray deposition, page 27).

Mr. Cordray testified that Dr. Atteberry's restrictions of five-pounds lifting and no overhead work would severely restrict Claimant's access to the labor market. (Cordray deposition, page 32).

Mr. Cordray was asked the following questions and gave the following answers at Cordray deposition pages 32-34:

Q. Now, Dr. Koprivica's limitations and restrictions due to the prevailing factor of the March 10, 2014 work accident were - - and I'm reading from Dr. Koprivica's report which is Exhibit M at Page 30. I'm going to read Dr. Koprivica's restrictions. Number 1, need - - restrictions and limitations: Number 1, need to recline and take naps during the day on an unpredictable but frequent basis. Number 2, no use of the left upper extremity vocationally except with the arm adducted to his side on a very limited basis as a support only. And Number 3, medically not reliable - - not reliably able to work eight hours a day; five days a week and 52 weeks a year at any substantial gainful employment.

Is that essentially what Dr. Koprivica had to say as far as limitations and restrictions due to the prevailing factor of the March 10, 2014 work accident?

A. Yes.

Q. And based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone and in isolation, if we rely on the restrictions of Dr. Koprivica, is Dan Payton able to compete in the open labor market?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10 work accident alone and in isolation, given the restrictions of Dr. Koprivica, is Dan Payton vocationally able to work eight hours a day, 40 hours a week, 52 weeks a year at any job on a reliable basis?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone and in isolation, given Dr. Koprivica's work restrictions, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton in his condition?

A. No.

Q. Based on a reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone in isolation, given the Dr. Koprivica's restrictions and limitations, is Dan Payton vocationally permanently totally disabled from all employment?

A. Yes.

Q. Essentially, do vocational experts agree that individuals are not allowed to lie down as part of any job and therefore are disqualified from all jobs?

A. Yes.

Mr. Cordray was asked the following questions and gave the following answers at Cordray deposition, pages 44-45:

Q. Based on reasonable vocational certainty when Dan Payton's left shoulder restrictions and limitations for the work injuries of March 10, 2014 combine with the preexisting right shoulder restrictions and limitations, vocationally would he be reliably able to work eight hours a day, five days a week, 52 weeks a year at any substantial gainful employment?

A. No.

Q. Considering the combination of the left shoulder March 10, 2014 restrictions and limitations and the preexisting right shoulder restrictions and limitations, vocationally, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton?

A. No.

Q. Considering the combination of the March 10, 2014 left shoulder restrictions or limitations with the preexisting right shoulder restrictions and limitations, is Dan Payton vocationally totally disabled from all employment?

A. That's my opinion, yes.

Q. Considering all of Mr. Payton's preexisting restrictions and limitations, which would include the right shoulder and both knees, plus his work limitations and restrictions from the March 10, 2014 accident to the left shoulder, is it your opinion that Mr. Payton is permanently totally disabled vocationally from all employment now?

A. Yes.

Mr. Cordray stated it was his opinion that Claimant is PTD from both shoulders. (Cordray deposition, page 55).

Mr. Cordray thought Claimant potentially could be trained in locksmithing. (Cordray deposition, page 56). He did not know how realistic it is for Claimant to get training in locksmithing or small engine mechanic. (Cordray deposition, page 58). He thought Claimant could do locksmithing or a small engine repair job. (Cordray deposition, page 59).

Mr. Cordray's August 6, 2015 report sets forth the following Conclusions:

CONCLUSIONS:

Prior to his injury on March 10, 2014, Mr. Daniel Payton had a vocational profile of an individual approaching advanced age who had preexisting medical problems including right shoulder surgery, left knee surgery, right knee surgery, and has currently had left shoulder surgery.

Mr. Payton's work background includes primarily working as a maintenance mechanic doing boiler repair and repair or [*sic*] equipment in restaurants and hospitals prior to working for the school district. Mr. Payton has been unable to return to his job and has been terminated by the school district.

Dr. Thomas Atteberry, as regards the right shoulder, released Mr. Payton to return to work. He also performed surgeries on Mr. Payton's knees and released him to return to work.

Dr. Koprivica in his report of January 12, 2015, applies restrictions. He notes that at the time of Mr. Payton's most recent injury on March 10, 2014, Mr. Payton was in discussions with Dr. Atteberry regarding need for total knee replacement. Dr. Koprivica notes that Mr. Payton is at the end stage disease process in both knees, and had injections to

the knees in June and July of 2011 as well as October of 2012. He notes that Mr. Payton had difficulty secondary to the knees doing tasks where he would have to get down on the ground, that he had an obstacle to performing work which required squatting, crawling, kneeling, or climbing, that Mr. Payton was limited in how long he could work on a ladder. Dr. Koprivica notes that Dr. Atteberry performed surgery on Mr. Payton's right shoulder in November 2011, and Mr. Payton noted that following this surgery he relied more heavily on his left upper extremity in doing overhead activities prior to his injury in March 2014.

Therefore, in my opinion it appears that Mr. Payton had demonstrated to have significant hindrance and obstacle to employment or reemployment, as an individual who was primarily doing maintenance work climbing ladders, doing overhead reaching in changing lightbulbs. In my opinion Mr. Payton would have a difficult time kneeling to clean bathrooms, kneeling in doing yard work, or climbing ladders to do painting.

Dr. Koprivica has advised restrictions specific to the left upper extremity injury. He notes that Mr. Payton would be required to use his left arm in a dependent fashion with primary use of the right. Mr. Payton has already noted that after his right shoulder surgery he used the right in a dependent fashion to support the left.

Therefore based upon the comments of Dr. Koprivica it is my opinion that Mr. Payton's inability to perform work in the labor market is primarily due to the combination of his preexisting bilateral knee surgeries, which limit his abilities to do climbing, squatting, kneeling or crawling, as well as his bilateral upper extremity surgeries which cause him to need to be in a dependent fashion with both upper extremities, with no dominant right or left upper ability reaching and lifting.

As Dr. Koprivica stated in his report of January 12, 2015:

'Under this hypothetical and assuming support of a vocational expert that, in fact, Mr. Payton is permanently totally disabled, it is my opinion that the synergism of combining those disabilities results in Mr. Payton being permanently totally disabled.'

‘Under this hypothetical, when one combines the pre-existent industrial disability of the right shoulder, the disability of the left shoulder, and the additional disability involving both knees, there is further synergistic effect.’

Therefore it is my opinion that Mr. Payton’s’ total disability is a result of his combination of bilateral upper extremity impairments and bilateral lower extremity impairments that result in total vocational disability.

The opinions expressed are based upon a reasonable degree of vocational rehabilitation certainty and 41 years of professional experience as a vocational rehabilitation counselor. I have also relied on accepted standard treatises in the field of vocational rehabilitation, including the Dictionary of Occupational Titles; The Occupational Outlook Handbook, the Handbook for analyzing Jobs, U. S. Census Bureau.

Exhibits A through J contain treatment records and billing records relating to the care provided to Claimant for the injury he sustained in this case. The medical bills Claimant requests be paid by Employer are \$4,067.00 of Miller Orthopedic Specialists (Exhibit J), \$19,319.00 of Advanced Surgery Center, LLC (Exhibit G), and \$11,662.30 of Clarinda Regional Health Center (Exhibit F).

Rulings of Law

Based on the substantial and competent evidence, the stipulations of the parties, and the application of the Workers’ Compensation Law, I make the following Rulings of Law:

1. Was Claimant’s March 10, 2014 accident the prevailing factor in causing an injury, and is Claimant’s current condition medically causally related to the alleged work accident of March 10, 2014?

Section 287.800, RSMo³ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially

³ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers’ compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman*

without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.3, RSMo provides in part:

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.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and

(b) 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 nonemployment life.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms ‘injury’ and ‘personal injuries’ shall mean violence to the physical structure of the body. . . .

v. Cam’s Trucking Inc., 20 S.W.3d 579, 585-86 (Mo.App. 2000). *See also Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

Section 287.020.10, RSMo provides:

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.

The workers' compensation claimant bears the burden of proof to show that her injury was compensable in workers' compensation. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, 2012 WL 1931223 (Mo. banc 2012) (citing *Sanderson v. Producers Comm'n Ass'n*, 360 Mo. 571, 229 S.W.2d 563, 566 (Mo. 1950)).

"In a workers' compensation case, the claimant carries the burden of proving all essential elements of the claim." *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *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, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), 29; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993).

The Commission may not arbitrarily disregard and ignore competent, substantial, and undisputed evidence of witnesses who are not shown by the record to have been impeached and the Commission may not base its findings upon conjecture or its own mere personal opinion unsupported by sufficient and competent evidence. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 907 (Mo.App. 2008), citing *Copeland v. Thurman Stout, Inc.*, 204 S.W.3d 737, 743 (Mo.App. 2006).

8 CSR 50–2.010(14) states in part, “Prior to hearing, the parties shall stipulate uncontested facts and present evidence only on contested issues.” Such stipulations “are controlling and conclusive, and the courts are bound to enforce them.” *Hutson v. Treasurer of Missouri as Custodian of Second Injury Fund*, 2012 WL 1319428 (Mo.App. 2012) (citing *Boyer v. Nat'l Express Co.*, 29 S.W.3d 700, 705 (Mo.App. 2001)).

I find Claimant credibly testified that on March 10, 2014 while working for Employer, he injured his left shoulder when he and a co-worker were lifting a soccer goal that weighed approximately 200 pounds. I believe Claimant’s testimony that when he got the goal to the top of his head, he heard a loud pop and felt excruciating pain in his left shoulder.

The medical treatment records discussed previously in this award describe Claimant’s history of his March 10, 2014 left shoulder injury and the treatment for the injury. The St. Francis Hospital Emergency Department record dated March 10, 2014 states Claimant “was picking up a soccer goal when his left shoulder popped. He felt immediate pain and is unable to lift his arm up.” Dr. Atteberry performed surgery on Claimant’s left shoulder on May 12, 2014.

Claimant has had significant left shoulder pain, weakness, and limitation of motion since the March 10, 2014 injury that has been described previously in this Award.

On March 4, 2014, Claimant lifted a tote at home that weighed between 20 and 25 pounds. His pain was a 0 to 1 on a scale of 0 to 10. He did not go to the Emergency Room at that time. He did not schedule an appointment to see a doctor. He did schedule an appointment to see a nurse on March 14, 2014.

Claimant worked full-time without restrictions prior to the March 10, 2014. He regularly lifted 50 pounds at work. He went to work on March 5, 2014 and lifted a refrigerator tank at work on March 5, 2014 that weighed between 60 and 70 pounds. He was able to lift that by himself. The lifting of the refrigerator tank did not cause any more shoulder pain. Claimant worked eight hours on March 5, March 6, and March 7, 2014. March 7 was a Friday. Claimant did not see a doctor or go to the Emergency Room over

the weekend of March 8 or 9, 2014. An MRI was not done between March 4 and March 10, 2014.

Dr. Koprivica testified the March 10, 2014 incident resulted in a massive rotator cuff tear on the left that included the supraspinatus, infraspinatus, and subscapularis along with involvement of the footprint with tearing of the biceps as a direct result of that injury. Dr. Koprivica did not believe Claimant would have been able to carry and assemble the soccer goal parts, and lift the assembled soccer goal weighing 200 pounds with a co-worker if he had that preexisting condition. Dr. Koprivica also testified that a result of that condition Claimant had undergone an attempted repair with failure. I find these opinions are credible and persuasive.

Dr. Koprivica's report states the work injury of March 10, 2014 is felt to represent the direct, proximate and prevailing factor in his development of a massive rotator cuff involving the left shoulder that was identified post-injury, and that it was medically reasonable and a direct necessity of that permanent injury on March 10, 2014, that Claimant underwent the surgical repair involving the massive rotator cuff tear that involved the supraspinatus and infraspinatus with partial injury to the subscapularis on May 12, 2014. I find these opinions are credible and persuasive.

I find Dr. Koprivica's explanations of his opinions regarding causation are credible and persuasive.

Dr. DiStefano examined Claimant on March 11, 2014. He noted Claimant stated about a month before, he had been antiquing when he bent over to pick up a tote and felt a pop in the shoulder with mild pain. It is Dr. DiStefano's opinion that the March 10, 2014 accident is not the prevailing factor in the cause of Claimant's current condition and left shoulder injury. I find this opinion is not credible or persuasive. Dr. DiStefano did not explain the basis of his opinion. He did not identify the records he reviewed. His opinion is inconsistent with the history of Claimant's March 10, 2014 injury.

I find the opinions of Dr. Koprivica are more persuasive than the opinions of Dr. DiStefano regarding the cause of Claimant's left shoulder injury and current condition.

The parties stipulated that on or about March 10, 2014, Claimant sustained an accident in Maryville, Nodaway County, Missouri, arising out of and in the course of his employment.

I find and conclude that on March 10, 2014, Claimant injured his left shoulder when he and a co-worker were lifting a soccer goal that weighed approximately 200 pounds. Claimant felt a pop in his left shoulder and had immediate pain in his left shoulder while he was lifting the soccer goal. I find and conclude that this was an

unexpected traumatic event 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.

I find and conclude that Claimant's current left shoulder condition is medically causally related to the work accident of March 10, 2014.

I find and conclude that on March 10, 2014, Claimant sustained a compensable injury to his left shoulder by accident arising out of and in the course of his employment for Employer and that the accident was the prevailing factor in causing both the resulting medical condition and disability.

2. *What is Employer's liability, if any, for permanent partial disability benefits, or in the alternative, permanent total disability benefits?*

Claimant requests an award for permanent total disability benefits from Employer for his March 10, 2014 injury.

a. *What is the degree of Claimant's disability from his injury on March 10, 2014 alone?*

Section 287.190.2, RSMo provides:

(2) Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

An employee has the burden to establish permanent total disability by introducing evidence to prove her claim. *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604, 608 (Mo.App. 2011), citing *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 616 (Mo.App.2009).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 908 (Mo.App. 2008); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App.

1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo. App. 1985); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968).

The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

“The evaluation of medical testimony concerning a claimant's disability is within the peculiar expertise of the Commission, and, as such, the Commission is free to disbelieve the testimony of the claimant's medical expert.” *Tombaugh v. Treasurer of State*, 347 S.W.3d 670, 675 (Mo.App. 2011).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

The court in *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S.W.3d 604 (Mo.App. 2011) states at 610:

The question whether a claimant is totally and permanently disabled is not exclusively a medical question. *Crum v. Sachs Elec.*, 769 S.W.2d 131, 136 (Mo.App.1989), *overruled in part by Hampton*, 121 S.W.3d at 220. The Commission, in arriving at its ultimate conclusion as to the degree of a claimant's disability, need not rely exclusively on the testimony of medical experts; rather, it may consider all the evidence and the reasonable inferences drawn from that evidence. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 239 (Mo.App.2003).

Section 287.220.3, RSMo (2014) states:

3. (1) All claims against the second injury fund for injuries occurring after January 1, 2014, and all claims against the second injury fund involving a subsequent compensable injury which is an occupational disease filed after January 1, 2014, shall be compensated as provided in this subsection.

(2) No claims for permanent partial disability occurring after January 1, 2014, shall be filed against the second injury fund. Claims for permanent total disability under section 287.200 against the second injury fund shall be compensable only when the following conditions are met:

(a) a. An employee has a medically documented preexisting disability equaling a minimum of fifty weeks of permanent partial disability compensation according to the medical standards that are used in determining such compensation which is:

(i) A direct result of active military duty in any branch of the United States Armed Forces; or

(ii) A direct result of a compensable injury as defined in section 287.020; or

(iii) Not a compensable injury, but such preexisting disability directly and significantly aggravates or accelerates the subsequent work-related injury and shall not include unrelated preexisting injuries or conditions that do not aggravate or accelerate the subsequent work-related injury; or

(iv) A preexisting permanent partial disability of an extremity, loss of eyesight in one eye, or loss of hearing in one ear, when there is a subsequent compensable work-related injury as set forth in subparagraph b of the opposite extremity, loss of eyesight in the other eye, or loss of hearing in the other ear; and

b. Such employee thereafter sustains a subsequent compensable work-related injury that, when combined with the preexisting disability, as set forth in items (i), (ii), (iii), or (iv) of subparagraph a.

of this paragraph, results in a permanent total disability as defined under this chapter; or

(b) An employee is employed in a sheltered workshop as established in sections 205.968 to 205.972 or sections 178.900 to 178.960 and such employee thereafter sustains a compensable work-related injury that, when combined with the preexisting disability, results in a permanent total disability as defined under this chapter.

(3) When an employee is entitled to compensation as provided in this subsection, the employer at the time of the last work-related injury shall only be liable for the disability resulting from the subsequent work-related injury considered alone and of itself.

(4) Compensation for benefits payable under this subsection shall be based on the employee's compensation rate calculated under section 287.250.

The Court in *Lewis v. Treasurer of State*, 2014 WL 2928017 (Mo.App. E.D. 2014) states:

Fund liability for PTD under Section 287.220.1 occurs when the claimant establishes that he is permanently and totally disabled due to the combination of his present compensable injury and his preexisting partial disability. *Highley*, 247 S.W.3d at 55; Section 287.220.1. For a claimant to demonstrate Fund liability for PTD, he must establish (1) the extent or percentage of the PPD resulting from the last injury only, and (2) prove that the combination of the last injury and the preexisting disabilities resulted in PTD. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo.App. E.D.2007); Section 287.220.1.

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Michael*, 334 S.W.3d at 663; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent

partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). “The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.” *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

Section 287.020.7, RSMo provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.” The phrase “inability to return to any employment” has been interpreted as “the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Greer v. SYSCO Food Servs.*, -- S.W.3d --, 2015 WL 8242710 (Mo banc 2015); *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483 The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Lewis v. Kansas University Medical Center*, 356 S.W.3d 796, 800 (Mo.App. 2011); *Molder v. Missouri State Treasurer*, 342 S.W.3d 406, 411, (Mo.App. 2011); *Carkeek*, 352 S.W.3d at 608; *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

The court in *Vaught*, 938 S.W.2d 931, states at 939:

As explained in *Stewart, id.* at 854, § 287.220.1 contemplates that where a partially disabled employee is injured anew and sustains additional disability, the liability of the employer for the new injury “may be at least equal to that provided for permanent total disability.” Consequently, teaches *Stewart*, where a partially disabled employee is injured anew and rendered permanently and totally disabled, the first step in ascertaining whether there is liability on the Second Injury Fund is to determine the amount of disability caused by the new accident alone. *Id.* The employer at the time of the new accident is liable for that disability (which may, by itself, be permanent and total). *Id.* If the compensation to which the employee is entitled for the new injury is *less* than the compensation for permanent and total disability, then in addition to the compensation from the employer for the new injury, the employee (after receiving the compensation owed by the employer) is entitled to receive from the Second Injury Fund the remainder of the compensation due for permanent and total disability. § 287.220.1

Based on the substantial and competent evidence and the application of the Workers’ Compensation Law, I find and conclude that Claimant’s injury on March 10, 2014 considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire Claimant in his condition, reasonably expecting him to perform the work for which he is hired.

Factors which support my finding and conclusion that Claimant’s injury on March 10, 2014, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled include the following.

Claimant worked full-time without restrictions prior to the March 10, 2014. He regularly lifted 50 pounds at work. The competent and substantial evidence does not establish that Claimant was permanently and totally disabled solely because of preexisting disabilities.

Claimant credibly testified he has had significant ongoing debilitating left shoulder pain since the March 10, 2014 injury. He had left shoulder surgery on May 12, 2014. He has not had another left shoulder surgery because there is no guarantee that he would get any mobility back and Dr. Atteberry did not say how much pain would be alleviated from a second surgery.

Claimant's primary pain now is in his left shoulder. His left shoulder pain is constant. It averages between a 3 and 7. The pain is excruciating when it gets to hurting. His left shoulder pain increases when he moves, when he reaches out, and when he rolls over at night. He has significant weakness and loss of motion in his left shoulder. His left shoulder condition has limited his ability to perform activities around his house.

Claimant's left shoulder pain interrupts his sleep. Sharp pains in his left shoulder waken him during the night. Claimant slept an average of seven hours sleep per night before the March 2014 accident. Claimant averages about four hours per night since the March 10, 2014 accident. During an average night, his left shoulder pain wakes him three to four times per night.

Claimant's left arm causes him to lie down during the day. He sometimes nods off during the day due to lack of sleep. He sometimes has difficulty concentrating. He lies down or sits in a recliner and closes his eyes three to four times a day between 8:00 a.m. and 5:00 a.m. on an average day. He dozes off a couple times per day between 8:00 a.m. and 5:00 a.m.. He did not lie down or doze off during the day before the March 10, 2014 injury.

Claimant takes Tylenol 3 and Tramadol for left shoulder pain. He takes a prescription sleeping pill. He is takes the maximum dose of Tylenol and Naproxen with very little relief.

Claimant is 58-years old. He has a high-school education. He has not been employed since March 10, 2014. He has not applied for work since then. He does not feel he is able to do anything. He does not feel he is able to work in any employment. He testified he would still be working if he had not had the March 10, 2014 injury.

I find Claimant's description of his injury, condition, complaints, and limitations to be credible.

Raymond Gebhart, Jr., Herb Andrews, Richard S. Payton, and Debbie Payton credibly described activities Claimant did before the March 10, 2014 injury, but no longer does since that injury.

Dr. Koprivica examined Claimant on January 12, 2015. He stated Claimant did not have any pre-existing permanent partial left shoulder disability before March 10, 2014. He observed atrophy of the supraspinatus and infraspinatus of Claimant's left shoulder. He noted those objective findings of atrophy were consistent with the work injury of March 10, 2014 and that Claimant had a failed repair. He noted Claimant had severe left shoulder pain. He had significant loss of motion of the left shoulder. Dr. Koprivica testified Claimant was not able to lie supine for any duration of time on the

examination table because his left shoulder hurt so bad. Dr. Koprivica testified that sleep interruption is medically consistent with Claimant's left shoulder injuries due to the prevailing factor of the March 10, 2014 work incident.

Dr. Koprivica assigned significant restrictions and limitations due to the March 10, 2014 work accident considered alone and in isolation. Dr. Koprivica testified as follows:

Q. Based on reasonable medical certainty, list the limitations and restrictions due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation?

A. My opinion is that he is restricted to essentially one-armed type of work. So, vocationally he really can't use his left arm based on this injury. He can use it for balance or support purposes, but it needs to be very restricted. I would say it would be on a rare basis. He can't really lift with the left arm, and he needs—in terms of positioning the arm when he is using it, he needs to have it where his arm is adducted which means he has his upper arm and elbow against his side when he is using the arm for that purpose.

He has a limitation of needing to recline and take naps on an unpredictable basis, and that's because of his sleep interruption that he has that's directly due to this injury that he can't sleep and get restorative sleep at night. So, during the day he is going to have to nap during the day unpredictably which is part of the limitation that I thought was profoundly disabling from the injury.

I find these restrictions and limitations of Dr. Koprivica due to the March 10, 2014 work accident considered alone and in isolation are credible and persuasive. I find and conclude Claimant needs to lie down unpredictably during the day due to difficulty sleeping caused by left shoulder pain resulting from his March 10, 2014 compensable work accident considered alone and in isolation.

Dr. Koprivica concluded Claimant is totally disabled from all employment and that it would be unrealistic to expect any ordinary employer to employ Claimant with the restrictions from the March 10, 2014 accident. Dr. Koprivica testified as follows:

Q. And these limitations and restrictions are due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton medically, reliably able to work eight hours a day, five days a week, 52 weeks a year at any employment?

A. Not in my opinion.

Q. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton?

.....

A. In my opinion he is not able to - - it would be unrealistic to expect any ordinary employer to employ him with the severity of the restrictions and limitations that are necessary from the March 10th, 2014, work injury.

Q. (By Mr. McKay) Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton medically, totally disabled from all employment?

A. In my opinion he is.

.....

Q. And it is your opinion that it's the last accident of March 10th, 2014, that is the prevailing factor in rendering claimant permanently and totally disabled in isolation without consideration of anything prior, correct?

A. That's my opinion.

Q. And that's based on the restrictions resulting from the injury, the pain, the functional limitations, the failed left shoulder surgery, the poor sleep and the fact that he has to lie down during the day at unpredictable times for unpredictable periods, those factors is what you are basing your opinion that the March 10, 2014, injury is what is rendering claimant unemployable and permanently and totally disabled in isolation, correct?

A. Yes.

I find these opinions of Dr. Koprivica are credible and persuasive.

Michael Dreiling concluded no employer in the ordinary course of business would reasonably be expected to hire Claimant due to the March 10, 2014 work accident alone and in isolation. Mr. Dreiling testified as follows:

Q. Based on reasonable vocational certainty, please list the limitations and restrictions due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation which you identified?

A. The need to recline and take naps during the day on an unpredictable but frequent basis. No use of left upper extremity vocationally except with arm adducted to his side on a very limited basis as a support only. Medically not reliably able to work eight hours a day, five days a week and 52 weeks a year at any substantial gainful employment.

Q. Based on reasonable vocational certainty, due to the prevailing factor of the March 10, 2014, accident considered alone and in isolation, what is the significance of the March 10, 2014, limitations and restrictions?

A. They would represent substantial vocational barriers for this gentleman.

.....

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton able to compete in the open labor market?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton vocationally able to work eight hours a day, 40 hours a week, 52 weeks a year at any job?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014, work accident alone and in isolation, is Dan Payton vocationally permanently totally disabled from all employment?

A. Yes.

.....

Q. Okay. He also talks about his requirement to take naps during the day on an unpredictable but frequent basis. Dr. Koprivica states that it's felt to be consistent with the severity of his disability to his left shoulder and his pain. The need for someone to lie down unpredictably on a frequent basis during the day, doesn't that tend to render one unemployable in isolation for that reason alone?

A. Yes.

Q. Okay. And as far as you know, he was not having any sleep interruption or needing to lie down during the day before this injury of March 10th, 2014, correct?

A. Correct.

.....

And so you agree with Dr. Koprivica, that it is this last accident of March 10th, 2014, to the left shoulder which is rendering Mr. Payton unemployable in an open labor market, correct?

A. Correct.

I find these opinions of Mr. Dreiling are credible and persuasive.

Mr. Dreiling agreed Claimant was not taking any narcotic pain medication before the injury of March 2014 and was not having poor sleep or having to lie down during the day before that injury.

Terry Cordray was aware that following Claimant's surgery, Dr. Atteberry gave Claimant a five-pound lifting restriction as of September 2014, and that Employer could not accommodate that restriction, and that Claimant had not applied for other jobs.

Mr. Cordray testified that Dr. Atteberry's restrictions of five-pounds lifting and no overhead work would severely restrict Claimant's access to the labor market. I find this opinion credible and persuasive.

Mr. Cordray thought that if you took out the prior injuries and just had the left shoulder injury, Claimant might have been able to do the supervisory work he had done before assigning other work to others. He thought Claimant may have been able to do cashiering work or some type of light retail sales or light assembly work. He would have to do something very light. He might have been able to work in a store during some kind of retail sales if he did all the lifting with the right and cradled with the left, and he might have been able to stock shelves and work in a hardware store. I find these opinions are not credible or persuasive.

I have previously found that Dr. Koprivica's restrictions and limitations are credible and persuasive due to Claimant's March 10, 2014 injury alone and in isolation and that Claimant needs to lie down unpredictably during the day due to his March 10, 2014 injury alone and in isolation. Mr. Cordray was aware of Dr. Koprivica's restrictions and limitations due to the March 10, 2014 work accident. Mr. Cordray agreed if we rely on the restrictions of Dr. Koprivica, Claimant is not able to compete in the open labor market.

Mr. Cordray testified in part:

Q. And based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone and in isolation, if we rely on the restrictions of Dr. Koprivica, is Dan Payton able to compete in the open labor market?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10 work accident alone and in isolation, given the restrictions of Dr. Koprivica, is Dan Payton vocationally able to work eight hours a day, 40 hours a week, 52 weeks a year at any job on a reliable basis?

A. No.

Q. Based on reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone and in isolation, given Dr. Koprivica's work restrictions, would any employer in the ordinary course of business reasonably be expected to employ Dan Payton in his condition?

A. No.

Q. Based on a reasonable vocational certainty due to the prevailing factor of the March 10, 2014 work accident alone in isolation, given the Dr. Koprivica's restrictions and limitations, is Dan Payton vocationally permanently totally disabled from all employment?

A. Yes.

I find these opinions of Mr. Cordray are credible and persuasive.

I find and conclude that Claimant's injury on March 10, 2014, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I find and conclude that no employer in the usual course of business would be reasonably expected to hire Claimant in his condition, reasonably expecting him to perform the work for which he is hired.

The court in *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902 (Mo.App. 2008), stated at 910:

After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. Furthermore, an employers' liability for permanent partial or permanent total disability does not run concurrently with their liability for temporary total disability.

Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

The Missouri Supreme Court in *Greer v. SYSCO Food Servs.*, -- S.W.3d --, 2015 WL 8242710 (Mo banc 2015) states: “This Court agrees with the holding in *Cardwell* that the commission must decide whether any further medical progress can be reached because that decision is essential in determining when a disability becomes permanent for the purpose of awarding permanent partial or PTD benefits.”

Claimant has not worked for Employer or anywhere else since March 10, 2014. I find and conclude that Claimant has not worked and that he has been unable to work continuously since March 10, 2014 as a result of his March 10, 2014 work injury.

Dr. Atteberry treated Claimant’s left shoulder from March 14, 2014 until September 17, 2014. Dr. Atteberry performed a left rotator cuff repair on May 12, 2014. Claimant has not had any further left shoulder surgery since September 17, 2014. Claimant’s left shoulder condition has not materially changed since September 17, 2014.

Dr. Koprivica considered Claimant to have reached maximum medical improvement on September 17, 2014. Dr. Koprivica testified that September 17, 2014 was “the date where the discussion was whether or not he was going to have any further revision surgery and a decision was made that he was not at that point.” Dr. Koprivica “thought that was medically a reasonable decision, that he has a likely irreparable tear, and if he is not going to pursue surgery, there really isn’t any other treatment that would be afforded to him that is going to change his underlying function.” I find these opinions of Dr. Koprivica are credible and persuasive.

The parties stipulated that Claimant reached maximum medical improvement on September 17, 2014.

Based on the competent and substantial evidence, I find and conclude that Claimant’s left shoulder condition caused by his March 10, 2014 work injury reached the point where no further progress was expected and would no longer improve with medical treatment on September 17, 2014. I find and conclude Claimant reached maximum medical improvement on September 17, 2014 in connection with his March 10, 2014 work injury.

I find Claimant’s permanent total disability began on September 18, 2014. I find that since September 18, 2014, Claimant has not been able to compete in the open labor market, and no employer in the usual course of business would be reasonably expected to hire him in his condition, reasonably expecting him to perform the work for which he is hired.

The parties stipulated that the rate of compensation is \$432.82 per week for permanent total disability. I find the rate of compensation is \$432.82 per week for permanent total disability.

I award Claimant permanent total disability benefits against Employer in the amount of \$432.82 per week beginning on September 18, 2014.

I therefore order and direct Employer to pay to Claimant permanent total disability benefits beginning September 18, 2014, and thereafter, at the rate of \$432.82 per week for Claimant's lifetime.

3. What is Employer's liability, if any, for past temporary total disability benefits from March 10, 2014 through and including September 17, 2014?

Claimant requests an award for past temporary total disability benefits from March 10, 2014 through and including September 17, 2014 at the weekly rate of \$432.82.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in section 287.020.7, RSMo 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." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Greer v. SYSCO Food Servs.*, -- S.W.3d --, 2015 WL 8242710 (Mo banc 2015); *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. The ability to perform some work is not the test for temporary total disability, but rather, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). "This standard is applied to temporary total disability, as well as permanent total disability. Contrary to the findings of the Commission, this does not mean that an employer is forced to either make light duty available to a claimant or pay temporary total disability benefits simply because

the claimant remains under active medical care and there is a reasonable expectation that the employee's functional level might improve. An employer is only obligated for said benefits if the employee could not compete on the open market for employment.”

Cooper, 955 S.W.2d at 575.

A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 575-76. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

A “‘claimant is capable of forming an opinion as to whether she is able to work, and her testimony alone is sufficient evidence on which to base an award of temporary total disability.’ ” *Stevens v. Citizens Mem. Healthcare Found.*, 244 S.W.3d 234, 238 (Mo.App.2008) (quoting *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003)); *Pruett v. Federal Mogul Corp.*, 365 S.W.3d 296, 309 (Mo.App. 2012).

The Missouri Supreme Court states in *Greer v. SYSCO Food Servs.*, -- S.W.3d --, 2015 WL 8242710 (Mo banc 2015):

This Court is not eliminating the concept of maximum medical improvement from the workers' compensation lexicon. This Court recognizes that the date of maximum medical improvement could aid the commission in determining the time when a disability becomes permanent and TTD benefits should be terminated. However, this Court holds the commission is not *required* to accept maximum medical improvement as a bright-line date to terminate TTD benefits when there is substantial and competent evidence presented that a claimant continues to be engaged in the rehabilitative process beyond a date initially believed to be the end of the rehabilitative process. Cases that hold to contrary should no longer be followed.

Dr. Koprivica concluded Claimant was at maximum medical improvement as of September 17, 2014. I find this opinion is credible and true.

Dr. Koprivica considered Claimant to have been temporarily totally disabled from Claimant's last day of work which was March 10, 2014 until September 17, 2014 when Claimant reached maximum medical improvement. Dr. Koprivica thought there really was not any other treatment that would be afforded to Claimant that was going to change his underlying function. I find these opinions of Dr. Koprivica are credible and persuasive.

The parties stipulated that Claimant reached maximum medical improvement on September 17, 2014. I find and conclude that Claimant reached maximum medical improvement on September 17, 2014.

I find there is no substantial and competent evidence presented that Claimant continued to be engaged in the rehabilitative process beyond September 17, 2014.

Claimant testified Employer paid him no temporary total disability benefits. The attorneys stipulated at the hearing that no temporary total disability benefits have been paid in this case. I find Employer has paid no temporary total disability benefits to Claimant in this case. I further find that Claimant has not worked since March 10, 2014. Claimant testified he received no unemployment benefits after March 10, 2014, and there was no evidence to the contrary. I find Claimant received no unemployment benefits after March 10, 2014.

I find that Claimant was unable to work and was temporarily and totally disabled, from March 11, 2014 through September 17, 2014, and that he is entitled to temporary total disability benefits March 11, 2014 through September 17, 2014. I find that the total weeks that Claimant was temporarily and totally disabled as a result of this March 10, 2014 accident are 27 ²/₇ weeks.

The parties stipulated that the temporary total disability rate in this case is \$432.82 per week. I find the temporary total disability rate in this case is \$432.82 per week.

I award Claimant the sum of \$11,809.80 from Employer for past temporary total disability benefits for the period March 11, 2014 through September 17, 2014 at the rate of \$432.82 per week.

4. *What is Employer's liability, if any, for past medical expenses in the claimed amount of \$35,048.30?*

"Employee had the burden of proving his entitlement to benefits for care and treatment authorized by § 287.140.1, i.e., that which is reasonably required to cure and relieve from the effects of the work injury." *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004); *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo.App. 2001).

Meeting that burden requires that the past bills be causally related to the work injury. *Bowers*, 132 S.W.3d at 266; *Pemberton v. 3M Co.*, 992 S.W.2d 365, 368-69 (Mo.App. 1999).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926 (Mo.App. 1991); *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990); *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994); *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992); *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992).

The *Martin* court states at 769 S.W. 2d 111-12:

In this case, Martin testified that her visits to the hospital and various doctors were the product of her fall. She further stated 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 the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation. The employer, of course, may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. In this age of soaring medical costs it no longer serves the purposes of the Act to assume that medical bills paid by an injured worker are presumed reasonable (because they were paid), while those which remain unpaid, very probably because of lack of means, must be proved reasonable and fair.

The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. *Martin*, 769 S.W.2d at 111.

The law in Missouri provides that while the employer has the right to name the treating physician, it waives that right by failing or neglecting to provide necessary medical aid to the injured worker. *Emert v. Ford Motor Co.*, 863 S.W.2d 629, 631 (Mo.App.1993); *Shores v. General Motors Corp.*, 842 S.W.2d 929, 931 (Mo.App.1992);

Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo.App. 1995); *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984). The Court in *Shores* stated at 931-932:

The case law under §287.140(1) establishes the employer's right to provide medical treatment of its choice, however, this right is waived when the employer fails to provide necessary medical treatment after receiving notice of an injury. *Wiedower v. ACF Indus., Inc.*, 657 S.W.2d 71, 74 (Mo.App.1983). 'Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the [claimant] may make his own selection and have the cost assessed against the employer.' *Id.*

In the present case, there is substantial evidence which supports a finding that employer had notice of claimant's injuries and refused to provide medical treatment. On the day she was injured, and thereafter whenever the pain made it difficult to work, claimant reported to the plant dispensary to receive medical aid. At some point, a nurse at the dispensary informed claimant that she was no longer welcome and should consult her own doctor for further treatment.

The court in *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo.banc 2003) states at 822:

As previously noted, the aim of Missouri's workers' compensation law is to remedy the losses incurred by an employee as a result of a compensable injury. *Bethel*, 551 S.W.2d at 618. To award Ms. Farmer-Cummings compensation for medical expenses for which she has no liability would result in a windfall rather than compensation. On the other hand, to reduce Ms. Farmer-Cummings' award when she may still be held liable for those reduced amounts vitiates the policy behind workers' compensation-to place upon the shoulders of industry the burden of workplace injury. *See id.* Personnel Pool must reimburse Ms. Farmer-Cummings for all medical expenses incurred as a result of her workplace injury. Moreover, Personnel Pool should not receive an advantage for failing to timely pay medical bills incurred in such treatment at Ms. Farmer-Cummings' expense.

Ms. Farmer-Cummings had the burden and has produced documentation detailing her past medical expenses and has testified to the relationship of such expenses to her compensable workplace injury. *See Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989); *Esquivel v. Day's Inn*, 959 S.W.2d 486, 489 (Mo.App.1998). It is a defense of Personnel Pool, as employer, to

establish that Ms. Farmer-Cummings was not required to pay the billed amounts, that her liability for the disputed amounts was extinguished, and that the reason that her liability was extinguished does not otherwise fall within the provisions of section 287.270. *See Martin, 769 S.W.2d at 112; Esquivel, 959 S.W.2d at 489.*

The medical records in evidence contain a history of Claimant's care and treatment relating to his March 10, 2014 injury.

Claimant credibly testified he incurred the medical bills represented in Exhibits F, G, and J that total \$35,048.30 for treatment of his March 10, 2014 left shoulder injury. He credibly testified the medical bills are related to and are a product of his left shoulder injury on March 10, 2014. He is liable for payment of those bills.

Dr. Koprivica testified:

Q. (By Mr. McKay) Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, are Dan Payton's medical bills in Exhibit A through J reasonable and necessary?

A. Yes.

Dr. Koprivica's report states: "7. The medical bills listed in Exhibits A through J represent medical bills which are reasonable in amount, medically necessary and due to the prevailing factor of the work accident of March 10, 2014." I find these opinions of Dr. Koprivica are credible and persuasive.

The parties stipulated that the medical expenses incurred to treat Claimant's condition were fair and reasonable and usual and customary.

Exhibits A through J contain treatment records and billing records relating to the care provided to Claimant for the injury he sustained in this case. These records and Claimant's testimony establish that Claimant incurred these bills for treatment of his March 10, 2014 injury. These bills were a product of the injury he sustained from a compensable accident while working for Employer. The medical bills Claimant requests be paid by Employer are \$4,067.00 of Miller Orthopedic Specialists (Exhibit J), \$19,319.00 of Advanced Surgery Center, LLC (Exhibit G), and \$11,662.30 of Clarinda Regional Health Center (Exhibit F). These medical bills for which Claimant requests payment by Employer are in the total amount of \$35,048.30.

Employer had notice of Claimant's March 10, 2014 injury when Claimant reported the injury on March 10, 2014.

Employer refused to provide medical aid to Claimant under workers' compensation after his March 10, 2014 injury, and after being notified of the injury. As in *Shores*, there is substantial evidence which supports a finding that Employer had notice of Claimant's injuries and refused to provide medical treatment. Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the claimant may make his own selection and have the cost assessed against the employer.

I find and conclude the medical bills in evidence were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of Claimant's injury. I find and conclude that the medical care Claimant received on and after March 10, 2014 that is represented by the medical bills and treatment records in evidence (Exhibits A through J) was reasonably necessary to cure and relieve him of the effects of his March 10, 2014 injury that arose out of and in the course of his employment for Employer.

I have previously found that Claimant's March 10, 2014 compensable accident while working for Employer was the prevailing factor in causing his left shoulder injury and resulting disability.

Employer did not pay Claimant's medical expenses for which he seeks payment. The evidence documents that Claimant received the treatment for the injury that is represented by the expenses for which he seeks payment. Employer offered no evidence that the charges were not fair and reasonable and usual and customary and offered no credible evidence that showed that the medical expenses incurred were not related to the injury in question.

Employer offered no evidence that Claimant was not required to pay the billed amounts, that his liability for the disputed amounts was extinguished, and that Claimant has ceased to be liable to healthcare providers for write-offs and fee adjustments. I find Employer failed to prove that Claimant was not required to pay the billed amounts, failed to prove that his liability for the disputed amounts was extinguished, and failed to prove that Claimant has ceased to be liable to healthcare providers for write-offs and fee adjustments.

I find and conclude that Claimant met his burden of proof regarding Employer's liability for past medical expenses of \$35,048.30. I find that the medical expenses incurred in this case in the amount of \$35,048.30 were fair, reasonable, and necessary expenses to cure and relieve the effects of the injury that Claimant sustained in the course of his employment on March 10, 2014 while he was working for Employer.

I find and conclude that the medical bills incurred to treat Claimant's March 10, 2014 injury in the amount of \$35,048.30 should be paid by Employer. I award the sum of \$35,048.30 in favor of Claimant against Employer for these past medical expenses.

5. *What is Employer's liability, if any, for future medical aid?*

Claimant is requesting an award of additional medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Greer v. SYSCO Food Servs.*, -- S.W.3d --, 2015 WL 8242710 (Mo banc 2015); *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004). Medical aid is a component of the compensation due an injured worker under Section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Farmer v. Advanced Circuitry Division of Litton*, 257 S.W.3d 192, 197 (Mo. App. 2008); *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

The Missouri Supreme Court in *Greer*, -- S.W.3d --, 2015 WL 8242710 states:

Greer need not present "conclusive evidence" that future medical treatment is needed to be entitled to an award of future medical benefits. *Null v. New Haven Care Ctr., Inc.*, 425 S.W.3d 172, 180 (Mo.App.E.D.2014). Instead, Greer needs only to show a reasonable probability that the future treatment is necessary because of his work-related injury. *Id.* Future medical care should not be denied simply because an employee may have achieved maximum medical improvement. *Pennewell v. Hannibal Reg'l Hosp.*, 390 S.W.3d 919, 926 (Mo.App.E.D.2013).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 524 (Mo.App. 2011); *Farmer*, 257 S.W.3d at 197; *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 53 (Mo. App. 2007); *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves

room to doubt.” *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Tillotson*, 347 S.W.3d 525; *Forshee v. Landmark Excavating & Equipment*, 165 S.W.3d 533, 538 (Mo. App. 2005); *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Farmer*, 257 S.W.3d at 197; *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. 2006). 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*; *Tillotson*, 47 S.W.3d 519.

The court in *Tillotson* states at 347 S.W.3d 519:

The existing case law at the time of the 2005 amendments to The Workers' Compensation Law instructs that 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. *Bowers v. Hiland Dairy Co.*, 188 S.W.3d 79, 83 (Mo.App. S.D.2006). 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*.

The court in *Tillotson* states at 347 S.W.3d 524:

To receive an award of future medical benefits, a claimant need not show ‘conclusive evidence’ of a need for future medical treatment.” *Stevens*, 244 S.W.3d at 237 (quoting *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo.App.W.D.2007)). “Instead, a claimant need only show a ‘reasonable probability’ that, because of her work-related injury, future medical treatment will be necessary. A

claimant need not show evidence of the specific nature of the treatment required. *Id.*

The court in *Tillotson* also states at 525:

In summary, we conclude that once the Commission found that Tillotson suffered a compensable injury, the Commission was required to award her compensation for medical care and treatment reasonably required to cure and relieve her compensable injury, and for the disabilities and future medical care naturally flowing from the reasonably required medical treatment.

Claimant has continuing complaints relating to his left shoulder. He continues to take medication for pain in his left shoulder. He agrees to the need for future treatment of his left shoulder. He would consent to future pain management. He would consent to a possible surgery on his left shoulder.

Dr. Koprivica testified:

Q. Based on reasonable medical certainty due to the prevailing factor of the March 10, 2014, work accident considered alone and in isolation, is Dan Payton in need of open and ongoing medical treatment, and if so, please give us a list of the types?

A. In my opinion it's medically probable he is going to have future treatment needs. They are going to be dictated by pain and dysfunction based on that pain. That includes monitoring by an appropriate surgeon or doctor that can provide him medication to deal with those pain issues. Ultimately the question is going to be that with intractable pain to pursue a reverse shoulder arthroplasty would be an approach.

Again, it's not something that is predictably going to improve his function that I would say he is going to be employable, but in terms of reduction of pain it's a reasonable approach and that you have to leave that up to the patient to make that decision as to when that's going to be performed.

Q. Based on reasonable medical certainty more likely than not due to the prevailing factor of the March 10, 2014, work accident at some point is Dan Payton going to have a level of pain that justifies doing this reverse total shoulder arthroplasty?

A. Yeah. I would say it's more probable than not that he would reach that point that a reverse total shoulder arthroplasty would be pursued.

I find these opinions of Dr. Koprivica are credible and persuasive.

Dr. Koprivica's January 12, 2015 report states in part:

8. It is medically probable that Mr. Payton has ongoing indefinite treatment needs based on the March 10, 2014, work injury.

I would consider the March 10, 2014, work injury to be the prevailing factor in terms of the necessity of the future treatment needs.

Regarding that issue, Mr. Payton is currently a candidate for an attempt at a revision surgery with attempt at revision repair of the recurrent complete rotator cuff tear that is currently present.

I would note that there is an expectation that Mr. Payton will have need for physician monitoring. As part of that physician monitoring, it will include the need for medications to deal with chronic pain issues.

At his current age and with the rotator cuff insufficiency that is present, it is my opinion that it is probable that he will develop a rotator cuff arthropathy.

The end state of rotator cuff arthropathy is the necessity for a reverse total shoulder arthroplasty.

I find these opinions of Dr. Koprivica are credible and persuasive.

Based on competent and substantial evidence and the application of the Missouri Workers' Compensation Law, I find Claimant will need additional medical aid to cure and relieve him from the effects of his March 10, 2014 compensable injury.

Employer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his March 10, 2014 injury, in accordance with section 287.140, RSMo.

What is the Second Injury Fund's liability for permanent total disability benefits?

I have previously found and concluded that Claimant's injury on March 10, 2014, considered alone, in isolation, and in and of itself, rendered Claimant permanently and totally disabled. I have found and concluded Employer is responsible for the entire amount of compensation in this case. The Second Injury Fund therefore has no liability in this case. Claimant's claim against the Second Injury Fund is denied.

Attorney's Fees

Claimant's attorney is entitled to a fair and reasonable fee in accordance with section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. Exhibit R is the Work Comp Attorney/Client Contract between Claimant and John E. McKay respecting Claimant's "work injuries on or about 3/10/14 for the Maryville R2 School District" that provides in part: "I agree to pay, and John E. McKay and any referring attorney agree to accept, twenty-five percent (25%) of all gross proceeds including future payments." I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to 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 Claimant: John E. McKay.

Made by: /s/ Robert B. Miner
 Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

