

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

Injury No.: 04-033175

Employee: Jack Sanderson  
Employer: Sachs Electric  
Insurer: Zurich North America

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence and briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the December 2, 2009, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

**Preliminary Matters**

The administrative law judge heard this matter to consider 1) medical causation; 2) liability for past medical expenses of \$30,382.75; 3) liability for future medical care; 4) liability for temporary total disability; and 5) liability for permanent partial disability benefits.

The administrative law judge found that employee satisfied his burden and established by reasonable probability that his work injury caused the need for his second surgery. The administrative law judge found employee entitled to \$25,543.75 for past medical expenses. Further, the administrative law judge found employee entitled to temporary total disability benefits for the periods of March 1, 2004 through April 10, 2004, September 14, 2004 through January 18, 2005, and March 12, 2007 through May 7, 2007. The administrative law judge found that employee is entitled to \$3,383.45 in temporary total disability benefits. The administrative law judge found that employee sustained 30% permanent partial disability to his right shoulder and is entitled to \$24,154.68 in permanent partial disability benefits.

The administrative law judge denied employee temporary total disability benefits for the periods of July 19, 2005 through August 2, 2005, and August 2, 2005 through August 20, 2007 (with the exception of the aforementioned period of March 12, 2007 through May 7, 2007). The administrative law judge denied employee future medical care, as he found that there is no indication that employee will need further treatment.

The employee appealed to the Commission alleging: 1) the administrative law judge erred in finding that employee is entitled to only \$3,383.45 in temporary total disability benefits; and 2) the administrative law judge erred in failing to award payment of the past medical bills of Dr. Feinberg.

**Summary of Facts**

The findings of fact and stipulations of the parties were accurately recounted in the award of the administrative law judge and are adopted by the Commission to the extent they are not inconsistent with the additional facts and analysis listed below.

On January 14, 2004, employee was injured while working as a journeyman lineman for employer. Employee sought treatment and was allowed to work light duty until he was laid off on March 1, 2004, because there was no more light duty work available.

Employee: Jack Sanderson

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Employer provided treatment and paid temporary total disability benefits to employee for some time, however, employer stopped providing treatment and temporary total disability benefits once it believed employee had reached maximum medical improvement. Employee disagreed with employer's conclusion that he had reached maximum medical improvement because he continued to experience problems with his shoulder.

Employee argues on appeal that he should be entitled to temporary total disability benefits from July 19, 2005 to August 20, 2007,<sup>1</sup> and that he should be reimbursed for past medical expenses relating to his treatment with Dr. Feinberg.

On July 19, 2005, employee saw Dr. LaBore who essentially came to three conclusions: 1) employee cannot return to work; 2) employee needs more physical therapy and medication; and 3) employee has reached maximum medical improvement. Following said visit, employee continued to receive authorized physical therapy treatment. On October 4, 2005, employee returned to Dr. LaBore. Dr. LaBore discharged employee from his treatment at said visit and indicated on the Doctor's Status Form that "if Mr. Sanderson is willing to tolerate the shoulder/neck pain that will accompany his return to work, he may return to work."

Following the aforementioned visit with Dr. LaBore, employee was seen by Dr. Feinberg on October 11, 2005. Dr. Feinberg stated in his records that employee is advised to perform no more than sedentary work.

On October 13, 2005, employee demanded further treatment and temporary total disability benefits from employer. Employer refused to provide further treatment and additional temporary total disability benefits. Employee received medical care, on his own, through Dr. Feinberg from January 16, 2006 through April 12, 2006. A hardship hearing was held on March 20, 2006, regarding employee's request for additional treatment and temporary total disability benefits and a temporary award was issued by an administrative law judge on June 6, 2006. The administrative law judge denied employee's request for additional treatment and temporary total disability benefits. Employee then continued treating on his own.

On November 2, 2006, employee began treating with Dr. Lehman. Dr. Lehman took employee completely off work, but later stated that employee could have performed sedentary work during this time, with activities that did not involve use of the right shoulder, and lifting up to 25 pounds. On March 12, 2007, Dr. Lehman performed surgery on employee. Dr. Lehman did not return employee to work at full duty until August 20, 2007.

### **Conclusions of Law**

In evaluating the disputed period of temporary total disability benefits (July 19, 2005 through August 20, 2007), the administrative law judge broke that period down into two separate periods, July 19, 2005 through August 2, 2005, and August 2, 2005 through August 20, 2007.

During the initial two week period, from July 19, 2005 through August 2, 2005, the administrative law judge stated that the reasons employee is not entitled to temporary total disability benefits are because: 1) Dr. LaBore said that employee had reached maximum medical improvement; and 2) a functional capacity evaluation showed that employee could function in the heavy to very heavy category.

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<sup>1</sup> The exception to this statement is the period of eight (8) weeks following employee's surgery on March 12, 2007. The administrative law judge did award temporary total disability benefits during that time frame.

Employee: Jack Sanderson

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Although Dr. LaBore stated at the July 19, 2005, visit that he believed employee had reached maximum medical improvement, he also conflictingly recommended that employee not return to work. This combined with employee's continued problems, treatment, and eventual surgery that took place after this July 19, 2005, visit, convinces us to find that employee is entitled to temporary total disability benefits for this period.

For the second period, August 2, 2005 through August 20, 2007, the administrative law judge denied temporary total disability benefits, with the exception of the eight week period following the surgery of March 12, 2007. However, as employee argues in his brief, the factual evidence, and opinions from the vocational experts, establishes that employee should be entitled to total disability benefits during the entirety of this time.

From August 2, 2005 to October 4, 2005, employee was off work due to Dr. LaBore's disability certificate on July 19, 2005. During that period, employee was also still receiving physical therapy and was scheduled for a follow-up appointment with Dr. LaBore.

On October 4, 2005, Dr. LaBore released employee to perform his normal job, so long as he was willing to tolerate the pain that would come with doing so. Employee testified that the only reason Dr. LaBore released him on that date was because employee had requested Dr. LaBore do so to allow him to "put some food on the table." Employee's testimony seems logical; especially when you consider that Dr. LaBore released employee to full duty, while also recommending vocational rehabilitation.

Although employee had been released to work by Dr. LaBore, employee knew that something was still wrong, so he sought treatment from Dr. Feinberg on October 11, 2005, and advised employer of the same. Dr. Feinberg took employee off work until his pain levels could be reduced. Dr. Feinberg's physical therapy notes mention a great deal of ongoing complaints including increased periods of pain, difficulty sleeping, difficulty arising from bed, fatigue with telephone use, pain with driving, etc.

Vocational expert Timothy Lalk testified at the hardship hearing on March 20, 2006, that if employee had tried to obtain employment at that time, he would have been met with reluctance because he left his career occupation due to a chronic medical condition that had yet to be fully diagnosed and treated. In addition, the fact that employee was seeking medical treatment would be met with reluctance by potential employers due to the potential for lost time from work.

Employee was denied additional treatment and temporary total disability benefits in the Temporary Award, but employee sought treatment on his own. Employee began treating with Dr. Lehman on November 2, 2006. Dr. Lehman issued employee an "off work" slip which stated that employee was to remain off work through May 10, 2007. On July 26, 2007, Dr. Lehman issued another such slip, and on August 14, 2007, he said that employee could return to work at full duty on August 20, 2007.

We find, as employee argues, that it is clear based on employee's medical timeline that he should not have been discharged from treatment by Dr. LaBore on October 4, 2005. This is evidenced by the fact that employee still had weakness, multidirectional instability, and a compensatory movement pattern. In addition, as would later be revealed, employee was still in need of surgery at the time Dr. LaBore discharged him. Also, the fact that employee was still in need of surgery at the time he treated with Dr. Feinberg confirms that Dr. Feinberg's treatment was reasonable and necessary. At no point during the period of July 19, 2005, through August 20, 2007, could it reasonably be concluded that employee was able to return to work.

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For the foregoing reasons, we find that employee is entitled to additional temporary total disability benefits for the full period of July 19, 2005 through August 20, 2007, or \$71,934.00 (\$662.55 TTD x 108 4/7 weeks). We also find that employer is liable for the medical bills of Dr. Feinberg (\$3,919.00).

**Award**

We modify the award of the administrative law judge with respect to the amount of temporary total disability benefits awarded, and find that employee is entitled to temporary total disability benefits for the entire period of July 19, 2005, through August 20, 2007, or \$71,934.00. We further modify the award of the administrative law judge by finding employer liable for the medical bills of Dr. Feinberg (\$3,919.00). In all other respects, we affirm the award.

The award and decision of Administrative Law Judge Kathleen M. Hart issued December 2, 2009, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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

Given at Jefferson City, State of Missouri, this 8<sup>th</sup> day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Jack Sanderson

Injury No.: 04-033175

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Sachs Electric

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: n/a

Insurer: Zurich North America

Hearing Date: September 14, 2009

Checked by: KMH

### 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: January 14, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis County
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:  
Claimant injured his right shoulder at work when pulling wire.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: 30% of the right shoulder
15. Compensation paid to-date for temporary disability: \$35,967.00
16. Value necessary medical aid paid to date by employer/insurer? \$45,420.89

Employee: Jack Sanderson

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- 17. Value necessary medical aid not furnished by employer/insurer? \$25,543.75
- 18. Employee's average weekly wages: unknown
- 19. Weekly compensation rate: \$662.55/\$347.05
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$25,543.75
Temporary total disability	\$ 3,383.45
69.6 weeks of permanent partial disability from Employer	\$24,154.68

22. Second Injury Fund liability: No

TOTAL: \$53,081.88

23. Future requirements awarded: None

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

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

Dean Christianson

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

Employee: Jack Sanderson

Injury No.: 04-033175

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: Sachs Electric

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: n/a

Insurer: Zurich North America

Checked by: KMH

A hearing was held on the above captioned matter September 14, 2009. Jack Sanderson (Claimant) was represented by attorney Dean Christianson. Sachs Electric (Employer) and Zurich North America (Insurer) were represented by attorney Chris Archer.

Claimant injured his right shoulder at work January 14, 2004. After surgery and extensive treatment, he sought additional treatment which Employer denied. A hearing was held and a temporary award was issued by another Administrative Law Judge June 6, 2006. That Judge denied Claimant's request for additional treatment and TTD benefits. Claimant then treated on his own. He now seeks past TTD and medical bills as well as PPD benefits.

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

### **STIPULATIONS**

The parties stipulated to the following:

1. Claimant was injured by accident January 14, 2004, while in the course and scope of his employment for Employer.
2. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation law.
3. Employer's liability was fully insured by Zurich North America.
4. Employer had notice of the injury and a claim for compensation was timely filed.
5. Claimant's average weekly wage was sufficient to entitle him to the maximum rates of compensation of \$662.55 for TTD and \$347.05 for PPD.
6. Employer has paid \$35,967.00 in TTD benefits and \$45,420.89 in medical benefits.

## ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Medical Causation
2. Liability for past medical expenses of \$30,382.75.
3. Future medical care
4. TTD
5. PPD

## FINDINGS OF FACT

Based on all the previous findings of facts and on the substantial and competent evidence adduced at both hearings, as well as the reasonable inferences to be derived therefrom and my observations of Claimant at trial, I find the following facts:

1. I hereby adopt and reissue all previous findings of fact as if fully set forth herein.
2. Claimant is a 31 year-old right handed male who injured his right shoulder at work January 14, 2000. He worked light duty until he was laid off March 1, 2004, because there was no more light duty available. Claimant received unemployment from March 1, 2004, through April 10, 2004. Employer paid \$187.47 per week during this time towards Claimant's unemployment benefits.
3. Employer began TTD benefits April 11, 2004 and continued benefits through June 7, 2004. Claimant had rotator cuff surgery authorized by Employer April 16, 2004. He had extensive physical therapy, and was released from treatment June 8, 2004.
4. After he was released, he worked small jobs. Claimant testified as his jobs became more demanding, his shoulder pain increased, so he requested additional treatment. Employer sent Claimant to Dr. Mannis for a second opinion September 14, 2004. He suspected thoracic outlet syndrome, recommended additional tests and therapy, and restricted Claimant to no repetitive overhead use of his arm. Based on Dr. Mannis' restrictions, Employer began paying TTD benefits September 15, 2004.
5. Claimant's follow-up tests ordered by Dr. Mannis were normal, and he was sent to Dr. Mackinnon who ordered an MRI, which was unremarkable. She recommended additional physical therapy through Dr. Yamaguchi and Physical Therapist Rene Ivans. Claimant testified they would not see him because the MRI did not show any red flags.

6. Employer continued TTD and authorized treatment with Dr. LaBore in January 2005. Before seeing Dr. LaBore, Claimant traveled to San Antonio, Texas, to see a chiropractor who is a relative. Claimant testified he had two weeks of chiropractic treatment which brought significant relief. Claimant then saw Dr. LaBore January 18, 2005. He noted Claimant continued to have pain, weakness and numbness. He diagnosed multifactorial shoulder girdle dysfunction associated with scapular stabilizer/postural deconditioning, shoulder/capsular inflexibility, and possible thoracic outlet syndrome that appeared resolved. He recommended Claimant not work and attend physical therapy and work specific conditioning. Dr. LaBore noted the therapy caused an increase in Claimant's symptoms, but he recovered afterwards. Claimant testified his shoulder got worse during this therapy, and he again had numbness and pain up his arm into his shoulder.
7. On July 19, 2005, Dr. LaBore found Claimant had reached MMI, but he demonstrated poor tolerance to sustained workloads. His functional capacity evaluation showed he was performing in the heavy demand work load. Dr. LaBore recommended vocational rehabilitation because he opined Claimant had an "unlikely ability to tolerate the physical demands of his current profession". Claimant testified he signed up on the hiring list at the hall, but did not get any calls to work. Claimant believes he could not have worked at that time.
8. Claimant was able to do some odd jobs at home. The June 8, 2005, physical therapy records note Claimant was building a deck on his house. Claimant testified this was a small 8'x10' deck. He testified he did the light work, and his friends did the heavy work. They completed this work over several days by working a few hours at a time. Claimant also put siding on the front of his 1200 square foot home with the help of a neighbor. The neighbor did the heavy work, and he assisted by cutting pieces of siding and handing it to the neighbor who nailed it to the house. He testified he also helped a friend with some roofing during that time, although his friend did most of the work.
9. Employer continued to pay TTD through August 1, 2005, and has paid no TTD since that time. From August 4, 2004 through January 18, 2005, Claimant received TTD and unemployment. Employer paid \$187.47 per week towards unemployment during that 18 week time period.
10. Claimant last saw Dr. LaBore October 4, 2005. He noted Claimant continued to have pain. He opined Claimant was still at MMI. His FCE showed he could perform at the level his job required if he could work with pain levels intermittently flared. Dr. LaBore recommended Claimant attend vocational rehabilitation if he could not tolerate the work demand.
11. Claimant testified Dr. LaBore recommended he work in a lighter duty capacity than Electrician. He asked Dr. LaBore to release him to full duty so he could return to work. He applied for work after he was released by Dr. LaBore. He testified he did not return to work as an Electrician because his arm was not fixed and he could not do heavy work due to pain. He testified he applied online at 20 Home Depot and Lowe's stores, but was not hired. He watched his children during the day and did not apply for other jobs. He testified he did not want to take a heavy job and get laid off because of his inability to

work. That would make his resume look bad. He did not attend vocational rehabilitation because he could not afford it. Claimant had some college credit, and wanted to attend ITT to become a construction supervisor, but was not able to attend due to financial constraints.

12. Claimant saw Dr. Feinberg for an evaluation in October 2005. He diagnosed internal derangement of the right shoulder and recommended additional physical therapy. He restricted Claimant to no overhead work and no work with his arm extended, and opined Claimant could do sedentary work. Claimant attended physical therapy from January 2006 through April 2006. He also had injections into his low back to increase the work of the muscles in his upper back. Claimant testified this therapy was different than the earlier authorized therapy he had undergone. Dr. Feinberg recommended Claimant continue this therapy, but Employer would not authorize further treatment.
13. A hearing was held March 20, 2006, wherein Claimant requested additional medical treatment and TTD benefits from August 1, 2005 into the future. The Judge issued an award denying further benefits June 6, 2006. Claimant testified he had to stop treating with Dr. Feinberg in April 2006 because he did not win his temporary award and could not afford the treatment.
14. Claimant testified between April 2006 and his initial visit with Dr. Lehman, he was waiting for his award on his temporary hearing, and he had no medical treatment. Once he got the award, he sought treatment on his own. It took him a few months to get an appointment with Dr. Lehman. He spent that time looking into vocational rehabilitation and further education at ITT. He testified his shoulder was not doing well throughout this time. He had numbness and tingling in his arm with normal use. He had pain up to his elbow, and he had shoulder pain. He testified the only way to relieve this pain was to sit in a good posture for a while. He testified he could not do things around the house, but was able to do some work on his house with the help of friends. After each of these projects, he had significant shoulder pain, and he could not do anything for a few days.
15. Claimant first saw Dr. Lehman in November 2006. Dr. Lehman noted Claimant developed numbness in his fingers and pain shooting up to his elbow after his shoulder surgery. He found significant subacromial bursal inflammation and a positive Addison's maneuver, which is the vascular test for thoracic outlet syndrome. He had no complaints of shoulder instability at this time. Dr. Lehman recommended Claimant see Dr. Thompson, a thoracic outlet specialist. Claimant saw Dr. Thompson who recommended additional physical therapy as the surgery for thoracic outlet syndrome was too risky.
16. Claimant saw Dr. Lehman again February 16, 2007. He noted the therapy had improved Claimant's thoracic outlet symptoms, but he now demonstrated some instability or laxity in his shoulder which was not present on his initial evaluation. Dr. Lehman diagnosed multidirectional instability and recommended reconstruction to tighten the instability.
17. Claimant had surgery March 12, 2007. The postoperative diagnosis was inferior, anterior, and posterior instability, impingement syndrome and rotator cuff laxity. Claimant testified he had several weeks of physical therapy and was released to return to work full

duty August 20, 2007. Claimant has had no medical treatment since this release. Claimant testified the surgery was a success. He has returned to work. The pain and numbness that ran up his arm has subsided. The deep shoulder blade pain is gone.

18. Claimant continues to do some exercises at home and is able to work. He occasionally takes Ibuprofen. He continues to have a hard time sleeping and cannot lay on his right side anymore. He can't throw a ball with his kids. While working, he has to move his ladder more often so he does not reach out further than his core. When he starts to reach too far, he gets shoulder pain. His numbness and tingling are gone. At home, he has difficulty moving furniture, and can't pull start the lawn mower because the jerking motion on his shoulder is too painful.
19. Claimant did not work from September 15, 2004 through August 20, 2007. He was paid TTD benefits from September 15, 2004 through August 1, 2005. Employer claims 2 credits for that time period. The first credit claimed is for Employer's contribution to the unemployment Claimant collected through January 18, 2005. The second credit claimed is for an alleged overpayment. The treating doctor found Claimant reached MMI July 19, 2005, and Employer paid benefits through August 1, 2005.
20. Gary Weimholt, Employer's vocational expert, testified live at trial. In formulating his opinions, he reviewed medical records, Claimant's deposition, and Dr. Lehman's deposition. He opined even though Claimant had surgery scheduled and had work restrictions, he was capable of working in the open labor market from March 1, 2004 through April 10, 2004. His restrictions only limited his ability to work overhead, and did not restrict him from any work category. To be safe, he would recommend work only in the sedentary, light, and some medium levels.
21. Regarding the time period of August 2, 2005 through August 20, 2007, Mr. Weimholt opined there were temporary or full time jobs Claimant could do even with his varying restrictions. Dr. Feinberg's recommendations were most restrictive and would have allowed telemarketing type jobs. Dr. Lehman's opinions would allow sedentary work as well as lifting of 20-25 pounds with the right arm, which is within the light range of work. Combining the ability to lift with his left arm, Claimant was capable of working at the medium level. 95% of the job market consists of medium or lower work levels. Mr. Weimholt opined with Claimant's education and work history, he was qualified for numerous temporary jobs within his work restrictions. Dr. LaBore's work recommendations were less restrictive and would have allowed Claimant to work in more physical temporary jobs.
22. Claimant's vocational expert, Tim Lalk, opined between March 1, 2004, and April 10, 2004, a new employer would not be likely to hire Claimant since he had surgery scheduled and was unable to return to his former position. Mr. Lalk opined between August 2005 and August 2007 Claimant's efforts to obtain a diagnosis and treatment for his shoulder would have affected his employment potential. He testified an employer would be reluctant to hire an individual who is actively seeking treatment, an employer would be suspicious about an individual who stopped work in a lucrative field for an entry level position, and an employer would be concerned about liability for future

injuries when hiring an individual with a shoulder condition. Based on all these considerations, Claimant would not find a favorable job market and wouldn't be able to find work. He opined Claimant could not return to his former occupation.

23. Mr. Lalk agreed based solely on the FCE, there were jobs available for Claimant in the open labor market, but he did not believe Claimant could sustain heavy work for the entire week. Claimant's main obstacle during the two year period in question was a combination of looking for future treatment and an employer's reluctance to hire someone who could not go back to their former job because of medical treatment issues. He agreed if Claimant had accepted that further treatment was not an option and never had surgery with Dr. Lehman, he could have told an employer he was committed to their job, and he could have worked.
24. Dr. Lehman testified Claimant's work injury coupled with his underlying instability caused the need for his second surgery. Claimant had been able to compensate for his underlying instability until his work injury destabilized his shoulder. Claimant was not completely rehabbed after his first surgery. This left him with an instability pattern which continued to be problematic. His postoperative weakness allowed him to manifest his instability and exacerbated his instability. He testified his course of treatment was necessitated by the underlying instability coupled with the work injury.
25. Dr. Hulsey, Employer's expert, opined Claimant developed an entirely different problem once he returned to work following his first surgery. Dr. LaBore diagnosed multifactorial shoulder girdle dysfunction which is a weakness of the shoulder girdle that causes abnormal function and pain. It means one part of the shoulder is not moving right because it is compensating for pain. Dr. Hulsey testified this condition has nothing to do with laxity or instability. The instability was not noted until months after Claimant began treating with Dr. Lehman. None of the previous treating or evaluating physicians noted any instability. Therefore, he could not say what caused the multidirectional instability, and he had no opinion as to how this developed. He assumed Claimant had some congenital laxity and maybe some residual weakness of the rotator cuff aggravated that laxity. He testified Claimant's second surgery was not for his shoulder girdle dysfunction but for his multidirectional instability, and these are different diagnoses. He rated Claimant's disability at 8% from the rotator cuff tear and 7% from the underlying congenital laxity.
26. Claimant's expert, Dr. Volarich, opined Claimant's work injury was the substantial contributing and prevailing factor in causing the impingement and partial rotator cuff tear. After the initial surgery, Claimant developed some instability which necessitated a second surgery. Dr. Volarich testified Dr. LaBore identified shoulder instability and began working with the shoulder girdle to stabilize the muscles. The shoulder girdle dysfunction was the result of weakness of the musculature around the shoulder girdle. He opined Dr. LaBore's diagnoses are what Dr. Lehman repaired. He fixed the capsular inflexibility and shoulder girdle dysfunction. All the conditions Dr. Lehman lumped together as multi-directional instability were what Dr. LaBore was treating in January 2005.

27. Dr. Volarich also reviewed the therapy notes beginning in May 2005. These notes indicate scapular downward rotation and thoracic rotation syndrome. He testified these are different words for the same condition Dr. Lehman treated. It all relates to shoulder girdle dysfunction. Instead of moving properly, the scapula rotated outward and drifted downward. Both Dr. LaBore and Dr. Lehman found these problems. The main function of the rotator cuff is to provide stability to the joint. That stability is lost if the shoulder becomes deconditioned causing more instability which may contribute to impingement. Pain inhibits the rotator cuff muscles and further weakens the shoulder stabilizers. Dr. Volarich testified these things were all indicated in the medical records since the first surgery, and the condition of Claimant's shoulder when Dr. Lehman saw him in 2006 was the same as when Dr. LaBore saw him in 2005. He rated Claimant's disability at 45% of the shoulder.

## RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

### 1. Medical Causation.

There is no dispute Claimant was injured at work in January 2004. Claimant had shoulder surgery and extensive physical therapy authorized by Employer. Claimant contends his shoulder was not cured or relieved following this treatment, necessitating a second surgery and physical therapy. Employer contends this treatment was not related to his work accident.

Section 287.020 (RSMo 2000) provides an injury is compensable if work was a substantial factor in causing the resulting medical condition or disability. The claimant has the burden of proving all the essential elements of the claim for compensation. Proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986).

I find the opinions and testimony of Dr. Lehman and Dr. Volarich compelling. Claimant had some shoulder instability prior to his work injury. There is no indication of any treatment or complaints related to this instability before his work injury. Clearly Claimant's recovery from his first surgery was not the typical course of recovery. Employer paid a substantial amount of TTD and sent Claimant to several doctors in an effort to explain his ongoing difficulties. His diagnostic studies revealed no abnormality, and Claimant was released from treatment. Dr. Lehman credibly explained Claimant continued to have problems because he was not completely rehabbed after his surgery. This weakness exacerbated his instability and caused the need for his second surgery. Dr. Hulsey also suggests the weakness in Claimant's rotator cuff aggravated his pre-existing laxity. Dr. Volarich also noted early therapy records and Dr. LaBore's records note shoulder instability.

I find Claimant has satisfied his burden and established by reasonable probability that his work injury caused the need for his second surgery.

**2. Claimant is entitled to \$25,543.75 in past medical expenses.**

Claimant testified he went to Dr. Amen, a chiropractor in San Antonio, of his own accord. A claimant may select his own physician when an employer refuses to provide necessary medical care. At the time Claimant chose to see Dr. Amen, Employer had authorized treatment with Dr. LaBore. Claimant was aware Dr. LaBore was the treating physician. I find Employer is not responsible for Dr. Amen's bills.

In her temporary award, the Judge found the treatment recommended by Dr. Feinberg was not reasonable and necessary and did not award further treatment. Consistent with her award, Employer is not responsible for Dr. Feinberg's bills.

The remaining bills in issue relate to Dr. Lehman's treatment, surgery, and therapy. I have found this treatment medically and causally related to Claimant's work injury. Employer contends these bills were paid by a collateral source, namely Claimant's wife's group health carrier, and should not be awarded. Employer relies on *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, (Mo.banc 2003) for the proposition that Claimant failed to prove the extent of his liability for the bills because he did not submit bills that listed written off charges or payments made by a collateral source.

Section 287.270 (RSMo 2000) provides "no savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or employer's insurer for liability under this chapter, shall be considered in determining the compensation due". I cannot consider whether the bills were paid by Claimant's wife's carrier. Claimants are allowed to benefit from collateral sources independent of their employer.

I disagree with Employer's interpretation of *Farmer-Cummings*. That case addressed the issue of whether medical bills remain "fees and charges" collectable by an employee when they are reduced or written off. The court found fees and charges include only those amounts for which an employee may still be liable. If any reductions resulted from collateral sources independent of Employer, they cannot be considered and Claimant is entitled to recover those amounts. The court further noted it is up to the defense to establish an employee "was not required to pay the billed amounts... liability for the disputed amounts was extinguished, and that the reason the liability was extinguished does not otherwise fall within the provision of section 287.270." *Id.* at 821.

Of the three providers, Webster Surgery Center is the only bill listing any reductions or payments. These are attributed to "match in network benefits", a self-pay payment, and an insurance payment. The bills do not appear to be written off or reduced. To assume Claimant is no longer liable for these bills would be speculation. I find Claimant is entitled to compensation for the total of these bills or \$11,309.00.

Claimant submitted bills from Dr. Lehman totaling \$12,202.00. There are no write-offs on these bills. There is no indication of any payments on these bills. I find these bills are “fees and charges” and Claimant may remain liable for these bills. Employer is ordered to compensate Claimant for Dr. Lehman’s bill.

Claimant submitted bills from Team-Work rehabilitation. This is for therapy ordered by Dr. Lehman. My calculations indicate the bills total significantly higher, but the account balance as listed as \$2,032.75. Claimant requested compensation for this account balance. I find these bills also are “fees and charges” and award Claimant compensation of \$2,032.75 for these bills.

### **3. Claimant is not entitled to future medical care.**

The parties identified future medical care as an issue at trial. There is no indication Claimant will need further treatment, and future medical care is denied.

### **4. Claimant is entitled to \$3,383.45 in TTD benefits.**

The first period of TTD in issue is March 1, 2004 through April 10, 2004. Following Claimant’s injury in January, the treating doctor imposed restrictions of no overhead work and limited use of the right upper extremity. Based on the expert testimony and Claimant’s restrictions, I find Claimant was unable to compete in the open labor market from March 1 through April 10. Section 287.170.3 (RSMo 2000) provides for a credit to Employer in an amount equal to the unemployment compensation paid to the employee. Claimant is therefore entitled to TTD benefits of \$662.55 minus \$187.47, or \$475.08 per week for 5 6/7 weeks. This totals **\$2,782.61**.

The second period of TTD in question is 18 weeks from September 14, 2004 through January 18, 2005. Employer paid TTD and unemployment during this time. Employer is entitled to a credit of \$187.47 for 18 weeks or **\$3,374.46**.

The third period of TTD in question is July 19, 2005 through August 2, 2005. Employer paid TTD during this time and claims a credit as Dr. LaBore found Claimant at MMI July 19<sup>th</sup>. The July 15, 2005 FCE showed Claimant could work in a heavy to very heavy category. While there was some doubt as to whether he could sustain employment all week in a heavy category, the law does not require Claimant to be able to return to his former employment. I find Claimant was able to compete in the open labor market as established by his FCE and the testimony of the medical experts. Employer is therefore entitled to a TTD credit of 2 weeks or **\$1,325.10**.

The final TTD period in issue is August 2, 2005, through August 20, 2007. Claimant was undergoing treatment and recovering from his second surgery during part of that two year period. From his MMI date of July 19, 2005 until his surgery date of March 12, 2007, the most restrictive recommendations were from Dr. Feinberg and would have allowed at least sedentary work. Dr. Lehman testified he would have allowed a 25 pound lifting restriction with the right arm. Claimant had no restrictions with the use of his left arm, and no difficulty standing, walking or sitting. The vast majority of jobs available in the open labor market fit within

Claimant's restrictions. I find the testimony of Gary Weimholt credible, and find Claimant was able to compete in the open labor market from July 19, 2005 until his second surgery on March 12, 2007.

Dr. Lehman testified Claimant would have been in a sling and had lifting restrictions for six to eight weeks following his surgery. I find Claimant is entitled to TTD benefits for 8 weeks. At his applicable rate, he is entitled to **\$5,300.40** in TTD benefits. Based on the testimony of the experts, I find Claimant was able to compete in the open labor market after that 8 week time period and is not entitled to additional TTD benefits.

Considering each of these TTD credits and TTD amounts due, I find Claimant is entitled to **\$3,383.45** in TTD benefits.

**5. Claimant has sustained 30% PPD to his right shoulder and is entitled to \$24,154.68 in PPD benefits.**

Claimant has recovered well following his second surgery, and has returned to his prior occupation. Based on Claimant's testimony and the medical evidence, I find Claimant has sustained 30% PPD to his right shoulder and is entitled to \$24,154.68 in PPD benefits.

Date: \_\_\_\_\_

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

**KATHLEEN M. HART**  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*