

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

Injury No.: 98-177473

Employee: Steven Simmons  
Employer: B. T. Office Products  
Insurer: Travelers Indemnity Company of America  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged July 9, 1998  
Place and County of Accident: Alleged St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 25, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued January 25, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this \_\_\_\_\_ 10<sup>th</sup> \_\_\_\_\_ day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Steven Simmons

Injury No.: 98-177473

Dependents: N/A

Before the  
**Division of Workers'**

Employer: B.T. Office Products, Inc.

**Compensation**

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Travelers Indemnity Company of America

Hearing Date: November 22-23, 2005

Checked by: EJK

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: July 9, 1998 (alleged)
5. State location where accident occurred or occupational disease was contracted: St. Louis 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? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The employee, a warehouse associate, 7 worked long hours in a hot warehouse.
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: Body as a whole
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Steven Simmons

Injury No.: 98-177473

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: \$597.20
19. Weekly compensation rate: \$398.13/\$294.73
20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

None

22. Second Injury Fund liability: No

TOTAL:

None

23. Future requirements awarded: None

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

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

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

Employee:	Steven Simmons	Injury No.: 98-177473
Dependents:	N/A	Before the <b>Division of Workers'</b> <b>Compensation</b>
Employer:	B.T. Office Products, Inc.	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	Travelers Indemnity Company of America	Checked by: EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a warehouse associate, suffered heat exhaustion while working long hours in a hot warehouse. The issues for determination are (1) Accident or occupational disease arising out of and in the course of employment, (2) Medical causation, (3) Past medical benefits, (4) Future medical benefits, (5) Temporary disability benefits, (6) Permanent disability benefits, and (7) Liability of the Second Injury Fund. The evidence compels an award for the defense, because the claimant was compensated for his work related injury in case bearing Injury Number 98-177475.

At the hearing, the claimant and Nancy Puzniak, Director of Human Resources for the Employer, testified in person. The claimant also offered depositions of Fred Hicks, M.D., Joseph Hanaway, M.D., and James M. England, a vocational rehabilitation counselor, voluminous medical records, weather records, a job description, pay check stubs, selected portions of the DSM-IV, letters from the employer to the claimant and selected letters from Hartford Insurance. The defense offered the depositions of Stacey Smith, M.D., and Patrick Hogan, M.D., records from Hartford Insurance, Blue Cross/Blue Shield, the Division of Workers Compensation, and Dr. Edward Kweskin, Ph.D., a medical report from David Volarich, D.O., and the employer's personnel file.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### **SUMMARY OF FACTS**

This forty-eight year old claimant worked as a warehouse worker for twenty years. He previously worked for National Foods for fifteen years before his employer laid him off in 1995. In November 1995, this employer hired him as a warehouse worker where he worked until July 1998. He stopped working in July 1998 allegedly due to the effects of heat exhaustion. His warehouse duties with the employer primarily involved shipping and

receiving, wherein he would operate an "order picker" in the warehouse to retrieve merchandise. This employer hired him as a "warehouseman" and promoted him to "lead associate" in December 1997, which involved the same job duties in addition to supervision of several employees. The claimant testified that his job duties involved a lot of walking and standing, along with lifting, stooping, reaching and crouching. He described the warehouse as "hot", though the temperature would vary. He described his general work atmosphere as stressful with lots of daily pressure and deadlines.

More specifically, the claimant described his job duties of "filling orders" and "replenishment". When filling orders, he would review a purchase order/invoice. He would then determine the quantity and location of the item so it could be retrieved in the warehouse and prepared for shipment. When handling replenishment, he would restock items in the warehouse so that the "pickers" could continue to fill orders. He testified that replenishment was heavier work and that he would often work up high on his "order picker" near the ceiling, where it was hotter. He testified that he performed replenishment activities over the last few weeks of his employment in July 1998. He testified that he worked longer hours during his last weeks of employment due to a shortage of workers.

The physical demands for the claimant's position required that in an eight hour day, an employee stands for eight hours, walks for five hours, lifts 51 to 100 pounds frequently (34-66% of the time), lifts over 100 pounds occasionally (0-33% of the time), climbs occasionally (0-33% of the time) and stoops and crouches frequently (34-66% of the time). See Exhibit S. An employee also frequently reaches above shoulder height. See Exhibit S. The position description involves "Heavy work: Lifting 100 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 50 lbs." See Exhibit S. The position also requires: "Verying (sic) temperature in workplace" and "Continuous activity - cannot leave work area during working hours, except assigned breaks." See Exhibit S. The specific duties require that an employee "must routinely be able to lift, pull, press, bend, twist and carry up to 60 lbs." In addition, he "must be able to perform strenuous work in varying temperature conditions." See Exhibit S.

The claimant received two fifteen minute breaks and a forty-five minute lunch with no further breaks during overtime. There were no work/rest cycles and no instructions on how to work in hot conditions, but the claimant knew that he had to keep hydrated.

The warehouse is a large cinder block building with an aluminum roof and two small exhaust fans in the 30 feet high ceiling. The warehouse was not air-conditioned. There were both a receiving and a separate shipping dock. The claimant testified that conditions on the dates of his injury were like an oven and that it was hotter inside the building than outside. He testified that another employee brought a thermometer to work the previous year but was told to remove it or he would be fired. On that date, the temperature in the building was eight degrees hotter than the outside temperature.

The maximum temperatures during the period July 6 through July 9, 1998 were in excess of 90 degrees. On July 9, 1998 the temperature at 3:00 p.m. was 90 degrees and at midnight the outside temperature was still 81 degrees and the humidity had risen significantly over the claimant's shift. See Exhibit Q.

On the last date he was able to work, claimant was working on replenishment, which is heavier labor than order picking. He used an order picker, which is a large machine with forks to hold wooden pallets. He would stand on a platform, which would go up 25 feet. He spent 70-75% of the time on the order picker. It was hotter closer to the roof. The outside temperature had been ninety degrees or above every day on the week of July 6, 1998.

In the four days during the week of his injury, the claimant worked 50 to 55 hours. He worked from 3:00 p.m. until the work was complete for the day. The employer was short workers, and the claimant worked overtime most of the time. One day during the week of the injury, he was still at work when the sun came up. For the two-week period ending on July 10, 1998, he worked 80 regular hours and 9.25 overtime hours. See Exhibit W. He also received 8 hours of paid holiday for July 4 when he did not work. He was not able to work on July 10 at his 3:00 p.m. shift. Therefore, he worked 89.25 hours in eight days. This period of long hours in high heat made this week different than others.

On the date he last worked, the shift supervisor, Mike Pope, was on vacation. The claimant and two other

lead associates ran the shift but were short on crew.

The claimant began feeling ill on the evening of July 9, 1998. He continued working until about 1:00 or 1:30 a.m. on July 10, 1998. At that time, he felt hot, had a headache, stomach pain, blurred vision, lightheadedness, trouble concentrating. He was sweating profusely and threw up in the rest room. He feared he would faint or that something serious was happening to him. He had never felt anything like that before.

There were a couple of hours of work left to do but he paged the other two lead associates and told them that he was overheated and sick and that he had to leave. He sat in his air-conditioned car for about fifteen minutes feeling disoriented and lost. He wondered what was happening and if he could make it the short distance to his home. Eventually, he drove home, took off his wet clothes and took a cold cloth to his face and arms. He went to bed and basically stayed there through the weekend except to use the bathroom. He had diarrhea and abdominal pain on Saturday. He called in sick Friday, July 10 and Monday, July 13. He reported that he had overheated at work the previous week and he felt terrible when he called in sick on Monday.

On Tuesday, July 14, 1998, the claimant returned to work and worked for fifteen or twenty minutes. He told his supervisor, Mike Pope, that that he had overheated at work and that he was still sick from July 9-10. Mike Pope told him to go to a doctor immediately but did not tell him to go to a particular doctor.

On July 14, 1998, the claimant went to Dr. Allen at MedFirst and reported a headache, nausea, feeling light-headed, dizzy, difficulty focusing, abdominal pain, tiredness and weakness, confusion and trouble thinking. She prescribed rest and some blood tests.

On July 20, 1998, the claimant went to Dr. Eidelman, who reported, "He works under a lot of heat and warm environment, no ventilation and right now the weather is about 100 degrees. He came here four days ago and Dr. Allen saw him. She thought he had heat exhaustion, which I agree with her." See Exhibit B. Dr. Eidelman ordered a barium contract enema to rule out diverticulitis at Missouri Baptist Hospital, which was negative. See Exhibit B. A blood test indicated an exposure to Epstein Barr virus but it was not active. See Exhibit B.

The claimant went to a hematologist (Dr. Alves) and a neurologist (Dr. Friesenhahn), and underwent additional blood tests, a spinal tap and an MRI, which were essentially normal. Dr. Alves first discussed with claimant that he thought that his symptoms might be caused by depression manifesting itself with somatic symptoms at his consultation on August 21, 1998. See Exhibit B.

Dr. Hicks examined the claimant on September 3, 1998, and the claimant has continued to receive treatment from Dr. Hicks for more than seven years. He continued to see Dr. Hicks and paid for the visits because he felt Dr. Hicks was helping him. He now sees Dr. Hicks through Medicare.

The claimant notified his employer that he was diagnosed with heat exhaustion occurring at work. The claimant continued to notify the employer of his medical treatment, but he stopped when his employer discharged him from employment.

The claimant currently takes Lexapro, Trileptal and Lamictal for his symptoms. The claimant testified that he suffers from depression, short and long term memory problems, headaches, nausea, chronic diarrhea, sleep problems, confusion, low energy, lack of motivation and sweating. He testified that he is nervous and anxious.

The claimant applied for and received both short and long term disability from the Hartford Insurance Company. In the process of applying for disability benefits, he dealt with the employer's human resources department. The Hartford terminated the claimant's disability payments in 2000 because his Social Security disability payments were greater than his Hartford payments. At the time of his injury, the claimant had 112 hours of unused vacation.

The claimant's day now consists of trying to get motivated to get up, coffee, news, medication, feeding the cat if he can remember to, trying to plan the days activity, lunch, probably 2 to 3 hours of chores over a day and then it is time for dinner. Overall, his days just seem to slip by without him being able to accomplish much at all. It

takes a couple of days to cut the grass because he gets hot. The claimant no longer feels like doing anything that he used to enjoy like golf, biking, camping, sporting events, fishing, floating, movies or dinner. He played golf once since the injury but got overheated and had to stop. He can read, write, do basic math, do laundry, cook, clean and does about eighty percent of his own shopping. Most of his friends have moved on. If he could he would most definitely return to work.

The claimant now has occasional difficulty lifting and has back pain in cold weather. He testified that these problems did not affect his work; he worked through the pain in his foot or back. The employer presented no evidence of a poor attendance record. The claimant did not recall ever calling in sick to this employer because of his foot or back. He had no medically imposed lifting restrictions for this employer. He has no braces and has not worn a back belt since he last worked. No surgery was ever recommended for his back. He had never had heat exhaustion before 1998.

The claimant applied for a promotion with this employer in spring 1998, but the employer selected another applicant for the position. He testified that he was told that he was not selected for the position because he would hold employees to too high a standard. The claimant was disappointed that he did not receive the promotion. He does not recall discussing it with Dr. Hicks, but he recalls that he realized that he should begin to look for another job with more potential when things slowed down at work.

The claimant incurred past medical bills in the sum of \$14,859.90 that he related to the occurrence. Dr. Hicks testified that these expenses were necessarily incurred as a result of his injury and reasonable in amount. The claimant paid for some of the medication and some of the medical bills out of his pocket. Medicare now pays part of Dr. Hicks' treatment and Dr. Hicks provides samples of medication. He also testified that the claimant needed future medical treatment and to be followed by a psychiatrist and receive daily medication.

Dr. Smith examined the claimant on June 2, 2005, and Dr. Hogan examined the claimant on June 15, 2005. The claimant served a deposition subpoenas on the employer's Custodian of Personnel and Payroll records. The employer's human resources director, Nancy Puzniak, received the subpoena and contacted the legal department for instructions. At their request, she copied the personnel, workers' compensation, disability and medical files and forwarded them to the legal department in Colorado. The legal department forwarded some records to the attorneys for the parties. The employer's human resources director testified that not all of the documents that she sent to the legal department were included in the material sent to the attorneys and that some things were obviously missing that should have been there. She was instructed not to attend the deposition. The claimant's attorney did not cancel the deposition and made a record that no one attended on behalf of the employer.

Dr. Hicks

Dr. Hicks, board certified psychiatrist, first examined the claimant on September 3, 1998, after a referral from Dr. Allen and took a medical history as follows: The claimant had been having difficulty since going home from work in mid July with heat exhaustion. He had been working long hours in a warehouse with no air conditioning and poor ventilation when he became ill. He complained of sleep disturbance, nausea, weight loss, fatigue, poor motivation and interest, problems with concentration and memory, headaches and poor visual acuity. He reported that he had been hospitalized in 1984 for emotional disturbance associated with his divorce and had taken medication for a few weeks thereafter. Otherwise, he reported that he was in general good health and had a stable work history. He had worked as a warehouseman for twenty years, the last two and one-half at his current job. Other specialists evaluated the claimant with a lumbar puncture and MRI without significant pathology. He acknowledged that he had trouble tolerating heat in previous work efforts. He reported that the summer work hours had been longer in the intense heat. See Dr. Hicks' deposition, pages 11, 12. Dr. Hicks diagnosed:

Axis I: adjustment disorder, recent work stress, major depression, single episode, moderate, possible post-traumatic stress disorder;

Axis II: obsessive-compulsive personality disorder;

Axis III: heat exhaustion;

Axis IV: struggle with disability from work; and

Axis V: global assessment of function of 50 with the highest level in the past year of 75. See Exhibit E-1.

On September 24, 1998, Dr. Hicks noted that the claimant still had heat symptoms with sudden sweatiness, headaches and lightheadedness. Dr. Hicks continued to treat the claimant through May 20, 2005. The claimant's symptoms remained the same, and Dr. Hicks' diagnosis continued to be heat exhaustion, major depression, single episode, and post-traumatic stress disorder throughout his treatment. He testified that the claimant still has sudden sweatiness, headache and light-headedness. Dr. Hicks testified that this was a psychological condition that triggers a physiological response and the reason he has the diagnosis of post-traumatic stress disorder. Dr. Hicks prescribed numerous medications, outpatient program services and ECT (electroconvulsive shock therapy). The claimant did not wish to undergo the ECT, and the medications did not prove very effective.

Dr. Hicks diagnosed major depression with symptoms of depressed mood, markedly diminished interest in formerly pleasurable activities, feelings of worthlessness, diminished ability to concentrate and recurrent thoughts of heat and being exposed to heat. On March 26, 2004, Dr. Hicks' assessment of the claimant's condition included:

Axis I adjustment disorder with work stress, dysthymic disorder with atypical features, major depression, single episode, moderate, possible posttraumatic stress disorder,  
Axis II obsessive/compulsive personality disorder,  
Axis III heat exhaustion,  
Axis IV moderate disabled and financial problems, and  
Axis V GAF of 50. See Exhibit E-6.

He opined that the claimant had disabling limitations with intermittent fatigue, physical distress, inability to engage in vocational rehabilitation, and that the work conditions were a substantial factor in the cause of his medical condition and resulting permanent total disability. He also opined that the claimant's prognosis for significant recovery was very poor. He gave a global assessment of function at 50/50 (range 0 to 100).

Dr. Hicks opined that the work conditions on July 9 and 10, 1998, were a substantial factor causing the claimant's heat exhaustion and that the heat exhaustion was a substantial factor causing the major depression, single episode, and posttraumatic stress disorder. Dr. Hicks considered other stressors in the claimant's life but that did not change his opinions. In addition, he testified that the claimant was unable to work since July 10, 1998, and that he was permanently and totally disabled. See Dr. Hicks' deposition, page 51. Further, he testified that he did not believe that the claimant was being deceptive in his presentation and that the physical and psychological limitations were the result of the heat exhaustion at work. See Dr. Hicks' deposition, page 109-111. The claimant is limited by intermittent fatigue and physical distress and the inability to engage in vocational rehabilitation. Dr. Hicks testified that he has "actually been somewhat of an advocate for him for both the short term disability and the workers' comp case." See Dr. Hicks' deposition, page 98.

### ***Dr. Kweskin***

Dr. Kweskin, a psychologist, examined the claimant for treatment from November 3, 1998, through January 5, 1999, and with nine sessions and an MMPI-2. On November 20, 1998, Dr. Kweskin reviewed the MMPI-2 and found:

That is, his highest elevations were on the Hysteria and Hypochondrias scales. In particular, his Hysteria scale is quite elevated. This profile is characteristic of individuals who report a wide variety of physical symptoms, but generally lack real concern. Secondary gain is usually present and such individuals tend to use their somatic complaints to be exploitative and they are often viewed as narcissistic and egocentric. See Exhibit 8.

On December 10, 1998, Dr. Kweskin opined, "While I would not apply the word malingering, I do believe that he has settled into a comfortable sick role." On January 12, 1999, Dr. Kweskin found:

Mr. Simmons presents with a variety of symptoms including headache, muscle pain and fatigue; all of which have not been associated with any particular medical etiology. Assessment with the MMPI-2 suggests a Somatoform disorder. Although Mr. Simmons complains of pain and fatigue, I have not observed any pain behaviors and he consistently appears alert during our sessions. I have corresponded with Dr. Hicks twice and indicated this inconsistency. However, Mr. Simmons verbal description of his current condition suggests an inability to be consistently involved in gainful employment. At the present time his return to work is indeterminate. See Exhibit 8.

### ***Dr. Vorhees***

Dr. Vorhees, a psychologist, treated the claimant from February 2, 1999, to April 27, 1999, and diagnosed depression and somatoform disorder. See Exhibit G. Dr. Vorhees reported, "The claimant's MMPI suggests that he resists psychological interpretations. I gave him a copy of the test and he disagreed a lot with the MMPI-2 results. He talked about how he doesn't go to the day program on time. He talked about this being a workmans comp. Case and I told him his psych testing suggests this is not a workers comp case." See Exhibit G.

### **Dr. Hanaway**

Dr. Hanaway, a board certified neurologist, examined the claimant in 2004, and testified that he has experience in the medical issues of heat exhaustion and heat stroke. Dr. Hanaway testified that claimant's symptoms were consistent with heat exhaustion. Heat, humidity, lack of ventilation and physical exertion are factors causing heat exhaustion. Dr. Hanaway opined that the claimant was permanently and totally disabled and that the conditions at work on July 6, 7, 8, 9 and 10, 1998, were a substantial factor causing the claimant's heat exhaustion and that the heat exhaustion was a substantial factor in causing his major depression and posttraumatic stress disorder. See Dr. Hanaway deposition, page 53. The claimant did not have heat stroke. See Dr. Hanaway deposition, page 75. He testified that posttraumatic stress disorder was a common problem after an episode of heat exhaustion. See Dr. Hanaway deposition, pages 84, 85. On the other hand, he did not know whether heat exhaustion is a common cause for posttraumatic stress disorder in the DSM. See Dr. Hanaway deposition, page 85. He testified that the claimant's episode of heat exhaustion was a life-threatening episode. See Dr. Hanaway deposition, page 71.

### **James M. England**

Mr. England performed a vocational rehabilitation evaluation on November 23, 2004, and described the claimant as cooperative, attentive and straightforward. The claimant did the best that he could on his tests and his cognitive ability was excellent. Mr. England noted that the claimant had a very flat affect and appeared rather tired. He concluded that the claimant's physical and medical problems appear to have him functioning at less than what would be required to sustain even sedentary work. The claimant's global assessment of functioning of 50 meant he was just not going to make it in a work setting. Mr. England opined that the claimant's disability was a psychological disability. The claimant was not a good candidate for vocational rehabilitation and was totally disabled from a vocational standpoint.

### **Dr. Hogan**

Dr. Hogan, a neurologist, examined claimant on June 15, 2005. After examining the claimant's medical records, he testified that he found no objective evidence in the records that the claimant ever had any heat related illness whatsoever. He did not render an opinion that the claimant did not suffer from heat exhaustion. Dr. Hogan testified that evidence of heat related illness would have included temperature elevation, cardiac abnormalities, fatigue, and/or electrolyte abnormalities. He opined that there would not still be objective evidence of heat exhaustion a week after the injury. Dr. Hogan testified that he could not understand the diagnosis of heat exhaustion with the basis of psychiatric disease seven years after the event. Dr. Hogan testified that claimant's symptoms were characteristic of depression. He noted other life situations in claimant's records that could have caused or exacerbated depression. He did not find evidence in the records of any traumatic event that would have produced stress and produced a post-traumatic stress disorder. He did not find any evidence that would inhibit the

claimant from performing any and all duties for which he was qualified without limitation or restriction and suggested that financial gain was a factor in his symptoms. Dr. Hogan could not opine whether claimant's depression was disabling because he did not do a psychiatric evaluation.

#### Dr. Smith

Dr. Smith, a psychiatrist, examined the claimant on June 2, 2005. The claimant was open and honest in Dr. Smith's examination. See Dr. Smith deposition, page 30. The claimant told her a Med First doctor had told him that he had either heat exhaustion or a mild heat stroke. See Dr. Smith deposition, pages 47, 48. She testified that the claimant's reported conditions at work could cause heat exhaustion and that the symptoms reported by the claimant were consistent with heat exhaustion. See Dr. Smith deposition, page 48-51.

Dr. Smith opined that the claimant developed a psychological disorder based on his perception of the events that occurred while at work. See Dr. Smith deposition, page 84. She described the claimant as having an adjustment disorder, dysthymia, a passive aggressive personality structure and the use of somatization. See Dr. Smith deposition, page 55. She opined that the claimant had a GAF of 63. See Dr. Smith deposition, page 65. Dr. Smith testified that something happened to claimant on July 9 and 10 while at work. She believed that the circumstances leading up to that period and his reaction to the workplace and perhaps the weather started his psychological reaction in motion. She opined that he developed an adjustment disorder due to his beliefs about his workplace and that he had chronic dysthymia. See Dr. Smith deposition, page 84. Dr. Smith opined that the claimant did not suffer from post-traumatic stress syndrome. See Dr. Smith deposition, page 87. She found no evidence that any event prior to the heat exhaustion caused claimant any meaningful impairment. She testified it was unlikely that claimant would be working in the future.

#### COMPENSABILITY

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

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

Where the performance of duties of an employee leads to physical breakdown or a change in pathology, the injury is compensable. Wolfgeher v. Wagner Cartage Service, 646 S.W.2d 781, 784 (Mo. banc 1983). However, there are statutory limitations on compensability:

An injury is compensable if ... work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. ... Ordinarily, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment. An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent ... that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and

(d) 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. Section 287.020, RSMo 2000.

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

The claimant testified that he suffered stress at work from long hours, pressure to complete assigned tasks, and hot conditions. On July 10, 1998, he reported to his employer that he was unable to perform his duties due to a condition that virtually every medical provider has described as heat exhaustion. He called in sick Friday, July 10 and Monday, July 13. On Tuesday, July 14, 1998, the claimant returned to work and worked for fifteen or twenty minutes. He told his supervisor, Mike Pope, that he was still sick from July 9-10. He testified that he reported that he had overheated at work and reported his condition. Mike Pope told him to go to a doctor immediately. On July 14, 1998, the claimant went to Dr. Allen at MedFirst and reported a headache, nausea, feeling light-headed, dizzy, difficulty focusing, abdominal pain, tiredness and weakness, confusion and trouble thinking. She prescribed rest and some blood tests. On July 20, 1998, the claimant went to Dr. Eidelman, who reported, "He works under a lot of heat and warm environment, no ventilation and right now the weather is about 100 degrees. He came here four days ago and Dr. Allen saw him. She thought he had heat exhaustion, which I agree with her. . . ." See Exhibit B. Dr. Eidelman ordered a barium contract enema to rule out diverticulitis at Missouri Baptist Hospital, which was negative. See Exhibit B. A blood test revealed an exposure to Epstein Barr virus, but it was not active. See Exhibit B. The claimant went to a hematologist (Dr. Alves) and a neurologist (Dr. Friesenhahn), and underwent additional blood tests, a spinal tap and an MRI, which were essentially normal. On August 21, 1998, Dr. Alves suggested that the claimant's symptoms might be caused by depression manifesting itself with somatic symptoms. See Exhibit B. Dr. Allen, the claimant's treating physician opined that the claimant should be off work through August 31, to complete testing to rule out other conditions. See Exhibit B.

The claimant had worked for two weeks in extreme heat. In the last four days prior to his heat exhaustion, he had accumulated 55 to 57 hours. His shift began at 3:00 p.m. One day during the week, he had still been at work when the sun came up. The temperatures inside the building, particularly near the ceiling where he was working on a lift were higher than the outside temperatures. His job consisted of heavy labor, lifting heavy boxes and carrying them. He stood the entire time he was on the job with only two fifteen minute breaks and a forty-five minute lunch break. After the initial eight hour shift, there were no more breaks scheduled. The work had to be completed each day. These factors were not those to which he would have been equally exposed outside of and unrelated to the employment. In Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876 (Mo. App. 2004), the claimant suffered a heart attack, and the court found that heavy physical work and doing the work of two men on a hot summer day was a factor exclusive to claimant's employment. The court found these factors were not a hazard or risk unrelated to the employee's employment. In this case, the claimant testified that he performed long hours of work including heavy lifting (70 pounds) in a poorly ventilated facility with high temperatures and outside temperatures were in excess of 90 degrees. These are clearly factors exclusive to his employment.

However, the evidence compels an award for the defense, because the claimant completed all work on July 9, 1998, with no disability. Any disability arose out of events that occurred in the early hours of the following day and were completely addressed in an award issued in injury number 98-177473.

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**LIABILITY FOR PAST MEDICAL EXPENSES**  
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The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as

may be reasonably required after the injury. Section 287.140.1, RSMo 2000.

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

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

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

The claimant offered medical bills with the medical records and testified that the medical services were a product of his July 10, 1998, occurrence at work:

Provider	Services	Dates	Exh.	Amount
Dr. Hicks	Psychiatric	9/3/98-5/5/05	E	\$6965.00
Dr. Kveskin	Psychological	11/3/98-1/19/99	F	\$1330.00
Dr. Vorhees	Psychological	2/9/99-4/27/99	G	\$1200.00
Mo. Baptist Hosp.	Psychiatric	3/1999-8/27/99	C	\$5364.90
Total				\$14,859.90

Dr. Hicks testified that the services were reasonable in that amount and necessary for the claimant. See Dr. Hicks' deposition, pages 53, 54. None of the above medical services related to treatment of heat exhaustion. On the other hand, the services rendered were for a psychiatric condition or mental injury that the claimant testified that he suffered an injury as a result of stress at work in terms of long hours, pressure to complete assigned tasks, and heat. However, the evidence compels an award for the defense, because the claimant completed all work on July 9, 1998, with no disability. Any disability arose out of events that occurred in the early hours of the following day and were completely addressed in an award issued in injury number 98-177473.

### FUTURE MEDICAL CARE

Awards may and often do include an allowance for the expense of reasonable future medical care and treatment. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo. App. W.D. 2001). Future medical care and treatment are provided for in Section 287.140.1, which states:

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

This statute has been interpreted to mean that a claimant is entitled to compensation for care and treatment "which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Id. Of course, the appellant bears the burden to prove an entitlement to benefits for such care and treatment. Id. To prove an entitlement to workers' compensation benefits for future medical care and treatment, an employee must show something more than a possibility that he will need such medical care and treatment. Id. However, the claimant is not required to present evidence demonstrating with absolute certainty a need for future medical care and treatment. Id. Rather, it is sufficient for the claimant to show his/her need for additional medical care and treatment by a "reasonable probability." Id. "'Probable' means founded on reason and experience which inclines the mind to believe but leaves room for doubt." Id. "In determining whether this standard has been met, the court should resolve all doubt in favor of the employee." Id. "[A] claimant is not required to present evidence of specific medical treatment or procedures which will be necessary in the future in order to receive an award for future medical care." Id. Such a requirement could "put an impossible and unrealistic burden" upon the claimant.

Id. The only requirement is that the finding of a need for future medical care and treatment be shown to be reasonably probable and be founded upon reason and experience. Id.

Given the persistence of the claimant's psychiatric condition, the claimant needs "to be followed by a psychiatrist and receive appropriate daily medications." See Dr. Hicks' deposition, page 53. However, the evidence compels an award for the defense, because the claimant completed all work on July 9, 1998, with no disability. Any disability arose out of events that occurred in the early hours of the following day and were completely addressed in an award issued in injury number 98-177473.

### TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.170.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

Dr. Allen opined that the claimant was unable to work from July 10, to August 31, 1998, 7 3/7 weeks, based on his heat condition and a need to run tests for the condition. The claimant did not return to work thereafter due to his psychiatric condition, which is not a compensable condition based on the above findings. However, the evidence compels an award for the defense, because the claimant completed all work on July 9, 1998, with no disability. Any disability arose out of events that occurred in the early hours of the following day and were completely addressed in an award issued in injury number 98-177473.

### PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997). "Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

The weight of the evidence is that the claimant is totally disabled from his psychiatric conditions. The defense claims that the claim for psychiatric conditions should be defeated, because the claimant failed to determine how much of the claimant's depression was preexisting and how much triggered by this occurrence. This is because where two events, one compensable and the other non-compensable, contribute to the claimant's alleged disabilities, the claimant has the burden to prove the nature and extent of disability attributed to the job related injury. Strate v. Al Baker's Restaurant, 864 S.W.2d 417, 420 (Mo.App. E.D. 1993); Bersett v. National Super Markets, Inc., 808 S.W.2d 34, 36 (Mo.App. E.D. 1991). The defense position is untenable on that ground, because the record is clear that the claimant suffered no preexisting permanent partial disability before the occurrence. It is true that the claimant suffered prior episodes of depression, one of which required hospitalization. On the other hand, Dr. Volarich diagnosed the condition in 1992, but found no permanent partial disability. The record bears no evidence that the claimant's preexisting condition was permanent or substantially disabling.

However, the evidence compels an award for the defense, because the claimant completed all work on July

9, 1998, with no disability. Any disability arose out of events that occurred in the early hours of the following day and were completely addressed in an award issued in injury number 98-177473.

### **SECOND INJURY FUND**

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

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 2000; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 2000; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1, RSMo 2000, contains four distinct steps in calculating the compensation due an employee, and from what source:

1. The employer's liability is considered in isolation- " the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had been no preexisting disability."
2. Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered.
3. The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability.
4. The balance becomes the responsibility of the Second Injury Fund. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

In this case, the claimant suffered no preexisting permanent partial disabilities that combined with any compensable permanent partial disability. Therefore, the claim against the Second Injury Fund is denied.

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

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

EDWIN J. KOHNER

A true copy: Attest:

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Patricia "Pat" Secrest  
Director  
Division of Workers' Compensation

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 98-177475

Employee: Steven Simmons  
Employer: B. T. Buschart Office Products  
Insurer: Travelers Indemnity Company of America  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: July 10, 1998  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence, read the briefs, heard oral argument 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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 25, 2006, as supplemented herein.

The administrative law judge concluded that employee sustained an injury due to an accident arising out of and in the course of his employment, and awarded employee appropriate workers' compensation benefits. Employee filed a timely Application for Review with the Commission alleging the benefits awarded by the administrative law judge were inadequate, and in lieu thereof, additional benefits should be awarded. We disagree and affirm the benefits awarded by the administrative law judge.

The instant claim involves a request for workers' compensation benefits in behalf of the employee based on an alleged mental injury due to an accident arising out of and in the course of employment. From the evidence presented, and as thoroughly discussed by the administrative law judge, the incident or stimulus allegedly producing a mental injury was heat exhaustion sustained by the employee while at work.

In order to clear up any possible confusion, the Commission perceives this claim for compensation as an allegation of a physical type injury resulting in a mental condition. Accordingly, the Commission has reviewed the claim/award pursuant to section 287.120.1 RSMo. The Commission has not reviewed this injury as a mental/mental type claim, pursuant to the dictates of 287.120.8 RSMo. The Commission has not reviewed this claim as an allegation of mental injury resulting from work-related stress; rather, the Commission has reviewed it under section 287.120.1 RSMo as to whether or not a physical injury, heat exhaustion, has resulted in a mental

condition and disability.

The Commission agrees with the ultimate conclusion reached by the administrative law judge, that the heat exhaustion sustained by employee, that arose out of and in the course of his employment, was not a substantial factor causing the alleged resulting mental conditions or mental disabilities.

The Commission agrees that appropriate workers' compensation benefits were awarded employee due to the accident/injury sustained from the heat exhaustion.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued January 25, 2006, 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 10<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Steven Simmons

Injury No.: 98-177475

Dependents: N/A

Before the  
**Division of Workers'  
Compensation**

Employer: B.T. Office Products, Inc.

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

Additional Party: Second Injury Fund

Insurer: Travelers Indemnity Company of America

Hearing Date: November 22-23, 2005

Checked by: EJK

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes

3. 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
6. Date of accident or onset of occupational disease: July 10, 1998
7. State location where accident occurred or occupational disease was contracted: St. Louis 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
10. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
The employee, a warehouse associate, suffered heat exhaustion while working long hours in a hot warehouse.
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: Body as a whole, unscheduled
15. Nature and extent of any permanent disability: None, as a result of the occurrence
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: Steven Simmons

Injury No.: 98-177475

17. Value necessary medical aid not furnished by employer/insurer? \$14,859.90
19. Employee's average weekly wages: \$597.20
19. Weekly compensation rate: \$398.13/\$294.73
20. Method wages computation: By agreement

#### **COMPENSATION PAYABLE**

21. Amount of compensation payable:
 

7 3/7 weeks of temporary total disability (or temporary partial disability)	\$2,957.37
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  22. Second Injury Fund liability: No
- TOTAL: \$2,957.37

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: David J. Rauscher, Esq.

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

Employee:	Steven Simmons	Injury No.: 98-177475
Dependents:	N/A	Before the
Employer:	B.T. Office Products, Inc.	<b>Division of Workers'</b>
Additional Party:	Second Injury Fund	<b>Compensation</b>
Insurer:	Travelers Indemnity Company of America	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a warehouse associate, suffered heat exhaustion while working long hours in a hot warehouse. The issues for determination are (1) Accident or occupational disease arising out of and in the course of employment, (2) Medical causation, (3) Past medical benefits, (4) Future medical benefits, (5) Temporary disability benefits, (6) Permanent disability benefits, and (7) Liability of the Second Injury Fund. The evidence compels an award for the claimant for temporary total disability benefits.

At the hearing, the claimant and Nancy Puzniak, Director of Human Resources for the Employer, testified in person. The claimant also offered depositions of Fred Hicks, M.D., Joseph Hanaway, M.D., and James M. England, a vocational rehabilitation counselor, voluminous medical records, weather records, a job description, pay check stubs, selected portions of the DSM-IV, letters from the employer to the claimant and selected letters from Hartford Insurance. The defense offered the depositions of Stacey Smith, M.D., and Patrick Hogan, M.D., records from Hartford Insurance, Blue Cross/Blue Shield, the Division of Workers Compensation, and Dr. Edward Kweskin, Ph.D., a medical report from David Volarich, D.O., and the employer's personnel file.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### **SUMMARY OF FACTS**

This forty-eight year old claimant worked as a warehouse worker for twenty years. He previously worked for National Foods for fifteen years before his employer laid him off in 1995. In November 1995, this employer hired him as a warehouse worker where he worked until July 1998. He stopped working in July 1998 allegedly due to the effects of heat exhaustion. His warehouse duties with the employer primarily involved shipping and receiving, wherein he would operate an "order picker" in the warehouse to retrieve merchandise. This employer hired him as a "warehouseman" and promoted him to "lead associate" in December 1997, which involved the same job duties in addition to supervision of several employees. The claimant testified that his job duties involved a lot of walking and standing, along with lifting, stooping, reaching and crouching. He described the warehouse as "hot", though the temperature would vary. He described his general work atmosphere as stressful with lots of daily pressure and deadlines.

More specifically, the claimant described his job duties of "filling orders" and "replenishment". When filling orders, he would review a purchase order/invoice. He would then determine the quantity and location of the item so it could be retrieved in the warehouse and prepared for shipment. When handling replenishment, he would restock items in the warehouse so that the "pickers" could continue to fill orders. He testified that replenishment was heavier work and that he would often work up high on his "order picker" near the ceiling, where it was hotter. He testified that he performed replenishment activities over the last few weeks of his employment in July 1998. He

testified that he worked longer hours during his last weeks of employment due to a shortage of workers.

The physical demands for the claimant's position required that in an eight hour day, an employee stands for eight hours, walks for five hours, lifts 51 to 100 pounds frequently (34-66% of the time), lifts over 100 pounds occasionally (0-33% of the time), climbs occasionally (0-33% of the time) and stoops and crouches frequently (34-66% of the time). See Exhibit S. An employee also frequently reaches above shoulder height. See Exhibit S. The position description involves "Heavy work: Lifting 100 lbs. maximum with frequent lifting and/or carrying of objects weighing up to 50 lbs." See Exhibit S. The position also requires: "Verying (sic) temperature in workplace" and "Continuous activity - cannot leave work area during working hours, except assigned breaks." See Exhibit S. The specific duties require that an employee "must routinely be able to lift, pull, press, bend, twist and carry up to 60 lbs." In addition, he "must be able to perform strenuous work in varying temperature conditions." See Exhibit S.

The claimant received two fifteen minute breaks and a forty-five minute lunch with no further breaks during overtime. There were no work/rest cycles and no instructions on how to work in hot conditions, but the claimant knew that he had to keep hydrated.

The warehouse is a large cinder block building with an aluminum roof and two small exhaust fans in the 30 feet high ceiling. The warehouse was not air-conditioned. There were both a receiving and a separate shipping dock. The claimant testified that conditions on the dates of his injury were like an oven and that it was hotter inside the building than outside. He testified that another employee brought a thermometer to work the previous year but was told to remove it or he would be fired. On that date, the temperature in the building was eight degrees hotter than the outside temperature.

The maximum temperatures during the period July 6 through July 9, 1998 were in excess of 90 degrees. On July 9, 1998 the temperature at 3:00 p.m. was 90 degrees and at midnight the outside temperature was still 81 degrees and the humidity had risen significantly over the claimant's shift. See Exhibit Q.

On the last date he was able to work, claimant was working on replenishment, which is heavier labor than order picking. He used an order picker, which is a large machine with forks to hold wooden pallets. He would stand on a platform, which would go up 25 feet. He spent 70-75% of the time on the order picker. It was hotter closer to the roof. The outside temperature had been ninety degrees or above every day on the week of July 6, 1998.

In the four days during the week of his injury, the claimant worked 50 to 55 hours. He worked from 3:00 p.m. until the work was complete for the day. The employer was short workers, and the claimant worked overtime most of the time. One day during the week of the injury, he was still at work when the sun came up. For the two-week period ending on July 10, 1998, he worked 80 regular hours and 9.25 overtime hours. See Exhibit W. He also received 8 hours of paid holiday for July 4 when he did not work. He was not able to work on July 10 at his 3:00 p.m. shift. Therefore, he worked 89.25 hours in eight days. This period of long hours in high heat made this week different than others.

On the date he last worked, the shift supervisor, Mike Pope, was on vacation. The claimant and two other lead associates ran the shift but were short on crew.

The claimant began feeling ill on the evening of July 9, 1998. He continued working until about 1:00 or 1:30 a.m. on July 10, 1998. At that time, he felt hot, had a headache, stomach pain, blurred vision, lightheadedness, trouble concentrating. He was sweating profusely and threw up in the rest room. He feared he would faint or that something serious was happening to him. He had never felt anything like that before.

There were a couple of hours of work left to do but he paged the other two lead associates and told them that he was overheated and sick and that he had to leave. He sat in his air-conditioned car for about fifteen minutes feeling disoriented and lost. He wondered what was happening and if he could make it the short distance to his home. Eventually, he drove home, took off his wet clothes and took a cold cloth to his face and arms. He went to bed and basically stayed there through the weekend except to use the bathroom. He had diarrhea and abdominal pain on Saturday. He called in sick Friday, July 10 and Monday, July 13. He reported that he had

overheated at work the previous week and he felt terrible when he called in sick on Monday.

On Tuesday, July 14, 1998, the claimant returned to work and worked for fifteen or twenty minutes. He told his supervisor, Mike Pope, that that he had overheated at work and that he was still sick from July 9-10. Mike Pope told him to go to a doctor immediately but did not tell him to go to a particular doctor.

On July 14, 1998, the claimant went to Dr. Allen at MedFirst and reported a headache, nausea, feeling light-headed, dizzy, difficulty focusing, abdominal pain, tiredness and weakness, confusion and trouble thinking. She prescribed rest and some blood tests.

On July 20, 1998, the claimant went to Dr. Eidelman, who reported, "He works under a lot of heat and warm environment, no ventilation and right now the weather is about 100 degrees. He came here four days ago and Dr. Allen saw him. She thought he had heat exhaustion, which I agree with her." See Exhibit B. Dr. Eidelman ordered a barium contract enema to rule out diverticulitis at Missouri Baptist Hospital, which was negative. See Exhibit B. A blood test indicated an exposure to Epstein Barr virus but it was not active. See Exhibit B.

The claimant went to a hematologist (Dr. Alves) and a neurologist (Dr. Friesenhahn), and underwent additional blood tests, a spinal tap and an MRI, which were essentially normal. Dr. Alves first discussed with claimant that he thought that his symptoms might be caused by depression manifesting itself with somatic symptoms at his consultation on August 21, 1998. See Exhibit B.

Dr. Hicks examined the claimant on September 3, 1998, and the claimant has continued to receive treatment from Dr. Hicks for more than seven years. He continued to see Dr. Hicks and paid for the visits because he felt Dr. Hicks was helping him. He now sees Dr. Hicks through Medicare.

The claimant notified his employer that he was diagnosed with heat exhaustion occurring at work. The claimant continued to notify the employer of his medical treatment, but he stopped when his employer discharged him from employment.

The claimant currently takes Lexapro, Trileptal and Lamictal for his symptoms. The claimant testified that he suffers from depression, short and long term memory problems, headaches, nausea, chronic diarrhea, sleep problems, confusion, low energy, lack of motivation and sweating. He testified that he is nervous and anxious.

The claimant applied for and received both short and long term disability from the Hartford Insurance Company. In the process of applying for disability benefits, he dealt with the employer's human resources department. The Hartford terminated the claimant's disability payments in 2000 because his Social Security disability payments were greater than his Hartford payments. At the time of his injury, the claimant had 112 hours of unused vacation.

The claimant's day now consists of trying to get motivated to get up, coffee, news, medication, feeding the cat if he can remember to, trying to plan the days activity, lunch, probably 2 to 3 hours of chores over a day and then it is time for dinner. Overall, his days just seem to slip by without him being able to accomplish much at all. It takes a couple of days to cut the grass because he gets hot. The claimant no longer feels like doing anything that he used to enjoy like golf, biking, camping, sporting events, fishing, floating, movies or dinner. He played golf once since the injury but got overheated and had to stop. He can read, write, do basic math, do laundry, cook, clean and does about eighty percent of his own shopping. Most of his friends have moved on. If he could he would most definitely return to work.

The claimant now has occasional difficulty lifting and has back pain in cold weather. He testified that these problems did not affect his work; he worked through the pain in his foot or back. The employer presented no evidence of a poor attendance record. The claimant did not recall ever calling in sick to this employer because of his foot or back. He had no medically imposed lifting restrictions for this employer. He has no braces and has not worn a back belt since he last worked. No surgery was ever recommended for his back. He had never had heat exhaustion before 1998.

The claimant applied for a promotion with this employer in spring 1998, but the employer selected another applicant for the position. He testified that he was told that he was not selected for the position because he would hold employees to too high a standard. The claimant was disappointed that he did not receive the promotion. He does not recall discussing it with Dr. Hicks, but he recalls that he realized that he should begin to look for another job with more potential when things slowed down at work.

The claimant incurred past medical bills in the sum of \$14,859.90 that he related to the occurrence. Dr. Hicks testified that these expenses were necessarily incurred as a result of his injury and reasonable in amount. The claimant paid for some of the medication and some of the medical bills out of his pocket. Medicare now pays part of Dr. Hicks' treatment and Dr. Hicks provides samples of medication. He also testified that the claimant needed future medical treatment and to be followed by a psychiatrist and receive daily medication.

Dr. Smith examined the claimant on June 2, 2005, and Dr. Hogan examined the claimant on June 15, 2005. The claimant served a deposition subpoena on the employer's Custodian of Personnel and Payroll records. The employer's human resources director, Nancy Puzniak, received the subpoena and contacted the legal department for instructions. At their request, she copied the personnel, workers' compensation, disability and medical files and forwarded them to the legal department in Colorado. The legal department forwarded some records to the attorneys for the parties. The employer's human resources director testified that not all of the documents that she sent to the legal department were included in the material sent to the attorneys and that some things were obviously missing that should have been there. She was instructed not to attend the deposition. The claimant's attorney did not cancel the deposition and made a record that no one attended on behalf of the employer.

#### Dr. Hicks

Dr. Hicks, board certified psychiatrist, first examined the claimant on September 3, 1998, after a referral from Dr. Allen and took a medical history as follows: The claimant had been having difficulty since going home from work in mid July with heat exhaustion. He had been working long hours in a warehouse with no air conditioning and poor ventilation when he became ill. He complained of sleep disturbance, nausea, weight loss, fatigue, poor motivation and interest, problems with concentration and memory, headaches and poor visual acuity. He reported that he had been hospitalized in 1984 for emotional disturbance associated with his divorce and had taken medication for a few weeks thereafter. Otherwise, he reported that he was in general good health and had a stable work history. He had worked as a warehouseman for twenty years, the last two and one-half at his current job. Other specialists evaluated the claimant with a lumbar puncture and MRI without significant pathology. He acknowledged that he had trouble tolerating heat in previous work efforts. He reported that the summer work hours had been longer in the intense heat. See Dr. Hicks' deposition, pages 11, 12. Dr. Hicks diagnosed:

Axis I: adjustment disorder, recent work stress, major depression, single episode, moderate, possible post-traumatic stress disorder;

Axis II: obsessive-compulsive personality disorder;

Axis III: heat exhaustion;

Axis IV: struggle with disability from work; and

Axis V: global assessment of function of 50 with the highest level in the past year of 75. See Exhibit E-1.

On September 24, 1998, Dr. Hicks noted that the claimant still had heat symptoms with sudden sweatiness, headaches and lightheadedness. Dr. Hicks continued to treat the claimant through May 20, 2005. The claimant's symptoms remained the same, and Dr. Hicks' diagnosis continued to be heat exhaustion, major depression, single episode, and post-traumatic stress disorder throughout his treatment. He testified that the claimant still has sudden sweatiness, headache and light-headedness. Dr. Hicks testified that this was a psychological condition that triggers a physiological response and the reason he has the diagnosis of post-traumatic stress disorder. Dr. Hicks prescribed numerous medications, outpatient program services and ECT (electroconvulsive shock therapy). The claimant did not wish to undergo the ECT, and the medications did not prove very effective.

Dr. Hicks diagnosed major depression with symptoms of depressed mood, markedly diminished interest in formerly pleasurable activities, feelings of worthlessness, diminished ability to concentrate and recurrent thoughts of heat and being exposed to heat. On March 26, 2004, Dr. Hicks' assessment of the claimant's condition included:

Axis I adjustment disorder with work stress, dysthymic disorder with atypical features, major depression, single episode, moderate, possible posttraumatic stress disorder,  
Axis II obsessive/compulsive personality disorder,  
Axis III heat exhaustion,  
Axis IV moderate disabled and financial problems, and  
Axis V GAF of 50. See Exhibit E-6.

He opined that the claimant had disabling limitations with intermittent fatigue, physical distress, inability to engage in vocational rehabilitation, and that the work conditions were a substantial factor in the cause of his medical condition and resulting permanent total disability. He also opined that the claimant's prognosis for significant recovery was very poor. He gave a global assessment of function at 50/50 (range 0 to 100).

Dr. Hicks opined that the work conditions on July 9 and 10, 1998, were a substantial factor causing the claimant's heat exhaustion and that the heat exhaustion was a substantial factor causing the major depression, single episode, and posttraumatic stress disorder. Dr. Hicks considered other stressors in the claimant's life but that did not change his opinions. In addition, he testified that the claimant was unable to work since July 10, 1998, and that he was permanently and totally disabled. See Dr. Hicks' deposition, page 51. Further, he testified that he did not believe that the claimant was being deceptive in his presentation and that the physical and psychological limitations were the result of the heat exhaustion at work. See Dr. Hicks' deposition, page 109-111. The claimant is limited by intermittent fatigue and physical distress and the inability to engage in vocational rehabilitation. Dr. Hicks testified that he has "actually been somewhat of an advocate for him for both the short term disability and the workers' comp case." See Dr. Hicks' deposition, page 98.

### ***Dr. Kweskin***

Dr. Kweskin, a psychologist, examined the claimant for treatment from November 3, 1998, through January 5, 1999, and with nine sessions and an MMPI-2. On November 20, 1998, Dr. Kweskin reviewed the MMPI-2 and found:

That is, his highest elevations were on the Hysteria and Hypochondrias scales. In particular, his Hysteria scale is quite elevated. This profile is characteristic of individuals who report a wide variety of physical symptoms, but generally lack real concern. Secondary gain is usually present and such individuals tend to use their somatic complaints to be exploitative and they are often viewed as narcissistic and egocentric. See Exhibit 8.

On December 10, 1998, Dr. Kweskin opined, "While I would not apply the word malingering, I do believe that he has settled into a comfortable sick role." On January 12, 1999, Dr. Kweskin found:

Mr. Simmons presents with a variety of symptoms including headache, muscle pain and fatigue; all of which have not been associated with any particular medical etiology. Assessment with the MMPI-2 suggests a Somatoform disorder. Although Mr. Simmons complains of pain and fatigue, I have not observed any pain behaviors and he consistently appears alert during our sessions. I have corresponded with Dr. Hicks twice and indicated this inconsistency. However, Mr. Simmons verbal description of his current condition suggests an inability to be consistently involved in gainful employment. At the present time his return to work is indeterminate. See Exhibit 8.

### ***Dr. Vorhees***

Dr. Vorhees, a psychologist, treated the claimant from February 2, 1999, to April 27, 1999, and diagnosed depression and somatoform disorder. See Exhibit G. Dr. Vorhees reported, "The claimant's MMPI suggests that

he resists psychological interpretations. I gave him a copy of the test and he disagreed a lot with the MMPI-2 results. He talked about how he doesn't go to the day program on time. He talked about this being a workmans comp. Case and I told him his psych testing suggests this is not a workers comp case." See Exhibit G.

Dr. Hanaway

Dr. Hanaway, a board certified neurologist, examined the claimant in 2004, and testified that he has experience in the medical issues of heat exhaustion and heat stroke. Dr. Hanaway testified that claimant's symptoms were consistent with heat exhaustion. Heat, humidity, lack of ventilation and physical exertion are factors causing heat exhaustion. Dr. Hanaway opined that the claimant was permanently and totally disabled and that the conditions at work on July 6, 7, 8, 9 and 10, 1998, were a substantial factor causing the claimant's heat exhaustion and that the heat exhaustion was a substantial factor in causing his major depression and posttraumatic stress disorder. See Dr. Hanaway deposition, page 53. The claimant did not have heat stroke. See Dr. Hanaway deposition, page 75. He testified that posttraumatic stress disorder was a common problem after an episode of heat exhaustion. See Dr. Hanaway deposition, pages 84, 85. On the other hand, he did not know whether heat exhaustion is a common cause for posttraumatic stress disorder in the DSM. See Dr. Hanaway deposition, page 85. He testified that the claimant's episode of heat exhaustion was a life-threatening episode. See Dr. Hanaway deposition, page 71.

James M. England

Mr. England performed a vocational rehabilitation evaluation on November 23, 2004, and described the claimant as cooperative, attentive and straightforward. The claimant did the best that he could on his tests and his cognitive ability was excellent. Mr. England noted that the claimant had a very flat affect and appeared rather tired. He concluded that the claimant's physical and medical problems appear to have him functioning at less than what would be required to sustain even sedentary work. The claimant's global assessment of functioning of 50 meant he was just not going to make it in a work setting. Mr. England opined that the claimant's disability was a psychological disability. The claimant was not a good candidate for vocational rehabilitation and was totally disabled from a vocational standpoint.

Dr. Hogan

Dr. Hogan, a neurologist, examined claimant on June 15, 2005. After examining the claimant's medical records, he testified that he found no objective evidence in the records that the claimant ever had any heat related illness whatsoever. He did not render an opinion that the claimant did not suffer from heat exhaustion. Dr. Hogan testified that evidence of heat related illness would have included temperature elevation, cardiac abnormalities, fatigue, and/or electrolyte abnormalities. He opined that there would not still be objective evidence of heat exhaustion a week after the injury. Dr. Hogan testified that he could not understand the diagnosis of heat exhaustion with the basis of psychiatric disease seven years after the event. Dr. Hogan testified that claimant's symptoms were characteristic of depression. He noted other life situations in claimant's records that could have caused or exacerbated depression. He did not find evidence in the records of any traumatic event that would have produced stress and produced a post-traumatic stress disorder. He did not find any evidence that would inhibit the claimant from performing any and all duties for which he was qualified without limitation or restriction and suggested that financial gain was a factor in his symptoms. Dr. Hogan could not opine whether claimant's depression was disabling because he did not do a psychiatric evaluation.

Dr. Smith

Dr. Smith, a psychiatrist, examined the claimant on June 2, 2005. The claimant was open and honest in Dr. Smith's examination. See Dr. Smith deposition, page 30. The claimant told her a Med First doctor had told him that he had either heat exhaustion or a mild heat stroke. See Dr. Smith deposition, pages 47, 48. She testified that the claimant's reported conditions at work could cause heat exhaustion and that the symptoms reported by the

claimant were consistent with heat exhaustion. See Dr. Smith deposition, page 48-51.

Dr. Smith opined that the claimant developed a psychological disorder based on his perception of the events that occurred while at work. See Dr. Smith deposition, page 84. She described the claimant as having an adjustment disorder, dysthymia, a passive aggressive personality structure and the use of somatization. See Dr. Smith deposition, page 55. She opined that the claimant had a GAF of 63. See Dr. Smith deposition, page 65. Dr. Smith testified that something happened to claimant on July 9 and 10 while at work. She believed that the circumstances leading up to that period and his reaction to the workplace and perhaps the weather started his psychological reaction in motion. She opined that he developed an adjustment disorder due to his beliefs about his workplace and that he had chronic dysthymia. See Dr. Smith deposition, page 84. Dr. Smith opined that the claimant did not suffer from post-traumatic stress syndrome. See Dr. Smith deposition, page 87. She found no evidence that any event prior to the heat exhaustion caused claimant any meaningful impairment. She testified it was unlikely that claimant would be working in the future.

### COMPENSABILITY

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

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

Where the performance of duties of an employee leads to physical breakdown or a change in pathology, the injury is compensable. Wolfgeher v. Wagner Cartage Service, 646 S.W.2d 781, 784 (Mo. banc 1983). However, there are statutory limitations on compensability:

An injury is compensable if ... work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor. ... Ordinarily, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment. An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent ... that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and

(d) 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. Section 287.020, RSMo 2000.

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability

claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

The claimant testified that he suffered stress at work from long hours, pressure to complete assigned tasks, and hot conditions. On July 10, 1998, he reported to his employer that he was unable to perform his duties due to a condition that virtually every medical provider has described as heat exhaustion. He called in sick Friday, July 10 and Monday, July 13. On Tuesday, July 14, 1998, the claimant returned to work and worked for fifteen or twenty minutes. He told his supervisor, Mike Pope, that he was still sick from July 9-10. He testified that he reported that he had overheated at work and reported his condition. Mike Pope told him to go to a doctor immediately. On July 14, 1998, the claimant went to Dr. Allen at MedFirst and reported a headache, nausea, feeling light-headed, dizzy, difficulty focusing, abdominal pain, tiredness and weakness, confusion and trouble thinking. She prescribed rest and some blood tests. On July 20, 1998, the claimant went to Dr. Eidelman, who reported, "He works under a lot of heat and warm environment, no ventilation and right now the weather is about 100 degrees. He came here four days ago and Dr. Allen saw him. She thought he had heat exhaustion, which I agree with her." See Exhibit B. Dr. Eidelman ordered a barium contract enema to rule out diverticulitis at Missouri Baptist Hospital, which was negative. See Exhibit B. A blood test revealed an exposure to Epstein Barr virus, but it was not active. See Exhibit B. The claimant went to a hematologist (Dr. Alves) and a neurologist (Dr. Friesenhahn), and underwent additional blood tests, a spinal tap and an MRI, which were essentially normal. On August 21, 1998, Dr. Alves suggested that the claimant's symptoms might be caused by depression manifesting itself with somatic symptoms. See Exhibit B. Dr. Allen, the claimant's treating physician opined that the claimant should be off work through August 31, to complete testing to rule out other conditions. See Exhibit B.

The claimant had worked for two weeks in extreme heat. In the last four days prior to his heat exhaustion, he had accumulated 55 to 57 hours. His shift began at 3:00 p.m. One day during the week, he had still been at work when the sun came up. The temperatures inside the building, particularly near the ceiling where he was working on a lift were higher than the outside temperatures. His job consisted of heavy labor, lifting heavy boxes and carrying them. He stood the entire time he was on the job with only two fifteen minute breaks and a forty-five minute lunch break. After the initial eight hour shift, there were no more breaks scheduled. The work had to be completed each day. These factors were not those to which he would have been equally exposed outside of and unrelated to the employment. In Aldridge v. Southern Missouri Gas Co., 131 S.W.3d 876 (Mo. App. 2004), the claimant suffered a heart attack, and the court found that heavy physical work and doing the work of two men on a hot summer day was a factor exclusive to claimant's employment. The court found these factors were not a hazard or risk unrelated to the employee's employment. In this case, the claimant testified that he performed long hours of work including heavy lifting (70 pounds) in a poorly ventilated facility with high temperatures and outside temperatures were in excess of 90 degrees. These are clearly factors exclusive to his employment. The claimant proved that he suffered a work related injury requiring medical attention and suffered temporary disability. The claimant has proven causation of an injury that arose out of and in the course of employment in this case.

### **LIABILITY FOR PAST MEDICAL EXPENSES**

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 2000.

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

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being

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

The claimant offered medical bills with the medical records and testified that the medical services were a product of his July 10, 1998, occurrence at work:

Provider	Services	Dates	Exh.	Amount
Dr. Hicks	Psychiatric	9/3/98-5/5/05	E	\$6965.00
Dr. Kveskin	Psychological	11/3/98-1/19/99	F	\$1330.00
Dr. Vorhees	Psychological	2/9/99-4/27/99	G	\$1200.00
Mo. Baptist Hosp.	Psychiatric	3/1999-8/27/99	C	\$5364.90
Total				\$14,859.90

Dr. Hicks testified that the services were reasonable in that amount and necessary for the claimant. See Dr. Hicks' deposition, pages 53, 54. None of the above medical services related to treatment of heat exhaustion. On the other hand, the services rendered were for a psychological condition or mental injury that the claimant testified that he suffered an injury as a result of stress at work in terms of long hours, pressure to complete assigned tasks, and heat. The question becomes whether the claimant's depression and various other psychological conditions are compensable conditions. Mental injury in workers' compensation cases are governed by Section 287.120, RSMo 2000:

8. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events.

9. A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer.

The claimant testified that the hours were ten to fourteen hours per day, that the temperature exceeded ninety degrees in the warehouse, and that the pressure to complete assigned tasks was heavy due to personnel shortages. However, he testified that he had worked in warehouses for many years and that the conditions were not extraordinary or unusual. The claimant's testimony is particularly important, because the Courts have construed the statute to use the "objective causal nexus" test:

We are persuaded that the proper comparison for purposes of Section 287.120.8 is to compare Employee's work-related stress with the stress encountered by employees having similar positions, regardless of employer, with a focus on evidence of the stress encountered by similarly situated employees for the same employer. See Dunlavey, supra. This standard allows consideration of the employment conditions of others in the industry when an employer is too small to have other similarly situated employees or when the stress levels of a particular employer are high. This also permits an employee to rely on evidence which is conceivably more readily available to the employee, evidence of the employee's employer, if necessary to satisfy the employee's burden of proof. Williams v. DePaul Heath Center, 996 S.W.2d 619, 628, 629 (Mo.App. E.D.1999).

Based on the claimant's testimony and his many years of work as a warehouse associate, the conditions in the employer's warehouse were not extraordinary or unusual. Looking to the other statutory test in the last sentence of Section 287.120.8, RSMo 2000, the conditions were measurable by objective standards by the temperature (with weather records as evidence), long hours (with time records in evidence), and pressure to complete assigned tasks under time constraints. The defense offered no evidence to refute the conditions at the time of the injury.

The claimant's counsel argued in his brief that none of this makes any difference, because the claimant's psychological condition resulted from a physical injury (heat exhaustion), rather than work related stress, that later caused the claimant's psychological condition:

This is not a mental stress claim under Section 287.120.8. Although claimant suffers from a psychiatric condition as a result of the heat exhaustion, the psychiatric condition is not the basis of the claim but rather a consequence of his primary injury. Claimant's is a case of physical injury causing mental consequences. The mental consequences of a physical injury are compensable. Tangblade v. Lear Corp., 58 S.W.3d 662, 687 (Mo. App. 2001).

This case is similar to E.W. v. Kansas City Missouri School District, 89 S.W.3d 527 (Mo. App. 2002). Claimant was teaching when a fight broke out in the classroom. She was shoved against a bookcase and sustained injury to her leg and back for which she received treatment. In addition, she was diagnosed with post-traumatic stress disorder and major depressive disorder (coincidentally the same diagnosis as in this case). Claimant was awarded permanent total disability benefits because her mental injury claim was not based upon work-related stress. The plain language of Section 287.120.8 indicates that it applies only to claims of mental injury resulting from work related stress. "[T]he reason for requiring proof of extraordinary and unusual work stress was the legislature's intention to limit workers' compensation benefits to mental injuries caused by circumstances other than ordinary day-to-day mental stresses experienced by all employees." (Citing Williams v. DePaul Health Ctr., 996 S.W.2d 619, 627-28 (Mo. App. 1999).

In analyzing this issue, a review of the forensic evidence is important. In this case, the claimant's experts, Dr. Hicks and Dr. Hanaway opined that the claimant developed heat exhaustion at work, that the heat exhaustion has persisted for the seven years since the occurrence, and that the heat exhaustion caused the claimant's psychological disorders. Dr. Hicks conceded that the claimant may have had preexisting psychological disorders, including dysthymic disorder and obsessive/compulsive personality disorder. On the other hand, the defense expert, Dr. Smith, opined that the claimant developed a psychological disorder based on his belief about the events that occurred while at work rather than the claimant's heat exhaustion directly. See Dr. Smith deposition, page 84. She found no evidence of posttraumatic stress disorder, because she found no symptoms of the condition and the severity of the stressor "would not meet criteria ... as required in the DSM." See Dr. Smith deposition, pages 16, 87. She diagnosed an adjustment disorder, dysthymia, a passive aggressive personality structure and the use of somatization. See Dr. Smith deposition, page 55. Dr. Smith testified that something happened to claimant on July 9 and 10 while at work. She believed that the circumstances leading up to that period and his reaction to the workplace and perhaps the weather triggered his psychological reaction. She opined that he developed an adjustment disorder due to his beliefs about his workplace and that he had chronic dysthymia. See Dr. Smith deposition, page 84. "The crux of this case is the passive aggressive construct of his personality ... it's an expression of hostility, and people express their hostility by not doing. ... That's his way of coping." See Dr. Smith deposition, page 116. She testified that the heat exhaustion was not severe enough to cause posttraumatic stress disorder, and the claimant's condition is "more likely to be an example of somatization and histrionic response." See Dr. Smith deposition, pages 87, 88. She opined that the claimant's current conditions

reflect at least one of his primary defense mechanisms, which is somatization, which is the experiencing of a variety of physical symptoms without an organic basis and that his tendency to somatize I do believe was exacerbated by his beliefs about the occurrence at B.T. ... I believe his tendency to use somatization as a defense mechanism was to some extent exacerbated by his beliefs about what happened at the company both before and after the episode or days or weeks of heat. See Dr. Smith deposition, pages 110, 111.

So the presence of somatization as a defense was so prominent in the psychological testing that the MMPI offered somatization or somatoform disorder as its primary diagnosis, ... To me, this is very strong evidence of primary use of this defense mechanism. ... The other diagnose authored by the MMPI-2 was adjustment disorder, dysthymia, and a variety of personality disorders, and did not suggest major depression. See Dr. Smith deposition, page 114.

Thus, the forensic experts differed in their analysis of the etiology of the claimant's severe psychological

condition. The claimant contended that the basis of the claim is a physical injury, whereas the defense contended that the claimant suffered a mental injury triggered by stress at work.

In evaluating the forensic psychological testimony, each expert appears to have some bias. While Dr. Hicks is the claimant's treating psychiatrist, he also testified that he has "actually been somewhat of an advocate for him for both the short term disability and the workers' comp case." See Dr. Hicks' deposition, page 98. Although Dr. Hicks opined that the claimant has major depression, single episode, the weight of the evidence suggests that the claimant has had multiple episodes of depression, at least one of which required hospitalization. Dr. Hicks also strains his credibility by referring to "possible" posttraumatic stress disorder in the bulk of his records, but contending that the condition is a definitive diagnosis and a disabling condition some seven years later in his testimony. He is the sole mental health provider to diagnose the condition. Dr. Hanaway is a neurologist with no particular specialized psychological or psychiatric expertise and did not conduct a psychiatric or psychological examination. See Dr. Hanaway deposition, pages 30, 69, 70. He deferred to Dr. Hicks for evaluation of the claimant's psychological conditions. See Dr. Hanaway deposition, page 70. For these reasons, Dr. Hicks' and Dr. Hanaway's findings appear to lack credibility on this issue. On the other hand, Dr. Smith testified that she has testified for the defense in a number of legal cases. She also testified that she never intends "to be an advocate for anyone. I'm asked for my psychiatric opinion, and I do my best to provide it." See Dr. Smith deposition, page 19.

Looking at the other evidence, the claimant had multiple prior episodes of depression. One prior episode of depression in the mid-1980's was serious enough to require medication and a brief course of inpatient care. In 1992, Dr. Volarich diagnosed depression but found no permanent partial disability from the condition. On November 20, 1998, after the occurrence that is the subject of this litigation, Dr. Kweskin reviewed the MMPI-2 and found:

That is, his highest elevations were on the Hysteria and Hypochondrias scales. In particular, his Hysteria scale is quite elevated. This profile is characteristic of individuals who report a wide variety of physical symptoms, but generally lack real concern. Secondary gain is usually present and such individuals tend to use their somatic complaints to be exploitative and they are often viewed as narcissistic and egocentric. See Exhibit 8.

In January 1999, Dr. Kweskin found, "Assessment with the MMPI-2 suggests a Somatoform disorder." See Exhibit 8. In 1999, Dr. Vorhees, a psychologist, treated the claimant from February 2, 1999, to April 27, 1999, and diagnosed depression and somatoform disorder. See Exhibit G. Dr. Vorhees reported, "The claimant's MMPI suggests that he resists psychological interpretations. I gave him a copy of the test and he disagreed a lot with the MMPI-2 results. He talked about how he doesn't go to the day program on time. He talked about this being a workmans comp case and I told him his psych testing suggests this is not a workers comp case." See Exhibit G.

The weight of the evidence compels a finding that the claimant had preexisting episodes of depression and had preexisting dysthymic disorder and obsessive/compulsive personality disorder. The claimant suffered from work related stress from long work hours, hot working conditions, and pressure to fill orders within time constraints. The claimant's psychological disorders became totally disabling. He also suffered an episode of heat exhaustion. The working conditions were a triggering factor for all of these conditions, based on the sudden onset and temporal relationship.

Three quarters of the mental health providers appear to support these findings. Dr. Smith opined that the claimant's opinions about his work caused the claimant's psychological conditions, but the work was not a substantial factor causing the conditions. These conclusions are supported by the other three mental health experts that the claimant has major depression and a somatoform disorder. Those findings also appear to be supported by the results of the MMPI-2 that Dr. Vorhees and Dr. Kweskin reviewed. See Exhibit 8. Her findings appear to be supported by the other treating mental health providers, Dr. Kweskin and Dr. Vorhees, who opined that the claimant had a somatoform disorder and depression. Their records did not support a finding that the work was a substantial factor causing the claimant's psychological disorders.

The claimant relies heavily on from E.W. v. Kansas City Missouri School District, 89 S.W.3d 527 (Mo. App. 2002). This case is distinguishable from E.W., because the injury in E.W. resulted from an assault at work, a mental injury "caused by circumstances other than ordinary day-to-day mental stresses experienced by all employees." In this case, the claimant's psychological conditions resulted from stress from long hours, pressure to complete assigned tasks timely, and hot working conditions, which were experienced by all employees. His own

testimony confirmed this conclusion. The claimant also cited various decisions from 2000 to 2005 affirming Commission decisions from that period, but none of those decisions appears to cite mental injury from stress at work. Those cases deal with depression from low back pain from a physical injury that was not experienced by all other employees that worked at the employer's premises. That is not the case here for the same reasons. Here, the claimant experienced the same work stress from heat, long hours, and pressure to complete work under time constraints that other employees experienced. For these reasons, the authorities cited by the claimant are distinguishable and not controlling in this case.

Based on the above, the claim for psychological medical expenses is denied.

### TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.170.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

Dr. Allen opined that the claimant was unable to work from July 10, to August 31, 1998, 7 3/7 weeks, based on his heat condition and a need to run tests for the condition. The claimant did not return to work thereafter due to his psychological condition, which is not a compensable condition based on the above findings. The claimant is awarded 7 3/7 weeks of temporary total disability benefits.

### OTHER ISSUES

This case also involves liability for future medical care, permanent disability, and Second Injury Fund liability. The claim is denied with regard to all of these issues, because they relate to the claimant's psychological condition rather than his heat exhaustion.

Given the persistence of the claimant's psychological condition, the claimant needs "to be followed by a psychiatrist and receive appropriate daily medications." See Dr. Hicks' deposition, page 53. Dr. Smith also testified that the claimant would do better on psychiatric medications. See Dr. Smith deposition, pages 108, 109. However, given the above findings regarding the relationship between the claimant's work and his psychological condition, the claim for future medical care is denied. None of the experts opined that the claimant required any further medical care for heat exhaustion.

Looking to the employer's liability for permanent disability, the weight of the evidence is that the claimant is totally disabled from his psychological conditions. However, the claimant's psychological conditions are not compensable under our statute based on the above findings. None of the experts opined that the claimant suffered any permanent partial disability from his heat exhaustion. Dr. Hanaway testified that the claimant "is probably recovered by now, many years later, from the heat exhaustion. See Dr. Hanaway deposition, page 42. No permanent disability benefits are awarded.

With regard to the second Injury Fund claim, the employer presented prior workers compensation settlements showing that the claimant suffered a 17.5% permanent partial disability to his right foot in 1986, a five percent permanent partial disability to his right knee and a 7.5% permanent partial disability to his low back in 1986, a 7.5% permanent partial disability to his neck in 1988, and a 17.5% permanent partial disability to his low back in 1992. It is true that the claimant suffered prior episodes of depression, one of which required hospitalization. On the other hand, Dr. Volarich diagnosed the condition in 1992, but found no permanent partial disability. However, the claimant offered no evidence that his preexisting permanent partial disabilities combined with any compensable permanent partial disability. See Dr. Hanaway deposition, page 93. Therefore, the claim against the Second Injury Fund is denied.

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

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

EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia "Pat" Secrest  
*Director*  
*Division of Workers' Compensation*