

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

Injury No.: 06-134487

Employee: Jimmie Stanford
Employer: Audrain County Road District
Insurer: Missouri Association of Counties
c/o Gallagher Bassett Services, Inc.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 19, 2011. The award and decision of Administrative Law Judge Vicky Ruth, issued October 19, 2011, 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 15th day of August 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Jimmie Stanford

Injury No. 06-134487

Dependents: N/A

Employer: Audrain County Road District

Additional Party: Second Injury Fund

Insurer: Missouri Association of Counties
c/o Gallagher Bassett Service, Inc.

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

Hearing Date: July 19, 2011

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: September 1, 2006.
5. State location where accident occurred or occupational disease was contracted: Audrain County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes .
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee injured his right shoulder while operating a chainsaw.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Right shoulder.
14. Nature and extent of any permanent disability: 45% of the right shoulder.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
17. Value necessary medical aid not furnished by employer/insurer? See Award.

- 18. Employee's average weekly wages: \$458.08.
- 19. Weekly compensation rate: \$305.39.
- 20. Method of wages computation: By Award.

COMPENSATION PAYABLE

- 21. Amount of compensation payable from employer:
 - PPD (104.4 weeks x \$305.39): \$31,882.72
 - TTD (7 weeks x \$305.39): \$ 2,137.73
 - Unpaid medical bills: \$44,330.36
 - TOTAL: \$78,350.81**

- 22. Second Injury Fund liability: N/A.
- 23. Future medical awarded: No.

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

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

Employee: Jimmie Stanford

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jimmie Stanford

Injury No: 06-134487

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: Audrain County Road District

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

Additional Party: Second Injury Fund

Insurer: Missouri Association of Counties,
c/o Gallagher Bassett Service, Inc.

On July 19, 2011, Jimmie Stanford, the Audrain County Road District, Missouri Association of Counties, and the Second Injury Fund appeared for a final award hearing. This case was tried at the same time as Injury No. 06-132821; however, a separate award will be issued in that case. Jimmie Stanford, the claimant, was represented by attorney Mark Moreland. Attorney Kelly Mills represented Audrain County Road District/Missouri Association of Counties, the employer/insurer. The Second Injury Fund elected not to participate in the hearing. The claimant testified in person at the hearing and by deposition. Dr. Thomas Musich and Dr. Michael Nogalski testified by deposition. The Administrative Law Judge set a deadline of August 16, 2011, for the filing of briefs or proposed awards. At the parties' request, the deadline was extended to August 18, 2011; claimant and the employer/insurer submitted briefs/proposed awards on that date and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about September 1, 2006, Jimmie Stanford, the claimant, was an employee of the Audrain County Road District, the employer (Injury No. 06-134487).
2. On or about December 6, 2006, claimant was an employee of the employer (Injury No. 06-132821).
3. The parties were operating subject to the provisions of Missouri Workers' Compensation Law.
4. The employer's liability for workers' compensation was fully insured by Missouri Association of Counties and administered by Gallagher Bassett Services, Inc.
5. The Missouri Division of Workers' Compensation has jurisdiction, and venue in Audrain County is proper.
6. A Claim for Compensation was timely filed in each case.
7. No temporary disability benefits have been paid to claimant.
8. In the September 2006 case (Inj. No. 06-134487), the employer/insurer did not provide any medical care.

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9. In the December 2006 case (Inj. No. 06-132821), the employer/insurer provided medical care in the amount of \$600.00.
10. No party indicated that notice is an issue.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Accident arising out of and in the course of employment.
2. Medical causation.
3. Nature and extent of permanent partial disability.
4. Compensation rate.
5. Non-payment of temporary total disability benefits.
6. Unpaid medical bills.
7. Future medical benefits.
8. Request for continuance/request to leave the record open.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence¹:

Exhibit A	Deposition of Dr. Thomas Musich.
Exhibit B	Medical records from Health Works/Audrain Medical Center.
Exhibit C	Medical records from Medical Imaging/Audrain Medical Center.
Exhibit D	Medical bills from Audrain Medical Center.
Exhibit E	Medical records and bill from Mid Missouri Anesthesiologists.
Exhibit F	Medical records from Columbia Orthopaedic Group.
Exhibit G	Medical bills from Columbia Orthopaedic Group.
Exhibit H	Medical records from Institute for Outpatient Surgery, LLC.
Exhibit I	Medical bills from Institute for Outpatient Surgery, LLC
Exhibit J	Medical records from Dr. H. Peter Ekern.
Exhibit K	Medical bill from Audrain Medical Center. ²

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1	Wage statement.
Exhibit 2	Statement of claimant. ³
Exhibit 3	Deposition of Jimmie Stanford.
Exhibit 4	Division of Workers' Compensation Records.
Exhibit 5	Medical records and letter from Orthopedic Associates, LLC.
Exhibit 6	Deposition of Dr. Michael Nogalski.

¹ All depositions were received subject to the objections contained therein.

² Exhibit K was received over the objections of the employer/insurer.

³ Exhibit 2 was admitted over the objections of claimant.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence.

FINDINGS OF FACT

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

1. Claimant was born on March 18, 1939; at the time of the hearing he was 72 years old. He currently lives in Laddonia, Missouri. Claimant completed the 8th grade but does not have a G.E.D.⁴
2. Throughout the years, claimant has worked as a truck driver, an electrician, and a heavy equipment operator.
3. Claimant began employment with the Audrain County Road District (the employer) in approximately 1988. He retired in November 2009. While working for the employer, claimant ran a motor grader. His typical day consisted of keeping the roads and ditches maintained and clearing the roads of ice, snow, and debris. Claimant typically worked from 7:00 a.m. until 3:30 p.m., five days per week. He testified that he made about \$1,985 per month.
4. On September 1, 2006, claimant was working to clear the roads of debris following a wind storm. Claimant testified that he was operating a chainsaw to remove a fallen tree when the chainsaw became stuck in a tree limb. He jerked on the chainsaw to try to dislodge it, causing pain in his right shoulder. Claimant is right handed.
5. Claimant testified that he did this in front of his supervisor, Glenn Higgenbotham, and a co-worker, Chad Isgrig. He testified that he told his supervisor that he was going to have to sit down because of his shoulder hurt. He noted that Mr. Isgrig may have seen him sitting down and may have heard him tell his supervisor that he hurt his shoulder. Claimant did finish his work day.
6. Claimant testified that a few days later he asked Mr. Higgenbotham if he had told the County Commissioners about his shoulder injury; he was told that Mr. Higgenbotham had not done so but would soon. Claimant testified that he later told one of the Commissioners about his upcoming surgery.
7. After the September 2006 injury, claimant testified that he went to his personal physician, Dr. Peter Ekern. On October 9, 2006, Dr. Ekern prescribed a Metrol dose pack for right shoulder pain. The doctor ordered x-rays of the right shoulder on October 27, 2010, and gave him a steroid injection in his shoulder. Claimant indicated that he felt that he

⁴ At trial, claimant indicated that he went to school until or through 10th grade. In his deposition, he indicated that he quit school after the 8th grade.

improved following the injection and so he did not seek further treatment until he had a fall from a road grader in December 2010.

8. On December 6, 2006, claimant was working at an equipment shed outside of Martinsburg. He was to obtain and operate a road grader. He put his lunch in the grader and went inside the shed. Claimant testified that there was some ice on the road and he decided that he would not take the grader out. He went back to the grader to retrieve his lunch, and while doing so, slipped and fell from the steps of the road grader. He landed on his left side. He drove from Martinsburg to Mexico, Missouri, where he immediately told one of the Commissioners about the accident.
9. After the December 2006 fall from the road grader, claimant again saw Dr. Ekern. The doctor's records indicate that claimant was sore on the left side over the 7th and 8th ribs. The x-rays taken at Audrain Medical Center showed that he had fractured the 7th and 8th ribs. Dr. Ekern prescribed Vicodin and recommended that claimant use ice.
10. In March 2007, claimant returned to Dr. Ekern, complaining of right shoulder problems. He was again prescribed a Medrol dose pack for the shoulder. Dr. Ekern diagnosed rotator cuff tendinitis. He followed up with Dr. Ekern on July 12, 2007. The medical records note that claimant was continuing to have problems with his right shoulder. He had no abduction and the infraspinatus was not working well.
11. The employer/insurer referred claimant to Dr. Michael Nogalski in August 2007; however, the employer/insurer refused to provide any additional treatment.
12. Ultimately, Dr. Ekern referred claimant to Dr. Pat Smith of the Columbia Orthopaedic Group. Dr. Smith performed right rotator cuff surgery on November 27, 2007. Dr. Smith's notes indicate that an arthroscopic surgery of the right shoulder was performed with the debridement of a partial biceps tear; claimant also had arthroscopic acromioplasty, distal clavicle excision, and an arthroscopic repair of the supraspinatus rotator cuff tear.
13. After the surgery, claimant underwent physical therapy at Health Works, a division of Audrain Medical Center.
14. Claimant testified that he was off work for about seven weeks after the shoulder surgery; he also testified that he used some sick leave and vacation time while he was off work. In his deposition he indicated that he used about two weeks of vacation time plus some sick leave time (amount not specified). According to Dr. Smith's records, however, claimant would have returned to work on or about January 28, 2008, which would be a period of about 8.86 weeks.
15. Claimant testified credibly about his ongoing medical complaints. He continues to have significant limitations of motion in his right shoulder and he is unable to extend his arm fully up over his head. Claimant has no overhead motion of the right shoulder and cannot reach behind his back. After claimant returned to work following the surgery, he had difficulty pulling up with his right arm when he climbed in and out of the road grader.

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He testified that it hurts to operate a chain saw, and that he has to rest more frequently now.

16. Claimant testified that he has pain in his shoulder almost all the time, even when he is resting. He noted that doing heavy lifting also causes shoulder pain, and that his arm is not as strong as it used to be.
17. As to his ribs, claimant testified that he sometimes get pain in his chest when he takes a deep breath or if he leans over and puts pressure on his ribs.
18. Claimant testified that he does not take pain medication as he does not like it; he indicated that he “was a different person” while he was on prescription pain medication.

Dr. Musich

19. On March 7, 2011, Dr. Thomas Musich testified by deposition on behalf of the claimant. In his report, Dr. Musich noted that claimant continued to suffer right shoulder pain at a level of 3 to 8 on a scale of 0 to 10. Dr. Musich noted that claimant stated that his right shoulder pain increased with any activity, especially with abduction, flexion, and rotation. Claimant also complained of weakness in the right shoulder girdle. The doctor noted claimant’s history that he had never suffered an injury to his right shoulder before the September 2006 work injury. As to the left side, Dr. Musich noted that claimant has pain with external pressure over the fracture sites as well as pain with deep breathing.
20. It was Dr. Musich’s opinion that claimant had developed adhesive capsulitis or a frozen shoulder. Dr. Musich opined that the work trauma on September 1, 2006, was the prevailing factor in the development of acute right shoulder pathology that ultimately resulted in surgical treatment after conservative measures failed. He rated claimant as having a 70% permanent partial disability (PPD) at the level of the right shoulder as a result of the work injury. The doctor rated claimant as having a 15% PPD of the body as a whole as a result of the left rib fractures. Dr. Musich’s testimony was credible.

Dr. Nogalski

21. On behalf of the employer/insurer, claimant saw Dr. Michael Nogalski in August 6, 2007 – about four months *before* the rotator cuff repair surgery. Dr. Nogalski did not examine claimant after his shoulder surgery in November 2007.
22. When the employer/insurer asked Dr. Nogalski to examine claimant, the claims adjuster apparently asked the doctor to address a December 15, 2006 injury.⁵ Dr. Nogalski was later asked to address questions about causation in reference to the September 1, 2006 injury. At that point he was provided some surgical records from the Columbia Orthopedic Group, along with records from Audrain Medical Center. Using this additional information, Dr. Nogalski provided a second report, dated April 11, 2009, in which he opined that the September 2006 fall was not the prevailing factor in causing

⁵ ER/INS Exh. 6, p. 19.

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claimant's current medical condition. He opined that there was a lack of documentation to support claimant's claim that he had a work-related injury to his shoulder in September 2006. He stated that it "is most reasonable to state that if he [claimant] did have an event that would have caused problems that it probably would have been directly identified by Mr. Stanford at the time of the event rather than much later and in retrospect, especially with respect to a distinct event or injury which would have caused a painful rotator cuff condition."⁶ In writing his second report, Dr. Nogalski was not provided information from the employer's internal investigation that showed that claimant's supervisor, Glen Higgenbothan, was present at the time of the accident and witnessed it, nor was he told of an interview with Chad Isgrig, a co-worker who witnessed the event with the chain saw.⁷

23. On cross examination, Dr. Nogalski agreed that if a work injury happened as claimant contends – claimant injured his right shoulder when he was using a chain saw, that the saw became stuck, that claimant jerked hard on the saw to dislodge it, and that he immediately felt a sharp pain – then the September 2007 incident could be the type of mechanism of injury that could cause a right shoulder rotator cuff tear.⁸

Medical bills

24. The evidence shows that claimant incurred the following bills for medical treatment for the right shoulder injury: Institute for Outpatient Surgery - \$29,614, Mid-Missouri Anesthesiologist, Inc.- \$ 1,044, Columbia Orthopaedic Group -\$ 7,041, Audrain Medical Center - \$ 2,555.87, Health Works Physical Therapy - \$ 4,075.49, for a total of \$44,330.36.
25. Claimant has made some payments on the bills, but the majority of the bills are still outstanding.

CONCLUSIONS OF LAW

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

The injury in this case occurred on September 1, 2006. Thus, the substantive changes that became effective in August 2005 apply to this case. The Workers' Compensation law is now to be strictly construed and the administrative law judge is to weigh the evidence impartially, without giving the benefit of a doubt to any party when weighing evidence and resolving factual conflicts.

Issue 1: Accident arising out of and in the course of employment

Issue 2: Medical causation

Issue 3: Nature and extent of permanent partial disability

⁶ ER/INS Exh. 6, attached 4/11/09 report.

⁷ ER/INS Exh. 6, pp. 19-22.

⁸ ER/INS Exh. 6, pp. 22-23.

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.¹⁰ Medical causation not within lay understanding or experience requires expert medical evidence.¹¹ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.¹²

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.¹³ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.¹⁴

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."¹⁵

An "injury" is defined to be "an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The "prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."¹⁶ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.¹⁷

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.¹⁸ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.¹⁹ A determination of the percentage of disability arising from a work-related injury

⁹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

¹⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

¹¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

¹² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

¹³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

¹⁴ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

¹⁵ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

¹⁶ Section 287.020.3(1).

¹⁷ Section 287.020.3(c).

¹⁸ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

¹⁹ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

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is to be made from the evidence as a whole.²⁰ It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.²¹

The fact finder is encumbered with determining the credibility of witnesses.²² It is free to disregard that testimony which it does not hold credible.²³

Claimant testified credibly that he injured his shoulder in a chain saw incident while working on September 1, 2006. Claimant continues to have significant limitations of motion in his right shoulder and he is unable to extend his arm fully up over his head. Claimant has no overhead motion of the right shoulder and cannot reach behind his back. He has pain in his shoulder almost all the time, even when he is resting. Heavy lifting also causes shoulder pain, and his right arm is not as strong as it used to be.

Dr. Musich testified credibly and convincingly that work was the prevailing factor in causing claimant's right shoulder injury and the need for the medical treatment claimant received for his shoulder. Dr. Nogalski's opinion lacks credibility in this case; Dr. Nogalski focused on issues surrounding causation of the shoulder injury but he was not provided pertinent information regarding the circumstances surrounding the September 2007 injury. In addition, Dr. Nogalski did not examine claimant after the November 2007 shoulder surgery. I find that claimant has proven by substantial and competent evidence that his right shoulder injury arose out of and in the course and scope of employment with the employer. I also find that work was the prevailing factor causing claimant's shoulder injury. Moreover, I find that claimant sustained a permanent partial disability of 45% of the right shoulder due to the September 2006 work injury.

Issue 4: Compensation rate

The parties agree that claimant earned \$1985 per month. Claimant contends that the resulting compensation rate for permanent partial and temporary total disability benefits is \$305.40.²⁴ The employer/insurer contends that the weekly compensation rate is \$305.38 for permanent partial and temporary total disability benefits. Thus, the parties are a mere two cents apart as to the weekly compensation rate.

I find that claimant's monthly salary was \$1985. I also find that that the average weekly wage was \$458.08, yielding a compensation rate of \$305.39 for permanent partial disability and temporary total disability benefits.²⁵

Issue 5: Temporary Total Disability

²⁰ *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

²¹ *Rana* at 626.

²² *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo. App. E.D. 2008).

²³ *Id.* at 908.

²⁴ In his brief, claimant also states that the average weekly wage (AWW) is \$438.09; as such an AWW would yield a lower compensation rate than that which he claims, it is likely that claimant meant to contend that the average weekly wage was \$458.08.

²⁵ \$1985/month x 12 months = \$23,820. \$23,820 ÷ 52 weeks = \$458.08 AWW. \$458.08 x 66 and 2/3 percent = \$305.39.

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that “the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made.” The term “total disability” is defined in Section 287.020.6, 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.” The purpose of temporary total disability is to cover the employee’s healing period, so the award should cover only the time before the employee can return to work.²⁶ Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of “maximum medical progress.”²⁷ Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.²⁸ This is reflected in the language that TTD benefits last only “during the continuance of such disability.”²⁹

At trial, claimant indicated that he was seeking seven weeks of temporary total disability benefits, covering the period beginning November 27, 2007. In his brief, he indicates that he seeks temporary total disability benefits for the period from November 27, 2007 (after his surgery) until January 28, 2008 (when he was released to return to work) – a period of approximately 8.86 weeks. Claimant testified in his deposition that although he did not receive any temporary total disability benefits, he did use some sick leave (an unspecified amount) and vacation time (about 2 weeks). I find I find that claimant has met his burden of proof that he is entitled to 7 weeks of temporary total disability benefits.

Issue 6: Past medical bills

Issue 7: Future medical bills

Subsection 1 of RSMo Section 287.140 states, in pertinent part, as follows:

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

Once an employer has received notice of the employee’s need for medical aid, the employer can waive its rights to select a health care provider by failing, refusing, or neglecting to provide the employee with necessary medical aid.³⁰ Courts have also said that once an

²⁶ *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).

²⁷ *Cooper* at 575.

²⁸ *Cooper* at 575; *Smith v. Tiger Coaches, Inc.*, 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

²⁹ Section 287.170.1, RSMo.

³⁰ *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816 (Mo.App 1995). See also *Shores v. General Motors Corp.*, 842 S.W.2d 929 (Mo.App. 1992).

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employer refused to provide or tender necessary medical aid, the injured employee need not lie helpless or in pain.³¹

If an employer denies the compensability of its employee's claim pursuant to the Missouri Workers' Compensation law, it therefore denies that it is liable for the provision of medical aid to the employee; under such circumstance, the employee may have the expense of the reasonable and necessary medical aid that the employee procures assessed against the employer if the employee's claim later proves to be compensable.³²

The employer/insurer refused to provide medical treatment for claimant's compensable September 2006 shoulder injury. Because of this, claimant was free to seek treatment on his own, and he did so. The surgery performed by Dr. Smith was reasonable and necessary to cure and relieve the effects of the injury. Although Dr. Nogalski did not believe the injury was work-related, he did agree that the treatment was reasonable for claimant's condition. Claimant testified that he received bills from Dr. Smith, the anesthesiologist, and from the physical therapy group, and the other providers, and that all the bills were for treatment from his work-related injury.

The employer/insurer argues that it should not be liable for the medical bills as 1) the right shoulder injury is not compensable, 2) the treatment was unauthorized, and 3) claimant failed to provide through medical expert testimony that the charges were fair and reasonable and that the charges were for treatment reasonably required to cure and relieves him from the effects of the work-related injury in question. Employer/insurer contends that the employee did not present any evidence that the charges were fair and reasonable and therefore did not meet his burden of proof.

Claimant has met his burden to provide that the right shoulder injury was compensable. The evidence also establishes that the treatment was reasonable required to cure and relieve him from the effects of the work-related injury. In *Martin v. Mid-America Farm Lines, Inc.*, the employer/insurer objected to bills on the ground that there was no evidence that the charges were fair and reasonable. The Missouri Supreme Court noted that the claimant in that case testified that her visits to the hospital and various doctors were the result of her work-related fall, and that the bills she received were the results of those visits. The court held that "We believe that when such testimony accompanies the bills, which the employee identifies as being related to and the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the commission to award compensation." The court further noted that the employer could challenge the reasonableness or fairness of those bills or may show that the medical expenses were not related to the injury in question. However, in the Martin case, the court noted that the employer made no showing that the bills were not reasonable.

During the trial and in his deposition, it was clear claimant was not the best historian. Nonetheless, I find that claimant testified honestly and to the best of his recollection. Although he did not always recall specific dates, specific names of providers, or dollar figures (such as his

³¹ *Stevens v. Crane Trucking, Inc.*, 446 S.W.2d 772 (Mo. 1969).

³² *Wiedower v. ACF Industries, Inc.*, 657 S.W.2d 71 (App. 1983).

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average weekly wage), his testimony is sufficient to find that the medical treatment was the result of claimant's September 2006 work injury and that the bills were the result of that treatment. The employer did not provide any evidence that the charges were not reasonable. I find that the claimant has met his burden on this issue. The employer/insurer is liable to claimant for the following medical bills:

Institute for Outpatient Surgery	\$29,614.00
Mid-Missouri Anesthesiologist, Inc.	\$ 1,044.00
Columbia Orthopaedic Group	\$ 7,041.00
Audrain Medical Center	\$ 2,555.87
Health Works Physical Therapy	<u>\$ 4,075.49</u>
Total:	<u>\$44,330.36</u>

Thus, the employer/insurer is ordered to pay claimant \$44,330.36 for past medical bills.

As for future medical case, the employee need only show that he is likely to need additional treatment "as may reasonably be required . . . to cure and relieve . . . the effects of the injury . . . that flow from the accident [or disease]." ³³ This has been interpreted to mean that an employee is entitled to compensation for care and treatment that gives comfort, i.e., relieves the employee's work-related injury, even though a cure or restoration to soundness is not possible, if the employee establishes a reasonable probability that he or she needs additional future medical care. ³⁴ "Probable" means founded on reason and experience that inclines the mind to believe but leaves room for doubt. ³⁵ Claimant need not show evidence of the specific nature of the treatment required, but only that treatment is going to be required. ³⁶

In this case, however, the record does not show that claimant needs any future medical care for the September 2006 work injury. Claimant's request for future medical treatment is denied.

Issue 8: Request for continuance/request to leave the record open

At 4:45 p.m. on Friday, July 15, 2011, the employer/insurer faxed to the Division of Workers' Compensation a request to cancel the hearing scheduled for Tuesday, July 19, 2011. Support for the request included, but was not limited to, the following: the employer/insurer was obtaining settlement authority from its client and believed that the matter could be settled and that a hearing was not necessary, and that additional discovery was necessary, in the form of a deposition of a witness.

The undersigned administrative law judge promptly held a conference call with the parties. During that call, counsel for the claimant objected to the request for the continuance.

³³ *Sullivan v. Masters and Jackson Paving*, 35 S.W.2d 879, 888 (Mo.App. 2001).

³⁴ *Rana v. Landstar TLC*, 46 S.W.3d 614 (Mo.App. W.D. 2001); *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418 (Mo.App. W.D. 2000).

³⁵ *Rana* at 622, citing *Sifferman v. Sears, Roebuck & Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995).

³⁶ *Aldredge v. Southern Missouri Gas*, 131 S.W. 3rd 786 at 833 (Mo. App. D. D. 2004).

Employee: Jimmie Stanford

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Claimant's counsel also stated that at that late date, claimant was no longer interested in settling for his previous demand and wished to proceed to trial. It was noted that the request for a hearing was received by the Division on April 7, 2011, and that notices of the hearing were mailed on or about April 13, 2011. The employer/insurer did not request a continuance until right before the close of business on the Friday preceding the Tuesday trial. The employer/insurer was unable to adequately justify the delay in scheduling the August deposition. The administrative law judge denied the request for a continuance, and also denied the subsequent request to leave the record open for 30 days for receipt of the deposition to be held in August 2011.

At the July 19, 2011 hearing, the employer/insurer renewed its request for a continuance or in the alternative, to leave the record open. The claimant objected to employer/insurer's requests. The administrative law judge declined to grant a continuance of the trial and declined to leave the record open for a late-filed exhibit (the deposition to be taken in August 2012 after the trial). The administrative law judge finds that it was within her discretion to deny the request for a continuance and to deny the request to leave the record open at trial for the submission of a deposition that had not yet taken place.

Summary

I find that claimant sustained a work injury on September 1, 2006, and that the injury arose out of and in the course of his employment with the employer. I also find that his injury and need for treatment was medically causally related to the work injury. I find that he sustained a permanent partial disability of 45% of the right shoulder. I find that the compensation rate for permanent partial and temporary total disability benefits is \$305.39. Thus, claimant is entitled to permanent partial disability benefits of \$31,882.72 (232 x 45% x \$305.39). In addition, the employer/insurer is liable for \$2,137.73 for seven weeks of temporary total disability (7 x \$305.39). Finally, the employer/insurer owes \$44,330.36 for past due medical expenses. The request for future medical treatment is denied.

Any pending objections not expressly ruled on in this award are overruled.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the claimant's attorney, Mark Moreland, for necessary legal services rendered to the claimant.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation