

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

Injury No.: 03-136275

Employee: Billy B. Williams
Employer: City of Kansas City, Missouri
Insurer: Self-Insured
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 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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 28, 2009. The award and decision of Administrative Law Judge Mark S. Siedlik, issued December 28, 2009, 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 18th day of May 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: Billy B. Williams Injury No: 03-136275
Dependents: N/A
Employer: City of Kansas City, Missouri
Additional Party: Treasurer of the State of Missouri as the Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: October 30, 2009

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: December 26, 2003
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was attempting to open a door that was stuck and injured his neck, left shoulder, left arm and mental and emotional psyche.
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: Neck, left shoulder, left arm and mental and emotional psyche.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: None.

16. Value necessary medical aid paid to date by employer/insurer? \$9,683.21.
17. Value necessary medical aid not furnished by employer/insurer? N/A
18. Employee's average weekly wages: \$1,200.00 per week.
19. Weekly compensation rate: \$662.55/347.05.
20. Method wages computation: Stipulated
21. Amount of compensation payable: The Employer is liable for Permanent Total Disability benefits in the amount of \$662.55 per week beginning October 29, 2004.
22. Second Injury Fund liability: None.
23. Future requirements awarded: Medical treatment to cure and relieve the Employee from the effects of the work injury of December 26, 2003 to his mental and emotional psyche.

Said payments to begin as of date of this award and to be payable and be subject to modification and review as provided by law.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Billy B. Williams

Injury No: 03-136275

Dependents: N/A

Employer: City of Kansas City, Missouri

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

Insurer: Self-Insured

Hearing Date: October 30, 2009

On October 30, 2009, the employee, the employer and the Second Injury Fund appeared for a final hearing. The employee, Billy B. Williams, appeared in person and with counsel, Frank D. Eppright. The employer, City of Kansas City, Missouri, appeared through counsel, Anthony Bush. The Second Injury Fund was represented by Benita Seliga.

STIPULATIONS

The parties stipulated that:

1. That on or about December 26, 2003 (the injury date), the City of Kansas City, Missouri (the employer) was an employer operating under and subject to Missouri's Workers' Compensation law with the right to self-insure.
2. That Billy B. Williams (the employee) was the employer's employee, working subject to the workers compensation law of the State of Missouri on December 26, 2003.
3. That the employee's average weekly wage on December 26, 2003 was \$1,200.00 per week with compensation rates of \$662.55/\$347.05. The employer has paid \$9,683.21 in medical expenses and no temporary total disability benefits.
4. That Mr. Williams filed his claim within the time allowed by law and gave proper notice.

The parties requested the Division to determine:

1. If employee was injured in the course and scope of his employment?
2. What, if any, is the nature and extent of disability sustained by the employee as a result of the work injury of December 26, 2003?
3. Whether the employee is entitled to future medical treatment as a result of his work-related injury?

FINDINGS

Billy B. Williams testified on his own behalf. In addition, Mr. Williams presented the following exhibits, all of which were admitted into evidence without objection:

- Exhibit A - 10/21/06 Report, Dr. P. Brent Koprivica (#1-17),
- Exhibit B - 09/03/08 Addendum Report of Dr. P. Brent Koprivica (#1-2)
- Exhibit C - 02/22/09 Addendum Report of Dr. P. Brent Koprivica (#1-6)
- Exhibit D - 10/23/07 Report of Dr. Allan Schmidt, Ph.D. (#1-6)
- Exhibit E - Deposition of Mary Titterington taken 08/11/09 along with Deposition Exhibits. 1-3 (#1-1173)
- Exhibit F - 07/15/04 e-mail from Billy Williams to Bruce Williams
- Exhibit G - 07/26/04 e-mail from Billy Williams to Bruce Williams
- Exhibit H - 07/27/04 e-mail from Bruce Williams to Billy Williams
- Exhibit I - 07/27/04 e-mail from Bruce Williams to Billy Williams
- Exhibit J - 07/28/04 e-mail from Billy Williams to Bruce Williams
- Exhibit K - 07/28/04 e-mail from Brandi Manning to Billy Williams
- Exhibit L - 08/05/04 e-mail from Billy Williams to Bruce Williams
- Exhibit M - Current Complaints

The employer presented no live evidence, however, it offered the following exhibits which were admitted into evidence without objection on the part of the employee:

- Exhibit 1 - Dr. Pratt Report & *Curriculum Vitae*
- Exhibit 2 - 9-21-09 IME of Dr. Hughes
- Exhibit 3 - 3-16-05 Report of Dr. Tung
- Exhibit 4 - 1-30-04 Report of Dr. Stepp
- Exhibit 5 - Work Ability Report
- Exhibit 6 - MRI Report

The Second Injury Fund objected to the admissibility of Exhibits 1 & 2 and its objection was sustained.

Billy B. Williams is a 61 year old gentleman who worked for the City of Kansas City, Missouri Water Department for 28 years until October 28, 2004 when he took a retirement from the City. The position from which he retired after working his way up from an entry level position was that of Area Superintendent of the Water Department.

On December 26, 2003 the employee sustained an injury to his neck and left shoulder while in the scope and course of his employment as an Area Superintendent for the City's Water Department. The employee was attempting to open a metal door that was stuck and in so doing injured his neck and left shoulder. Thereafter, he felt pain in his neck and left shoulder. After reporting the accident to his supervisor, he was sent to Emergency Health Services (EHS) where he was given physical therapy, Percocet and sent to Baptist Lutheran Medical Center for MRIs of the neck and left shoulder. The MRI of employee's neck revealed a central hard disk protrusion at C3-4 which effaced the ventral aspect of the thecal sac, a central hard disc protrusion at C4-5 with mild deformity of the spinal cord and large disc protrusion at C6-7 involving the left paracentral region extending into the neural foramina with nerve root impingement. The rest of the MRI was unremarkable. The left shoulder MRI revealed changes consistent with tendinopathy or partial tear within the supraspinatus tendon but no evidence of a full thickness tear with AC joint hypertrophy with impingement on the underlying tendon.

After the MRIs were taken, the employee was referred by the employer to Dr. Timothy Stepp, a neurosurgeon, on January 30, 2004. Dr. Stepp noted the physical therapy provided by EHS had not helped the employee's neck and left shoulder pain. He also noted the employee had a non work-related cyst on the base of his neck. Dr. Stepp's report notes the employee was having a left-sided C-7 radiculopathy which would be difficult to treat because of the cyst as well as the Coumadin (a blood thinner) employee was taking for a heart problem. Dr. Stepp encouraged the employee to continue his physical therapy.

The employer then transferred the employee's care to Dr. Terrence Pratt who first saw the employee on February 11, 2004. Dr. Pratt noted that Dr. Stepp had declined to do epidural injections because of the Coumadin the employee was taking for his heart condition. Dr. Pratt then prescribed a trial of therapeutic intervention including traction and active exercise; the Percocet was continued as well.

Dr. Pratt again saw the Employee on March 11, 2004. He noted the employee was not a good candidate for epidurals because of the Coumadin he was taking for a heart condition. Dr. Pratt recommended a referral to a pain management doctor at that time.

On May 6, 2004, the employee's care was transferred by the employer to Dr. Dan Hancock, a pain management specialist. He noted the employee was having severe pain in his neck and left shoulder, radiating into his left arm. Dr. Hancock did not want to do epidural

steroid injections because of the Coumadin. Instead Dr. Hancock prescribed Oxycontin, Oxycodone and Neurontin.

Dr. Hancock saw the employee on June 11, 2004 and noted that because he was taking Coumadin the only alternative, as far as treatment, was to manage the employee's pain pharmacologically.

On June 23, 2004 the employee had the non work-related cyst on his neck removed; and, its cost was paid for by his private insurance. The employee was seen again by Dr. Pratt on July 23, 2004 who referred him back to Dr. Hancock and suggested he had no further need to see him.

On July 15, 2004 the employee sent Bruce Williams, who was in charge of the employee's workers compensation case for the employer, the following e-mail:

Bruce, I spoke with Brandi Manning, she is sitting as the 'nurse', concerning my medical case that you are handling. Ms. Manning informed me that I have missed several scheduled doctor appointments. I have not missed any scheduled doctor appointments to the best of my knowledge. Ms. Manning also informed me that on one of the 'missed' appointments I was to receive a home therapy device. I recently received a call from Dr. Pratt's nurse who scheduled me for an appointment July 23, at 2:00pm. I will be there on that date. In addition, I spoke with Ms. Florene Bellows and made her aware of this situation. I am going to bring my file to Ms. Manning so that it may be updated. In the future I would like to keep all correspondence with you on Lotus Notes.
(signed) Billy Williams Area Superintendent.

This was followed by another e-mail from the employee to Bruce Williams on July 26, 2004 regarding "Pain and Suffering."

Good morning, Mr. (Bruce) Williams: This is just a synopsis of the events that have transpired since our last correspondence. You cancelled my appointment with Dr. Hancock, at the Pain Management Center. Then you set up another appointment for me with Dr. Pratt for 2:00 P.M. on 7/23/04. I kept the appointment and Dr. Pratt examined me. Dr. Pratt asked me during the examination, 'How was my pain?' I replied, 'there was no change in the pain as long as I take the medication that Dr. Hancock prescribed for me.' I continued, 'I am able to work pain free with no sleep depredation (sic)'. Dr. Pratt was puzzled as to the reason that an appointment was made for me to see him. Dr. Pratt then informed me that he wanted me to return to Dr. Hancock's care. I went to Dr. Hancock's office to make an appointment. The nurse took my information. The nurse then told me that their office would contact my case handler and inform me of the results. The ball is in your court. I eagerly await your reply.
(signed) Billy Williams Area Superintendent.

The next day, July 27, 2004, Bruce Williams, also by e-mail, responded to the employee:

Subject: pain and suffering. Mr. (Billy) Williams, Workers' Comp is not a drug maintenance program. We are awaiting the medical report of Dr. Pratt from you're (sic) 07/23/04 evaluation! Once this report is received, we will proceed to outline any further treatment program at that time."

By this time, the employee testified, he began worrying and became anxious about the reliability of his doctor's appointments and the availability of the narcotic medications the authorized treating doctors had prescribed for him. This is reflected in the employee's e-mail to Bruce Williams dated July 28, 2004:

Mr. (Bruce) Williams, Subject pain and suffering. I sincerely hope that you receive Dr. Pratt's evaluation as of yesterday. I have been out of pain medication since last Friday 7/23/04. This setback has resulted in the return of severe pain and continued sleep depredation (sic). This has impaired my ability to function on or off the job. I plan to contact Workman's Compensation as well as the Attorney General's office for the state of Missouri. Coincidentally, the Attorney General recently wrote me a letter inquiring about the medical treatment that I am receiving and were my medical needs being met. You can believe that I will send the Attorney General a precise account of your performance regarding this matter. (signed) Billy Williams Area Superintendent.

As is reflected in these e-mails and is buttressed by the employee's testimony, he was becoming increasingly desperate about the availability of the narcotic medications the employer's doctors prescribed for him. He needed the prescribed medications because, due to his heart condition, the authorized physicians, Dr. Stepp, Dr. Hancock and Dr. Pratt, all felt he was not a surgical candidate; and, instead prescribed the Oxycontin and Oxycodone to pharmacologically treat his pain. The next e-mail is from Brandi Manning who was with the Human Resources Water Services of the City dated July 28, 2004 to the employee:

Good afternoon, Billy. I just wanted to update you quickly regarding the status of your worker comp claim. I spoke with Bruce Williams on the phone this morning, and he stated that he had authorized another month of medication for you. At this point, Bruce is still working with Dr. Pratt and your other physicians to outline a progressive treatment plan for your injury. If you have any question, please do not hesitate to contact me. Thank you!
(signed) Brandi Manning Human Resources-Water Services.

The employee testified this e-mail caused him additional anxiety and stress because it seemed as if his narcotic medication was only going to be rationed out a month at a time and that each month would be problematic as to whether he would get the medication or not. Additionally the e-mail represented that Bruce Williams was working with Dr. Pratt for a treatment plan. This is contrary to Dr. Pratt's report of July 23, 2004 which had referred the employee's treatment to Dr. Hancock. On August 4, 2004 the employee was finally seen by Dr. Hancock who continued him on Oxycontin and Oxycodone.

On August 5, 2004 the employee again e-mailed Bruce Williams and stated:

Subject pain and suffering: Good morning, Bruce: Here is an update on my doctor appointment with Dr. Hancock, Wednesday 8/4/04. During my examination Dr. Hancock repeated Dr. Pratt's diagnosis that surgery or injections are 'out of the question'. Dr. Pratt stated that he had informed you of this fact. Dr. Pratt also said that he explained that I was sent to Pain Management for treatment because of my heart condition. Dr. Hancock wrote me a prescription for pain medication and rescheduled my next appointment for 9/1/04 at 11:00a.m. The prescription is for a 30 day supply. I wanted to let you know this well in advance because I do not want to run out of my pain medication again. Previously, you allowed a lapse in time between my medication expiring and my new prescription getting filled. I was completely out of medication and in severe pain for two weeks because you cancelled a scheduled doctor's appointment. In my opinion, and the doctor's opinion, that was negligent. Your actions created so much unnecessary turmoil that my medical needs went unattended. If you foresee any reason why I will be denied my necessary medical attention let me know in advance so that I can inform the doctors.

(signed) Billy Williams Area Superintendent.

This e-mail reflects the employee's escalating anxiety about the reliability of his prescriptions and the fact that he had to go two weeks without the medications and was in severe pain during that time because the employer had cancelled a scheduled doctor's appointment. The employee further testified that Dr. Hancock had told him that in his opinion this amounted to negligence on the employer's part. The e-mail further reflects that the employee was now in turmoil because his medical needs had been left unattended by his employer.

On September 15, 2004 the employee again saw Dr. Hancock who renewed his narcotic medications, Oxycontin and Oxycodone. During this time the employee was also seeing Edward Wortham, his family doctor. Dr. Wortham's notes of October 20, 2004 reflect the employee's problems in being able to focus and his memory problems. It was further noted that the employee was on Oxycontin and Oxycodone for chronic pain in his neck and shoulders. Dr. Wortham's notes indicate the employee was under considerable stress because of his workers' compensation case. Dr. Wortham made a diagnosis of depression and prescribed Zoloft, an anti-depressant. The employee testified that because of the uncertainty of the supply of narcotic medication he became depressed and anxious. This was manifested by his admission to Research Psychiatric Center from October 31 to November 2, 2004.

Mr. Williams was admitted to the Research Hospital Adult Psychiatric Hospital on October 31, 2004. The Research records indicate that the employee was hospitalized for depressive symptoms, anxiety and possible narcotic withdrawal. According to the records and the employee's testimony, he had been taking Oxycontin and had discontinued it suddenly and had suffered withdrawal.

He received group psychotherapies and was given Lexapro. His diagnoses were that of major depression, single episode, moderate without psychosis. It was noted that his GAF at admission was 35 and at discharge (11-2-04) 55. He was continued on his prior medications of Coumadin, Oxycontin and Oxycodone.

The psychiatric evaluation at Research Psychiatric Center dated October 31, 2004 by Dr. Steven D. Segraves notes that the employee had many stressors at work and that he had chronic pain and had become frustrated with taking the Oxycontin and had discontinued it and had developed classic symptoms of narcotic withdrawal. It is further noted that Mr. Williams was having problems concentrating and was having memory disturbance and he acknowledged dysphoria (depression and anxiety). The records also indicate the employee felt hopeless at times and had developed anxiety.

A consultation note from Research Psychiatric Center by Dr. Joy Cuezze dated November 1, 2004 reports that the employee had severe behavioral changes over the past 11 to 2 months. The employee, it was reported, attributed those to stressors at the job as well as financial stressors.

After he was discharged from Research Psychiatric Hospital, the employee reports that he became more depressed and confused and again stopped taking all of his medications; this time Coumadin as well. On December 1, 2004 he was admitted into Baptist-Lutheran Medical Center for a stroke. He was admitted with complaints of aphasia (impaired speech) and right-sided hemiparesis (weakness on the right side of the body). It was recorded that the employee had been off his medication for the last two weeks due to depression and feeling "drugged on the medicine". The employee was placed on a heparin drip and subsequently his Coumadin was restarted. He was prescribed physical therapy for his right-sided parasthesia and a pacemaker was installed to help his atrial fibrillation. He was released on December 8, 2004 with instructions to continue to take his Coumadin, Verapamil, Lavoxin and to follow up with his family doctor.

After his hospitalization for the stroke, the employee followed up with a new physician, Dr. Michael Dahl, on January 5, 2005. Dr. Dahl's records indicate the employee's depression caused him to stop taking his Coumadin which led to his hospitalization for the stroke.

The employee saw Terrie Price, Ph.D. for a neuropsychological evaluation on June 30, 2005 and on August 4, 2005.

The employee was also seen in follow-up by Dr. Brent Menninger from July 7, 2005 to August 19, 2005. Dr. Menninger gave the employee Trazadone and Lorazepam for his depression and noted the employee was extremely depressed and that he had memory loss and could not remember people he had worked with. Dr. Menninger's notes reflect the employee said his problems stemmed from the narcotic medication he had been taking.

In direct testimony the employee said he was having the following problems with his neck:

- (1) Pain coming down his neck and into his back that radiates to the left;
- (2) Neck pain is a stabbing pain and the left arm pain is an aching pain;
- (3) The neck pain is there all the time;
- (4) He has trouble sleeping due to the neck pain;
- (4) He has trouble sitting, standing, walking, getting up and down and laying down;
- (5) He has trouble lifting because of his neck pain;
- (6) He has trouble dressing himself;

- (7) He has trouble cooking;
- (8) He has trouble driving because he cannot turn his neck;
- (9) He has decreased range of motion of his neck;
- (10) Because of the pain in his neck, he has trouble doing household chores and has to have help;
- (11) He cannot do yard work.

Mr. Williams reported the following problems with his left arm:

- (1) An aching pain on a daily basis;
- (2) Trouble picking up things because of little grip strength;
- (3) He has trouble sleeping;
- (4) He has trouble lifting;
- (5) He has trouble dressing himself and cooking;
- (6) He has trouble driving because the seatbelt causes pain and loss of motion;
- (7) He has decreased range of motion of his left arm;
- (8) He has trouble doing household chores and yard work.

Lastly, Mr. Williams complained of the following mental and emotional problems he relates to his work related accident:

- (1) He locks himself in his house;
- (2) He has weird suicidal thoughts;
- (3) He is sad because he has to live with the pain;
- (4) He closes all the shades in his house and stays in one room;
- (5) He cannot go to the store and does not like to be around people;
- (6) He is fearful of people;
- (7) He has significant memory loss.

The employee testified that even though he had been diagnosed with cardiac arrhythmia before December 26, 2003, the condition had not caused him to miss time from work nor had it caused him to modify his work place activities in any way. Additionally, the employee stated that even though he had been treated twice for anxiety or depression before December 26, 2003 because of the death of his sister and father, the depression or anxiety had been transient in nature and had not caused him any lasting depression or anxiety nor had it caused him to miss time from work or affected his work activities before December 26, 2003.

The employee was seen by Dr. P. Brent Koprivica on October 21, 2006. Dr. Koprivica issued a report with several addenda. He opined that because of the employee's work related injury of December 26, 2003, the employee sustained permanent injury to his cervical spine with the development of an acute disk herniation at the C6-7 level to the left with resultant left C7 radiculopathy. Dr. Koprivica further stated the injury of December 26, 2003 was the substantial and prevailing factor in the permanent disability associated with his chronic cervical pain as well as chronic left C7 radiculopathy associated with the disk herniation. It was Dr. Koprivica's opinion that the chronic pain treatment that the employee underwent was a substantial factor contributing to the development of the major depression in October of 2004 which led to the employee leaving work. It was also Dr. Koprivica's opinion that the stresses from the work place

in terms of the issue of providing ongoing chronic pain management were contributing factors to the employee's major depression. Additionally, Dr. Koprivica stated the issues regarding depression led to the employee's discontinuation of his use of Coumadin which led to the development of the cerebrovascular incident (stroke). Dr. Koprivica further stated that the discontinuation of the Coumadin in this setting (an individual with chronic atrial fibrillation) led to the stroke. It was his opinion that employee's depression was the result of the events surrounding the work place injury and that the depression led to the employee's discontinuation of the Coumadin. Dr. Koprivica opined that if the effects of the stroke were taken into account, the employee was permanently totally disabled as to the December 26, 2003 injury; if not, the employee had a rating of 25% to the cervical area in isolation.

The employee was seen by psychologist Allan Schmidt Ph.D on October 23, 2007 at the request of his attorney. Dr. Schmidt took a history of the employee, performed tests, reviewed medical records provided to him and opined that because of the employee's work related injury of December 26, 2003 and the chronic pain he experienced along with the physical limitations, the employee developed anxiety and depression which caused him to decide to discontinue his Coumadin which resulted in his cardiovascular accident (stroke). Dr. Schmidt recommended additional counseling and psychiatric medication for the employee and opined that he would be unable to successfully return to the workplace and obtain a full-time job in the competitive job market based on his psychological condition alone. Dr. Schmidt gave the employee a 55% permanent partial disability rating as a result of the psychological injury from the December 26, 2003 injury. Dr. Schmidt also stated the employee had no pre-existing psychological disability.

Mary Titterington, a vocational expert, testified the employee was unemployable both from a physical standpoint from the effects of his neck injury, his stroke and his mental and emotional disabilities.

The employer submitted Dr. Pratt's report of October 4, 2004. In that report Dr. Pratt gave a rating of 10% permanent partial disability to the body as a whole based on the problems the employee was having with his neck when Dr. Pratt last saw him. Dr. Pratt's report was based on his evaluation of the employee before employee's psychiatric hospitalization at Research Hospital. Additionally, Dr. Pratt's evaluation occurred prior to employee's hospitalization at Baptist Hospital as a result of the stroke he suffered. Dr. Pratt had no opinion on these two hospitalizations or on whether they were related to the employee's employment. The only evidence the employer has regarding causation of the employee's hospitalization for this psychiatric condition and his stroke was from Dr. Patrick Hughes. Dr. Hughes did not have benefit of Research Psychiatric Center's records for employee's October 20, 2004 hospitalization. He also did not have the benefit of being able to review records from Dr. Pratt, Dr. Sherman Cole, Dr. Michael Stahl and Dr. Edward Wortham. Dr. Hughes opined that pain could not cause depression; however, he did admit the employee had significant depression and needed treatment.

Under *State of Missouri ex rel. Helen Carter v. City of Independence, Missouri*, 272 S.W.3d 371 (Mo.App. 2008), the employer could have had employee seen by a vocational expert of its choice, however, employer chose not to do so.

The Second Injury Fund put on no evidence.

RULINGS

The first issue to be resolved is whether employee was injured in the course and scope of his employment.

I find that he was. The evidence is replete with mention of the employee's injury of December 26, 2003. Further the employee testified he was injured on that date and there is no contrary evidence otherwise.

The second issue to be resolved is the nature and extent of disability and whether the conditions of which the employee complains are work-related or not.

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). The quantum of proof is reasonable probability. *Thorsen v. Sachs Elect. Co.*, 52 S.W. 3d 611 at 620 (Mo.App. W.D. 2001); *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of S. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198.

Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert Testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "medical causation of injuries which are not within 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." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991). Compensation is appropriate as long as the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mol. App. 2004).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelly v. Banta & Stude Constr. Co., Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 71 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith v. Donco Const.*, 182 S.W. 3d 693, at 701 (Mo.App. 1986); *Bowers v. Hiland Dairy Co.*, 132 S.W. 3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause and extent of

disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993); *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W. 2d 515, 516 (Mo.App. 1993). "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine. *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App. 1993). Credibility means the capacity for being believed or credited. *Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W. 2d 618, 626 (Mo.App. 1993)." *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 855 (Mo.App. 1996).

Chatmon v. St. Charles County Ambulance District, 55 S.W. 3d 451 (Mo. App. 2001), outlines the basis for permanent total disability. Total disability means an inability to return to any employment and not merely an inability to return to the employment in which the employee was engaged at the time of the accident. The test for permanent total disability is a workers' ability to compete in the open labor market and that it measures the worker's potential for returning to employment. *Sutton v. V.J. Cement Contracting Company*, 37 S.W. 3d 803, 811 (Mo. App. 2000). Therefore, the critical question is whether any employer in the usual course of employment would reasonably be expected to hire this employee in his or her present physical condition. *Reese v. Gary and Roger Link, Inc.*, 5 S.W. 3d 522, 526 (Mo. App. 1999)."

This case was filed before the 2005 changes in the compensation act. However, under Sec. 287.143 RSMo. (pursuant to *State of Missouri ex rel Helen Carter, supra*), the employer could have had its own vocational expert examine employee. But, it did not avail itself of this option.

The employee's vocational expert, Mary Titterington, interviewed and tested the employee and reviewed the medical records. Ms. Titterington found employee to be unemployable in the open labor market. I find persuasive Dr. Koprivica's, Dr. Schmidt's and Ms. Titterington's opinions that employee is not employable in the open labor market and that he is permanently and totally disabled as to the employee.

The third issue to be resolved is whether employee is entitled to future medical treatment as a result of his December 26, 2003 work-related injury.

Employee requests his future mental and psychological care as it relates to this accident be left open. An award of future medical benefits is appropriate if the need is demonstrated by reasonable certainty. *Landers v. Chrysler Corporation*, 963 S.W.2d 275, 283 (Mo.App. E.D. 1997). Both employer's and employee's experts support an award to leave future mental and psychological care open. While employer's expert does not believe the necessity for care is work-related, employee's expert does so find and so do I. Dr. Schmidt, employee's psychologist, opined that the employee should continue with psychiatric consultation to review current medication and also be referred for counseling to assist him in developing a more adaptive method for dealing with his cognitive and physical limitations and his pain. Dr. Schmidt also

Employee: Billy B. Williams

Injury No: 03-136275

recommended weekly counseling for twelve (12) months and psychiatric consultation every other month for the same period.

Based on all the evidence presented, the employer is liable to the employee for permanent total disability benefits and future medical and psychological treatment as a result of the December 26, 2003 accident. The employer is liable for permanent total benefits from the last day the employee worked which was October 31, 2004 in the amount of \$662.55 per week; and thereafter, for the employee's lifetime.

This Award is subject to a 25% lien for services rendered by Attorney Frank D. Eppright.

It is so ordered.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this ____ day of _____, 2009, by:

Naomi Pearson
Division of Workers' Compensation