

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

Injury No.: 08-123324

Employee: Milton Young
Employer: Boone Electric Cooperative
Insurer: Missouri Electric Cooperative Insurance Plan
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record, we find that the award of the administrative law judge allowing compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge with this supplemental opinion.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an accident or occupational disease arising out of and in the course of his employment; (2) whether the accident or occupational disease was the prevailing factor in the cause of any or all of the injuries and/or conditions that may be alleged in the evidence; (3) employer's liability, if any, for permanent partial disability benefits; and (4) Second Injury Fund liability, if any, for permanent partial disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained an accident arising out of and in the course of his employment on January 4, 2008; (2) employee sustained a left knee sprain arising out of and in the course of his employment on January 4, 2008; (3) employee's accident was not the prevailing factor in the cause of chondromalacia found by Dr. Quinn in employee's left knee; (4) the April 29, 2008, surgery was reasonably required to cure and relieve employee from the effects of the work injury; (5) employee sustained a 15% permanent partial disability of the left knee, and employer is liable for \$9,336.96 in permanent partial disability benefits; and (6) the Second Injury Fund has no liability for permanent partial disability benefits.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) because employee did not suffer an unexpected traumatic event or unusual strain as defined in § 287.020 RSMo; (2) in relying upon *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010); (3) in declining to credit employer's experts on the issue of medical causation; (4) in relying on *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011); and (5) in failing to apportion non-compensable preexisting disability as against compensable work-related disability.

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For the reasons explained below, we affirm the award of the administrative law judge with this supplemental opinion.

Discussion

Accident

In its Application for Review, employer challenged the administrative law judge's conclusion that employee suffered an "accident," defined in § 287.020.2 RSMo, as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

The administrative law judge appears to have credited employee's testimony as to what occurred on January 4, 2008. We agree that employee is credible. We find that employee was walking to his work truck on January 4, 2008, to get materials for the job when he stepped on a frozen dirt clod and his left knee buckled and popped, causing him to fall down. We find that other members of employee's crew helped him to his feet, at which time employee experienced another pop in his left knee.

We are convinced the circumstances of employee's fall on January 4, 2008, constitute an "unexpected traumatic event," or an "unusual strain." The event was likewise "identifiable by time and place of occurrence," and employee experienced "objective symptoms of an injury." We conclude, therefore, that employee suffered an accident.

Medical causation

The administrative law judge concluded that employee's accident is the prevailing factor causing employee to suffer a left knee sprain, but did not indicate which expert he credited to reach such a conclusion. Section 287.020.3(1) RSMo sets forth the statutory test for medical causation, and provides, in relevant part, as follows:

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.

The parties presented conflicting expert medical testimony on the question of medical causation. Employer presents Dr. Szewczyk, who opined that employee suffered a sprain but that the accident didn't cause any of the degeneration found in employee's left knee, or any ongoing disability. Dr. Szewczyk reasoned that because Dr. Quinn didn't find a meniscal injury during the surgery he performed on employee's left knee, employee didn't suffer any internal derangement or pathology to his left knee in the January 2008 fall.

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Employer also presents Dr. Herting, who opined that the accident was not the prevailing factor causing employee to suffer chondromalacia in his left knee. Dr. Herting did, however, opine that the accident caused employee to suffer a sprain of the anterior cruciate ligament, and that the accident caused the preexisting degenerative condition of his knee to become symptomatic. We note that Dr. Herting seemed to stumble over the meaning of “triggering” for purposes of the Missouri Workers’ Compensation Law, and then changed his answer on that topic after generous prompting from employer’s counsel.

Employee presents Dr. Volarich, who opined that the accident was the prevailing factor causing employee to suffer chondral lesions in the form of some loose cartilage on the patellofemoral joint. Dr. Volarich agreed that the chondromalacia of the tibial plateau was preexisting, but explained that the twisting mechanism of the accident suffered by employee is a classic cause of chondral injury to the patellofemoral joint. Dr. Volarich opined that employee suffered a 35% permanent partial disability of the left knee as a result of the accident.

In concluding that the accident was the prevailing factor in causing employee to suffer a sprain but not chondromalacia, it appears that the administrative law judge credited employer’s experts Drs. Szewczyk and Herting. But in concluding that employee sustained permanent partial disability as a result of the accident, the administrative law judge also appears to have partially credited Dr. Volarich’s opinion. However, we can only speculate, as the administrative law judge did not render any credibility findings. In a case such as this, with divergent opinions on the issue of medical causation, explicit credibility determinations are needed to resolve the conflicting evidence, and to make clear that the fact-finder has not improperly substituted his or her own lay opinion for that of the medical experts. See *Corp. v. Joplin Cement Co.*, 337 S.W.2d 252, 258 (Mo. 1960).

After careful consideration, we find most credible Dr. Volarich’s opinion. Dr. Szewczyk seemed to be more focused on the fact Dr. Quinn didn’t find the expected meniscal injury, and does not appear to have considered the possibility that the accident caused the preexisting degenerative condition in employee’s knee to become symptomatic. Meanwhile, Dr. Herting seemed to betray a certain level of bias when he had to be directed toward offering an opinion on “triggering” that would favor the employer. In our view, only Dr. Volarich’s opinion provides a reasonable and credible explanation for why employee’s accident caused the ongoing pain and discomfort in his knee.

We conclude that the accident was the prevailing factor causing employee to suffer the resulting medical condition of a left knee sprain and chondral injury in the form of loose cartilage on the patellofemoral joint, and associated disability.

Injury arising out of and in the course of employment

Employer appeals the administrative law judge’s finding that employee sustained an injury arising out of and in the course of his employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

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

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

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

We have already concluded that the accident on January 4, 2008, was the prevailing factor causing employee to suffer the injury for which he seeks compensation; it follows that the requirements of subsection (a) have been satisfied.

Turning to subsection (b), we note that the administrative law judge failed to apply the requisite “causal connection” test as set forth in *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504 (Mo. 2012). In *Johme*, the Court held that an employee who fell while making coffee at work did not sustain injuries that were compensable under the Missouri Workers’ Compensation Law. *Id.* at 512. The *Johme* employee fell in her office kitchen after making a new pot of coffee, per workplace custom, to replace a pot of coffee from which she had taken the last cup. *Id.* at 506. The *Johme* court found that the risk or hazard that resulted in the employee’s fall was “turning and twisting her ankle and falling off her shoe.” *Id.* at 511. The Court concluded that the employee “failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her ‘normal nonemployment life.’” *Id.* at 512.

In so holding, and in specifically contrasting a “work-related risk” versus a “risk to which the employee was equally exposed” outside of work, the *Johme* court made clear that our analysis under § 287.020.3(2)(b) must begin with an identification of the risk or hazard that resulted in the employee’s injuries, followed by a quantitative comparison whether this specific employee was equally exposed to that risk in her own normal nonemployment life. Following the Court’s reasoning, the result of that quantitative comparison should tell us whether the risk is related or unrelated to employee’s work, and in turn, whether the employee’s injuries were sufficiently causally connected to work, which finally will resolve the question whether an employee’s injuries arose out of and in the course of the employment.

Here, we conclude that the risk or hazard that resulted in employee’s injuries is that of stepping onto a frozen clod of dirt and falling. The next question is whether employee was equally exposed to that risk or hazard in his normal nonemployment life.

The most recent court to apply the quantitative analysis identified by the *Johme* court was the Missouri Court of Appeals, Eastern District in *Pope v. Gateway to the W. Harley Davidson*, No. ED98108 (Oct. 23, 2012). In *Pope*, the employee was climbing down a staircase at the motorcycle dealership where he worked, on his way to check with his supervisor whether his duties were done for the day. *Id.* at pg. *3. The employee fell down the stairs while wearing his work boots and while carrying a motorcycle helmet. *Id.* The court quoted the employer’s counsel’s cross-examination of the employee,

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noted that there was no evidence that employee fell because of his boots or that employee walked down stairs while carrying a motorcycle helmet in his normal, nonemployment life, and concluded: “the record does not contain substantial and competent evidence to support a finding that Pope was equally exposed to the risk of walking down stairs while carrying a work-required helmet outside of work.” *Id.* at pg. *10. The court held that the employee’s injuries arose out of and in the course of his employment. *Id.* at pg. *15-17.

Applying the *Pope* analysis in the context of this case, we ask whether the record contains evidence sufficient to warrant a finding that employee was equally exposed to the risk of stepping on a frozen dirt clod and falling in his normal nonemployment life. Employer fails to identify such evidence in its brief, and instead argues that employee’s injuries are not compensable because he was “merely walking” to his truck, like the employee in *Miller v. Mo. Highway & Transp. Comm’n*, 287 S.W.3d 671 (Mo. 2009). But we have not found that employee was merely walking, but instead that employee fell because he stepped on a frozen dirt clod. Accordingly, we conclude *Miller* is inapplicable to these facts.

We conclude that the record does not contain substantial and competent evidence to support a finding that employee was equally exposed to the risk of stepping on a frozen dirt clod and falling in his normal nonemployment life. We conclude that employee’s left knee injury 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. We conclude employee’s left knee injury arose out of and in the course of his employment.

Past medical expenses – stipulated issues

The administrative law judge concluded that employee’s April 2008 left knee surgery “was reasonably required to cure and relieve Claimant from the effects of the work-related injury,” and that employer was obligated to pay for the surgery under § 287.140 RSMo. *Award*, page 5. It is unclear why the administrative law judge made such a finding where the parties did not ask the administrative law judge to resolve any issue of medical expenses under § 287.140. *Transcript*, page 4. Where the parties did not identify any dispute with respect to § 287.140, we conclude that it was inappropriate for the administrative law judge to address any issue of medical expenses. See *Lawson v. Emerson Electric Co.*, 809 S.W.2d 121, 126 (Mo. App. 1991).

Employer alleges, on page 8 of its brief, as follows: “Even if Claimant’s injury was compensable, the 2008 accident was not the prevailing factor in the need for the April 29, 2008, surgery.” We note that employer’s point of appeal improperly conflates the issue of medical causation with the issue whether knee surgery was reasonably required to cure and relieve the effects of employee’s work injury. See *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011). Employer also fails to explain why we should reach the issue of employer’s liability for the cost of the surgery where this was not one of the issues identified by the parties at the hearing.

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For the benefit of the parties, we wish to make clear that if the issue were properly before us, we would conclude that the need for the left knee surgery flowed from the work injury. We would so conclude because we believe the surgery was reasonably required to cure and relieve the effects of employee's injury; even employer's expert Dr. Szewczyk conceded that the surgery was necessary in light of employee's ongoing pain following his left knee sprain injury. That the surgery may have benefitted preexisting degenerative conditions of employee's left knee is irrelevant under the applicable case law. *Tillotson*, at 519. With that said, we specifically disclaim the administrative law judge's findings and conclusions as to whether employer was required to pay for the knee surgery, because the parties did not ask the administrative law judge to resolve any issue of medical expenses under § 287.140 RSMo.

Nature and extent of disability

Employer argues that the administrative law judge erred in failing to apportion non-compensable preexisting disability as against disability resulting from the compensable left knee injury. Employer appears to invoke the case law rule that where more than one injury, condition, or disease has caused disability to the same member of the body, expert medical testimony is necessary to guide our apportionment of the percentage of the overall disability between the causative injuries, conditions and diseases. See, e.g., *Bock v. City of Columbia*, 274 S.W.3d 555, 560 (Mo. App. 2008).

Employer's argument assumes that employee suffered from a preexisting permanent partially disabling condition of his left knee at the time he sustained the work injury. But employer has failed to cite to any evidence of such preexisting disability. The mere fact that Dr. Quinn discovered degenerative changes in employee's knee does not mean that this condition necessarily caused employee to suffer preexisting permanent partial disability. Drs. Szewczyk and Herting pointed to preexisting degeneration of employee's knee as the cause of his *post-accident* problems, but did not rate any preexisting permanent partial disability of the left knee. We are unable to locate any reference to preexisting knee problems in employee's own testimony or in the medical records.

"[A] preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability." *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo. App. 1994). We find that, despite the preexisting degeneration in his left knee, employee was not suffering from any preexisting permanent partial disability of the left knee at the time he suffered the work injury. We conclude that the administrative law judge did not err in failing to apportion any preexisting disability.

Conclusion

We affirm and adopt the award of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued December 12, 2012, is attached and incorporated by this reference.

We approve and affirm the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 24th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Milton Young

Injury No. 08-123324

Dependents:

Employer: Boone Electric Cooperative

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-insured through Missouri Electric
Cooperative Insurance Plan, a self-insurance trust

Hearing Date: September 25, 2012

Checked by: RJD/cs

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 4, 2008.
5. State location where accident occurred or occupational disease was contracted: Boone 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 on a job site, was walking back to the bucket truck to get material when he stepped on a frozen dirt clod, his left knee buckled and popped, Employee fell to the ground with his left knee under his body, and his left knee popped again; as a result of this incident Employee sustained an injury, a left knee sprain.
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: Left knee.
14. Nature and extent of any permanent disability: 15% permanent partial disability of the left knee.
15. Compensation paid to-date for temporary disability: \$530.50.
16. Value necessary medical aid paid to date by employer/insurer? \$9,314.95.

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- 17. Value necessary medical aid not furnished by employer/insurer? None.
- 18. Employee's average weekly wages: \$1,165.20.
- 19. Weekly compensation rate: \$742.72 for temporary total disability; \$389.04 for permanent partial disability.
- 20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. From Employer:

24 weeks of permanent partial disability benefits	\$9,336.96
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22. Second Injury Fund liability: None. The Claim for Compensation against the Second Injury Fund is denied.

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:

Allen & Nelson, P.C.

Employee: Milton Young Injury No. 08-123324
Employee: Milton Young Injury No. 08-123324
Dependents:
Employer: Boone Electric Cooperative Before the
**DIVISION OF WORKERS'
COMPENSATION**
Additional Party: Second Injury Fund Department of Labor and Industrial
Relations of Missouri
Insurer: Self-insured through Missouri Electric Jefferson City, Missouri
Cooperative Insurance Plan, a self-insurance trust
Hearing Date: September 25, 2012

ISSUES DECIDED

The evidentiary hearing in this case (Injury No. 08-123324) was held in Columbia on September 25, 2012. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 16, 2012. The hearing was held to decide the following issues:

1. Whether Claimant, Milton Young, sustained an accident or occupational disease arising out of and in the course of his employment with Boone Electric Cooperative on January 4, 2008;
2. If found to have been sustained, whether the accident or occupational disease was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
3. The liability, if any, of Employer for permanent partial disability benefits; and
4. The liability, if any, of the Second Injury Fund for permanent partial disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;
4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;

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5. That the rates of compensation law are \$742.72/\$389.04, based on an average weekly wage of \$1,165.20;
6. That the notice requirement of Section 287.420, RSMo, is not a bar to this action;
7. That Boone Electric Cooperative was an authorized self-insurer for Missouri Workers' Compensation liability at all relevant times, through Missouri Electric Cooperative Insurance Plan (a self-insurance trust);
8. That Employer paid medical benefits of \$9,314.95; and
9. That Employer paid temporary total disability benefits totaling \$530.50.

EVIDENCE

The evidence consisted of the testimony of Claimant, Milton Brent Young; medical records; the narrative report and deposition testimony of Dr. David Volarich; the narrative report and deposition testimony of Dr. Michael Szewczyk; the clinic notes and deposition testimony of Dr. Robert Herting.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following facts and make the following rulings of law:

1. Milton Young ("Claimant") has worked as a lineman for Boone Electric Cooperative ("Employer") for 33 years;
2. On January 4, 2008, Claimant had loaded his bucket truck with material and had driven to a job site; after assessing the job, Claimant was walking back to the bucket truck to get material when he stepped on a frozen dirt clod, his left knee buckled and popped, Claimant fell to the ground with his left knee under his body, and his left knee popped again; as a result of this incident Claimant sustained an injury, a left knee sprain;
3. The hazard or risk of walking on uneven, frozen ground was a hazard or risk related to Claimant's employment as a lineman; therefore, there is no need to inquire as to whether workers would have been equally exposed to such risk or hazard outside of and unrelated to the employment in normal nonemployment life. *Pile v. Lake Regional Health System*, 321 S.W.3d 463, 467 (Mo. App. S.D. 2010);

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4. Claimant sustained an accident arising out of and in the course of his employment on January 4, 2008;
5. Claimant sustained an injury arising out of and in the course of his employment, to-wit: left knee sprain, on January 4, 2008;
6. The work-related accident of January 4, 2008 was the prevailing factor in the cause of Claimant's left knee sprain;
7. While treating for the left knee sprain, Claimant underwent an MRI which was interpreted as Claimant having sustained a tear of the medial meniscus;
8. On April 29, 2008, Dr. William Quinn of Columbia Orthopaedic Group performed arthroscopic surgery on Claimant's left knee; no tear of the medial meniscus was visualized by Dr. Quinn; Dr. Quinn performed a chondroplasty of of the articular surface of the patella; Dr. Quinn's post-operative diagnosis was chondromalacia;
9. The work-related accident of January 4, 2008 was not the prevailing factor in the cause of the chondromalacia;
10. The April 29, 2008 surgery was reasonably required to cure and relieve Claimant from the effects of the work-related injury, to-wit: left knee sprain; thus Employer was required to provide Claimant with such surgery pursuant to §287.140, RSMo; "Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant." *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 519 (Mo. App. W.D. 2011);
11. As a result of the work-related injury of January 4, 2008 Claimant has sustained a permanent partial disability of 15% of the left knee; this entitles Claimant to 24 weeks of compensation at the stipulated permanent partial disability rate of \$389.04, totaling \$9,336.96;
12. Prior to January 4, 2008, Claimant did not have a permanent partial disability of such seriousness as to constitute a hindrance or obstacle to employment or reemployment;
13. Employer's liability for permanent partial disability benefits is \$9,336.96; and
14. The Second Injury Fund has no liability for permanent partial disability benefits.

ORDER

Employer is ordered to pay Claimant the sum of \$9,336.96 for permanent partial disability benefits. The Claim for Compensation against the Second Injury Fund is denied.

Claimant's attorney, Allen & Nelson, P.C., is allowed 25 percent of the amount awarded to Claimant as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.

Interest shall accrue as per applicable law.

Employee: Milton Young

Injury No. 08-123324

Made by /s/Robert J. Dierkes (12/11/12)
Robert J. Dierkes
Chief Administrative Law Judge
Missouri Division of Workers' Compensation

FINAL AWARD ALLOWING COMPENSATION

Injury No.: 09-081734

Employee: Milton Young
Employer: Boone Electric Cooperative
Insurer: Missouri Electric Cooperative Insurance Plan
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have read the parties' briefs, reviewed the evidence, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) whether employee sustained an accident or occupational disease arising out of and in the course of his employment; (2) whether the accident or occupational disease was the prevailing factor and the cause of any or all of the injuries and/or conditions that may be alleged in the evidence; (3) whether employee is entitled to his past medical expenses in the amount of \$640.24; (4) whether employer shall be ordered to pay temporary total disability benefits, and if so, for what period of time; (5) employer's liability, if any, for permanent partial disability benefits; and (6) Second Injury Fund liability, if any, for permanent partial disability benefits.

The administrative law judge rendered the following findings and conclusions: (1) employee sustained an accident arising out of and in the course of his employment on October 2, 2009; (2) employee sustained an injury arising out of and in the course of his employment on October 2, 2009; (3) employee's accident was the prevailing factor in the cause of employee's right shoulder glenoid labral tear, partial biceps and subscapularis tears, and full-thickness supraspinatus tear; (4) a November 11, 2009, surgery was reasonably required to cure and relieve employee from the effects of the work injury, and thus employer was required to provide it pursuant to § 287.240 RSMo, and employer is ordered to pay the sum of \$640.24 for medical expenses, and to hold employee harmless for the medical bills relating to the right shoulder injury paid by group health insurance benefits; (5) employee is entitled to 29 weeks of temporary total disability benefits in the amount of \$23,416.92; (6) as a result of the work injury, employee sustained a permanent partial disability of 35% of the right shoulder, and employer is liable for \$34,345.16 in permanent partial disability benefits; (7) at the time of employee's right shoulder injury of October 2, 2009, employee had a preexisting permanent partial disability of the left knee, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, in the form of a 15% permanent partial disability of the left knee; (8) the credible evidence establishes that the right shoulder injury,

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combined with the preexisting permanent partial disability of the left knee, causes 10% greater overall disability than the independent sum of the disabilities; and (9) the Second Injury Fund is liable for 10.52 weeks of overall greater disability for a total of \$4,449.64.

Employer filed a timely Application for Review with the Commission alleging the administrative law judge erred: (1) because employee was performing a usual and customary activity of his employment and there was no unexpected traumatic event or unusual strain as that term is defined in § 287.020; (2) in relying upon *Pile v. Lake Reg'l Health Sys.*, 321 S.W.3d 463 (Mo. App. 2010); (3) in declining to credit employer's experts; (4) in relying on *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511 (Mo. App. 2011); and (5) in failing to apportion non-compensable preexisting disability as against compensable work-related disability.

We affirm, with our own supplemental analysis, certain of the findings and conclusions of the administrative law judge, and modify others.

Discussion

Accident

Employer appeals the administrative law judge's conclusion that employee sustained an accident. Section 287.020.2 RSMo defines an "accident," as follows:

The word "accident" as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

In finding that on October 2, 2009, employee pulled himself up onto his work truck using a hand rail and felt a pop in his right shoulder, the administrative law judge appears to have credited employee's testimony regarding the circumstances of the accident. We agree with this choice, and find employee to be credible. But employer argues that these circumstances cannot constitute an accident because employee was merely climbing the platform onto his work truck, as he had done many times before. Employer argues that employee's testimony about hearing a pop in his shoulder cannot help him establish the elements of an "accident," because the "pop" was the "injury," a term which, of course, enjoys its own particular definition under Chapter 287.

We are not persuaded. As will be seen in more detail below in our discussion of the issue of medical causation, the "pop" was not the injury itself, but rather merely a tangible manifestation to employee of a problem inside his shoulder. We are convinced that employee suffered an accident, because despite the fact employee had pulled himself up onto the truck many times before, *this time* he felt a pop in his shoulder, and *this time* he was unable to lift his arm afterward. We believe that these facts constitute the "unexpected traumatic event or unusual strain" required under the law. We conclude that employee suffered an accident for purposes of § 287.020.2.

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Medical causation

Employer appeals the administrative law judge's conclusion that employee's accident was the prevailing factor causing his right shoulder injury. The administrative law judge did not make any credibility findings, so it is unclear what evidence he relied upon in reaching his conclusions on the issue of medical causation. Section 287.020.3(1) RSMo sets forth the statutory test for medical causation, and provides, in relevant part, as follows:

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.

The parties have presented conflicting medical expert testimony on the question whether employee suffered an acute injury when he pulled himself up onto his truck.

Employer presents Dr. Szewczyk, who opined that the mechanism of injury employee described is not consistent with the pathology shown on an MRI of employee's shoulder. Dr. Szewczyk also opined that one does not actually use the arms in climbing onto employee's work truck. Dr. Szewczyk described an experiment in which he tried to perform the same motion described by employee on one of employer's trucks. According to Dr. Szewczyk, such a motion puts no pressure on the shoulder at all, but instead one uses the legs to step up.

Dr. Szewczyk appears to be attempting to blend his medical opinions with his own view of employee's credibility as to whether employee used his arms to climb onto the truck. This becomes clear in the following exchange from Dr. Szewczyk's deposition:

- Q. So it's your opinion that pulling himself up into the truck or onto the platform didn't cause any change in the shoulder?
- A. Well, first of all, I don't believe that he pulled himself up into the thing. I think he stepped up into it. And to answer your question, yes, I don't believe that it caused any change.

Transcript, page 533.

Employee testified he pulled himself up. We believe that employee, rather than Dr. Szewczyk, is the best source of evidence as to whether he pulled himself up onto his work truck on October 2, 2009. We have credited employee's testimony and found that he pulled himself up. Consequently, we deem Dr. Szewczyk's medical opinion to be premised on an incorrect version of the facts, and to lack credibility as a result.

Employer also presents Dr. Herting, who opined that the prevailing factor in employee's problem was not getting up in his truck at work. Dr. Herting relies on the premise that what employee described is "a normal body motion" of getting up into a truck. It

Employee: Milton Young

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appears that Dr. Herting failed to understand the specific mechanism of injury involved in this case: employee testified that he was climbing onto the platform of his work truck to grab a reel of wire, not climbing into the truck itself. We also note that Dr. Herting seemed to stumble over the meaning of “triggering” for purposes of the Missouri Workers’ Compensation Law, and then changed his answer on that topic after generous prompting from employer’s counsel. We find Dr. Herting’s testimony to lack credibility.

Employee presents Dr. Volarich, who acknowledged the preexisting arthritis in employee’s right shoulder, but opined that the accident was the prevailing factor causing a labral tear, rotator cuff tear, partial biceps tendon tear, and impingement. Dr. Volarich explained that when employee heard the pop, it was the sound of something tearing in his shoulder. We find Dr. Volarich’s testimony to be credible on the question of medical causation. We conclude that the accident was the prevailing factor causing employee to suffer a labral tear, rotator cuff tear, partial biceps tendon tear, impingement, and associated disability.

We note that the administrative law judge found that employee “underwent no treatment for his shoulders prior to October 2, 2009.” *Award*, page 5. This finding is somewhat inaccurate, in light of treatment notes from Dr. Ciolino indicating employee presented with complaints of right shoulder pain on September 15, 2009. *Transcript*, page 244. The treatment note does not reveal whether Dr. Ciolino prescribed any medications or otherwise recommended additional treatment for the shoulder; it appears that employee and the doctor were more focused on employee’s other complaints on that visit, which included insomnia, hypertension, and other complaints unrelated to the right shoulder.

Injury arising out of and in the course of employment

Employer appeals the administrative law judge’s finding that employee sustained an injury arising out of and in the course of his employment for purposes of § 287.020.3(2) RSMo, which provides, as follows:

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

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

(b) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

We have concluded that the accident on October 2, 2009, was the prevailing factor causing employee to suffer a labral tear, rotator cuff tear, partial biceps tendon tear, impingement, and associated disability; it follows that the requirements of subsection (a) have been satisfied.

Turning to subsection (b), we note that the administrative law judge failed to apply the Missouri Supreme Court’s controlling decision in *Johme v. St. John’s Mercy Healthcare*,

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366 S.W.3d 504 (Mo. 2012). In *Johme*, the Court held that an employee who fell while making coffee at work did not sustain injuries that were compensable under the Missouri Workers' Compensation Law. *Id.* at 512. The *Johme* employee fell in her office kitchen after making a new pot of coffee, per workplace custom, to replace a pot of coffee from which she had taken the last cup. *Id.* at 506. The *Johme* court found that the risk or hazard that resulted in the employee's fall was "turning and twisting her ankle and falling off her shoe." *Id.* at 511. The Court concluded that the employee "failed to meet her burden to show that her injury was compensable because she did not show that it was caused by risk related to her employment activity as opposed to a risk to which she was equally exposed in her 'normal nonemployment life.'" *Id.* at 512.

In so holding, and in specifically contrasting a "work-related risk" versus a "risk to which the employee was equally exposed" outside of work, the *Johme* court made clear that our analysis under § 287.020.3(2)(b) must begin with an identification of the risk or hazard that resulted in the employee's injuries, followed by a quantitative comparison whether this specific employee was equally exposed to that risk in her own normal nonemployment life. Following the Court's reasoning, the result of that quantitative comparison should tell us whether the risk is related or unrelated to employee's work, and in turn, whether the employee's injuries were sufficiently causally connected to work, which finally will resolve the question whether an employee's injuries arose out of and in the course of the employment.

Here, we conclude that the risk or hazard that resulted in employee's injuries is that of reaching up and pulling himself onto the platform of his work truck. The next question is whether employee was equally exposed to that risk or hazard in his normal nonemployment life.

The most recent court to apply the quantitative analysis identified by the *Johme* court was the Missouri Court of Appeals, Eastern District in *Pope v. Gateway to the W. Harley Davidson*, No. ED98108 (Oct. 23, 2012). In *Pope*, the employee was climbing down a staircase at the motorcycle dealership where he worked, on his way to check with his supervisor whether his duties were done for the day. *Id.* at pg. *3. The employee fell down the stairs while wearing his work boots and while carrying a motorcycle helmet. *Id.* The court quoted the employer's counsel's cross-examination of the employee, noted that there was no evidence that employee fell because of his boots or that employee walked down stairs while carrying a motorcycle helmet in his normal, nonemployment life, and concluded: "the record does not contain substantial and competent evidence to support a finding that Pope was equally exposed to the risk of walking down stairs while carrying a work-required helmet outside of work." *Id.* at pg. *10. The court held that the employee's injuries arose out of and in the course of his employment. *Id.* at pg. *15-17.

Applying the *Pope* analysis in the context of this case, we ask whether the record contains evidence sufficient to warrant a finding that employee was equally exposed in his non-work life to the risk of reaching up and pulling himself onto the platform of his work truck. Employee credibly testified (and we so find) that he climbs up onto the work truck every day. On page 12 of its brief, employer asserts that Dr. Szewczyk opined that the motion of getting into the truck was very similar to getting into a tractor, and

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thus employee would be equally exposed to the risk, because he does some farming in his spare time.

We are not persuaded. First, Dr. Szewczyk did not so testify; Dr. Herting did, but in the context of the issue of medical causation, not the issue whether employee was equally exposed to the applicable risk, and in any event, we have found Dr. Herting to lack credibility. Second, employee testified he gets on his tractors at home about once or twice a week, so even if the risk of getting into tractors can be said to be analogous to that of climbing onto employee's work truck, employee cannot be said to have been "equally exposed" to that risk where he climbs onto the work truck every day.

We conclude that the record does not contain substantial and competent evidence to support a finding that employee was equally exposed to the risk of reaching up and pulling himself onto the platform of his work truck in his normal nonemployment life. We conclude that, for purposes of § 287.020.3(2)(b), employee's right shoulder injury 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. We conclude employee's right shoulder injury arose out of and in the course of his employment.

Nature and extent of disability

Employer appeals the administrative law judge's finding that employee suffered a 35% permanent partial disability of the right shoulder as a result of the work injury. Employer cites Dr. Volarich's report, wherein the doctor rates 45% permanent partial disability of the right shoulder, 15% of which Dr. Volarich attributes to degenerative changes in the glenohumeral joint. In other words, Dr. Volarich only rated a 30% permanent partial disability of the right shoulder resulting from the work injury.

Employer also cites to employee's deposition, wherein he purportedly testified he is able to do whatever he wants with his shoulder. Employer fails, however, to cite the transcript where this testimony can be found. Upon a review of the record, we discovered that it does not include any deposition testimony from employee.

At the hearing, employee testified that he has pain in his shoulder all the time, that his shoulder is weak, that he can't work out in front of himself as long as he used to, and has trouble putting on a belt. Employee takes ibuprofen and occasionally a muscle relaxer at night to control the pain.

After careful consideration, we modify the award of the administrative law judge on the issue of the permanent partial disability liability of the employer. We find that employee suffered a 30% permanent partial disability of the right shoulder as a result of the work injury. We conclude that employer is liable for 69.6 weeks, or \$29,438.71 in permanent partial disability benefits.

Second Injury Fund liability

Our modification of the administrative law judge's award as to the issue of the permanent partial disability liability of the employer affects the calculation of the Second

Employee: Milton Young

Injury Fund's liability for permanent partial disability benefits. Accordingly, we modify the award of the administrative law judge with respect to the Second Injury Fund's liability for enhanced permanent partial disability as follows: 69.6 weeks for the primary injury + 24 weeks for the preexisting left knee injury = 93.6 weeks x 10% = 9.36 weeks of enhanced permanent partial disability.

We conclude that the Second Injury Fund is liable for 9.36 weeks, or \$3,959.00 in permanent partial disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issues of employer liability and Second Injury Fund liability for permanent partial disability benefits.

Employer is liable for \$29,438.71 in permanent partial disability benefits.

The Second Injury Fund is liable for \$3,959.00 in permanent partial disability benefits.

The award and decision of Administrative Law Judge Robert J. Dierkes, issued December 10, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

We approve and affirm 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 24th day of May 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James Avery, Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Milton Young

Injury No. 09-081734

Dependents:

Employer: Boone Electric Cooperative

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-insured through Missouri Electric
Cooperative Insurance Plan, a self-insurance trust

Hearing Date: September 25, 2012

Checked by: RJD/cs

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: October 2, 2009.
5. State location where accident occurred or occupational disease was contracted: Boone 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 climbing up onto the first step of the bucket truck to operate the bucket from a platform and was pulling himself up onto the first step by a hand rail with his right arm and felt a pop in his right shoulder.
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: 35% permanent partial disability of the right shoulder.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? \$1,355.94.

Employee: Milton Young

Injury No. 09-081734

17. Value necessary medical aid not furnished by employer/insurer? \$640.24.
18. Employee's average weekly wages: \$1,253.60.
19. Weekly compensation rate: \$807.48 for temporary total disability; \$422.97 for permanent partial disability.
20. Method wages computation: Stipulation.

COMPENSATION PAYABLE

21. From Employer:

81.2 weeks of permanent partial disability benefits	\$34,345.16
29 weeks of temporary total disability benefits	\$23,416.92
Medical benefits	\$640.24

Employer is also ordered to hold Claimant harmless for the medical bills relating to the right shoulder injury paid by group health insurance benefits.

22. Second Injury Fund liability:

10.52 weeks of permanent partial disability benefits	\$4,449.64
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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:

Allen & Nelson, P.C.

Employee: Milton Young

Injury No. 09-081734

Dependents:

Employer: Boone Electric Cooperative

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Additional Party: Second Injury Fund

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

Insurer: Self-insured through Missouri Electric
Cooperative Insurance Plan, a self-insurance trust

Hearing Date: September 25, 2012

ISSUES DECIDED

The evidentiary hearing in this case (Injury No. 09-081734) was held in Columbia on September 25, 2012. The parties requested leave to file post-hearing briefs, which leave was granted, and the case was submitted on November 16, 2012. The hearing was held to decide the following issues:

1. Whether Claimant, Milton Young, sustained an accident or occupational disease arising out of and in the course of his employment with Boone Electric Cooperative on October 2, 2009;
2. If found to have been sustained, whether the accident or occupational disease was the prevailing factor in the cause of any or all of the injuries and/or conditions alleged in the evidence;
3. The liability, if any, of Employer for bills and charges for medical treatment;
4. Whether Employer shall be liable for the payment of temporary total disability ("TTD") benefits, and, if so, for what period(s) of time;
5. The liability, if any, of Employer for permanent partial disability benefits; and
6. The liability, if any, of the Second Injury Fund for permanent partial disability benefits.

STIPULATIONS

The parties stipulated as follows:

1. That the Missouri Division of Workers' Compensation has jurisdiction over this case;
2. That venue is proper in Boone County;
3. That the claim for compensation was filed within the time allowed by the statute of limitations, Section 287.430, RSMo;

Employee: Milton Young

Injury No. 09-081734

4. That both Employer and Employee were covered under the Missouri Workers' Compensation Law at all relevant times;
5. That the rates of compensation law are \$807.48/\$422.97, based on an average weekly wage of \$1,253.60;
6. That the notice requirement of Section 287.420, RSMo, is not a bar to this action;
7. That Boone Electric Cooperative was an authorized self-insurer for Missouri Workers' Compensation liability at all relevant times, through Missouri Electric Cooperative Insurance Plan (a self-insurance trust);
8. That Employer paid medical benefits of \$1,355.94;
9. That Employer paid no temporary total disability benefits;
10. That if the claim is found compensable, that Employer shall be ordered to reimburse Claimant the amount of \$640.24 for "out-of-pocket" medical expenses and to hold Claimant harmless for the medical bills relating to the right shoulder injury paid by group health insurance benefits.

EVIDENCE

The evidence consisted of the testimony of Claimant, Milton Brent Young; medical records; the narrative report and deposition testimony of Dr. David Volarich; the narrative report and deposition testimony of Dr. Michael Szewczyk; the clinic notes and deposition testimony of Dr. Robert Herting.

FINDINGS OF FACT AND RULINGS OF LAW

In addition to those facts and legal conclusions to which the parties stipulated, I find the following facts and make the following rulings of law:

1. Milton Young ("Claimant") has worked as a lineman for Boone Electric Cooperative ("Employer") for 33 years;
2. Prior to October 2, 2009, Claimant had occasional pain or soreness in his shoulders; Claimant had x-rays of both shoulders on February 11, 2004 which were interpreted as "unremarkable"; no other diagnostic studies were done on Claimant's shoulders prior to

Employee: Milton Young

Injury No. 09-081734

- October 2, 2009; Claimant underwent no treatment for his shoulders prior to October 2, 2009;
3. Early in Claimant's workday on October 2, 2009, Claimant participated in a safety meeting; as a part of that meeting, Claimant performed a "pole rescue" exercise in which he was required to climb a utility pole, cut loose a 180 pound dummy, lower the dummy down to the ground with a rope and hand line, and climb back down; Claimant completed the exercise without problem;
 4. Later during the workday on October 2, 2009, Claimant was climbing up onto the first step of the bucket truck to operate the bucket from a platform and was pulling himself up onto the first step by a hand rail with his right arm and felt a pop in his right shoulder; the first step is 22 inches from the ground, without the riggers out, as measured by Dr. Szewczyk;
 5. Employer had Claimant evaluated by Dr. Robert Herting, an occupational medicine physician, on October 5, 2009; a right shoulder MRI was performed on October 12, 2009; the note from Dr. Laura Sievert, radiologist from October 12, 2009 states: "*Degenerative changes are seen within the acromioclavicular joint. A small amount of subacromial fluid is seen. Increased signal is seen throughout the infraspinatus tendon, consistent with tendinopathy. No complete tear is seen. The biceps tendon and anchor appear normal. Glenoid labrum is intact. No muscular atrophy is seen.*";
 6. On October 14, 2009, Dr. Herting met with Claimant and informed him that his shoulder injury was not work-related, and that Claimant should seek follow up with his primary care doctor;
 7. Claimant's primary care doctor, Dr. Thomas Ciolino, referred Claimant to Dr. Ronald Carter of Columbia Orthopaedic Group; Claimant was seen by Dr. Carter on October 20, 2009; Dr. Carter's note of that date states: "*The MRI was reviewed and I feel that he probably has at least a partial biceps tendon injury near the labral insertion with some swelling in the bicipital groove. There is a partial tear of the supraspinatus. The patient is given samples of Naprelan 500 mg and Celebrex 200 mg to take sequentially. ... If this is not effective, then the next step would be a subacromial bursa injection, and if that does not resolve his symptoms, he will need arthroscopic surgery to treat this injury that occurred on October 2nd.*";
 8. On November 11, 2009, Dr. Carter performed surgery on Claimant's right shoulder; Dr. Carter's postoperative diagnoses were: "*(1) Right shoulder glenoid labral tear; (2) Glenoid and humeral chondromalacia with synovitis; (3) Partial tears of the subscapularis and biceps with full-thickness 1 x 0.5 cm supraspinatus tear and impingement*"; the supraspinatus and subscapularis are two of the four muscles comprising the rotator cuff;
 9. The glenoid and humeral chondromalacia with synovitis, found by Dr. Carter during the surgery on 11-11-09, pre-existed the work incident of October 2, 2009;
 10. The work incident of October 2, 2009, in which Claimant was climbing up onto the first step of the bucket truck and was pulling himself up onto the first step by a hand rail with his right arm and felt a pop in his right shoulder, was the prevailing factor in the cause of the glenoid labral tear, the partial biceps and subscapularis tears, and the full-thickness supraspinatus tear;
 11. The hazard or risk of pulling oneself up onto the bucket truck was a hazard or risk related to Claimant's employment as a lineman; therefore, there is no need to inquire as to

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- whether workers would have been equally exposed to such risk or hazard outside of and unrelated to the employment in normal nonemployment life. *Pile v. Lake Regional Health System*, 321 S.W.3d 463, 467 (Mo. App. S.D. 2010);
12. Claimant sustained an accident arising out of and in the course of his employment on October 2, 2009;
 13. Claimant sustained an injury arising out of and in the course of his employment on October 2, 2009, to-wit: right shoulder glenoid labral tear, partial biceps and subscapularis tears, and full-thickness supraspinatus tear;
 14. The work-related accident of October 2, 2009 was the prevailing factor in the cause of Claimant's right shoulder glenoid labral tear, partial biceps and subscapularis tears, and full-thickness supraspinatus tear;
 15. The work-related accident of October 2, 2009 was not the prevailing factor in the cause of the glenoid and humeral chondromalacia with synovitis of the right shoulder;
 16. The November 11, 2009 surgery was reasonably required to cure and relieve Claimant from the effects of the work-related injury, to-wit: glenoid labral tear, partial biceps and subscapularis tears, and full-thickness supraspinatus tear; thus Employer was required to provide Claimant with such surgery pursuant to §287.140, RSMo; "Once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant." *Tillotson v. St. Joseph Medical Center*, 347 S.W.3d 511, 519 (Mo. App. W.D. 2011);
 17. As a result of the work-related injury of October 2, 2009, and the November 11, 2009 surgery reasonably required to cure and relieve Claimant from the effects of the work-related injury of October 2, 2009, Claimant was unable to compete in the open market for employment from November 11, 2009 through June 1, 2010, a total of 29 weeks;
 18. Claimant is entitled to 29 weeks of TTD benefits at the stipulated rate of \$807.48, totaling \$23,416.92;
 19. As a result of the work-related injury of October 2, 2009, Claimant has sustained a permanent partial disability of 35% of the right shoulder; this entitles Claimant to 81.2 weeks of compensation at the stipulated permanent partial disability rate of \$422.97, totaling \$34,345.16;
 20. At the time of Claimant's work-related right shoulder injury of October 2, 2009, Claimant had a preexisting permanent partial disability to the left knee, which meets the statutory threshold and is of such seriousness as to constitute a hindrance or obstacle to employment or reemployment, being 15% of the left knee (24 weeks);
 21. The credible evidence establishes that the right shoulder injury, combined with the pre-existing permanent partial disability of the left knee, causes 10% greater overall disability than the independent sum of the disabilities. The Second Injury Fund liability is thus calculated as follows: 81.2 weeks for last injury + 24 weeks for preexisting injuries = 105.2 weeks x 10% = 10.52 weeks of overall greater disability;
 22. Employer's liability for permanent partial disability benefits is \$34,345.16; and
 23. The Second Injury Fund's liability for permanent partial disability benefits is \$4,449.64.

ORDER

Employee: Milton Young

Injury No. 09-081734

Employer is ordered to pay Claimant the sum of \$23,416.92 for temporary total disability benefits, the sum of \$34,345.16 for permanent partial disability benefits, and the sum of \$640.24 for medical expenses. Employer is also ordered to hold Claimant harmless for the medical bills relating to the right shoulder injury paid by group health insurance benefits.

The Second Injury Fund is ordered to pay Claimant the sum of \$4,449.64 for permanent partial disability benefits.

Claimant's attorney, Allen & Nelson, P.C., is allowed 25 percent of all amounts awarded to Claimant as and for necessary attorney's fees, and the amount of such fees shall constitute a lien thereon, until paid.

Interest shall accrue as per applicable law.

Made by/s/Robert J. Dierkes (12/10/12)
Robert J. Dierkes
Chief Administrative Law Judge
Division of Workers' Compensation