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

Injury No.: 07-134522

Employee: Dennis Carver

Employer: Delta Innovative Services, Inc.

Insurers: 1) Midwest Builders' Casualty Mutual Company
2) American Home Assurance Company

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

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard the parties' arguments and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 24, 2010, as supplemented herein.

Introduction
The issues stipulated in dispute at the hearing were: (1) whether employee sustained an accident arising out of and in the course of his employment in Kansas City, Jackson County, Missouri; (2) whether employer had notice of employee's accident; (3) whether employee is entitled to past temporary total disability for the period October 13, 2007 to January 4, 2008, and June 25, 2008 to November 4, 2009; (4) whether employee is entitled to past medical expenses of $63,859.05; (5) the nature and extent of employee's disability; (6) liability of the Second Injury Fund; (7) whether employee is entitled to future medical treatment; and (8) whether a penalty for safety violations should be imposed.

The administrative law judge made the following findings: (1) employee sustained an accident arising out of and in the course of his employment with employer while carrying a roll of felt up a ladder on the Federal Reserve project on October 1, 2007; (2) employee's need for medical treatment and his resulting disability were a direct result and natural consequence of employee's October 1, 2007, accident; (3) employee provided notice to his employer as required by statute; (4) employee is entitled to temporary total disability benefits from October 13, 2007 through January 4, 2008, and June 25, 2008 through December 2, 2009, in the amount of $64,720.62; (5) employee is entitled to his past medical expenses; (6) employee is permanently and totally disabled as a result of the October 1, 2007, injury considered in isolation; (7) employee willfully violated a safety rule and his compensation is subject to the maximum reduction of 50% under § 287.120.5 RSMo; and (8) employer and insurer are obligated to provide future medical treatment to employee under § 287.140 RSMo.

Employee filed an Application for Review alleging the administrative law judge erred in reducing employee's compensation pursuant to § 287.120.5 RSMo.

Employer and its insurer American Home Assurance Company filed an Application for Review alleging the administrative law judge erred: (1) in finding employee met his burden of proving he sustained a compensable injury arising out of and in the course of his employment on October 1, 2007; (2) in finding employee provided notice of his October 1, 2007, accidental injury to the employer as required by statute; and (3) in failing to address whether the employer and American Home Assurance Company are entitled to reimbursement for benefits paid pursuant to employee's claim in another jurisdiction.

Employer and its insurer Midwest Builders' Casualty Mutual Company filed an Application for Review seeking modification of the Award to: (1) reflect payments for medical treatment and temporary total disability benefits on behalf of employer to employee; and (2) address the fact that the date of accident of October 1, 2007, shifts liability from Midwest Builders' Casualty Mutual Company to American Home Assurance Company. The Application for Review also asks us to credit past payments made by employer and to order reimbursement by the responsible carrier American Home Assurance Company to Midwest Builders' Casualty Mutual Company.

We agree with the result reached by the administrative law judge, but find her analysis incomplete on the issue of notice. We write this opinion to address the issue of notice and also to respond to the request from employer and Midwest Builders' Casualty Mutual Company for a credit or reimbursement of past payments to employee in connection with employee's claim in another jurisdiction.

Discussion

Employee's claim is not barred by § 287.420 RSMo

Employer argues that the administrative law judge improperly concluded that employee provided notice of his work injury to the employer as required under § 287.420 RSMo. That section provides, in pertinent part, as follows:

> No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

The purpose of the foregoing section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Soos v. Mallinckrodt Chem. Co.*, 19 S.W.3d 683, 686 (Mo. App. 2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003). By operation of the foregoing section, employee was required to provide written notice to the employer within 30 days of the accident, or show that the employer was not prejudiced by the employee's failure to provide timely notice.

The administrative law judge found that employee provided notice to employer "as required by statute." This finding is not supported by the record. To the contrary, it is effectively undisputed[1] that employee did not provide a written notice to employer that met each of the criteria of § 287.420 RSMo. See *Allcorn v. Tap Enters.*, 277 S.W.3d 823, 830 (Mo. App. 2009). The administrative law judge did make certain findings that are relevant to the question whether employer was prejudiced by employee's failure to provide notice in the form required by statute, but did not clearly apply the appropriate burden-shifting analysis.

We find that employee failed to provide written notice to employer as required under § 287.420. Thus, the question is whether employee demonstrated that employer was not prejudiced by his failure to provide statutory notice. In order to answer this question, we first examine the record to determine whether employee has provided substantial evidence that employer had actual knowledge of the accident.

> The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. If the employer does not admit actual knowledge, the issue becomes one of fact. If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice which shifts the burden of showing prejudice to the employer.
>
> However, when the claimant does not show either written notice or actual knowledge, the burden rests on claimant to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation.

Soos, 19 S.W.3d at 686 (citations omitted).

Employee testified as follows: Employee talked to Danny Boyle, his supervisor and employer's owner, on the morning of October 3, 2007, two days after the accident, and told him he hurt his back. On October 6, 2007, employee called Mr. Boyle to ask off work, citing back pain. Employee was still waiting at that point to see whether he had seriously injured his back or just strained it. Employee's back pain got worse but employee tried to go back to work. On October 12, 2007, employee was on the jobsite when his back began to hurt so bad that all he could do was go down his ladder and get in his work truck. Employee sought medical treatment. On October 18, 2007, employee learned from Dr. Drisko that he had a herniated disk; employee called Mr. Boyle that same day to report the diagnosis of his work injury and to ask for medical treatment from employer.

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[1] Employee appears to ignore the statutory requirement of written notice and argues that our inquiry should end, like that of the administrative law judge, with a finding that employee delivered actual notice to employer. If that were the appropriate analysis under the statute, we would have no reason to issue this supplemental opinion. In any case, employee directs us to no evidence that would show employee did provide a written notice that met all the requirements of § 287.420, under a strict construction of that section.

Employee's testimony was detailed, sequential as to dates and events, and easy to follow. We note that Mr. Boyle testified he had no reason to dispute that he spoke to employee on the morning of October 3, 2007. We find employee credible as to the version of events set forth above. We find that employee told Mr. Boyle about his back injury on October 3, 2007, and again on October 18, 2007, after receiving the diagnosis from Dr. Drisko. It is well settled that notice of a potentially compensable injury acquired by a supervisory employee is imputed to the employer. *Hillenburg v. Lester E. Cox Medical Ctr.*, 879 S.W.2d 652, 654-55 (Mo. App. 1994). Because employee provided actual notice of his back injury to Mr. Boyle on October 3, 2007, and again on October 18, 2007, we conclude that employer had actual knowledge of employee's work injury. Accordingly, the burden shifts to employer to demonstrate it was prejudiced by employee's failure to provide statutory notice.

We find no evidence to suggest employer was prejudiced by employee's failure to provide notice in the form required by statute. Mr. Boyle was aware of employee's back problems only two days after the accident, and employee kept him informed as his condition deteriorated in subsequent days. As a result of this clear and ongoing communication between employee and Mr. Boyle, employer had employee examined by its treating doctors at Concentra on October 19, 2007, only eighteen days after the accident. Employer was thereby able to minimize the impact of employee's injuries and to have him evaluated by its physicians. We are not persuaded that employer was prejudiced by any of the confusion over the location that employee was working when he hurt his back. Even if all parties had understood from the beginning that the injury occurred on the Federal Reserve job, there were no witnesses to interview regarding the accident because Jeremy Reno was working on a different part of the building and did not witness employee carrying the felt roll up the ladder. More importantly, Mr. Boyle acknowledged that it goes with the territory in roofing to have days when an employee thinks he tweaked his back and that it is not abnormal for employees to assume such routine aches and pains will get better on their own, and that he has no reason to think employee is lying when employee says he hurt himself carrying something heavy up a ladder. Especially given that Mr. Boyle feels he has no reason to doubt employee's version of the accident, we cannot say employer was prejudiced by any confusion over the exact location where employee was injured.

Accordingly, we conclude that employer was not prejudiced by employee's failure to provide written notice.

Midwest Builders' Casualty Mutual Company's request for a credit
With this supplemental opinion, and in adopting and affirming the award of the administrative law judge, we have resolved all of the issues before us and determined the liability of employer under the Missouri Workers' Compensation Law. We note that the parties stipulated at the hearing before the administrative law judge that, in the event an award of compensation is awarded to employee in his claim for the October 1, 2007, injury, that Midwest Builders' Casualty Mutual Company would not be liable to provide workers' compensation benefits, but rather American Home Assurance Company would be the liable insurer.

We note there is evidence on the record before us that Midwest Builders' Casualty Mutual Company previously made voluntary payments to employee under Kansas workers' compensation law. In its Application for Review, Midwest Builders' Casualty Mutual Company requests that, in our Award, these amounts be "credited to the employer and properly applied and credited to the liability of the employer for proper reimbursement by the responsible carrier American Home Assurance c/o AIG to Midwest Builders Casualty Mutual Company who voluntarily provided said benefits to [employee]."

We must deny this request for two reasons. First, the issue of "credits" or "reimbursement" as between the parties was not made an issue at the hearing before the administrative law judge and is thus not properly before us. More importantly, we lack jurisdiction to make such an award, in that there is no provision of Chapter 287 that would provide for the kind of relief requested by Midwest Builders' Casualty Mutual Company.

We trust that the parties are capable of reaching an accounting among themselves based on the terms of the compensation we have awarded herein. In the event they are unable to do so, the Commission is not the proper forum for such a dispute.

Decision

We conclude that employee's claim for compensation for his injuries resulting from the work accident of October 1, 2007, is not barred by the notice requirement of § 287.420 RSMo.

The award and decision of Chief Administrative Law Judge Paula A. McKeon, issued September 24, 2010, is attached and incorporated to the extent it is not inconsistent with this supplemental opinion.

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 22nd day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

____
William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

____
Secretary

DISSENTING IN PART

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I disagree with the decision of the administrative law judge (and the majority) to apply the maximum penalty contemplated under § 287.120.5 RSMo, which provides as follows:

> Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

The foregoing section requires employer to prove: (1) that employee's injury was caused by his failure to obey a reasonable rule adopted by employer; (2) that employee had actual knowledge of the rule so adopted; and (3) that employer made a reasonable effort to cause employees to follow the safety rule.

The rule at issue here is the "three-point-contact" rule, which requires employees to keep three points of contact at all times while climbing a ladder. In other words, while climbing a ladder, the employee is required to keep either two hands and one foot on the ladder, or two feet and one hand. Employee acknowledged he violated this rule when he carried a felt roll up a ladder at employer's jobsite on October 1, 2007, but explained that he didn't have the proper equipment or the manpower available to get the roll of felt onto the roof in any other way. Based in part on employee's forthright admission that he violated this rule, the administrative law judge reduced employee's recovery in this matter by 50%, implicitly finding that employee's rule violation was so egregious or blameworthy that it warrants imposition of the maximum penalty available under the statute. I think this enormous penalty is excessive and unwarranted by the evidence, but more importantly, I believe the administrative law judge's analysis is incorrect.

Notably absent from the administrative law judge's analysis is any consideration of the third element under § 287.120.5—that employer made a reasonable effort to cause its employees to follow the safety rule. I cannot find this evidence from employer. To the contrary, while it appears employee knew he was "technically" violating a rule when he carried the felt roll up the ladder, it also appears that the rule was laxly enforced. Mr. Boyle admitted that he is aware that his employees "do things wrong all the time" and that sometimes employees are rushing to get a job done and it's just faster to carry things up a ladder. Mr. Boyle did not identify when or if any of his employees who violate safety rules "all the time" were ever warned, counseled, sanctioned, or otherwise disciplined by employer, let alone whether employees were ever disciplined specifically for violating the

three-point-contact rule. Nor did Mr. Boyle identify what other reasonable steps employer took to address what was apparently an epidemic of safety rule violations on employer's jobsites. I don't believe taking the passive step of having employees sign a safety manual or even asking employees to attend informal "toolbox talks" amount to "reasonable steps" when it's obvious neither of these actions by employer were effective in preventing employees from routinely violating employer's rules.

By failing to provide any evidence of the measures it took to enforce the three-point-contact rule, and by allowing a work atmosphere in which the rules were violated "all the time," employer failed to show that it made a reasonable effort to cause employee to follow the rule. As a result, employer's defense under § 287.120.5 fails, and employee's award is not properly subject to any reduction.

I would modify the award of the administrative law judge and find that employee's award is not subject to a reduction under § 287.120.5. Because the majority has determined otherwise, I respectfully dissent in part from their decision.

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Curtis E. Chick, Jr., Member

FINAL AWARD

Employee: Dennis Carver Injury No. 07-134522

Dependents: N/A

Employer: Delta Innovative Services, Inc.

Insurer: Midwest Builders' Casualty Mutual Company and American Home Assurance Company

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

Hearing Date: July 12, 2010 and July 13, 2010 Checked by: PAM/cy

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 1, 2007

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 climbing a ladder to the elevator tower at the parking garage of the Federal Reserve building carrying a heavy roll of felt paper when he felt severe pain in his low back which radiated down his left leg.

12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Body as a whole

14. Nature and extent of any permanent disability: Permanent Total Disability

15. Compensation paid to-date for temporary disability: $0

16. Value necessary medical aid paid to date by employer/insurer? $0

17. Value necessary medical aid not furnished by employer/insurer? $63,859.05

18. Employee's average weekly wages: $1,200.00

19. Weekly compensation rate: $742.72/$389.04

20. Method wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable: 87.14 weeks of temporary total disability totaling $64,720.62. Permanent total disability benefits from employer beginning on December 3, 2009 and thereafter for claimant's lifetime at the rate of $742.72 per week.

22. Second Injury Fund liability: None

23. Future requirements awarded: Future medical care and treatment to relieve claimant from this injury as it relates to this injury.

    Said payments to begin December 3, 2009 and to be payable and be subject to modification and review as provided by law. Compensation awarded is subject to 50% reduction pursuant to §287.120 RSMo.

This compensation awarded to the Claimant shall be subject to a 25% lien in favor of Mark E. Kelly, Attorney at Law, for reasonable and necessary attorney's fees pursuant to Mo. Rev. Stat. §287.260.1.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Dennis Carver Injury No. 07-134522

Dependents: N/A

Employer: Delta Innovative Services, Inc.

Insurer: Midwest Builders' Casualty Mutual Company and American Home Assurance Company

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

Hearing Date: July 12, 2010 and July 13, 2010 Checked by: PAM/cy

A Final hearing was held on July 12, 2010 and continued on July 13, 2010. The Employee, Dennis Carver, appeared in person and with counsel, Mark Kelly. The Employer and Insurer, Midwest Builder, appeared through counsel, C. Anderson Russell. The Employer/Insurer, American Home Assurance, appeared through counsel John Jurcyk. The Second injury Fund appeared through Assistant Attorney General Andrew Dickson.

STIPULATIONS

At the hearing, the parties entered into the following stipulations:

1. The employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. The employer's liability under said law was fully insured by American Home Assurance on October 1, 2007;
3. An employer/employee relationship existed on or about October 1, 2007 between the employer and employee;
4. A Claim for Compensation was filed within the time prescribed by law;
5. Venue is proper;
6. Carver's average weekly wage was sufficient to qualify for the maximum weekly compensation rates, which are $742.72 for TTD and PTD, and $389.04 for PPD;
7. No compensation has been paid by American Home Assurance.

ISSUES

The issues to be determined by the hearing are as follows:

1. Whether on or about October 1, 2007, Dennis Carver suffered an accident or occupational disease arising out of and in the course of his employment;
2. Whether employer had notice of the employee's accident;
3. Whether Carver is entitled to temporary total disability;
4. Whether the employer is liable for past medical aid;
5. Whether the employer is liable for future medical benefits;
6. Nature and extent of disability, including permanent total disability or in the alternative permanent partial disability; and
7. Whether Carver violated §287.120 RSMo.

EXHIBITS

Employee's Exhibits:

A. February 13, 2009 Correspondence to C. Anderson Russell and John D. Jurcyk;
B. June 19, 2009 Correspondence to C. Anderson Russell and John D. Jurcyk;
C. Employment File/Medical File;
D. Timesheets;
E. Deposition Transcript of Dr. Robert M. Drisko;
F. Curriculum Vitae and Records of Dr. Robert M. Drisko;
G. October 18, 2007 Work Status Report;
H. Midwest Neurosurgery Records;
I. Records from Family Health Specialists;
J. Medical Records of Concentra;
K. Medical Records of Dr. Steven Hendler
L. Medical Records of Drisko, Fee & Parkins
M. Medical Expense Summary
N. Deposition Transcript of Dr. P. Brent Koprivica
O. Vocational Report of Terry Cordray
P. October 10, 2008 Correspondence to Builders Mutual Casualty Co.
Q. October 10, 2009 Correspondence to Builders Mutual Casualty Co.
R. October 10, 2009 Correspondence to Builders Mutual Casualty Co.
S. December 2, 2009 Narrative Report of Dr. Drisko
T. Itemization of TTD Paid by Builders Mutual Casualty Co.
U. Itemization of Medical Paid by Builders Mutual Casualty Co.
V. Curriculum Vitae of Terry Cordray

Employer/Insurer's Exhibits:

1. Builders Mutual Casualty Co. Letter
2. Deposition Transcript of Donna Abram
3. Federal Reserve Orientation Checklist
4. Concentra Patient Information Form
5. CIP Safety Program
6. Deposition Transcript of Dr. Chris Fevurly
7. Deposition Transcript of Danny Boyle
8. Deposition Transcript of Dr. Mitzi Gore

9. Deposition Transcript of Dr. Robert Drisko
10. Photograph – 15th Floor of the Federal Reserve Building
11. Photograph- September 21, 2007 Areal of the Federal Reserve Building
12. Photograph- August 15, 2007 Areal of the Federal Reserve Building
13. Photograph- Not offered
14. Photograph- August 15, 2007 Areal View Southwest
15. Photograph- September 21, 2007 Areal View Northeast
16. Photograph- Not offered

FINDINGS OF FACT

Dennis Carver has worked as a roofer for nearly thirty years. In 1993 he suffered a work-related back injury, which resulted in a workers' compensation settlement based on 13.5% permanent partial disability to the body as a whole. The medical records from Carver's family doctors confirm that Carver suffered from sporadic but ongoing back pain following his 1993 work injury.

Carver began working for Delta Innovative Services as a journeyman roofer in 2004.

Carver testified he injured his back while carrying a load of felt up a ladder on October 1, 2007 while working on a "punch list" at the Federal Reserve Bank. Carver felt immediate pain but thought he could work through it. Carver continued to have pain and sought medical treatment. Carver first mentioned a work injury to his family physician, Dr. Mitzi Gore, on October 8, 2007. Dr. Gore reported that Carver twisted his back at work on Friday and was unable to work the next day because of pain in his legs. Dr. Gore diagnosed Carver with sciatica and prescribed Vicodin, Prednisone, and Flexeril. Dr. Gore ordered an MRI on October 16, 2007 and referred Carver to neurosurgeon, Dr. Kaufman, on October 17, 2007, when Carver's symptoms did not resolve.

According to Dr. Kaufman's report, Carver indicated that he first noticed sharp pain in his low back and legs approximately two weeks earlier. Carver explained that he carried some roofing materials that weighed up to one hundred pounds up a ladder at work without any significant difficulty and woke up the following morning with pain in his back and legs.

Dr. Kaufman felt that any symptoms Carver may have experienced suggestive of lumbar radiculopathy had cleared. Dr. Kaufman thought Carver likely had a problem in his left knee, and recommended that he see an orthopedic surgeon for a knee evaluation.

On October 18, 2007, Carver saw Dr. Drisko, orthopedic surgeon. According to Dr. Drisko's records, Carver reported that he felt a twinge in his back when he was carrying a one hundred pound bag up a ladder at work on October 1, 2007, and then developed severe pain in his back and left leg the next day. Dr. Drisko reviewed Carver's MRI and concluded that it revealed a herniated disk at L5-S1 on the left and recommended an epidural block as treatment.

Carver acknowledged that he did not notify his employer that he had sustained a work injury on October 1, 2007. On October 19, 2007, Carver notified his employer that he had injured his back and needed medical attention. Carver's employer filed a Report of

Accident with the Kansas Division of Workers' Compensation and sent Carver to Concentra for an examination and a drug screen.

Concentra's records reflect that Carver reported that his low back and left leg injury occurred at work on October 12, 2007 when he was "bent over torching" at the Oak Park Mall. Carver reported that he experienced a "hard time to stand erect, limping left leg buttocks to knee."

On December 7, 2007, Dr. Drisko referred Carver to Dr. Lee for epidural injections. On February 21, 2008, Carver reported to Dr. Lee that he had continued to improve and that he again started to experience pain after jumping into a sky track the previous day. April 8, 2008, Carver explained that he had been doing well overall until approximately a week previous when he suffered another lifting injury at work which caused excruciating low back pain.

On April 23, 2008, Carver returned to Dr. Drisko for a follow-up appointment. At that time, Dr. Drisko authorized him to increase his activities to whatever level he could tolerate and reported that Carver's disk had likely been absorbed. Carver's back pain returned following a coughing/sneezing incident in early May 2008.

Dr. Drisko performed a second MRI of employee's lumbar spine. This MRI revealed a large herniated disk at L5-S1 to the left. Dr. Drisko performed surgery on July 23, 2009. Carver's symptoms became significantly more severe following surgery. Dr. Drisko diagnosed Carver with RSD/Complex Regional Pain Syndrome.

Carver testified that his current condition is extremely painful and disabling. He explained that he experiences constant pain, paralyzed toes, and a burning sensation from his waist to his toes. It is very difficult to walk. Carver uses a cane while ambulating. Carver has difficulty sleeping, sitting for more than 30 minutes or standing for more than 15 minutes. He lies down periodically during the day. Carver currently takes pain medication including narcotics.

Jeremy Reno, Delta co-worker, testified that he worked with Carver doing "punch list" items at the Federal Reserve project on October 1, 2007. Reno has no direct knowledge of whether Carver carried a felt roll up the ladder but did notice that Carver wasn't able "to pull his weight" in terms of work duties. Reno remembers an extension ladder being in place but does not recall how the materials got to the roof.

Elizabeth Carver, Dennis Carver's wife, testified that she placed the phone calls on behalf of Carver to various doctors including Gore, Kaufman, and Drisko. Mrs. Carver testified that Carver's symptoms seemed to get progressively worse which prompted her call to the physicians. Mrs. Carver was aware of Carver's prior back injury and complaints but indicated these complaints were different and worse.

Danny Boyle, owner of Delta, does not specifically recall Carver advising him of any injury of October 1, 2007. Boyle was aware and reported any injury in Kansas based on an October 12, 2007 date of accident.

Accident

There is certainly confusion surrounding whether Carver sustained an accident on October 1, 2007 at the Federal Reserve Bank in Kansas City, Missouri. But based on Carver's testimony, co-worker testimony, and supporting medical records which are consistent and credible, I find Dennis Carver sustained an accident arising out of and in the course of his employment with Delta Innovative Services while carrying a roll of felt up a ladder on the Federal Reserve project on October 1, 2007. Carver testified his symptoms started on that day after carrying the felt roll up a ladder. His symptoms continued to progress to the point Carver sought medical treatment, all of which is consistent with his testimony.

Causation

Employer contends that even if Carver sustained an accident on October 1, 2007, subsequent accidents or Carver's prior back injury are the prevailing cause of his need for treatment.

Both Dr. Kauffman and Dr. Drisko's records reflect Carver reported the same mechanism of injury to them: carrying a 100 pound item up a ladder.

Medical evidence established Carver was treated by Dr. Drisko from October 18, 2007 through December 2, 2009. Carver also treated with Dr. Lee of Dr. Drisko's office and Dr. Drisko had the opportunity to review Dr. Lee's records on a regular basis. After treating Carver for over two years, Dr. Drisko was asked to give his testimony regarding the cause of Carver's injuries. Although Dr. Drisko acknowledged Carver had subsequent exacerbations of pain during the course of his treatment, he testified once Carver had a herniation, it would be expected he would suffer aggravations and increase in pain with activity. Dr. Drisko testified the MRI on October 15, 2007 reflected Carver had a herniated disk at the same level. Dr. Drisko specifically stated in a May 19, 2009 report, "I do not think there is any question that carrying a 100 pound bag up the 40 foot ladder was the prevailing factor with regard to his injury and need for subsequent medical treatment." Although the employer and insurer have attempted to show the disk was absorbed and was caused to herniate again by subsequent activity, Dr. Drisko believed even if it was absorbed, Carver was disabled enough at that point to require operative intervention regardless. Dr. Drisko also testified Carver developed RSD following the surgery and felt the condition was directly related to the October 1, 2007 injury.

Dr. Koprivica testified that the October 1, 2007 injury was the prevailing factor in Carver's need for treatment including back surgery. Dr. Koprivica attributed Carver's Complex Regional Pain Syndrome/CRPS to the October 1, 2007 injury.

Dr. Fevurly, who evaluated Carver on behalf of the employer/insurer, testified that Carver's surgical intervention was necessitated by a sneezing/coughing event in May 2008.

I find the testimony of Dr. Drisko to be more credible and persuasive than that of Dr. Fevurly. Likewise, Dr. Drisko's opinions are supported by that of Dr. Koprivica. I find Dr. Koprivica's opinions to be credible as well.

Accordingly, I find Carver proved that an accident occurred in the course and scope of his employment on October 1, 2007 and Carver's subsequent need for medical treatment and his resulting disability were a direct result and natural consequence of Carver's October 1, 2007 accident.

Notice

Section 287.420 RSMo. requires notice to be given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Carver testified he spoke with Delta's owner, Boyle, on the Wednesday following his October 1, 2007 injury and reported to Boyle that he had hurt his back. Carver testified as soon as he realized that his back pain was not going to go away like a typical sprain, he notified Boyle that he had suffered a back injury as a result of work. Boyle immediately sent him to Concentra on October 19, 2007. Additionally, on October 19, 2007, as evidence by Employer's Exhibit 1, Delta's insurer sent a letter to Carver acknowledging the accident, evidencing they had notice of the alleged accident. Furthermore, §287.420 RSMo. requires notice to be given to the employer. The onus is on the employer to notify their insurance carrier of the accident – not the employee. Notice was given to Carver's employer, Delta, well within the 30 day requirement pursuant to §287.420 RSMo.

I find Carver provided that and notice was given to his employer, Delta, as required by statute.

Temporary and Total Disability

Carver is seeking temporary total disability compensation for the period of October 13, 2007 through January 4, 2008 and June 25, 2008 through December 2, 2009. Employer and insurer stipulated that they did not pay any temporary total disability benefits pursuant to the Missouri Workers' Compensation laws.

Section 287.270 RSMo provides that an injured employee is to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in §287.020.7 as the "inability to return to any employment and not merely… [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Univ. of Missouri, 822 S.W. 2d 504 (Mo.App. 1991); Phelps v. Jeff Wok Const. Co., 803 S.W. 2d 641, 645 (Mo.App. 1991); and Williams v. Pillsbury Co., 694 S.W. 2d 488 (Mo.App. 1985).

The employee has the burden of proving that he or she is unable to return to any employment. 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). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Evidence of temporary disability given by the employee is not necessarily

beyond the realm of understanding by lay persons. Riggs v. Daniel Intern, 771 S.W. 2d 850, 851 (Mo.App. 1989).

I believe the testimony of Dr. Drisko and Dr. Koprivica supports Carver's claim for temporary total disability compensation. Additionally, Carver's testimony and the corroborating medical records evidence Carver's inability to work from October 13, 2007 through January 4, 2008 and June 25, 2008 through December 2, 2009. Further, Dr. Drisko and Dr. Koprivica testified Carver did not reach maximum medical improvement until he was released from Dr. Drisko's care on December 2, 2009. There is no evidence to the contrary.

I find Carver has met his burden of proof in his claim for temporary total disability compensation. Carver was temporarily disabled from October 13, 2007 through January 4, 2008 and June 25, 2008 through December 2, 2009. The employer shall pay $64,720.62 representing 87.14 weeks for the time period in which Carver was temporarily totally disabled.

Liability for Past Medical Benefits

Carver has asserted a claim for past medical benefits and no medical benefits were provided pursuant to the Missouri Workers' Compensation laws.

"Employee had the burden of proving his entitlement to benefits for care and treatment authorized by §287.140.1 i.e., that which is reasonably required to cure and relieve from the effects of the work injury." Bowers v. Hiland Dairy Co., 132 S.W. 3d 260, 266 (Mo.App. 2004); Rana v. Landstar TLC, 46 S.W. 3d 614, 622 (Mo.App. 2001). Meeting that burden requires that the past bills be causally related to the work injury. Bowers, 132 S.W. 3d at 266; Pemberton v. 3M Co., 992 S.W. 2d 365, 368-69 (Mo.App. 1999).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W. 2d 926 (Mo.App. 1991), overruled in part on the grounds by Hampton, 121 S.W. 3d at 229; Jones v. Jefferson City School District, 801 S.W. 2d 486, 490-91 (Mo.App. 1990), overruled in part on the other grounds by Hampton, 121 S.W. 3d at 230; Roberts v. Consumers Market, 725 S.@. 2d 652, 653 (Mo.App. 1987); Brueggemann v. Permaneer Door Corporation, 527 S.W. 2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W. 2d 105 (Mo. 1989); Meyer v. Superior Insulating Tape, 882 S.W. 2d 735 738 (Mo.App. 1994) overruled in part on other grounds by Hampton, 121 S.W. 3d at 228; Lenzini v. Columbia Foods, 829 S.W. 2d 482, 484 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W. 3d at 229; Wood v. Dierbergs Market, 843 S.W. 2d 396, 399 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W. 3d at 229. The medical bills in Martin were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. Martin, 769 S.W. 2d at 111.

Carver has submitted the medical records and bills reflecting the treatment he received into evidence. The total medical bills were itemized and admitted as Exhibit M. The medical records correlate with the medical bills entered into evidence. Further, Dr. Koprivica reviewed

the medical records and found that they were reasonable and necessary to cure and relieve Carver of the symptoms of his injuries as a result of the October 1, 2007 accident. There is no evidence to the contrary. Because Carver's accident on October 1, 2007 was the prevailing factor in causing his need for medical treatment and resultant disability, Carver's employer and insurer were responsible for providing medical care and treatment to relieve him of his injuries. As they failed to provide said benefits, I find that Carver met his burden of proof regarding the past medical expenses.

Nature and Extent of Claimant's Disability

Carver has asserted a claim for permanent and total disability benefits, with the liability of such resting with either the employer and insurer or the Second Injury Fund.

Section 287.020.7 RSMo. provides, "The term and "total disability" as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee' was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowaiski v. M-G Metals and Sales, Inc., 631 S.W. 2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W. 3d 879, 884 (Mo.App. 2001), overruled in part on the grounds by Hampton, 212 S.W. 3d at 225: Reiner v. Treasurer of the State of Mo., 837 S.W. 2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W. 3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W. 2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W 2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W. 2d 831, 834 (Mo.App. 1993).

Section 287.220, RSMo. creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the Fund in "[a]ll cases of permanent disability where there has been previous disability." In deciding whether the Fund has any liability, the first determination is the degree of disability from the last injury considered alone. Landman v. Ice Cream Specialties, Inc., 107 S.W. 3d 240, 248 (Mo.banc 2003), overruled in part on other grounds by Hampton, 121 S.W. 3d at 224 (Mo.banc 2003); Hughey v. Chrysler Corp., 34 S.W. 3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the Fund has no liability and the employer is responsible for the entire amount of compensation. Id. At 248.

Dr. Koprivica assigned Carver restrictions that included no lifting activities from floor level, rare bending at the waist, pushing, pulling or twisting. He also stated Carver should avoid sustained or awkward positions of the lumbar spine and posturally Carver was restricted to captive sitting intervals of 30 minutes or less with the flexibility of getting up whenever necessary. Dr. Koprivica also restricted Carver's standing and walking to the use of a cane and

felt his abilities were severely limited. On a one time basis, Dr. Koprivica felt Carver's standing and walking should be restricted to 15 minute intervals or less. He was also restricted completely from squatting, crawling, kneeling or climbing. Dr. Koprivica felt Carver was permanently totally disabled as a result of the October 1, 2007 accident in isolation .

Dr. Fevurly believed the weakness in Carver's left leg from the residual of the left S1 radiculopathy limited his ability to perform lifting greater than 20 pounds, work on ladders or perform repetitive stair climbing.

Terry Cordray provided a vocational evaluation of Carver. Mr. Cordray opined a 51 year old man identified as having CRPS with no transferable skills from his long-term employment as a roofer requires the need to alternate sitting and standing and who is taking narcotic pain medications, is permanently totally disabled. In addition to those factors, Mr. Cordray cited Carver's need to lie down unpredictably during the day, his lack of driving ability and his need to walk with a cane as further barriers to his employment. Mr. Cordray unequivocally stated Carver is permanently and totally disabled.

Ms. Abram authored a report regarding Carver's work abilities and acknowledged based on the FCE, Carver would be precluded from full-time employment. Additionally, if she followed the restrictions of Dr. Koprivica, Carver was permanently totally disabled. Furthermore, Ms. Abram acknowledged the additional restriction of the need to lie down unpredictably during the day would make Carver unemployable. Ms. Abram did believe Carver capable of part-time employment.

I find the testimony of Dr. Koprivica to be more persuasive and credible than that of Dr. Fevurly. I also find the testimony of Terry Cordray to be more credible and persuasive than that of Donn Abram.

Based upon the evidence presented, I find that Carver is permanently and totally disabled. I find that no employer could reasonably be expected to hire Carver in his current condition, particularly when one considers the chronic pain Carver suffers, the need for narcotic medications and the requirement to lie down unpredictably throughout the day. I further find the total disability is a result of the October 1, 2007 injury in isolation.

The evidence establishes that Carver reached maximum medical improvement on December 2, 2009. The employer and insurer are therefore directed to pay the sum of $742.72 per week for permanent total disability commencing on December 3, 2009 and continuing for the remainder of Carver's life, pursuant to Missouri Workers' Compensation laws.

Violation of Section 287.120 RSMo.

Section 287.120(5), RSMo. states:

> "Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death

> benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had prior to the injury made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees."

The protection to the employer provided by this section is an affirmative defense and therefore the burden of proof is on the employer and insurer.

A number of witnesses testified about the "3 point contact rule" requiring employees to maintain 3 points of contact at all times while climbing a ladder. Transporting materials up a ladder is virtually impossible within the confines of this safety rule.

Carver testified that he knowingly violated a safety rule by engaging in the activity that allegedly caused his back injury on October 1, 2007. He acknowledged that roofers are never supposed to carry materials up a ladder. Multiple witnesses testified regarding the 3 point contact rule. Nevertheless, Carver testified that he knew he was going to violate this safety rule before he began working on October 1, 2007 and made a conscious decision to do so.

I find that the facts of this case call for a reduction in Carver's benefits under §287.120.5. The next inquiry is what percentage of a reduction is proper given the totality of the circumstances. Unfortunately, there are currently no appellate decisions available that offer any insight regarding how to determine what percentage reduction in benefits is appropriate in a particular case. The only opinion construing is Ross Stillwell vs. Knapheide Truck Equipment Co., Injury No. 06-002402, a March 23, 2010 decision of the Labor and Industrial Relations Commission.

The issue before the Commission in Stillwell was whether medical expenses are to be considered "compensation" as that term is used in §287.120.5 and, therefore, subject to any reduction imposed pursuant to that provision. The Commission concluded that medical expenses are clearly "compensation" and are subject to the reduction provided in §287.120.5.

In Stillwell, the Commission did not address how a court should determine the appropriate percentage by which to reduce an employee's compensation for failure to obey a reasonable safety rule. Rather, the Commission affirmed the Administrative Law Judge's finding that a 30 percent reduction would be appropriate given the facts of that case.

I find a 50 percent reduction is justified. In this case, Carver was the foreman on his project and was solely responsible for ensuring that all safety rules were followed. The Federal Reserve project Carver was working on was extremely safety-oriented and many efforts were made to ensure that safety rules were followed. The materials were provided to Carver to make it possible to comply with the safety rule at issue in this case. Nevertheless, Carver went to work on the morning of October 1, 2007 with the intention and plan to violate the 3 point contact rule. I find that a willful violation such as this certainly justifies a maximum reduction in compensation under §287.120.5.

Carver seeks an award leaving open future medical care and treatment to relieve and cure him of the work related injuries he has suffered.

Section 287.140, RSMo. requires that the employer/insurer provide "such medical surgical, chiropractic, and hospital treatment… as may reasonably be required … to cure and relieve [the employee] from the effects of the injury." Mathia v. Contract Freighters, Inc., 929 S.W. 2d 271, 277 (Mo.App. 1996). The standard of proof for entitlement to an allowance for further medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need further medical treatment. Modlin v. Sun Mark, Inc., 699 S.W. 2d 5, 7 (Mo.App. 1995). Employees are required to show by a reasonable probability that they will need future medical treatment. Sharp v. New Mac Elec. Co-op. 92 S.W. 3d 351, 354 (Mo.App. 2003), overruled in part on other grounds by Hampton, 121 S.W. 3d at 224; Dean v. St. Luke's Hospital, 936 S.W. 2d 601, 603 (Mo.App. 1997), overruled in part on other grounds by Hampton, 121 S.W. 3d at 227.

Drs. Drisko and Koprivica testified that Carver will require further medical treatment and care to cure and relieve the effects of his October 1, 2007 injury.

Based on this evidence, employer and insurer are directed to provide all additional medical treatment reasonable and necessary to cure and relieve Carver from the effects of his October 1, 2007 injury in accordance with the provisions of §287.140 RSMo. This requirement for future medical aid shall include all care and treatment that is causally related to the October 1, 2007 accident.

An attorney fee of 25% of compensation awarded is allowed Carver's attorney, Mark Kelly, for necessary services provided Claimant.

Made by:______________________________
Paula A. McKeon
Chief Administrative Law Judge
Division of Workers' Compensation

This award is dated, attested to and transmitted to the parties this _____ day of ________, 2010, by:

____
Naomi Pearson
Division of Workers' Compensation