

The Missouri Bar
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Robert B. Miner
Administrative Law Judge
525 Jules Street, Suite 315
St. Joseph, Missouri 64501

Permanent Total Disability and Future Medical Care

1. Burden of proof.

Old law. Prior to August 28, 2005, Section 287.800, RSMo 2000 provided in part: "Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . ." The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.*, 804 S.W.2d 743, 745-46 (Mo. 1991), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224 (Mo. banc 2003)¹. Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994).

New law. Section 287.800, RSMo 2006 provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

¹ Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

Section 287.808, RSMo 2006 provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen*, 52 S.W.3d at 618; *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996). The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

2. Definition of “accident” and “injury.”

Old law. Section 287.020.2, RSMo 2000 requires that the injury be "clearly work related" for it to be compensable. Section 287.020, RSMo 2000 provides:

2. The word ‘accident’ as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) 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 employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

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

New Law. Section 287.020.2, RSMo 2006 provides:

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.

Section 287.020.3, RSMo 2006 provides in part:

3. (1) In this chapter the term ‘injury’ is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) 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.

(3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

(5) The terms ‘injury’ and ‘personal injuries’ shall mean violence to the physical structure of the body. . . .

3. Disability demonstrated and certified by a physician.

Section 287.190.6 (2), RSMO 2006 provides:

Permanent partial disability or permanent total disability shall be demonstrated and certified by a physician. Medical opinions addressing compensability and disability shall be stated within a reasonable degree of medical certainty. In determining compensability and disability, where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings. Objective medical findings are those findings demonstrable on physical examination or by appropriate tests or diagnostic procedures.

4. Permanent total disability.

Section 287.020.7, RSMo 2006 provides: “The term ‘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.” *Kowalski 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. *Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 635 (Mo. App. 2007); *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992); *Isacc v. Atlas Plastic Corp.*, 793 S.W.2d 165, 166 (Mo.App. 1990).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483 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. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

5. Future Medical Aid.

Section 287.140, RSMo 2006 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.” Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 266 (Mo.App. 2004); *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman*, 906 S.W.2d at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers*, 132 S.W.3d at 270. Medical aid may be required even though it merely relieves the employee’s suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Bowers*, 132 S.W.3d at 266; *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brollier*, 163 S.W. 2d at 115. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

6. Aggravation.

Old law. A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the pre-existing condition to “escalate to the level of disability.” *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo.App. 2005); *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo. App. 1998); *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. 1994). An employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury. *Gennari v. Norwood Hills Corporation*, 322 S.W.2d 718, 722-23 (Mo. 1959); *Miller*, 890 S.W.2d at 376; *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652 (Mo.App. 1983). It is sufficient to show only that the

performance of usual and customary duties led to a breakdown or change in pathology. *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504, 509 (Mo.App. 1997); *Smith v. Climate Engineering*, 939 S.W.2d 429, 434 (Mo.App. 1996); *Wolfgeher v. Wagner Cartage Serv, Inc.*, 646 S.W.2d 781, 784 (Mo. banc 1983).

The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a “change in pathology.” *Winsor*, 950 S.W.2d at 509; *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo.App. 1991). The Court notes in *Winsor* at 509:

Dr. Weed testified that there was an exacerbation of Winsor's previous back injury by virtue of the August 11th incident. ‘Exacerbation,’ whether used in medical parlance or everyday conversation, means the same thing: an ‘increase in the severity of a disease or any of its symptoms,’ *Dorland's Illustrated Medical Dictionary* 589 (28th ed.1994), an ‘intensification or aggravation, as of a disease, pain, etc.’

“If substantial evidence exists from which the Commission could determine that Claimant’s preexisting condition did not constitute an impediment to performance of Claimant’s duties, there is sufficient competent evidence to warrant a finding that Claimant’s condition was aggravated by a work-related injury.” *Avery*, 966 S.W.2d at 322; *Miller*, 890 S.W.2d at 376.

New law: Under the 2005 amendments to the Workers’ Compensation Law, Claimant needs to prove that work was the prevailing factor in causing his injury and disability. *Gordon v. City of Ellisville*, 268 S.W.3d 454 (Mo.App. 2008). The Court in *Gordon* states at 459-460:

Case law preceding the 2005 amendments to the Worker's Compensation Law indeed permitted a claimant to recover benefits by establishing a direct causal link between job duties and an “aggravated condition.” See *Rono v. Famous Barr*, 91 S.W.3d 688, 691 (Mo.App. E.D.2002). However, since *Rono* was decided, the legislature amended Section 287.020, changing the criteria for when an injury is compensable. In particular, the legislature struck out language stating that an injury is deemed to arise out of and in the course of employment where it is reasonably apparent that the “employment” is a “substantial” factor in causing the injury, “can be seen to have followed as a natural incident of the work” and “can be fairly traced to the employment as a proximate cause.” See S.B. Nos. 1 & 130, section A 93rd Gen.

Assem., 1st Reg. Sess. (Mo.2005). Thus, while Rono's approval of compensation where the claimant establishes a causal link between his aggravated condition and his job duties fits within the former version of section 287.020, we review causation in light of a new statutory standard.

Under the current statute, a work injury “is compensable *only* if the accident was the prevailing factor in causing both the resulting medical condition and disability.” Section 287.020.3 (emphasis added). Further, Section 287.800 RSMo Supp.2006 requires this Court to strictly construe the provisions of the Worker's Compensation Law. Thus, we must limit our consideration of Claimant's claim for benefits to the standard contained in the current version of section 287.020.3. Specifically, we are to review whether Claimant established that his 2005 work accident was the prevailing factor in causing his need for rotator cuff surgery and post-surgery recovery. Therefore, because Claimant's argument that he is entitled to compensation is based on analysis under the former version of section 287.020, it has no merit.

Based on the standard contained in the current version of section 287.020, we find that the Commission's decision that Claimant's 2005 work accident was not the prevailing factor in causing his need for rotator cuff surgery and post-surgery recovery was supported by competent and substantial evidence. Dr. Lehman, Claimant's orthopedic surgeon, testified that after he observed first-hand the damage to Claimant's shoulder, he found no evidence of acute injury. He also concluded that the damage was long-term in nature. Dr. Lehman then specifically testified that the strain and inflammation Claimant experienced when he fell was not the prevailing factor in his need for surgery.

Dr. Poetz, who testified that the injury was the prevailing factor, was found to be less persuasive than Dr. Lehman because of his lack of expertise in the field of orthopedic surgery and his inability to reconcile Dr. Lehman's surgical findings with his opinion. In addition, as discussed below, Claimant did not offer any additional evidence to counter Dr. Lehman's conclusions with regard to medical causation other than his own testimony, which was not sufficient to discount

Dr. Lehman's surgical findings. Based on the foregoing,
Claimant's first point is denied.