

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

Injury No.: 06-068486

Employee: Marc Meng
Employer: SystemAire, Inc.
Insurer: Cincinnati Ins. Co.
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 reviewed the evidence, read the parties' briefs, 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. We adopt the administrative law judge's findings, except where inconsistent with our supplemental findings below.

Preliminaries

The Award prepared by the administrative law judge identifies the parties in the caption in this matter at page one, as Employee, Marc Meng; Employer, SystemAire, Inc.; and Insurer, Cincinnati Ins. Co. In addition to those parties, the Second Injury Fund was a party appearing and participating at the hearing, as noted on paragraph one of the Award at page three and should be included as a party in the caption.

This matter (06-068486) and Injury No. 08-121599 involving employer, Harke Heating and Air Conditioning Systems (Harke), were tried together. Applications for review were filed by employer/insurer in this matter (06-068486) and by employee in Injury No. 08-121599. At the beginning of oral argument on August 27, 2019, the parties were asked for input regarding allotting time for argument, considering the overlap of issues between the two cases, and to address it in the most efficient and fair manner. After allowing input, hearing no further objection, the Commission determined to hear the cases separately, allowing ten minutes for each party of a case with additional time allowed at the end for questions from the Commission to the parties. As the Commission's oral arguments are open to the public, each party was allowed to be present as observers on the related claim.

We further note constitutional and equitable arguments raised by attorney Brian Weinstock for employer, in his briefing. We find no error or abuse of discretion by the administrative law judge or the Honorable John Ottenad in their rulings on discovery and evidentiary issues. From our review, due process was afforded and we decline to address these concerns¹ raised by Mr. Weinstock further.

¹ We note the administrative law judge addressed these issues in detail at page 32-33 of the decision in Injury No. 08-121599, including legal theories of equitable estoppel, judicial estoppel, abandonment of waiver of defenses, and due process. In this matter (Injury No. 06-068486) the administrative law judge addressed the nature of those concerns as raised through evidentiary objections, at page 7 of the award.

Employee: Marc Meng

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DiscussionLast Exposure Rule

We agree with the administrative law judge's finding that SystemAire is the employer in whose employment the employee was last exposed to the hazards of the disabling occupational diseases of carpal tunnel syndrome, cubital tunnel syndrome and thoracic outlet syndrome. We supplement the administrative law judge's decision to make it clear that we find these conditions were related and all developed through his work as a sheet metal worker, with first evidence of disability on all conditions, appearing during the employment with SytemAire.

Section 287.063 RSMo. Occupational Diseases, Presumption of Exposure – Last Employer Liable – Statute of Limitations, Starts Running, When.

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease *prior to evidence of disability*, regardless of the length of time of such last exposure, subject to the notice provisions of section 287.420. (Emphasis ours)

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Section 287.067 RSMo. Occupational Disease Defined – Repetitive Motion, Loss of Hearing, Radiation Injury, Communicable Disease, Others; provides in relevant part:

8. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

Employee was employed with SystemAire from January 3, 2005 to August 20, 2007. His work duties exposed him to repetitive motion activities involving his hands, arms, and raising his arms above his head involving his shoulders. These repetitive motion activities have been found by credible medical opinion to be the prevailing factor in causing the conditions of carpal tunnel syndrome, cubital tunnel syndrome, and thoracic outlet syndrome (TOS).

Employee experienced symptoms consistent with carpal tunnel and cubital tunnel syndromes beginning in 2006, and was initially treated by employer's authorized medical providers. Evidence of disability due to carpal and cubital tunnel syndromes and thoracic outlet syndrome arose in 2006-2007, and employee was unable to work or unable to perform certain work duties during periods of his SystemAire employment. He underwent surgery for both wrists and elbows in early 2007, while employed by employer, SystemAire. As of July 24, 2007, Dr. Susan MacKinnon who had been treating employee for his wrist and elbow symptoms, began to further consider TOS, having documented his inability to raise his arms above his head, and his tendency to drop things. Dr. MacKinnon testified this was consistent with TOS. Medical records in 2006 and the summer and fall of 2007, identify symptoms consistent with TOS, and note evidence of disability resulting from the condition affecting his ability to perform his duties.

Employee: Marc Meng

Washington University medical providers, Dr. MacKinnon, M.D. and Renee Ivens, P.T. D.P.T. both opined that employee's symptoms were disabling in July through September 2007. Dr. MacKinnon explained that the symptoms of carpal and cubital tunnel and TOS are similar and that a physician may initially focus on one aspect, depending on how the patient presents his worst symptoms. Renee Ivens noted on September 27, 2007 that his neural symptoms were limiting his ability to work safely as a sheet metal worker.

After leaving SystemAire due to lay-off, employee was employed for about four days with a firm referred to as ICON. The duties as a sheet metal worker were the same as at SystemAire. Employee credibly testified in his May 2009 deposition, that his employment ended with ICON at least in part, because of pain and difficulty in performing the work duties.² *Transcript* page 5028. Employee then obtained a job through the union hall with American Sheet Metal (ASM) from October 25, 2007 to October 31, 2007, doing the same duties as in his prior sheet metal work position with SystemAire. He was then off work until he was hired by Harke in late November 2007. Employee's work with each of the interim employers, ICON and ASM, was for less than three months. The evidence supports the finding that the work with the previous employer, SystemAire, was the prevailing factor in causing all the injuries/occupational diseases and evidence of disability first arose during that employment.

Conclusion

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

The award and decision of Administrative Law Judge Marvin O. Teer, Jr. is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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 12th day of December 2019.



LABOR AND INDUSTRIAL RELATIONS COMMISSION

Robert Cornejo

 Robert Cornejo, Chairman

Reid K. Forrester

 Reid K. Forrester, Member

NOT SITTING

 Curtis E. Chick, Jr., Member

Attest:

Dana M. Boyman

 Secretary

² We note this finding is different than the administrative law judge's finding, and replace his finding at page 8, with our own. Employee's memory on this issue changed as time elapsed, but we deem the testimony nearest in time to the event to be more persuasive.

AWARD

Employee: Marc Meng

Injury No.: 06-068486

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: SystemAire, Inc.,

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

Insurer: Cincinnati, Ins. Co.,

Hearing Date: September 26, 2018 and
October 1, 2018 and
October 2, 2018

Checked by: MT;sh

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: May 15, 2006.
5. State location where accident occurred or occupational disease was contracted: St. Louis County, MO.
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: On or about May 15, 2006 Claimant sustained an occupational disease through repetitive work-related duties.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Upper extremities, body as a whole, wrists and elbows.
14. Nature and extent of any permanent disability: Permanent total disability of \$696.97/week beginning November 9, 2012 and continuing for life.
15. Compensation paid to-date for temporary disability: \$0.
16. Value necessary medical aid paid to date by employer/insurer? \$0.

Value necessary medical aid not furnished by employer/insurer? Thoracic outlet syndrome medical costs; \$183,027.30; Carpal tunnel syndrome medical costs; \$37,796.86;
 Total \$220,823.86

- 18. Claimant's average weekly wages: sufficient to result in the maximum weekly compensation rates.
- 19. Weekly compensation rate: \$696.97 TTD/\$365.08 PPD.
- 20. Method wages computation: Stipulated.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: (183,027 + 37,796.86)	\$220,824.16
36 4/7 & 231 4/7 weeks of temporary total disability: September 6, 2006 – May 19, 2007, June 3, 2008 – November 9, 2012 (36 4/7 weeks x \$696.97) or (\$25,090.92+398.26)	\$25,489.18
(231 4/7 weeks x \$696.97) or (\$161,000.97 + 398.26)	\$161,398.33

weeks of permanent partial disability from Employer
 None

13 weeks of disfigurement from Employer: (13 x \$365.08)	\$4,746.04.
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Permanent total disability benefits from Employer beginning November 9, 2012, for Claimant's lifetime.	TBD
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22. Second Injury Fund liability: \$0.00

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund:

TOTAL:	\$412,457.71
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23. Future requirements awarded: SystemAire to be responsible for providing ongoing medical care, as may be needed, to cure and relieve effects of Claimant's wrists, elbows, and thoracic outlet syndrome and its sequelae.

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: Dean Christiansen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Marc Meng

Injury No. 06-068486

Dependents: N/A

Before the
Division of Workers'
Compensation

Employer: SystemAire, Inc.,

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

Insurer: Cincinnati Ins. Co.,

Hearing Date: September 26, 2018 and
October 1, 2018, and
October 2, 2018.

Checked by: MT;sh

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on September 26, 2018 for a final hearing to determine the matter of Marc Meng (hereinafter Claimant"). Attorney Dean Christianson represented Claimant; Attorney Brian Weinstock represented Employer SystemAire (hereinafter "SystemAire"); Attorney Chris Archer represented Employer, Harke Heating & Air Conditioning (hereinafter "Harke"), Assistant Attorney General David Drescher represented the Second Injury Fund (hereinafter "SIF" or the "Fund"). This case and Injury Number 08-121599 were tried together.

The parties stipulated to the following

1. Claimant was an employee of Employer pursuant to Chapter 287 RSMo.; Venue is proper; and Employer received proper notice of the claim.
2. The average weekly wage at the date of injury was sufficient to result in compensation rates of \$696.97 for temporary total disability ("TTD"), and \$365.08 for permanent partial disability ("PPD").
3. Claimant received no compensation from Employer SystemAire.
4. Employer, SystemAire, has paid \$0 in medical costs.
5. The Court took judicial notice of Claimant's Division of Worker's Compensation file.

ISSUES

The issues to be determined are:

1. Was there an occupational disease arising out of employment?
2. Was Claimant's condition medically caused by his employment?

- Did Claimant sustain permanent disability?
4. Did Claimant sustain disfigurement?
 5. Is Claimant owed temporary total disability?
 6. Is Claimant owed the cost of past medical care?
 7. Is Claimant entitled to the cost of future medical care?
 8. What is the nature and extent of SIF liability?
 9. What is Claimant's date of maximum medical improvement?
 10. What is the applicable date of the last exposure?
 11. Were Claimant's medical bills fair and reasonable?
 12. Were any defenses abandoned or waived?
 13. Is there a question of equitable or judicial estoppel?
 14. Is there a question of due process?

The only issue relevant to the Fund is the nature and extent of SIF liability, if any.

EXHIBITS

Claimant's Exhibits:

1. Deposition transcript of Dr. Musich taken 10/26/15
2. Deposition transcript of Dr. Musich taken 11/16/17
3. Deposition transcript of Dr. Thompson taken 6/22/11
4. Deposition transcript of Dr. Thompson taken 9/1/11
5. Deposition transcript of Dr. Thompson taken 8/17/17
6. Deposition transcript of Timothy Lalk taken 11/9/17
7. Certified records of Barnes-Jewish Hospital (cert 12/13/17) (dates: 11/30/10, 12/8/10, 12/27/10, 8/11/11, et seq. Rastogi records)
8. Certified records of Barnes-Jewish Hospital (cert 3/25/09) (dates: 2/13/09)
9. Certified records of Barnes-Jewish Hospital (cert 9/16/10) (dates: 3/20/07, 2/12/09, 2/26/09, 6/4/09, 7/16/09, 10/1/09, 1/27/10, 4/1/10, 7/1/10)
10. Certified records of Barnes-Jewish Hospital (cert 9/15/10) (dates: 2/9/09, 8/10/10)
11. Certified records of Dr. Baak (cert 1/25/06)
12. Medical records of Dr. Geisman
13. Medical records of St. Charles Orthopedic Surgery Associates
14. Certified records of St. Joseph Health Center (cert 10/3/06) (dates: 3/22/99, 8/30/06, 9/3/04, 1/28/99, 3/13/98, 9/29/88, 9/24/85, 6/8/84)
15. Certified records of Concentra (cert 10/25/06)
16. Certified records of Mercy Clinic Family Medicine (cert 8/2/17) (dates: 3/3/09-2/17/17)
17. Certified records of Dr. Houser (cert 6/25/08) (dates: 8/25/91-4/10/08)
18. Certified records of Dr. Houser (9/20/06) (dates: 6/12/06-8/31/06)
19. Certified records of SSM St. Mary's CTSI (cert 11/16/17)
20. Certified records of SSM Wall Street Cardiology (cert 10/12/17)

21. Certified records of Dr. Mackinnon (cert 6/25/08)
22. Certified records of Dr. Mackinnon (cert 11/20/13)
23. Certified records of Washington University Physical Therapy Clinics (cert 2/4/16)
24. Certified records of Dr. Bhandiwad (cert 8/25/17)
25. Certified records of Mid County Orthopedic Surgery (cert 10/1/10) (dates: 5/2/08-6/16/08)
26. Certified records of Mid County Orthopedic Surgery (cert updated) (dates: 5/2/08-6/10/08)
27. Certified records of Western Anesthesiology Associates (cert 3/29/17)
28. Certified records of Dr. Rastogi (cert 11/26/12)
29. Medical records of Dr. Thompson
30. Certified records of the Division of Workers' Compensation
31. Certified records of Washington University Physical Therapy Clinics (cert 2/4/16)
32. Certified records of STL Plastic & Hand Surgery (cert 3/16/09)
33. Certified records of SSM Physical Therapy (cert 4/19/18)
34. Medical bill summary
35. Paycheck stubs
36. Active medication list
37. Deposition transcript of Dr. Thompson taken 5/12/16

Employer/Harke Heating & Air-Conditioning

Insurer/Auto-Owners Insurance Company's Exhibits:

- A. Deposition transcript of Claimant Marc Meng taken 10/26/06
- B. Deposition transcript of Claimant Marc Meng taken 5/6/09
- C. Deposition transcript of Claimant Marc Meng taken 11/24/09
- D. Deposition transcript of Claimant Marc Meng taken 5/20/16
- E. Deposition transcript of Dr. Susan Mackinnon taken 2/6/15
- F. Deposition transcript of Dr. Susan Mackinnon taken 6/23/17
- G. Deposition transcript of Dr. Susan Mackinnon taken 9/15/17
- H. Deposition transcript of Renee Ivens, P.T., with exhibits taken 7/24/16

Employer/SystemAire, Inc.

Insurer/Cincinnati Insurance Company's Exhibits:

- A. Deposition transcript of Dr. Michele Koo with SystemAire/Cincinnati Insurance Company, Exhibits A-Z and Claimant's Exhibits 1-4 taken 5/31/18
- B. Deposition transcript of June Blaine, M.S., C.R.C., with SystemAire/Cincinnati Insurance Company, Exhibits 1 & 2 taken 12/5/17
- C. Deposition transcript of Pamela Adams with SystemAire/Cincinnati Insurance Company, Exhibits A & B, taken 2/1/18

- D. Deposition transcript of Kristen Campbell with SystemAire/Cincinnati Insurance Company, Exhibits A & B and Claimant's Exhibit 1 taken 2/1/18
- E. Calendars for 2006, 2007, and 2008 (3-pages)
- F. SystemAire Laid Off Record (1-page)
- G. Wage Records (2-pages)
- H. Sheet Metal Workers' Local #36 International Association (31-pages) (Portions redacted by sustained objection)
- I. Medical records of Dr. Robert Hagan (4-pages)
- J. Medical records of Mid County Orthopedic (6-pages)
- K. Medical records of Mid County Orthopedic (10-pages)
- L. Medical records of Dr. Stephen Baak (6-pages)
- M. Medical records of Western Anesthesiology Associates, Inc. (8-pages)
- N. Medical records of Concentra (10-pages)
- O. Medical records of Dr. Susan Mackinnon (10-pages)
- P. Medical records of Dr. Anthony J. Berni (13-pages)
- Q. Medical records of Dr. Michael Houser (14-pages)
- R. Medical records of Dr. Michael Houser (25-pages)
- S. Medical records of Dr. Anita R. Bhandiwad (26-pages)
- T. Medical records of Barnes-Jewish Hospital (26-pages)
- U. Medical records of Barnes-Jewish Hospital (30-pages)
- V. Medical records of Barnes-Jewish Hospital (78-pages)
- W. Medical records of Dr. Rahul Rastogi (85-pages)
- X. Medical records of Washington University Vascular (42-pages)
- Y. Records of Missouri Department of Conservation (2-pages)
- Z. Records of Missouri Department of Conservation (4-pages)
- AA. Two discs with Social Security records and audio (audio accessed by downloading for free at www.fortherecord.com check under products for FTR Player)
- BB. Social Security Disability records (Portions redacted by sustained objection)
- CC. Deposition transcript of Dennis Westray taken 5/12/10
- DD. Notice of Deposition of Dr. Susan Mackinnon taken 2/6/15
- EE. Correspondence from former defense counsel Brandy Johnson to former Claimant's attorney Scott Pecher dated 11/25/15 (Not admitted)
- FF. E-mail from former defense counsel Brandy Johnson for Harke Heating & Air Conditioning/Auto-Owners Insurance Company to Attorney Brian Weinstock dated 11/30/15 (Not admitted)
- GG. E-mail correspondence to Attorneys Scott Pecher and Brian Weinstock from defense attorney Christopher Archer dated 12/15/16. (Not admitted)
- HH. 9/14/06 Filed Claim for Compensation v. SystemAire, Inc.
- II. 5/11/09 Filed Claim for Compensation v. Harke Heating & Air Conditioning
- JJ. 10/8/13 Filed Amended Claim for Compensation v. SystemAire, Inc.

OBJECTIONS TO EXHIBITS

Objections were sustained by the Claimant's attorney as it would pertain to SystemAire's Exhibit H and Exhibit BB, identified for the record involving references to collateral sources, annuities, and pensions deemed not relevant. With no argument or response to the objections, the objections were sustained and those portions of the Exhibits are excluded.

Objection was raised by counsel for Harke Heating/Auto-Owners Insurance Company to SystemAire/Cincinnati Insurance Company's Exhibits EE, FF, and GG, which are sustained with those Exhibits being excluded. The Exhibits are attempts to introduce communication between counsel pertaining to potential settlement of each of the two separate claims.

An objection was also raised by defense attorney for SystemAire/Cincinnati Insurance Company pertaining to testimony contained in the deposition of Physical Therapist Renee Ivens with corresponding Exhibits pertaining to her deposition taken on 7/24/16, for which the attorney was not noticed. As tender was made for this witness to be redeposed for SystemAire to conduct discovery or cross-examination to cure and relieve any objection as to prejudice or scope or qualification and competence to testify; an offer subsequently declined, those objections are overruled and the transcript and the Exhibits are ruled admissible.

Renee Ivens testified the Claimant was diagnosed with thoracic outlet syndrome by Dr. Susan Mackinnon who prescribed the physical therapy Renee Ivens provided the Claimant through September 2007 prior to the Claimant's employment at Harke Heating & Air Conditioning in November of 2007. Renee Ivens' testimony in her deposition established on a factual basis the level of the Claimant's disability related to his diagnosis of thoracic outlet syndrome, relevant to the issue of the application of the last exposure rule made in both cases.

All objections not previously sustained are, hereby, overruled. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo. 1994, because the accidents were alleged to have occurred in Missouri.

FINDINGS OF FACT

Claimant's Background Testimony

Marc Meng (Claimant) testified he was born on October 1, 1962. Claimant is 5'11" tall and weighs 225 pounds having gained roughly 65 pounds since 2006. The Claimant is taking prescription medications, most of which are related to his injuries, including OxyContin along with medications to help his breathing. He identified the prescriptions contained in Claimant's Exhibit 36, which are allegedly related to his injuries and those that are not. The Claimant used to be a heavy smoker; consuming two-to-three packs a day, but stopped smoking in 2009. He admits to drinking three-to-four drinks on a daily basis, although he does not drink every day.

Claimant did not graduate high school and never obtained his GED. He has no computer skills and never served in the military. He had been a member of the Sheet Metal Workers' Local Union Number 36 since 1983 receiving training in that sheet metal trade.

Claimant testified to having worked for SystemAire between October 11, 2002 through August 1, 2004; January 3, 2005 through September 6, 2006; and last working at SystemAire on May 21, 2007 through August 20, 2007. He testified that he left SystemAire due to a "lack of work" in accord with the records from the union admitted into evidence.

After he stopped working for SystemAire on August 20, 2007, he next went to work for ICON. ICON is also a heating and air-conditioning contractor. His job duties with ICON were the same as with SystemAire. He worked for ICON for only four days from September 3, 2007 to September 7, 2007. He confirmed he left ICON because of the union's 150-hour rule. The 150-hour rule means that if he is given a job from the hiring hall and if he stays on that job for 150 hours or more, then when he leaves that job, he must go to the bottom of the hiring hall list. On the other hand, if he leaves that job after working fewer than 150 hours, then, he returns to his previous position on the hiring hall list. Claimant stated that he knew that ICON did not have much work, and he therefore left ICON before performing 150 hours of work so that he could keep his position on the hiring hall list. He stated he was never disciplined or demoted at ICON for failing to perform his job.

Claimant next worked for American Sheet Metal ("ASM"). He stated his position and job duties with ASM were the same as with SystemAire. He worked for ASM from October 25, 2007 to October 31, 2007. He, again, left on his own due to the 150-hour rule. He was never disciplined or demoted at ASM for failing to perform his job. He did not work anywhere between ICON and ASM.

After leaving ASM, he next went to work for Harke Heating and Air. He began working for them on or about November 29, 2007. His position was the same as with SystemAire. He last worked for Harke on June 3, 2008. He has not worked anywhere since he left Harke.

Claimant testified, while he was working at SystemAire, he had problems with his hands dropping tools. He reported to his supervisor, Mark Jones, his symptoms and complaints and testified he was sent for evaluation and treatment by SystemAire to Concentra Medical Center on May 16, 2006. Claimant testified Concentra provided no care but suggested he see his personal physician. Claimant proceeded to undergo medical treatment from his personal physician, Dr. Michael Houser whose records were introduced. Claimant testified to thereafter being evaluated by Dr. Michele Koo at the request of SystemAire/Cincinnati Insurance Company. Claimant testified Dr. Koo originally indicated he could not work due to his symptoms and complaints but revised her opinion/order suggesting he could return to work at full duty. Claimant testified to being seen thereafter on referral from Dr. Houser to Dr. Susan Mackinnon and undergoing right wrist and right elbow surgery on January 5, 2007, and left wrist and left elbow surgeries on

March 26, 2007. The Claimant testified to having returned to work for SystemAire on May 19, 2007 at full duty.

Claimant testified he saw Dr. Mackinnon, once again, on July 24, 2007, and, then again, on September 27, 2007. After this last visit with Dr. Mackinnon Claimant was referred to Renee Ivens, a physical therapist, for a diagnosis made of possible thoracic outlet syndrome.

The medical records suggest Renee Ivens last saw the Claimant on September 27, 2007. In an e-mail/report admitted into evidence, it states as follows: "Not made any improvement in symptoms. His neural symptoms fairly severe at times and really limit his ability to work safely..." Claimant's records indicate physical therapy records of Renee Ivens show a return appointment with Dr. Mackinnon had been arranged for October 4, 2007. Claimant testified he was unaware of that return appointment testifying he was never provided notice of the same.

Claimant testified he started working for Harke Heating & Air Conditioning on November 28, 2007 and he worked until June 3, 2008 when, at that time, he quit working and has not worked in any capacity since that date. Claimant testified to having been, thereafter, referred to Dr. Robert Thompson who performed left-sided thoracic outlet surgery on February 13, 2009, undergoing a second left thoracic outlet procedure on November 30, 2010. He identified a few other evaluations of physicians prior to those surgeries that were conducted and, made part of the record.

Claimant testified concerning his current symptoms and complaints. He stated his right hand is weak with difficulty with grip and ongoing pain in his right arm. He has trouble as well with his right arm with pain running up the arm. He has similar symptoms and complaints with his both left hand and left elbow. Claimant testified to complications documented in the medical records of the phrenic nerve being damaged in the first thoracic outlet surgery performed by Dr. Thompson. This injury has left him with symptoms related to his breathing for which he takes medication and has panic attacks/anxiety. He states he has a fear of water due to his difficulty with breathing. He testified to his neck being painful and sore and pain up his arms and shoulders as well as his back.

Testimony of Phillip Sappington

SystemAire/Cincinnati called to testify Phillip Sappington. Phillip Sappington testified he is currently working at Hauser Mechanical, Inc., having previously worked for SystemAire between June of 1981 through April of 2018. He was the superintendent/riding boss over the supervisors working at SystemAire in 2006 and 2007, the relevant period associated with this claim. He testified Claimant was a good worker and testified that the union records suggests the Claimant left SystemAire due to a "lack of work," according to those records. He testified SystemAire had some economic issues or a lack of work during that period, confirming as well they had no light duty made available to anyone. He otherwise identified the work the Claimant

was performing at ICON and at ASM were similar to the type of work Claimant had utilizing his upper extremities. He identified a Ms. Lois Jenkins as the office manager for SystemAire. Lois Jenkins is identified in the Concentra records from May 6, 2006 as having been referred the Claimant to Concentra for medical treatment.

Testimony of Raymond Trimble

Raymond Trimble was identified as currently working for BSI Constructors, Inc. since July of 2017. He worked for SystemAire, between January of 2006 through July of 2017 as the comptroller and CFO. His testimony mimicked that of Phillip Sappington associated with the "lack of work" description provided in the union records in regards to the Claimant's reason for leaving SystemAire's employment, otherwise identifying in the union records Claimant signed up for work on August 21, 2007.

Medical Testimony

Deposition of Dr. Koo

Dr. Michele Koo was deposed on behalf of Employer, SystemAire on May 31, 2018. Dr. Koo is a board-certified plastic surgeon who works for herself. According to her CV, she trained with Dr. Weeks from 1989-1990. On direct examination, Dr. Koo testified she is a medical doctor, but is "absolutely not a neurologist, neurosurgeon, radiologist, or even an orthopedic surgeon who deals with the cervical spine." On cross-examination, Dr. Koo identified documents, printed from her website, including information related to her sales of skin care products. The printouts, from her website, note her specialties as ambulatory cosmetic surgery, cosmetic breast surgery, facelifts, eyelids, nasal surgery, tummy tucks, and liposuction. On cross-examination, she testified, for the last couple of years, she has only performed one carpal tunnel surgery every four to five months.

Dr. Koo saw Claimant on September 6, 2006 for an independent medical examination. She reviewed certain medical records, interviewed Claimant, examined him, and issued a report. She took x-rays of Claimant's hand and wrist, which showed some slight loss of joint space in his right thumb. Dr. Koo noted Claimant stated he smoked two packs of cigarettes per day since his teenage years and drank six drinks per day. She also noted Claimant's hands were mottled and cyanotic, his distal fingertips were cold, and he had numbness in all fingers of both hands. He had positive Tinel's at the right wrist, positive Phalen's, and positive reverse Phalen's signs.

After the examination, Dr. Koo diagnosed Claimant with bilateral severe carpal tunnel syndrome. She did not diagnose Claimant with cubital tunnel syndrome on either side. She related this diagnosis to Claimant's lifelong occupation, and not to his specific work for Employer SystemAire. She said Claimant told her he had been having symptoms for four-to-five years, but he had only worked for Employer SystemAire for four years.

Dr. Koo said Claimant's work status was full duty with no restrictions. On cross-examination, she acknowledged the treatment record dated September 6, 2006, was in her handwriting. After "light duty restrictions consist of," Dr. Koo wrote "no work at present." She later said she thought this was a description of what he told her rather than a proscription limiting his work.

Dr. Koo only saw Claimant on September 6, 2006. However, she authored a number of additional reports. Dr. Koo's first addendum report was dated September 18, 2006, and it was prepared after reviewing a Dr. Houser's note dated August 28, 2006. The medical record referenced a violaceous hue to Claimant's hands and feet, which Dr. Koo said indicated that Claimant had a systemic illness. She testified she would have attributed the violaceous and mottled appearance to his smoking but also to nerve damage perhaps from alcoholism or alcohol use. She testified thoracic outlet syndrome would not affect the blood flow to Claimant's feet. Dr. Houser's record also noted a "vasospastic-type thing" in association with the violaceous hue, which Dr. Koo said could have been from a vasospasm that closed down the vessel and caused diminished blood flow.

Dr. Koo said diminished blood flow would decrease the amount of oxygen going to the hands, wrists, elbows, and feet, which would create a traumatic environment for the nerves. Nerves in a traumatic environment can respond by swelling. This can cause compression at compression points in the peripheral nervous system, including the ulnar nerve at the cubital tunnel. Dr. Koo's first addendum, states the medical record does not change her opinion that Claimant's carpal tunnel syndrome was not related specifically to his work for Employer SystemAire, but rather was, perhaps, more due to his life-long occupation as a sheet metal worker further caused, and aggravated by, his smoking two packs of cigarettes per day and his cardiac dysfunction causing hypoperfusion of his hands, mottling, and the cyanotic appearance of his hands.

On September 27, 2006, Dr. Koo authored another report in which she opined Claimant's work for Employer, SystemAire, was not the prevailing factor with regard to his bilateral carpal tunnel syndrome. At that time, she felt his bilateral carpal tunnel syndrome would be related to his smoking, which caused a decreased blood flow, which would then cause hypofusion and perhaps even cardiac dysfunction, which would, then, result in vasospasm. On cross-examination, Dr. Koo testified if she did not read any new or additional medical records into the record, she probably did not review any additional medical records before that report was written.

Dr. Koo's remaining addendum reports attributed Claimant's bilateral peripheral neuropathies to his smoking and drinking, and Dr. Koo did not change her opinion that Claimant's work for Employer SystemAire was not the prevailing cause of Claimant's peripheral neuropathies.

Deposition of Dr. Susan Mackinnon

Dr. Susan Mackinnon was deposed on behalf of Employer, Harke, on February 6, 2015, June 23, 2017, and September 15, 2017. Dr. Mackinnon is a board-certified plastic surgeon and the chief of the Division of Plastic and Reconstructive Surgery at Washington University. Her clinical practice is restricted to problems related to nerve injuries.

Dr. Mackinnon first saw Claimant in October 2006. Claimant complained of decreased grip, hand pain, and dropping items. In the pain drawing he gave her in October 2006, Claimant circled the entire extremity, shoulder to fingertips, which Dr. Mackinnon testified is a pattern people with thoracic outlet syndrome describe. Dr. Mackinnon recommended getting baseline electrical studies.

Dr. Mackinnon testified the nerve conduction studies showed carpal tunnel and cubital tunnel syndrome. She operated on Claimant's right wrist and elbow on January 5, 2007, and her postoperative diagnoses were right carpal tunnel, right ulnar nerve compression at the Guyon's canal, and right ulnar nerve compression at the cubital tunnel. Dr. Mackinnon performed surgery on Claimant's left wrist and elbow on March 26, 2007. Her postoperative diagnosis was left carpal tunnel syndrome, left cubital tunnel syndrome, and left ulnar nerve compression at the Guyon's canal, and, she noted some medial epicondylitis in his left elbow.

Dr. Mackinnon testified Claimant initially did very well after his surgeries. However, in July 2007, Claimant, again, complained of pain in both hands, constant numbness, pain waking him at night, decreased strength, and left elbow pain when lifting. Dr. Mackinnon found nothing in a clinical examination of his elbows or wrists, but she could provoke thoracic outlet issues bilaterally. She testified he clinically had evidence of thoracic outlet syndrome at that time. She later testified that she made a clinical diagnosis of thoracic outlet because electrical studies cannot help to make the diagnosis. She testified Claimant did have thoracic outlet syndrome when she saw him.

On July 24, 2007, Dr. Mackinnon referred Claimant to pain management and to Renee Ivens, who she described as an expert physical therapist on muscle imbalance related to thoracic outlet. Dr. Mackinnon testified she sees hundreds of people with thoracic outlet every year, but she only operates on, maybe, four per year. She indicated it is a dangerous surgery. She said she first sends them to Ms. Ivens to see if the muscle posture causes the thoracic outlet symptoms, and she honors her expertise in determining whether to operate. She testified Ms. Ivens sent her an email in September or October 2007 she was returning Claimant to Dr. Mackinnon for probable surgery. Dr. Mackinnon said Claimant was scheduled to have an appointment with her in October 2007, but he cancelled the appointment and never came back to see her.

Dr. Mackinnon testified if she had seen Claimant in October 2007, she would have discussed thoracic outlet surgery with him. She testified she would have discussed the type of restrictions he needed with him and with the physical therapist in her office, and she said she would have eliminated overhead work. However, she would not have said he could not work at all.

Dr. Mackinnon testified Claimant's symptoms were disabling when she last saw him in July and when Ms. Ivens saw him in September or October 2007. She testified his symptoms would have posed a hindrance or an obstacle to his employment at that time. Nevertheless, she based this on his subjective complaints of pain, which is why she referred him to a pain management specialist. She testified she deferred any potential work restrictions to pain management.

Dr. Mackinnon testified she tested Claimant for thoracic outlet when she first saw him, but she did not find it at that time. She testified he definitely could have had it when she first saw him, but he was not impressed by it then. She said when patients have several things going on, and they lack the expertise to know the different distributions, they often tell you what the worst thing is. Once the worst issue is fixed, they will tell you the next worst, and so on. She testified the thoracic outlet, cubital tunnel, and carpal tunnel syndromes have similar symptoms, but they provoke differently in clinical testing.

Dr. Mackinnon testified she referred Claimant to Renee Ivens for thoracic outlet therapy for his thoracic outlet syndrome. She testified he had similar problems when she first saw him based on the pain drawings he made, but the symptoms waxed and waned. She said this was typical of thoracic outlet syndrome, which has a lot to do with posturing and positioning.

Dr. Mackinnon released Claimant from treatment at MMI on July 24, 2007. She testified she did not provide any treatment specifically to Claimant for thoracic outlet because she thought that he would be like 95% of her patients who get better. On cross-examination, she acknowledged she gave no work restrictions to Claimant after May 2007.

On cross-examination, Dr. Mackinnon testified she did not think that a scenario of Claimant drinking at least 42 beers per week would have increased his risk of carpal tunnel or cubital tunnel. She testified there was no evidence at all on Claimant's electrical study of polyneuropathy, and polyneuropathy was not mentioned at all in the electro diagnostic studies. She testified alcoholism is a very low risk factor for carpal tunnel, less than diabetic neuropathy which increases the risk 1.68 times. She said vibrations increase the risk by 20 times. She said alcoholism can cause carpal tunnel or cubital tunnel just a bit, but not like Claimant had.

Deposition of Renee Ivens, P.T.

The transcript of the sworn testimony of Renee Ivens, P.T. was admitted into evidence. Renee Ivens' deposition was taken on July 24, 2016. Renee Ivens testified as to her background as a physical therapist, obtaining a bachelor's degree, and completing a master's doctoral program in her field. She testified to having provided seminars in thoracic outlet syndrome and having experience in peripheral nerve injuries. Renee Ivens testified to having 20-25 years with treating patients with thoracic outlet syndrome and having worked with Dr. Susan Mackinnon regarding her patients with peripheral nerve injuries, especially in 2007.

Renee Ivens testified Dr. Susan Mackinnon provided the diagnosis of thoracic outlet syndrome. She testified to the referral form for the physical therapy prescription clearly indicating the Claimant had "TOS" which stands for thoracic outlet syndrome.

Renee Ivens testified on September 26, 2007, she provided a clinical note in communication to Dr. Mackinnon she was referring the Claimant back to Dr. Mackinnon for "possible surgery." Renee Ivens testified the Claimant's symptoms were bilateral, although his left arm was worse than his right arm symptoms. Renee Ivens testified to her recording of a note dated September 26, 2007, that the Claimant "was really limited in his ability to safely work as a sheet metal worker" stating that she based this opinion on her education and experience in treating patients. She made that comment with some confidence based upon her observations in simulations of job tasks and his abilities demonstrated with the therapy she provided.

On cross-examination, Renee Ivens confirmed she did not make the medical diagnosis in this case. Renee Ivens testified 50% of her patients in 2007 were on referral from Dr. Susan Mackinnon. She confirmed the physical therapy referral form was sent by Dr. Mackinnon's office. On cross-examination, Renee Ivens indicated she had seen the Claimant six times.

Deposition of Dr. Robert Thompson

Dr. Robert Thompson was deposed on behalf of Claimant on June 22, 2011, September 1, 2011, and August 17, 2017. Dr. Thompson is a physician and surgeon who is a professor of surgery, radiology and cell biology, and physiology at Washington University. He testified he has expertise in treating patients with thoracic outlet syndrome and is a medical expert in the field. He began treating Claimant on January 7, 2009.

Dr. Thompson treated Claimant for neurogenic thoracic outlet syndrome. He described neurogenic thoracic outlet syndrome as a compression of the nerves that go to the arm as they pass from the neck through the thoracic outlet to the arm. In neurogenic thoracic outlet syndrome, the brachial plexus nerves are compressed. He testified the arm positioned at chest

level or higher exacerbates the compression of the brachial plexus nerves at the level of the thoracic outlet.

Dr. Thompson testified repetitive motion activity or repetitive strain injury is one of the characteristic risk factors for the development of thoracic outlet syndrome. Dr. Thompson testified the type of work performed by Claimant for four-to-five years while working as an HVAC installer for Employer, SystemAire, and for seven to eight months while working for Employer, Harke, caused Claimant's neurogenic thoracic outlet syndrome. Dr. Thompson testified Claimant's symptoms developed earlier than January 2008, but they reached a threshold where they were disabling in January 2008. He said the cause of Claimant's symptoms occurred prior to and after that point. He further testified Claimant may have tried to return to work, and he may have been able to do that with restrictions to some degree. However, by July 2008, Claimant was unable to work; his symptoms were disabling. He testified the predominant factor in Claimant's development of neurogenic thoracic outlet syndrome is his career long use of the arms and overhead activity as part of his work. He testified Claimant indicated in his initial office visit he had developed symptoms in approximately 2005, and Dr. Thompson understood that these symptoms had been interfering with Claimant's work activities from 2005 to 2009. Claimant's work activities were the primary factor in causing the exacerbation of symptoms.

Dr. Thompson also testified Claimant had a phrenic nerve palsy that developed after the first operation to treat his thoracic outlet syndrome on the left side, and that the palsy persisted. The phrenic nerve innervates the diaphragm. He testified Claimant was unable to undergo the right-sided supraclavicular decompression due to the left-sided phrenic nerve palsy.

Deposition of Dr. Thomas Musich

Dr. Thomas Musich was deposed on behalf of Claimant on October 26, 2015, and November 16, 2017. He evaluated Claimant on March 11, 2014. Dr. Musich reviewed voluminous medical records, examined Claimant, and obtained a history of his job activities and a temporal sequence of his employment. He issued a report on March 11, 2014, and two addendum reports dated October 9, 2015, and October 3, 2016. Dr. Musich did not interview Claimant a second time in creating his addendum reports.

Dr. Musich testified, at the time Claimant was working for SystemAire, Claimant developed occupational disease in both of his upper extremities at both the wrist and elbow levels from overuse. Claimant had carpal tunnel syndrome, compression of the ulnar nerve at the Guyon's canal at the wrist level, and cubital tunnel syndrome. Dr. Musich's medical opinion was these were occupational diseases, due to work-related conditions, as to the work he was doing up through that point. He testified the bilateral compression neuropathies resulted in a 30% permanent partial disability of both elbows and 25% permanent partial disability of both wrists. Dr. Musich found Claimant to be at MMI for his 2006 injuries as of July 2007.

Dr. Musich testified Claimant developed severe and incapacitating symptomology at the neck and shoulder level of both upper extremities because of neurogenic thoracic outlet syndrome. Dr. Musich testified the prevailing causative factor for Claimant's bilateral thoracic outlet syndromes, as well as all of the complications, limitations, restrictions, and disabilities arising from that diagnosis is his employment with Employer Harke, particularly while working at Boeing. He further testified all the medical care Claimant received after June 30, 2008, was referable to the bilateral thoracic outlet was solely related to his work for Employer Harke. If Claimant never developed thoracic outlet syndrome, Dr. Musich believed he would be working today.

As a result of Claimant's bilateral thoracic outlet syndrome, and, his resulting evaluation and treatment, Dr. Musich testified Claimant had a 60% permanent partial disability of the left upper extremity, at the shoulder level, a 40% permanent partial disability of the right upper extremity at the shoulder level, and a 20% permanent partial disability of the person as a whole, secondary to pulmonary dysfunction, due to postoperative phrenic nerve injury. He reviewed the vocational reports of Mr. Lalk and Ms. Blaine, who both opined that Claimant is unable to obtain and maintain employment in the open labor market, and he determined that Claimant was not working today because of his ongoing symptomatology and functional disabilities flowing from his employment for Employer Harke.

Dr. Musich testified Claimant had additional partial disabilities that pre-existed his first work injury. Claimant had a 30% permanent partial disability in his left knee and a 35% permanent partial disability in his right knee from symptomatic internal derangement from meniscal pathology and degeneration. Claimant also had a 15% permanent partial disability of the body as a whole due to Claimant's chronic low back pain secondary to symptomatic lumbar spondylosis. Dr. Musich testified there is typically a synergistic effect when there is bilaterally involved, explaining how Claimant would have to rely on his opposing extremities to take up the slack. He described it as a snowball effect where one makes the other side worse.

On cross-examination, Dr. Musich acknowledged thoracic outlet syndrome is typically a longstanding condition that develops over a long period. He testified patients with thoracic outlet syndrome typically complain of vague neuropathic symptoms radiating into their arms distally, especially while having their arms extended from the bodies or overhead. He said discoloration or coldness in the hands could be a symptom associated with thoracic outlet syndrome. Other symptoms may include severe headaches, an ache that spreads up the back of the neck into the occipital or mastoid portion of the skull, pain in the supra and infraclavicular areas, and pain that radiates into the anterior chest wall simulating cardiac angina. Dr. Musich acknowledged Claimant's medical reports showed some of these symptoms in 2006 and 2007.

Dr. Musich acknowledged Claimant had symptoms in July 2007 that were thought to be consistent with early thoracic outlet syndrome, but he testified Dr. Mackinnon did not definitively diagnose Claimant with thoracic outlet syndrome. He also acknowledged Dr.

MacKinnon's record of July 24, 2007, states Claimant thought he was disabled with respect to doing his work as a sheet metal worker.

Vocational Rehabilitation Testimony

Deposition of Mr. Timothy Lalk

Mr. Timothy Lalk was deposed on behalf of Claimant on November 9, 2017. Mr. Lalk is a certified vocational rehabilitation counselor and has worked in that role for England & Company since 1995. Mr. Lalk interviewed Claimant on August 30, 2012, and he issued a report.

Mr. Lalk testified Claimant appeared to have a strained face and voice consistent with someone who was experiencing emotional or physical pain. He walked with a slow gait, and all of his motions were slow and guarded. Claimant described his primary problem as his breathing and the pain in his chest and neck where the surgery took place on the left side. The pain increases with activity including just using his arms, and environmental factors like cold, rain, or change of temperature also increases his symptoms. Claimant can walk his dog around the block, but he has to stop several times because of breathing problems. Claimant believes his breathing improved after the surgery that removed scar tissue. He also has shooting and stabbing pain in both arms from his biceps to his shoulders, which occur when he pushes a vacuum, does laundry, or there is a change in temperature. His left arm gives way after 10 seconds of lifting it above his head, but he can raise his right arm a little longer.

Claimant also has issues with numbness, tingling, and painful cramping in his hands; he often drops things. Claimant has difficulty fingering items, like, putting pills into a dispenser and his right hand is worse than his left. Vibrations from motorized tools cause him difficulty. Claimant also has lower back pain that makes it difficult to walk up the driveway. His lower back pain increases with activity, like, driving too long or bending. He also has headaches which began around 2004 or 2005, but have decreased in intensity and frequency following his thoracic outlet surgeries.

Claimant can lift 5 to 8 pounds comfortably, but lifting 10 pounds hurts his arms, shoulders, neck, and low back. He can walk less than a block because of low back pain and shortness of breath. He can stand for 45 to 60 minutes on a good day, and he is limited by low back pain. But when his neck, shoulder, and arms hurt, he wants to lie down anytime that he is standing. He cannot sit very long due to low back pain, but, again stated, when his neck, shoulder, and arms hurt, all he wants to do is lie down. His low back hurts after driving for one hour.

Claimant controls his symptoms with pain medication and by lying down. He puts a pillow on his chest and rests his arms on it. Sometimes, he spends days lying down except for

eating and caring for his hygiene, but he usually lies down for 4-to-5 hours at a time. He described his need to lie down as resulting from the pain in his upper extremities, not his lower back.

Mr. Lalk testified Claimant would not be able to find and maintain employment in the open labor market. If his symptoms and limitations are permanent, Mr. Lalk testified Claimant would continue to be permanently and totally disabled. Mr. Lalk testified Claimant was unable to return to employment because of his primary complaints of pain in his chest and neck where he underwent thoracic outlet surgery.

Mr. Lalk testified Claimant had no training or experience that would allow him to work in a sedentary position, but even if he did, Claimant would be unable to persist through any work activities through a full work shift on a regular basis. Based on his symptoms, Claimant could be expected to be absent from work multiple days per week. Furthermore, Claimant would have difficulty even being considered for a potential job because of his presentation that appears to be in discomfort and having difficulty performing simple activities, like standing, walking, sitting, and changing positions.

Mr. Lalk agreed Claimant is experiencing difficulty, due to his physical symptoms, that predate May 15, 2006, but he concluded that just the symptoms and limitations related to his thoracic outlet syndrome alone would prevent him from working. He testified that his other symptoms may prevent him from returning to his former occupation, but his thoracic outlet symptoms preclude him from doing unskilled sedentary work because of his need to lie down.

Deposition of Ms. June Blaine

The deposition of June Blaine was taken on behalf of Employer SystemAire on December 5, 2017. Ms. Blaine is a vocational rehabilitation counselor, which has been her profession since 1982. She was asked to work on Claimant's case by an attorney for Employer Harke.

Ms. Blaine met with Claimant, did some vocational testing, spoke with him for about an hour and ten minutes, reviewed approximately 10 inches of medical records, and prepared a report dated June 30, 2015. She, subsequently, received additional medical records and deposition testimony, but she testified this information did not change the opinions that she expressed in her report.

Ms. Blaine testified Claimant did not take his math test because he said he was having a migraine headache and was not good at math anyway. However, he completed both portions of his reading test. Claimant answered the questions that she asked, and he did not refuse to talk about anything.

Claimant described his work for Employer, Harke, as involving installs, carrying and putting air conditioners and heating ducts on scissor lifts, and working in the air about 50 or 60 feet. Her report said he was performing a lot of overhead commercial work, information that she would have obtained from Claimant. He last worked for Harke in June 2008, and he stopped working due to pain and weakness in his arms.

Ms. Blaine testified there were no functional guidelines from a physician after June 1, 2008, that indicated that Claimant could work. Ms. Blaine did not see any medical records before June 1, 2008, that placed a work restriction on Claimant or took him off work for thoracic outlet syndrome.

On cross-examination, Ms. Blaine testified she reached the opinion following her evaluation that Claimant was not employable in the open labor market. She based her opinion on Claimant's medical documentation concerning his current complaints, along with his lack of skills, lack of a GED, and his lack of computer skills and other types of aptitudes that an employer would look for when they hire someone for an alternative job.

Prior Injuries and Conditions

Right Hand

On June 8, 1984, Claimant was injured when an air conditioning fan he was working on turned on. Claimant presented to the emergency room at St. Joseph Health Center with a laceration to his right hand. X-rays revealed a fracture of the base of the second metacarpal. The laceration was irrigated and debrided and the fracture was casted. Claimant later developed an infection from the laceration, which was drained on September 28, 1984. This injury settled with the employer for 25% PPD of the right hand.

Left Knee

On September 16, 1988, Claimant was wiring a furnace while on his knees. He sat up to turn the furnace on and jumped back quickly twisting his left knee. He felt a snap in his left knee accompanied by severe pain and tenderness. When his condition did not improve, Dr. Emil Di Fillipo saw Claimant on September 25, 1988. On September 29, 1988, Dr. DiFillipo performed an arthroscopic partial medial meniscectomy and debridement of early degenerative arthritis of the left knee. Dr. Di Fillipo released Claimant from his care on August 3, 1989 and assessed a 10% PPD of the left knee as a result of this injury. This injury settled with the employer for 25% PPD of the left knee. Claimant testified at hearing he was under no permanent restrictions for this injury.

Left Wrist

Claimant had reported left wrist pain in 1991, that apparently resolved with conservative treatment.

Right Wrist

Claimant was diagnosed with radial nerve palsy in September 1993. He was conservatively treated with anti-inflammatory medication and physical therapy. By October 17, 1993, his hand had returned to nearly normal.

Low Back

Claimant suffers from low back pain, which began in approximately 1997. While he described pain that was, at times, severe to Mr. Timothy Lalk, a vocational rehabilitation counselor, he also related, "The low back is nothing compared to the upper extremities." He also informed Mr. Lalk he did not lie down to relieve his low back symptoms.

Right Knee

Claimant testified during his April 20, 2016 deposition, he injured his right knee while at a friend's farm. According to Claimant, he was eating lunch on the tailgate of a vehicle, and he injured his knee when he jumped off. He sustained this injury in August 2004, and was, subsequently, diagnosed with a medial meniscal tear. Dr. John Powell performed an arthroscopic surgical procedure to repair this injury. Claimant testified at hearing he was under no permanent restrictions for this injury.

**OCCUPATIONAL DISEASE ARISING OUT OF AND IN THE COURSE OF
EMPLOYMENT;
AND MEDICAL CAUSATION**

Claimant alleges he sustained occupational disease (repetitive trauma) injuries, which were medically caused by the heavy and repetitive nature of his work as a journeyman sheet metal worker.

I. Controlling Statutory and Case Law

A. Compensability of Repetitive Motion Injuries in General

With regard to repetitive motion injuries, the Missouri workers' compensation statute states:

[A]n injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure 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. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067 (2005). More specifically, and in relation to carpal tunnel syndrome, past decisions from the Missouri Court of Appeals which have said, "Carpal tunnel syndrome is a known occupational disease." *Cuba v. Jon Thomas Salons, Inc.*, 33 S.W.3d 542, 545 (Mo.App. 2000). See also *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575 (Mo.App. 1987), and *Weniger v. Pulitzer Publishing Co.*, 860 S.W.2d 359 (Mo.App. 1993).

B. Proof of a Medical Causal Relationship Between Work and Injury

With regard to the quantum of evidence required to prove a repetitive motion injury is compensable, Missouri law requires the burden is on the employee to establish a causal connection between the accident and the claimed injuries. *Davies v. Carter Carburetor Div.*, 429 S.W.2d 738 (Mo. 1968). Section 287.067 requires an injury by occupational disease is only compensable if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (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). Expert testimony is required where there are complicated medical issues, such as where the cause and effect relationship between the claimed injury or condition and the alleged cause is not within the realm of common knowledge. *McGrath v. Satellite Sprinkler Systems*, 877 S.W.2d 704, 708 (Mo. App. 1994). Expert testimony is essential where the issue is whether a pre-existing condition was aggravated by a subsequent injury. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5 (Mo. App. 1985).

II. Claimant's Wrist and Elbow Conditions

A. Diagnoses

Several expert witnesses testified as to the diagnosis of Claimant's hand, wrist and elbow conditions. The treating surgeon, Dr. Mackinnon, diagnosed Claimant with bilateral carpal tunnel and bilateral cubital tunnel syndromes.

Dr. Musich similarly testified Claimant had bilateral carpal tunnel syndrome and compression of the ulnar nerve at the Guyon's canal, along with bilateral cubital tunnel syndrome.

Finally, SystemAire's expert medical witness, Dr. Koo, diagnosed Claimant with bilateral severe carpal tunnel syndrome.

Since all three of these experts agree Claimant had bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome, the evidence supports a finding Claimant has bilateral carpal

tunnel syndrome, bilateral cubital tunnel syndrome, and compression of the ulnar nerve at the Guyon's canal. All conditions are found to have been present since the summer of 2006.

B. Causation

With regard to the cause of the wrist and elbow conditions, there is some disagreement among the experts. Dr. Mackinnon stated in her report of December 12, 2006 the hand and wrist conditions are work-related. Similarly, Dr. Musich testified these conditions are occupational diseases caused by Claimant's work activities as a sheet metal worker. But, Dr. Koo disagreed with Dr. Mackinnon and Dr. Musich, testifying these conditions were not caused by Claimant's employment.

In analyzing the qualifications of these physicians, there is a substantial difference. Dr. Mackinnon's credentials, as evidenced by her CV, are extensive and impressive. She is a world-renowned surgeon. She is the Chair of the Department of Plastic Surgery at Washington University. She has performed thousands of upper extremity surgeries, and continues to perform them to this day. She has authored hundreds of medical journal articles.

At the other end of the spectrum is Dr. Koo. She is a solo practitioner who performs carpal tunnel surgery approximately once every five months. The rest of her time is spent performing cosmetic surgical procedures such as breast enhancements and liposuction, with her website dedicated largely to selling women's cosmetics.

Dr. Musich's qualifications are those of a physician board-certified in family practice.

Dr. Musich testified Claimant developed occupational disease/repetitive trauma injuries in both of his upper extremities at the wrist and elbow levels. His opinion was the hand, wrist and elbow conditions are work-related conditions.

All three of the medical experts – Dr. Koo, Dr. Mackinnon, and Dr. Musich – were in agreement Claimant has conditions related to the repetitive nature of his work. And then Dr. Koo changed her opinion. Even so, the opinions of Dr. Mackinnon and Dr. Musich are found to be credible, and found to be the most persuasive. Dr. Koo's change in her opinion eliminates much of her credibility. Therefore, the evidence supports a finding Claimant developed bilateral carpal tunnel syndrome and compression of the ulnar nerve at the Guyon's canal, along with bilateral cubital tunnel syndrome, all as a result of his work for SystemAire.

III. Claimant's Thoracic Outlet Syndrome

A. Diagnosis

Claimant has also been diagnosed with thoracic outlet syndrome. On July 24, 2007 Dr. Mackinnon reported Claimant's examination showed evidence of bilateral thoracic outlet syndrome. Dr. Mackinnon recommended Claimant see Renee Ivens or another physical therapist for this problem. On September 26, 2007, Renee Ivens, PT, DPT sent a note to Dr. Mackinnon stating she was returning Claimant to see Dr. Mackinnon for probable surgery. His neural symptoms were fairly severe at times, and they limited his ability to work safely as a sheet metal worker.

On November 10, 2008, Claimant saw Dr. Hagan for an evaluation for bilateral thoracic outlet syndrome. Dr. Hagan encouraged Claimant to seek another opinion from either Dr. Mackinnon or Dr. Thompson at Washington University.

On January 7, 2009, Claimant began treatment with Dr. Thompson. Dr. Thompson, a physician and surgeon who is a professor of surgery, radiology, cell biology, and physiology at Washington University, testified he has expertise in treating patients with thoracic outlet syndrome and is a medical expert in thoracic outlet syndrome. Dr. Thompson treated Claimant for neurogenic thoracic outlet syndrome, which he described as a compression of the nerves that go to the arm as they pass from the neck through the thoracic outlet to the arm. In neurogenic thoracic outlet syndrome, it is the brachial plexus nerves, that are compressed. Dr. Thompson's impression was that Claimant had long-standing neurogenic thoracic outlet syndrome that was bilateral in nature and refractory to previous management.

Dr. Thompson discussed surgery to treat bilateral neurogenic thoracic outlet syndrome with Claimant, including the need to "stage" any bilateral procedures due to the potential for phrenic nerve palsy. Dr. Thompson subsequently performed that surgery. Afterwards, on June 4, 2009, Claimant was noted to have shortness of breath with exertion. Claimant's right-side symptoms were also increasing in severity. On July 16, 2009, Dr. Thompson noted Claimant's testing showed a partial paralysis of his left diaphragm, consistent with left-sided phrenic nerve palsy, and opined that it was caused by the surgery. Claimant's right-sided thoracic outlet syndrome was somewhat worse, which he attributed to Claimant overusing of the right arm while he was recovering from left-side surgery. From July 16, 2009, to November 11, 2010, Claimant continued to see Dr. Thompson for his thoracic outlet symptoms and his shortness of breath. On August 27, 2009, Dr. Thompson noted while Claimant was a candidate for thoracic outlet decompression on the right side, this could not be performed because he had not demonstrated normalization of left phrenic nerve function.

Dr. Musich testified Claimant developed severe and incapacitating symptomology at the neck and shoulder level of both upper extremities, as a result of neurogenic thoracic outlet syndrome.

Based upon the testimony of Dr. Mackinnon, Dr. Thompson and Dr. Musich, the evidence supports a finding Claimant developed bilateral neurogenic thoracic outlet syndrome, with a subsequent phrenic nerve palsy caused by the surgery to treat the left sided thoracic outlet syndrome.

B. Causation

Claimant testified his work for SystemAire involved overhead work. He states most ductwork is hung overhead, and he would frequently be working overhead to install the ductwork. He testified, as he performed his duties for SystemAire, he began to develop problems in his hands. He noticed problems with holding onto items, due to pain. These problems developed over time. He stated the problems were not just in his hands, but, in other areas of his arms and shoulders.

Claimant began working with Harke on November 29, 2007. His work duties with Harke were the same as with SystemAire, with some differences. At Harke he began working in their shop, building very large custom ovens. He stated the ovens were 250 feet long, and that it was difficult work. He did this for a period of weeks, and, he was then, sent to work on a job at the Boeing plant. He stated this work involved a lot of overhead work. While he was performing the work at Boeing, his arms started "dropping". He stated this means he was having trouble simply holding his arms up.

Dr. Thompson testified the compression of the brachial plexus nerves at the level of the thoracic outlet is exacerbated by the arm positioned at chest level or higher. Dr. Thompson testified repetitive motion activity or repetitive strain injury is one of the characteristic risk factors for the development of thoracic outlet syndrome. Dr. Thompson testified the type of work performed by Claimant for four-to-five years while working as an HVAC installer for SystemAire, and for seven-to-eight months while working for Harke caused Claimant's neurogenic thoracic outlet syndrome. He testified the predominant factor in Claimant's development of neurogenic thoracic outlet syndrome is his career long use of the arms and overhead activity as part of his work.

Dr. Musich testified the prevailing causative factor for Claimant's bilateral thoracic outlet syndromes, as well as all of the complications, limitations, restrictions, and disabilities arising from that diagnosis is his employment with Employer Harke, particularly while working for Harke at the Boeing plant. He further testified all the medical care Claimant received after June 30, 2008, was referable to the bilateral thoracic outlet that was solely related to his work for Employer Harke.

Based upon the opinions of Dr. Thompson and Dr. Musich, the evidence supports a finding Claimant's bilateral neurogenic thoracic outlet syndrome and phrenic nerve palsy developed as a result of his work duties as a sheet metal worker.

LAST EXPOSURE RULE

A. Missouri Law

The Missouri workers' compensation statute contains a section which has come to be known as the "last exposure rule". It states:

[t]he employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease prior to evidence of disability, regardless of the length of time of such last exposure, subject to the notice provision of section 287.420.

Section 287.063.2 (2005). Application of this rule to the matter at hand shows Claimant was evaluated by two of Employer's physicians in the summer of 2006, at which time he was advised he has bilateral carpal tunnel syndrome. He, then, filed his initial claim for compensation on September 14, 2006, less than three months after first being diagnosed with carpal tunnel syndrome. However, the statute also indicates the liable employer is that which last exposed the Claimant to the hazard of the disease *prior to evidence of disability*. So this raises the question: when was there evidence of disability?

In *King v. St. Louis Steel Casting Co.*, 182 S.W.2d 560, 562 (Mo. 1944), the case in which the last exposure rule was conceived, the Missouri Supreme Court held in occupational disease cases liability attaches to the employer and insurer at the time of the employee's disability. "Disability from occupational disease for which compensation is payable, must necessarily occur when the employee is incapacitated for work." *Id.* at 562. The Court discussed numerous cases from other jurisdictions before approving and adopting the reasoning of *Textileather Corp. v. Great Am. Indem. Co.*, 108 N.J.L. 121 (N.J. 1931) in which the Supreme Court of New Jersey stated:

"[t]he disability from occupational disease, for which compensation is payable, must necessarily occur when the employee is incapacitated for work. Any other view would make every other provision of the act, and particularly those respecting the time within which the employer must have knowledge of the disease, an absolute nullity. . . There is no more reason to search for the time when the poisoning first occurred than to search for the second, or third, or fourth exposure. It is disability after exposure in the employer's business that creates the obligation to compensation."

King, 182 S.W.2d at 562.

The last exposure rule was later codified in Missouri when Section 287.063 was enacted in 1959. It was, then, amended a number of times, the most recent time in 2005. The 2005 amendment to Section 287.063.2 substituted the words “prior to evidence of disability” for the words “for which claim is made.” That change brought the focus back to the point when exposure to a hazardous condition in an employer’s business becomes disabling. Under strict construction, evidence of disability is evidence an employee is unable to perform the work that exposed the employee to the hazard of the disease.

In *Simmerly v. Bailey Corporation*, 890 S.W.2d 12 (Mo. App. S.D. 1994), the court relied on *King* to determine the insurer responsible for the employee's claim was the one with coverage when the employee was last exposed before disability. *Id.* at 14. It found disability occurred when the employee was unable to do the work that exposed her to carpal tunnel syndrome. *Id.* Therefore, it held the second insurance company liable, rather than the first, although carpal tunnel syndrome was initially diagnosed before the change in carriers. *Id.* Similarly here, this court must determine which employer last exposed Claimant to the hazards of the occupational disease of carpal tunnel syndrome before he became disabled from doing the type of work that contributed to the disease.

B. Claimant’s Employment Timeline

The basic timeline of Claimant’s employment can be laid out as follows. Employers prior to SystemAire have not been included due to lack of relevance.

- 1/3/05 Claimant begins working for SystemAire
- 9/6/06 Claimant begins missing work with SystemAire
- 9/14/06 Claim for Compensation filed against SystemAire
- 5/21/07 Claimant returns to work for SystemAire
- 8/22/07 Claimant stops working for SystemAire
- 9/3/07 Claimant begins working for ICON
- 9/7/07 Claimant stops working for ICON
- 10/25/07 Claimant begins working for American Sheet Metal

10/31/07 Claimant stops working for American Sheet Metal

11/29/07 Claimant begins working for Harke

6/08 Claimant stops working for Harke

C. "Evidence of Disability": Hand and Wrist Conditions

On May 16, 2006, Claimant sought treatment at Concentra for bilateral hand pain. In his patient information form, Claimant wrote the accident occurred because he "snip[s] and bend[s] sheet metal every day." The records report Claimant had been having pain for years, but the pain was getting worse.

On July 27, 2006, Claimant saw his primary care physician, Dr. Houser, for right hand pain and numbness. He had decreased grip strength and pinprick sensation.

On August 28, 2006, Claimant again saw Dr. Houser. He complained his hands were still going numb, and the splint was no help. He had decreased grip strength and sensation in his right hand. Dr. Houser diagnosed Claimant with carpal tunnel syndrome.

On September 6, 2006 Claimant was evaluated by Dr. Koo at SystemAire's request. Dr. Koo issued a report which stated Claimant should have work restrictions of "no work at present" because of his bilateral carpal tunnel syndrome. Also on September 6, 2006, Claimant stops working at SystemAire due to his symptoms.

On September 13, 2006, Claimant filed a Claim for Compensation on September 14, 2006 in which he claimed to have "disability" in his upper extremities due to his work with SystemAire.

On October 23, 2006, Claimant saw Dr. Mackinnon upon referral of Dr. Houser. He complained of pain, dropping things, and decreased grip in his hands. He could not hold a jug of milk or a washcloth. Dr. Mackinnon operated on Claimant's right wrist and elbow on January 5, 2007.

Dr. Musich testified, at the time Claimant was working for SystemAire, Claimant developed occupational disease in both of his upper extremities at both the wrist and elbow levels from overuse. Claimant had carpal tunnel syndrome, compression of the ulnar nerve at the Guyon canal at the wrist level, and cubital tunnel syndrome. Dr. Musich's medical opinion was these were occupational diseases due to work-related conditions as to the work he was doing up through the point of when he stopped working for SystemAire. He testified the bilateral compression neuropathies resulted in a 30% permanent partial disability of each elbow and a 25% permanent partial disability of each wrist.

Based upon the above, the evidence supports a finding Claimant filed a claim and, was diagnosed with wrist and elbow conditions, which developed during his career as a sheet metal worker, up through the time of his employment with SystemAire. The evidence supports a finding the conditions affected Claimant's functioning, both at work and at home, such that it can be said that the conditions were "disabling" to him during the time he worked for SystemAire. Since they were disabling during this period of time, the evidence supports a finding the last exposure rule places liability upon SystemAire for Claimant's hand and wrist conditions.

D. Evidence of Disability: Thoracic Outlet Syndrome

Renee Ivens, PT, DPT, was deposed on behalf of Employer, Harke, on July 14, 2016. Dr. Mackinnon had referred Claimant to Ms. Ivens for physical therapy to treat his thoracic outlet syndrome. The initial appointment was on July 19, 2007, and it continued until September 14, 2007.

Dr. Musich testified Claimant developed severe and incapacitating symptomology at the neck and shoulder level of both upper extremities as a result of neurogenic thoracic outlet syndrome. Dr. Musich testified the prevailing causative factor for Claimant's bilateral thoracic outlet syndromes, as well as all of the complications, limitations, restrictions, and disabilities arising from that diagnosis is his employment with Employer Harke, particularly while working at the Boeing plant. Dr. Musich, however, acknowledged Claimant had symptoms in July 2007 that were thought to be consistent with early thoracic outlet syndrome, but he testified Dr. Mackinnon did not definitively diagnose Claimant with thoracic outlet syndrome at that time. He also acknowledged that Dr. Mackinnon's record of July 24, 2007, states Claimant thought he was disabled with respect to doing his work as a sheet metal worker.

Dr. Thompson testified the type of work performed by Claimant for four-to-five years while working as an HVAC installer for SystemAire, and for seven to eight months while working for Harke, caused Claimant's neurogenic thoracic outlet syndrome. Dr. Thompson testified Claimant's symptoms developed earlier than January 2008, but they reached a threshold where they were disabling in January 2008. He said the cause of Claimant's symptoms occurred prior to January 2008, and then, continued afterwards until Claimant stopped working. By July 2008, he said, Claimant was unable to work.

Dr. Mackinnon testified Claimant's symptoms were disabling when she last saw him in July of 2007, and when Ms. Ivens last saw him in September 2007. She testified his symptoms would have posed a hindrance or an obstacle to his employment at that time. But, she based this on his subjective complaints of pain, which is why she referred him to a pain management specialist. She testified she deferred any potential work restrictions to pain management.

Based upon the above, the evidence supports a finding Claimant first became disabled by his thoracic outlet syndrome on August 22, 2007 when he stopped working for SystemAire. While a representative of SystemAire testified Claimant was laid off at that time due to a "lack of work", the medical records of Dr. Mackinnon and Renee Ivens, during August and September of 2007, reveal Claimant was having difficulty performing his work activities while at SystemAire, such that it can be said the condition was disabling at that time. The evidence supports a finding of liability for the thoracic outlet syndrome falls upon SystemAire.

DATE OF MAXIMUM MEDICAL IMPROVEMENT

Claimant sought medical care from a variety of physicians through a period of years. His medical care continued up to the time of trial, though at the time of trial the care was limited to medications. Claimant had several surgeries in the past, with the last surgeries having been performed by Dr. Thompson. Dr. Thompson indicated in his report of November 9, 2012 Claimant had reached a point where his medical treatment was for "maintenance" purposes. Dr. Thompson also said Claimant had reached a point of permanent total disability as of that date. The evidence supports a finding Claimant had reached a point of maximum medical improvement on November 9, 2012.

TEMPORARY TOTAL DISABILITY

Claimant alleges entitlement to temporary total disability benefits during two periods of time: 1) September 6, 2006 through May 19, 2007; and 2) June 3, 2008 through November 9, 2012.

A. September 6, 2006 through May 19, 2007

Claimant testified he began working for SystemAire on January 3, 2005. He reported hand complaints on May 16, 2006, and was sent by SystemAire for an evaluation at Concentra. He was diagnosed with hand pain, and released to regular activity.

On July 27, 2006 Claimant was seen by his primary care physician, Dr. Houser. Dr. Houser diagnosed him with "probably carpal tunnel syndrome right wrist", but did not take him off work. On August 28, 2006, Dr. Houser referred Claimant to Dr. Berni for an evaluation.

On August 30, 2006, Claimant was evaluated in the emergency department of St. Joseph's Health Center. He complained of pain in his right upper chest. He was advised to avoid heavy lifting with his right arm. Claimant testified, however, that he continued working.

On September 1, 2006, Claimant was evaluated by Dr. Berni, an orthopedic surgeon. Claimant was diagnosed with right upper extremity entrapment neuropathy.

On September 6, 2006, Claimant was sent by SystemAire for an evaluation with Dr. Michele Koo. Dr. Koo evaluated Claimant and issued a report in which she stated Claimant was not able to work, though she later issued a report, which stated this was not due to a work injury. Claimant testified he worked continuously with SystemAire until September 6, 2006.

On October 18, 2006, Claimant was evaluated by Dr. Susan Mackinnon. Dr. Mackinnon performed surgeries on Claimant's upper extremities, and eventually released him to return to full duty on May 19, 2007.

Given these findings, the evidence supports a finding Claimant was off of work from September 6, 2006, through May 19, 2007, a period of 36 4/7 weeks. Consequently, the evidence supports a finding SystemAire is liable to Claimant for temporary total disability benefits during this period of time.

B. June 3, 2008 through November 9, 2012

Claimant testified that after he was released by Dr. Mackinnon to return to work, he did so, returning to work for SystemAire from May 19, 2007, until August 20, 2007. On August 20, 2007, SystemAire laid him off. He then had a couple of very short-term jobs with IKON and American Sheet Metal, before beginning employment with Harke on November 29, 2007. He testified that his symptoms worsened while he worked for Harke.

While working for Harke, Claimant was referred by his primary care physician to see Dr. Strege, an orthopedic surgeon. Dr. Strege allowed him to continue working, while electrical studies were performed on his upper extremities. When Claimant returned to see the doctor on June 3, 2008, he was taken off of work. Dr. Strege felt Claimant might have a cervical problem, so Claimant was referred to see Dr. Curylo, who is an orthopedic surgeon in the same group as Dr. Strege. Dr. Curylo found some changes on the MRI scans of Claimant's cervical spine, and also an arachnoid cyst. Surgery was not recommended, and Claimant was therefore referred to Dr. Pugh for pain management care. He saw Dr. Pugh on two occasions, and he received epidural injections at those visits. There was minimal relief. Claimant then saw Dr. Hagan, a plastic surgeon, on November 10, 2008. Dr. Hagan recommended Claimant be evaluated by Dr. Thompson, and indicated Claimant needed to be retrained for a different line of work.

Claimant began a treatment program with Dr. Thompson on January 7, 2009. Dr. Thompson issued a slip on that date, indicating Claimant "cannot return to work until he recovers from surgery to treat bilateral neurogenic thoracic outlet syndrome". Following his surgical procedures, Dr. Thompson eventually issued a report dated November 9, 2012, which stated that Claimant is permanently and totally disabled.

Given these findings, the evidence supports a finding Claimant was off of work from June 3, 2008 through November 9, 2012, a period of 231 4/7 weeks. SystemAire is found to be liable to Claimant for payment of temporary total disability benefits during this period of time.

PREVIOUSLY INCURRED MEDICAL BILLS

Section 287.140.1 RSMo. (2000), provides an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989). Since Claimant sustained a compensable injury, it was therefore up to the Employer to offer and provide medical care. Employer did not do so. The workers' compensation law states an injured worker is free to seek medical care from physicians of his own choosing if the employer fails or refuses to provide such care. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo.App. 2001).

Claimant has shown he was not tendered medical treatment by SystemAire. He was sent for one visit to Concentra, and one visit to Dr. Koo. SystemAire offered no other medical treatment after those appointments; he therefore sought treatment "on his own". At trial, Claimant identified his medical bill exhibit. He testified these were bills received for the medical treatment he underwent after SystemAire failed or refused to provide him with medical care. Exhibit 34 contains all of Claimant's claimed medical bills, both for treatment dealing with the wrist and elbow conditions, and for treatment dealing with the thoracic outlet syndrome.

Once an Claimant establishes his liability for the medical bills, the employer then has the burden of proving his liability for the bills was extinguished. *Farmer-Cummings v. Personnel Pool*, 110 S.W.3d 818 (Mo.banc 2003). This burden requires a showing the Claimant is not required to pay the bills, that his liability for the bills is extinguished, and that the reason his liability is extinguished does not fall within the provisions of §287.270 of the Missouri Workers' Compensation law. *Id.*

It was previously found Claimant's need for medical care was medically causally related to his repetitive trauma claim of May 15, 2006. The law requires SystemAire to provide medical care when its employees are injured at work. It did not do so. Claimant was, therefore, free to seek medical care from physicians of his own choosing, and thereafter seek reimbursement through the workers' compensation system. The evidence supports a finding the treatment relating to these bills was reasonable and necessary to cure and relieve the effects of the repetitive trauma claim of May 15, 2006. Claimant is entitled to reimbursement in the amount of \$183,027.30 from SystemAire for the treatment he underwent following May 15, 2006.

DISFIGUREMENT

The evidence supports a finding the Claimant is entitled to 13 weeks of disfigurement associated with the Claimant's scarring present on his left elbow, right elbow, as well as his wrists as identified above. In light of this Court's finding under the last exposure rule as discussed above, that liability for disfigurement rests with SystemAire/Cincinnati Insurance Company.

PERMANENT DISABILITY, DISFIGUREMENT, AND LIABILITY OF THE SECOND INJURY FUND

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. *Sanders v. St. Clair Corp.*, 943 S.W.2d 12, 16 (Mo.App. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." *Tiller v. 166 Auto Auction*, 941 S.W.2d 863, 865 (Mo.App. 1997). The standard for determining whether an employee is permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. *Joulzhouser v. Central Carrier Corp.*, 936 S.W.2d 908, 912 (Mo.App. 1997).

Insofar as there is unanimous opinion Claimant is unemployable in the open labor market, and insofar as there is unanimous opinion that Claimant is permanently and totally disabled, the evidence supports a finding Claimant is unemployable, and therefore permanently and totally disabled. The next question to ask is why is Claimant permanently and totally disabled? There is no evidence that suggests Claimant was rendered unemployable solely based upon the injuries and disabilities to his wrists and elbows that are the subject of the May 15, 2006 claim. To the contrary, all of the physicians who found Claimant to be permanently and totally disabled, based their opinions upon the diagnosis of thoracic outlet syndrome and its sequelae. Therefore, the evidence supports a finding Claimant was rendered permanently and totally disabled solely as a result of his thoracic outlet syndrome and more specifically due to the damage to Claimant's phrenic nerve.

FUTURE MEDICAL CARE

Section 287.140.1, RSMo, requires the employer to provide medical treatment as a component of an employee's compensation due to injury. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The pertinent portion of the statute reads, "[I]n addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury."

Where future medical benefits are to be awarded, the medical care must of necessity flow from the accident, via evidence of a "medical causal relationship" between the injury from the condition and the compensable injury, before the employer is to be held responsible. *Modlin v. Sun Mark, Inc.*, 699 S.W.2d 5, 7 (Mo.App. 1985). It is not necessary for a claimant seeking future medical benefits to produce conclusive evidence to support the claim, but the employee need only show a need for additional medical treatment by reason of the compensable accident as a reasonable probability. A mere possibility of a need for future medical care does not constitute substantial evidence to support an award, but if a medical expert testifies as to there being a reasonable probability (founded on reason and experience which inclines the mind to believe but leaves room for doubt) for the treatment, then it may be ordered. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). "The right to obtain future medical treatment should not be denied merely because it has not yet been prescribed or recommended as of the date of the date of the workers' compensation hearing." *Mathia*, (at 277). The compensation law does not require a worker to wait until he finds himself totally disabled in order to file a claim for compensation. *Mickey v. City Wide Maint.*, 996 S.W.2d 144 (Mo.App. 1999).

Dr. Musich stated in his report of March 11, 2014 "Mr. Meng will require ongoing pain management". He testified on cross-examination Claimant will need future and further medical care with regard to his bilateral neurogenic and thoracic outlet syndrome condition. He explained: "this gentleman will require some form of pain management and physical therapy".

After Dr. Thompson performed surgery for Claimant's thoracic outlet syndrome, he referred Claimant to Dr. Rastogi for pain management care. After a failed attempt at relief with a spinal cord stimulator, Claimant was discharged and advised to "continue current pain medications".

The medical records of Claimant's primary care physician, Dr. Houser, show the doctor has continued to prescribe pain medications since the discharge from the office of Dr. Rastogi.

Claimant testified he continues to receive medications to this day from Dr. Houser. He identified a list of the prescriptions he is currently taking. A number of the medications are for problems unrelated to his work injuries, such as the medications related to heart problems. However, there are also medications for treating pain, such as Oxycodone-Acetaminophen and Oxycontin.

Based upon this information and these medical opinions, the evidence supports a finding Claimant is in need of future medical care to cure and/or relieve the effects of his thoracic outlet syndrome. As the evidence supports a finding Claimant's thoracic outlet syndrome is the responsibility of SystemAire, then too SystemAire is found liable for the future medical care.

STATUTE OF LIMITATIONS

Evidentiary and procedural issues within the Missouri workers' compensation law are more relaxed than they are in the circuit courts. The statute says:

[a]ll proceedings before the commission or any commissioner shall be simple, informal, and summary, and without regard to the technical rules of evidence, and in accordance with section 287.800. All such proceedings shall be according to such rules and regulations as may be adopted by the commission.

RSMo. §287.550 (2005). The courts have said that *procedural* rights are considered as subsidiary to *substantive* rights, with substantive rights being enforced at the sacrifice of procedural formality. *Groce v. Pile*, 315 S.W.2d 482, 492 (Mo.App. 1958). A claim for compensation is not required to have the same elements of a petition in a civil court action. *Id.*

At the same time, the law states that a claim for compensation must be filed within two years of the date of injury. RSMo. §287.430 (2005). However, the situation involving "occupational disease" claims is more complicated because of the difficulty in determining when an injury has occurred and whether it is work-related. The Missouri legislature thereby established certain conditions must be met before the statute of limitations begins to run in an occupational disease claim. The workers' compensation law says:

[t]he statute of limitations referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that an injury has been sustained related to such exposure . . .

RSMo. §287.063.3 (2005).

A. Timeliness of the Claim

The facts of the present matter show Claimant was evaluated by two of SystemAire's physicians in the summer of 2006, at which time he was advised he has bilateral carpal tunnel syndrome. He then filed his initial claim for compensation on September 14, 2006, less than three months after first being diagnosed with carpal tunnel syndrome. In that claim, Claimant alleged he sustained a repetitive trauma injury as a result of the repetitive nature of his work duties with SystemAire. Clearly and obviously, The evidence supports a finding Claimant's initial claim for compensation was timely filed, as it was filed just three months after he was advised he has the condition. Employer's objection to the timeliness of Claimant's claim is without merit, and is therefore, denied.

B. Sufficiency of the Claim's Contents

SystemAire also raises issues with regard to the sufficiency of Claimant's pleadings, arguing they are insufficient to make a stated claim, and specifically arguing subsequent amendments do not "relate back" to the original claim for compensation. A review of the evidence shows such a complaint is without merit.

Claimant's original Claim alleged injury to "both hands, wrists, arms and body as a whole". That pleading covers all of the various injuries Claimant has alleged, as he is pursuing benefits for diagnoses related to the surgeries performed for his bilateral carpal tunnel, bilateral cubital tunnel, and thoracic outlet conditions. While SystemAire argues that the amended claims do not "relate back" to the Claim against SystemAire, such argument is without merit. This can be seen in case law such as the matter of *Wiele v. National Super Markets, Inc.*, 948 S.W.2d 142 (Mo.App.1997).

Wiele involved a fact pattern very similar to the present case, with the same injuries and even some of the same expert witnesses. Ms. Wiele claimed that she was injured due to the repetitive nature of her work duties. She was initially diagnosed with carpal tunnel syndrome, though the employer denied that the condition was caused by her work. Ms. Wiele therefore filed a claim for compensation in 1990 in which she alleged that the repetitive activity of her employment caused injury to her "right wrist, right arm, left wrist, left arm, [and] body". *Id.*, at 144. Since her claim was denied, she proceeded with bilateral carpal tunnel surgery through a physician of her own choosing. She had continued complaints following these surgeries, so she was referred to Dr. Mackinnon, where she was diagnosed in 1992 with bilateral thoracic outlet syndrome. Later on she was evaluated by Dr. Musich, who also diagnosed her with bilateral carpal tunnel syndrome and bilateral thoracic outlet syndrome.

The employer in *Wiele* then made the *same* argument and the *same* attack that Employer makes in the current matter. That employer argued that Ms. Wiele's thoracic outlet syndrome could not be found to be compensable because it was not diagnosed until 1992, and because the thoracic outlet syndrome (which they referred to as a "shoulder" claim), was a "separate and distinct condition" which had to be pleaded in the 1990 claim, but was not. The Court of Appeals rejected the employer's argument and found: 1) the 1990 claim alleging injury to "right wrist, right arm, left wrist, left arm, body" was sufficient to meet the pleading requirements for the thoracic outlet syndrome, even though the thoracic outlet syndrome was not formally diagnosed until two years later. *Id.*, at 146. They said:

Claimant's 1990 claim alleged injury not only to her wrists, but also to both arms and her body, and alleged progressive injuries to her wrist and arm as a result of doing repetitive work. Claimant adduced evidence that her shoulder disability was caused by her repetitive work duties and existed concurrently with her wrist disability. Claimant testified that when she sought medical treatment in 1990, she was experiencing numbness and tingling from her fingertips to her shoulder. Dr. Mackinnon's examination report and Dr. Musich's testimony support a finding

that claimant suffered from both bilateral carpal tunnel syndrome and bilateral thoracic outlet syndrome and that these conditions were caused by her repetitive work activity for a number of years. There was substantial and competent evidence to support the Commission's determination that claimant's shoulder problems existed concurrently with the carpal tunnel problem and this finding was not against the overwhelming weight of the evidence. The Commission did not err in finding that claimant's claim for injury to her arms from repetitive work activity covered her shoulder disability.

Id., at 147.

The factual pattern in *Wiele* is similar to that of the present matter, right down to the same expert witnesses. In the present matter, Claimant alleged injury to "both hands, wrists, arms and body as a whole" in his 2006 Claim. He alleged the injuries occurred by way of repetitive duties. He produced evidence showing he suffered from thoracic outlet syndrome concurrently with his carpal tunnel problem. And just as in *Wiele*, his claim of injury to his arms (and "body as a whole, for that matter") covered his thoracic outlet condition. Accordingly, the evidence supports a finding Claimant filed his original 2006 Claim for Compensation within the time prescribed by law, and as that Claim included the "arms" and "body as a whole", it is found to have been sufficiently pled. Any argument as to whether subsequent amended claims "relate back" to the original claim is therefore moot. SystemAire's statute of limitations complaint is denied.

SECOND INJURY FUND LIABILITY

Claimant bears the burden of proof on all essential elements of his Workers' Compensation case. *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990) (overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contrary evidence. *Id.* at 199. "Total disability" is defined 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." Section 287.020(7), RSMo.

For the Second Injury Fund to be liable for permanent total disability benefits, a claimant must establish that his total disability is due to the combination of the primary injury with his, then, pre-existing disabilities. See *Boring v. Treasurer of Mo., Custodian of the Second Injury Fund*, 947 S.W.2d 483, 489-490 (Mo.App. E.D. 1997). If a claimant's last injury, in and of itself, rendered the claimant permanently and totally disabled, then, the Second Injury Fund has no liability and the employer is responsible for the entire amount. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. E.D. 2000). The rationale for this proposition is that when the last injury is totally disabling, the prior disabilities do not combine with the primary injury.

NATURE AND EXTENT OF SIF LIABILITY

The Fund is not liable for either permanent partial disability benefits or permanent total disability benefits in this case. On the date of injury, Claimant was working at full duty without restrictions and was not receiving any accommodations from SystemAire. Claimant's preexisting injuries have not been proven to have been a hindrance or obstacle to employment prior to the date of injury.

Claimant has numerous complaints that appear to prevent him from working. However, these complaints do not stem from Claimant's preexisting injuries. Claimant worked for roughly 22 years after the 1984 fracture and laceration of his right hand, with no restrictions. He worked another 16 years after his 1989 left knee surgery, again without restrictions. He worked two years without permanent restrictions for his right knee after his 2004 surgery.

At hearing, Claimant disputed Mr. Lalk's statement that "his knees were shot." Claimant's 1991 left wrist injury and 1993 right wrist injury resolved with conservative treatment and no apparent permanent disability. Claimant's low back pain, prior to the date of injury, seems to have been intermittent, and no evidence of a hindrance or obstacle to work on the date of injury. There was no evidence it caused him to miss significant amounts of work. He was under no permanent restrictions due to his low back.

The ongoing complaints Claimant testified to at hearing are not complaints associated with the preexisting injuries. He testified he has difficulty holding items in his hands, which makes grocery shopping difficult. He frequently drops his groceries while putting them on the cash register conveyor belt and has even had older women offer to assist him. He now uses a tablet to order groceries. He does some cooking, but since his thoracic outlet syndrome diagnosis, Claimant finds himself dropping plates and other kitchen items. Claimant no longer does yard work because of symptoms in his hands and arms, as well as his breathing difficulties.

Despite Claimant's previous injuries, he continued to work and engage in his activities of daily living. Claimant's injuries prior to 2006 did not prevent him from engaging in his hobbies. He testified at hearing even after his 2004 knee surgery, but before his 2006 injury, he had hunted and fished.

The weight of the evidence and expert opinion support a finding of permanent and total disability resulting from neurogenic thoracic outlet syndrome alone. Moreover, it was the damage to the phrenic nerve that ultimately caused Claimant to be totally disabled. Both Dr. Musich and Dr. Thompson are unequivocal in their opinion thoracic outlet syndrome alone was sufficient to render Claimant permanently and totally disabled. Mr. Lalk and Ms. Blaine traced Claimant's inability to compete in the open labor market to symptoms associated with thoracic outlet syndrome, not his preexisting injuries.

While Claimant did complain of carpal and cubital tunnel symptoms at the time of the date of injury, these disorders were not disabling. Claimant was initially pleased with the results of the procedures performed by Dr. MacKinnon and only returned to her after he had begun working again. Dr. MacKinnon testified her examination of Claimant at that time did not reveal any evidence of carpal or cubital tunnel syndromes, but did reveal some evidence of thoracic outlet syndrome.

The question then for this Court is determining how Claimant suffered this injury and when it became disabling. Evidence shows after Dr. MacKinnon's surgeries, Claimant was initially pleased with the result, returning to her only after he began working again and experiencing symptoms. While she found no evidence of carpal or cubital tunnel syndrome at this time, she did find evidence of thoracic outlet syndrome, showing this condition existed when Claimant worked at SystemAire.

Claimant's continuing and increased complaints were diagnosed by Dr. Thompson on January 7, 2009 as neurogenic thoracic outlet syndrome, approximately one year after he stopped working for Harke Heating and Air Conditioning, a post-SystemAire employer. Dr. Thompson concluded Claimant was permanently and totally disabled due to this injury and his post-surgical respiratory complications.

The evidence shows Dr. MacKinnon found thoracic outlet syndrome as early as 2007. Claimant worked very briefly for two employers following his release by Dr. MacKinnon and then for nine months for Harke. Claimant was disabled while working at SystemAire and his employment after his release by Dr. MacKinnon was a failed work attempt. The evidence supports a finding Claimant is not permanently and totally disabled as a result of combination of his primary and preexisting injuries. He is permanently and totally disabled because of thoracic outlet syndrome and the subsequent damage to Claimant's phrenic nerve.

Claimant has not met his burden in proving he is permanently and totally disabled due to the combination of his primary and preexisting injuries. Consequently, the Fund is not liable for permanent total disability benefits or permanent partial disability benefits.

CONCLUSION

This claim associated with liability of SystemAire, Inc., and Cincinnati Insurance Company is hereby awarded consistent with this opinion.

Made by: 

MARVIN O. TEER, Jr.

I certify that on 1-7-49
I delivered a copy of the executed award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

Administrative Law Judge
Division of Workers' Compensation

By MPJ

