

IN THE CLAIMS COMMISSION FOR THE STATE OF TENNESSEE
EASTERN DIVISION

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IN THE CLAIMS COMMISSION
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JOHN VESPIE, a citizen and)
resident of Morgan County, Tennessee,)
)
Plaintiff)
)
v.)
)
STATE OF TENNESSEE,)
)
Defendant)

NO: 30100531316

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FINAL JUDGMENT

TN CLAIMS COMMISSION
CLERK'S OFFICE

This matter came on for consideration on the 5th day of September, 2014, before the Honorable William O. Shults, Commissioner, Claims Commission of the State of Tennessee, Eastern Grand Division, upon the pleadings filed in this cause, testimony of witnesses in open court, exhibits introduced, the deposition testimony of William E. Kennedy, M.D. (March 12, 2014), submitted on behalf of the Plaintiff and the deposition testimony of William M. Hovis, M.D. (April 16, 2014), submitted on behalf of the Defendant, stipulations announced by the parties, and the statements and arguments of counsel for the parties. Following the close of proof, the Claims Commissioner took the matter under advisement and on the 5th day of January, 2015, entered a "DECISION" which "DECISION" shall be referred to as the Commissioner's "Memorandum Opinion" and shall be entered upon the minutes of the Claims Commission. Accordingly, the "Memorandum Opinion" shall be incorporated herein and attached hereto as if set forth verbatim.

It is, hereby, **ORDERED, ADJUDGED** and **DECREED** as follows:

1. The Plaintiff, John Vespie, suffered an “accidental injury” arising out of and in the course and scope of his employment with the Defendant, State of Tennessee, on May 26, 2010. The appropriate rate of compensation of Plaintiff, in regard to the May 26, 2010, “accidental injury” is \$384.78.

2. The Plaintiff was rendered 41% permanent and partially disabled to the body as whole as a result of his “accidental injury” arising out of and in the course and scope of his employment on May 26, 2010. The Plaintiff’s permanent and partial disability benefits shall commence as of the date that Plaintiff’s temporary total disability benefits terminated.

3. The Plaintiff shall continue to receive the benefit of medical care as is reasonably necessary pursuant to the Workers’ Compensation laws of the State of Tennessee, for those injuries arising out of his “accidental injury” of May 26, 2010, pursuant to T.C.A. § 50-6-204, at the expense of the Defendant.

4. Tony Farmer, attorney for Plaintiff, has provided the Plaintiff reasonable and necessary legal services and is entitled to an attorney fee in an amount equal to 20% of the total award herein.

5. Based upon the factors prescribed by the Supreme Court of the State of Tennessee, for assessing attorney fees, including the difficulty of this matter and the history of this litigation, as well as the expertise required and the results achieved, the attorney fee herein, under all of these circumstances, is found to be reasonable.

6. Upon motion of Tony Farmer, attorney for Plaintiff, and for good cause shown, the court awards a computation of payment of the attorney fee pursuant to T.C.A. § 50-6-229(a).

7. The cost incurred by Plaintiff for the cost of the transcription of the deposition of William M. Hovis, M.D. is to be included as discretionary costs and shall be payable by the State of Tennessee.

ENTER this 4th day of February, 2015.


WILLIAM O. SHULTS
TENNESSEE CLAIMS COMMISSIONER

APPROVED FOR ENTRY:


Tony Farmer (BPR # 001865)
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CERTIFICATE

I certify that a true and exact copy of the foregoing Order has been transmitted to the following:

**Tony Farmer, Esq.
1356 Papermill Pointe Way
Knoxville, TN 37909**

**Eric Fuller, Esq.
Assistant Attorney General
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202**

This the 13th day of Feb., 2015.

Paula Swanson

Paula Swanson, Claims Commission Clerk

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION

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JOHN VESPIE,)
)
 Claimant,)
)
 v.) Claims No. 30100531316
)
 STATE OF TENNESSEE,)
)
 Defendant.)

DECISION

This matter arose when Mr. Vespie was injured while employed by the State of Tennessee at the Morgan County Correctional Facility.

After being hired by the State as a correctional officer, Mr. Vespie was sent to Tullahoma, Tennessee, for training. On May 26, 2010, Mr. Vespie was involved in a training exercise which required trainees to pair up and practice a "chokehold" maneuver. As Mr. Vespie was thrown to the ground, he landed on his shoulder. According to Mr. Vespie, the impact of landing on his shoulder during that exercise resulted in the injuries underlying this claim.

Mr. Vespie did receive treatment at an urgent care facility in Tullahoma and was subsequently treated by an orthopedic surgeon, Dr. McKay, who performed the first of two surgical procedures on him.

After the first surgery, Mr. Vespie continued to have problems with his shoulder, but returned to Tullahoma a second time for additional training. During that training, Mr. Vespie asserts that the firing of a gun irritated the injured shoulder.

It was Dr. McKay's opinion that a second surgery was necessary, but approval for it was denied at that time. Over a year later, Mr. Vespie was treated by another orthopedic surgeon, Dr. Hovis, who performed a second more extensive surgery on Claimant after attempting to treat through less invasive means.

Although the second surgery did apparently alleviate some of the problems with his shoulder, Mr. Vespie continued to experience problems with pain and loss of motion. Ultimately, Mr. Vespie was dismissed from employment as a correctional officer for the State because of his physical inability to perform the requisite job functions.

Mr. Vespie then filed this claim pursuant to the State of Tennessee Workers' Compensation Law.

PROCEDURAL HISTORY

This claim was originally filed with the Tennessee Claims Commission on May 29, 2013, and was assigned to the Eastern Grand Division.

The State then filed an Answer on July 16, 2013. The matter was initially set for trial May 15, 16, and 19, 2014. However, an Agreed Order Of Continuance was filed on May 27, 2014, on the ground that counsel for Claimant advised he would be out of the state and unavailable for trial. The matter was reset for August 29, 2014. The matter was again continued when counsel for the State suffered a serious medical condition which prevented his ability to participate in an August 29, 2014, trial. The trial was held on September 25, 2014.

The evidence presented at trial is as follows.

Testimony of John Vespie:

John Frederic Vespie resides at 553 Heidel Road, Wartburg, Tennessee, in Morgan County. (TR 1, p.21)¹. Mr. Vespie and his wife of twenty-four years, Tresa Lynn Vespie, have lived there since 1999. (*Id.*). Mr. Vespie and his wife have two grown children and three grandchildren. (TR 1, p. 21-22).

Mr. Vespie testified that he was born on October 25, 1967, and was forty-six (46) years old at the time of trial. (TR 1, p. 22). He also stated that he graduated from Central High School in 1985. (*Id.*). Mr. Vespie denied having pursued any further education in a formal setting for job purposes, but stated that he had attended Pensacola Bible Institute in Pensacola, Florida, to develop his skills as a pastor. (TR 1, p. 23). Although Claimant has attempted to use his Bachelor of Arts (“BA”) degree from the Pensacola Bible Institute for employment purposes, his degree has been rejected “many times” because of the institution’s unaccredited status. (TR 1, p. 23-24).

Mr. Vespie went on to testify in this regard that he had received email communications from Sheryl Atchison at the Tennessee Department of Human Resources in March and August of 2014, which stated that his degree could not be accepted because the institution is unaccredited. (TR 1, p. 24-25); see also Exh. 3 and 4.²

Mr. Vespie stated that he has on-the-job training in the field of “autobody” work. (TR 1, p. 26). Claimant went on to state that he had worked in the autobody field on and off for approximately twenty (20) years. (TR 1, p. 27). He also bought and sold cars privately during that same time period. (*Id.*). For a period of ten (10) to fifteen (15) years, Claimant owned and operated a used car lot, but he could not recall the exact dates. (TR 1, p. 27-28). Mr. Vespie also testified that he no longer owns or operates the used car lot. (*Id.*).

¹ References made to the transcript in this matter will be as follows: (TR __, p. __).

² References to exhibits marked at trial will be as follows: (Exh. __).

Mr. Vespie also worked for a sub- contractor to a large cable company for approximately four (4) years. (TR 1, p. 27).

For a period of three (3) years, although not consecutively, Mr. Vespie worked as a full-time pastor. (TR 1, p. 28). Mr. Vespie asserts that he has not been employed as a full-time pastor since 2008. (Id.). However, Mr. Vespie continues to work in a part-time capacity at Bible Baptist Church in Lansing, Tennessee, which he founded. Initially, he was paid a salary, but now he receives compensation in the form of paid expenses such as phone service and housing. (TR 1, p. 30-31). According to Claimant, the church has a regular attendance of six to fifteen people. (TR1, p. 31).

In May of 2010, Mr. Vespie began his employment with the State of Tennessee as a correctional officer at the Morgan County Correctional Complex ("MCCX"). (TR 1, p. 33-34).

After being hired, Mr. Vespie underwent a required physical examination by a physician authorized by the State. (TR 1, p. 33). According to Claimant, he did not recall any prior problems with his right shoulder. (TR 1, p. 33-34).

Mr. Vespie stated his first week the first week of his employment consisted of an orientation program which was done in a classroom setting. (Id.). Upon completion of that phase of training, Mr. Vespie was sent to Tullahoma, Tennessee, for specific training as a correctional officer. (TR 1, p. 34). According to Claimant, he believed the training period was between six to eight weeks in duration. (Id.). It was at the training facility in Tullahoma where Mr. Vespie was injured. (Id.). Mr. Vespie testified that trainees were partnered up to practice "a choke hold maneuver". He stated that one of the trainee pair was to perform the maneuver, and the other was not to resist. According to Mr. Vespie, he decided to let his partner perform the maneuver first. Claimant also stated that since his partner was short, he let him "go ahead and do the flip, flip me

over.” (TR1, p. 34-35). Mr. Vespie testified that he landed on the mat “much harder” than he expected, and was injured. (*Id.*).

Mr. Vespie was sent to the camp nurse where he was treated and then sent to an urgent care facility in Tullahoma, Tennessee. (TR 1, p. 35). Claimant stated that he was having considerable trouble with his shoulder while in Tullahoma, but was not able to get an MRI until he was seen by his primary care physician in Morgan County. (*Id.*). Claimant was not certain, but believed the MRI was performed in Oak Ridge. However, he was sure that no MRI was performed while he was at the training facility in Tullahoma. (TR 1, p. 35-36).

Mr. Vespie completed the training program. He testified that “the whole class knew that [he] had a problems [with his shoulder]”, so they would not make him use it. (TR 1, p.36).

When Mr. Vespie returned to Morgan County, he was seen at the Morgan County Medical Center, and an MRI was ordered. After the results of the MRI were reviewed, Claimant was provided with an orthopedic surgeon, a Dr. Michael McKay, in Oak Ridge, Tennessee. (TR 1, p. 36-37).

Dr. McKay performed the first surgery on Claimant’s shoulder on August 13, 2010. (TR 1, p. 37). After completing physical therapy as ordered by Dr. McKay, Claimant was continuing to have problems, and a second surgery was recommended. (*Id.*). Mr. Vespie testified that the State did not approve the second surgery. (TR 1, p. 38).

While waiting on the second surgery approval, Mr. Vespie continued to engage in physical therapy on his own with a personal trainer. (*Id.*).

When asked about a dispute with Dr. McKay, Claimant testified that there might have been a small dispute early on because of his pain, but he had no knowledge of the problem until recently. (TR 1, p. 39). According to Mr. Vespie, after the second surgery recommendation was

denied, he received a letter from Dr. McKay informing him that he was no longer going to treat him. (*Id.*).

Subsequently, the State continued to provide physician panels and eventually Dr. William Hovis was selected. Dr. Hovis saw Claimant for the first time in May of 2011, approximately nine months after the first surgery was performed by Dr. McKay. (TR 1, p. 39-40). Mr. Vespie was unsure if Dr. Hovis immediately recommended surgery, but he recalled having an MRI and receiving other treatments including injections. (TR 1, p. 40-41). The second surgery was eventually performed by Dr. Hovis in January of 2012. (*Id.*).

Approximately three to four months after the surgery, Dr. Hovis released Mr. Vespie to return to work with no restrictions. (TR 1, p. 41-42). However, Mr. Vespie stated that he was still having problems with his shoulder even at the time of his release to return to work. In fact, he testified that part of the grinding of the shoulder was fixed using the Mumford procedure and that the biceps tendon was lowered to address other problems. (TR 1, p. 42). However, Mr. Vespie also stated while there were improvements with the shoulder, he was advised by the doctor that he could only "get [him] so far". Mr. Vespie went on to testify that Dr. Hovis advised there was nothing more he could do, and that if he could not adequately perform his job duties upon returning to work, there was no need to come back to him, and he should seek treatment with his primary care physician. (TR 1, p. 42-43).

Mr. Vespie explained that after his injury in Tullahoma, he was permitted to work at MCCX in a limited capacity while awaiting both the first and second surgeries. He stated that he only performed light duties including driving a truck. (TR 1, p. 43-44). It was during this time that Mr. Vespie asserts he became aware he was having problems meeting the requirements for work as a correctional officer. (TR 1, p.43). He stated that during this time, the long shifts and

his trouble sleeping resulted in his “messaging up count”. (Id.). Mr. Vespie stated that to the best of his recollection, he worked in this limited capacity while awaiting surgery for some three months. (TR 1, p. 43-44).

Mr. Vespie clarified that after being released by Dr. Hovis following the second surgery, he worked approximately three weeks, one of which was attending another training session in Tullahoma. (TR 1, p. 45). While training in Tullahoma, Claimant fired a shotgun and continued to experience shoulder problems. (TR 1, p. 45-46). Claimant testified that he notified the State’s adjuster that he was going to see Dr. Seiber, his primary care physician, since Dr. Hovis had advised him not to return to him for further treatment. (Id.). Mr. Vespie stated that he was prescribed medication by Dr. Seiber, and that he again informed the adjuster of that treatment.

Claimant then testified that at the end of the three week period after his release by Dr. Hovis, he received a letter from Tony Howerton, who was the warden at the time at MCCX. (TR 1, p. 47); (Exh. 5). The letter from Mr. Howerton recommended that Claimant be removed from the position of correctional officer due to his inability to perform the requisite duties and responsibilities necessary in that position. (TR 1, p. 47-48).

Approximately one week later, Mr. Vespie testified that he received another letter, this one from a Mr. Doug Cook. (TR 1, p. 48-49); (Exh. 6). The letter from Mr. Cook was made in reference to a meeting with him of July 26, 2012. According to the letter, Mr. Vespie’s workers’ compensation benefits ceased on June 30, based on the workers’ compensation physician’s release of Claimant to return to work on June 27, 2012. The June 30, 2012, expiration was reached when it was determined that Claimant could not be scheduled to work prior to July 1, 2012. However, Mr. Vespie was required to refund the benefits paid for June 30, 2012, since he actually returned to work on that day. The letter also makes note that Mr. Vespie called in sick

on July 18, 2012, and a medical excuse was provided by Dr. Seiber for July 24, 2012, which restricted Claimant from performing the essential functions of a correctional officer. The letter goes on to state that Claimant exhausted all of his leave time and was in a "leave without pay" status. Mr. Cook's letter explains that Mr. Vespie's current condition is not beneficial for either himself or the institution. The letter concludes by saying that a Ms. Carol Martin would assist Mr. Vespie in applying for any other positions either at MCCX or another agency, and that the decision to terminate his employment in State service was for the good of the service. It was noted that Mr. Vespie would be recommended for rehire in the department. (TR 1, p. 48-50); (Exh. 6). Attached to Mr. Cook's letter was a letter from Dr. James David Seiber dated July 24, 2012. This same letter from Dr. Seiber had been provided to both Mr. Cook and Mr. Howerton. Dr. Seiber's letter stated that Mr. Vespie's "shoulder is still very painful and he has limited use of the arm." (Exh. 8). The letter goes on to state that Claimant "should not fire weapons and should not be involved in physical confrontations with others." (*Id.*). The letter concluded with Dr. Seiber's opinion that it would be difficult to impossible for Mr. Vespie to work as a security officer. (*Id.*).

Mr. Vespie testified that he remains under Dr. Seiber's care for pain management treatment. (TR 1, p. 51-53). Currently, Mr. Vespie is prescribed Ambien, Percocet, Valium and medication for blood pressure issues. (TR 1, p. 56). Mr. Vespie stated that the State has paid for some of the medications at times, and has not paid at other times. (TR 1, p. 56-57).

Since the injury, Mr. Vespie has continued his work as a part-time pastor. He has also worked in lawn care, although using the weed trimmer does cause his arm to go numb because of bicep "bunching" resulting from the operation. (TR 1, p. 57). Mr. Vespie also testified that the pain in his shoulder makes simple home repairs such as fixing a water leak a difficult task. (TR

1, p. 58). Claimant stated that he would not be able to perform jobs requiring physical labor for eight hours per day, five days a week without medication. (TR 1, p. 59). Mr. Vespie asserts that he does very little auto body work now, and generally gets somebody else to do that work now. (TR 1, p. 59). Mr. Vespie testified that at the time he was hired by the State, he and his wife had five horses and a farm. (TR 1, p. 60). Once the injury occurred, all the farm work fell to Claimant's wife, and the two subsequently lost the farm and horses in a bankruptcy. (TR 1, p. 60-61). Mr. Vespie testified that his wife was attending nursing school at Roane State at the time of his injury and is an LPN. (TR 2, p. 99). However, Claimant asserts that she is not currently working in the nursing field because she has to take care of him and the jobs around the home he can no longer perform. (TR 2, p. 99-100).

Additionally, Mr. Vespie states that he no longer maintains a garden, and has given up volleyball and basketball because of the irritation to the shoulder caused by sports and outdoor activities. (TR 1, p. 62-63). Claimant asserts that getting dressed is at times difficult given the problems he incurs when having to perform reaching movements. (TR 1, p. 63-64).

Mr. Vespie has not been given any of the jobs he has applied for which require a college degree because of the non-accredited status of the Pensacola Bible Institute. (TR 1, p. 66-67). He went on to state that he is willing to work so long as the job is one that he can perform and manage physically. (TR 1, p. 66-67).

On cross-examination, Mr. Vespie testified that he had reapplied with the State for a job as a parole officer. (TR 1, p. 70-71). Mr. Vespie stated that he did not know the physical requirements of a parole officer position, but believed it to be more akin to "computer work rather than hands on". (TR 1, p. 71).

Mr. Vespie also stated that he was attending the Great Plains Baptist University at the time of this injury, and that he has since been awarded a Masters of Divinity from that on-line institution. (TR 1, p 72). Claimant owes approximately one thousand dollars to the Great Plains Baptist University. (TR 1, p. 73; TR 2, p. 78). Mr. Vespie also serves as a volunteer chaplain for the military processing station in Knoxville, Tennessee. (*Id.*).

After being asked whether or not he receives a salary, Claimant clarified that if funds are available, the church writes him a check and that the money is used for expenses. (TR 2, p. 79). Mr. Vespie also stated that he does in fact own the auto body shop and still maintains the tax identification number, but is no longer doing any work there. (TR 2, p. 80-81). Although Mr. Vespie and his wife continued buying and selling cars for a time after his injury, Claimant indicated that he no longer has a dealer license which allows him to purchase and sell automobiles. (*Id.*). Mr. Vespie did testify that if given the opportunity, he could work in a supervisory role in a body shop. (TR 2, p. 82).

Mr. Vespie maintains that he can lift approximately 12 to 15 pounds with his right hand, and could potentially lift more with the aid of medication, but not without pain. (TR 2, p. 83-84). According to Claimant, he has shoulder pain even when sitting, but walking for a "long-term" period would irritate the shoulder. (TR 2, p. 85).

According to the QuickDash (*see* Kennedy Dep. Exh. 5) questionnaire filled out during his visit with Dr. Kennedy, Claimant maintains he has severe difficulty opening new or tight jars and completing household chores, including washing walls and floors. (TR 2, p. 87). Mr. Vespie also indicated that carrying a shopping bag or briefcase is severely difficult and this condition has not changed in the past three years. (TR 2, p. 88).

Mr. Vespie testified that the only improvement from the two surgeries was a reduction in the “grinding” of the shoulder. (TR 2, p. 92-94). By contrast, Claimant asserts that the ability to reach behind his back and the “bunching” or cramping of the biceps has worsened. (TR 2, p. 94).

Mr. Vespie again testified that “several” Sedgwick employees told him to see Dr. Seiber and the State would pay for the visits. (TR 2, p. 106-108). Mr. Vespie stated that Dr. McKay’s nurse, Pepper, also told him to see his primary care physician as well. (TR 2, p. 108). According to Mr. Vespie, treatment with Dr. McKay stopped when the second surgery was denied. (*Id.*). Claimant did acknowledge that some disagreements occurred between him and Dr. McKay over medications. It was Mr. Vespie’s testimony that some of the medications Dr. McKay wished to prescribe were psychological in nature, and that he does not “do well” on some of those suggested medications. (TR 2, p. 110). Mr. Vespie went on to testify that approximately one month before trial, he and his wife discovered that Dr. McKay had made notations in his file that Claimant was exhibiting drug-seeking behavior. (TR 2, p. 111-113). Claimant asserts that he had the doctor’s secretary provide the office notes, and a review of those notes led to this discovery. (*Id.*). Mr. Vespie testified that Dr. McKay never made any in-person accusations of potential drug-seeking issues. (TR 2, p. 116). However, a letter dated December 7, 2010, was sent from Mr. Vespie to Dr. McKay, wherein Claimant among other things states that he resents the insinuation made by Dr. McKay and his nurse Pepper that he was seeking narcotics. (TR 1, p. 117-121); see also (Exh. 12). Mr. Vespie attempted to explain this seeming contradiction about when he actually became aware of the suspicions surrounding potential drug seeking behavior on the part of Dr. McKay and or his officer personnel. Mr. Vespie stated that his letter addressed numerous concerns, such as what a Mumford Procedure is, and why no other options for treatment were available. He went on to testify that he wrote the letter to Dr. McKay out of

irritation that he was being dropped as a patient after the second surgery was denied approval. (TR 2, p. 120-122). Upon further questioning, Mr. Vespie testified that the problems with drug-seeking accusations occurred during telephone calls to Dr. McKay's office. (TR 2, p. 124).

In discussing Dr. Hovis and his treatment, Claimant stated that he was very pleased with his treatment, and that the grinding in his shoulder had in fact improved, though not cured. (TR 2, p. 126). Mr. Vespie testified that he had discussions with Dr. Hovis about a potential return to work to see if he would be able to perform his job duties. (TR 2, p. 126-127). It was during this conversation that Mr. Vespie states that Dr. Hovis advised him to return to his primary care physician if the return to work was unsuccessful. (*Id.*). Claimant went on to state that he was "shocked" when he read in Dr. Hovis' deposition that he believed Mr. Vespie's continued complaints stemmed from a desire for money, and that he had tried to impress him with the fact that he was a pastor. (TR 2, p. 127). Mr. Vespie stated that he was "blown away" by Dr. Hovis' comments and felt that they had a great relationship. (TR 2, p. 127-128). Claimant testified that he has been seen twice this year by Dr. Hovis and has been advised that there is nothing more that can be done.

Mr. Vespie testified that this situation has impacted him physically, psychologically and in his marriage and family. (TR 2, p. 133).

On redirect examination, Mr. Vespie testified that surveillance videos taken by Mr. Powers (discussed later herein) were of someone other than him. (TR 2, p. 156). Claimant further stated that he did not know who the individual in the video was. (*Id.*).

However, on re-cross, Mr. Vespie acknowledged that he was in one of the videos wearing a black shirt and was watching another individual jack up a car. (TR 2, p. 157).

Testimony of Richard C. Powers:

Mr. Powers is employed by Meridian Investigative Group as a private investigator. (TR 2, p. 135). He was assigned to conduct surveillance of Mr. Vespie beginning on August 8, 2011, and continuing on August 9, 2011, August 10, 2011 and October 25, 2011. (TR 2, p. 135-136). Mr. Powers stated that he would arrive near Claimant's residence and find a discreet position from which he could observe Mr. Vespie. (TR 2, p. 136). He stated that a video camera was used to document the movements of Mr. Vespie if and when he was outside. (*Id.*). Generally, the surveillance would last for eight hour period of time. (TR 2, p. 141). Mr. Powers testified that each day after the case is "worked", a report is generated and uploaded into Meridian's computer system. (TR 2, p. 137).

In observing Mr. Vespie, Mr. Powers recalled seeing Claimant remove some items from the back of a pickup truck and his mobility appeared "ok". (TR 2, p. 139-140). Powers stated that he believed Claimant did use his right hand to retrieve the item, but could not tell precisely what it was. (TR 2, p. 143). Later that day he observed Mr. Vespie driving to a local tire shop not far from the residence. He witnessed Claimant talking to several people while work was being done on the vehicle. (TR 2, p. 139-140). After some thirty minutes or so in the garage area, Mr. Vespie departed and returned home. (*Id.*). To Mr. Powers' recollection, these events took place either the first or second day of the surveillance assignment. (TR 2, p. 140).

It was Mr. Powers' testimony that Mr. Vespie was not involved in any vigorous activity when he watched him in October. (TR 2, p. 141-142). Mr. Powers recalled seeing a different individual at the residence working on Mr. Vespie's car, and the only thing he saw Claimant do was squat down a couple of times to do something, but the truck blocked the view of just what that activity was. (*Id.*). It appeared to Mr. Powers that Claimant was possibly using a jack but he

could not say that with certainty since his view was partially obstructed. (*Id.*). Although his report indicates that Claimant was pumping a jack with his right arm, Mr. Powers explained that he used the word “appeared” in his written report to show that he was not certain because of the obstructed view. (TR 2, 149-150).

On cross examination, Mr. Powers admitted that he could not say with one hundred percent certainty that the pictures he had taken during the surveillance assignment were actually of Mr. Vespie. (TR 2, p. 146-147). Mr. Powers explained that he had never met Claimant in person, and was not aware that the identity of the person he had observed and photographed was in question. (*Id.*). Mr. Powers testified that he was sure of the events which he documented, but admitted that he was not certain enough of the identity of the person in the video to dispute a direct challenge that it was not Mr. Vespie. (*Id.*).

However, on redirect, Mr. Powers pointed to Mr. Vespie in the courtroom after being asked who he observed during his surveillance assignment. (TR 2, p. 151).

Testimony of William M. Hovis, M.D.

Dr. Hovis is a board certified orthopedic surgeon licensed to practice medicine in Tennessee and qualified to testify as an expert in matters such as this.³ (Hovis Dep., p. 4).

Dr. Hovis testified that he first saw Mr. Vespie on May 4, 2011 for an independent medical evaluation. (Hovis Dep., p. 4-5). Dr. Hovis stated that the primary purpose of the visit was to evaluate Mr. Vespie was experiencing after a previous right shoulder subacromial decompression or acromioplasty procedure performed by Dr. McKay on August 13, 2010, as well as recommendations for future treatment. (Hovis Dep., p. 5-6).

Dr. Hovis recounted the cause of the injury and noted that Claimant landed on his right shoulder twice during self-defense training, and felt a tearing sensation in his shoulder. (*Id.*). Dr.

³ References to the transcript of Dr. Hovis will be as follows: (Hovis Dep., p. ____).

Hovis stated that Mr. Vespie complained of a “rubbing sensation” and described his symptoms as like a ball joint without grease with catching in the shoulder. (Hovis Dep., p. 6). Dr. Hovis went on to describe Claimant’s additional symptoms including numbness and tingling in his arm, neck discomfort and stiffness, popping in his neck and restricted motion of the neck. He also had pain deep in his shoulder in the front. After the first surgery, he experienced increased right shoulder and neck pain. (Hovis Dep., p. 6-7).

Dr. Hovis testified that he attempted to more thoroughly determine what problems existed and recommended an arthrogram MRI be performed at a location where the test would be read by a musculoskeletal radiologist. (Hovis Dep., p. 7). At that time, Dr. Hovis did not believe that Mr. Vespie was at maximum medical improvement and reserved a determination on that issue until after the arthrogram MRI results were completed. (*Id.*).

Dr. Hovis re-evaluated Mr. Vespie on June 1, 2011, after the arthrogram MRI, and released him to full duty with no restrictions. (Hovis Dep., p. 8).

Mr. Vespie returned on June 23, 2011, and informed Dr. Hovis that the pain and discomfort had not improved, and that his personal trainer had advised cutting back on fitness activities. (*Id.*). Dr. Hovis injected Mr. Vespie with trial steroids and recommended continuing therapy. (*Id.*).

On July 27, 2011, Dr. Hovis discussed a repeat arthroscopy and advised Claimant that some of his symptomology appeared to arise from his biceps and a potential occult labral tear which related back to the injury at issue here. (Hovis Dep., p. 9). Dr. Hovis performed the second surgery on January 17, 2012. (*Id.*). According to Dr. Hovis, he “did an arthroscopy of his shoulder. Repaired his superior glenoid labrum and a biceps tenodeses, a repeat acromioplasty

and with some symptomology in the AC joint, the acromioclavicular joint, ... [I] did a resection of his distal clavicle, which is referred to as a Mumford procedure.” (*Id.*).

Dr. Hovis placed Mr. Vespie at maximum medical improvement (“MMI”) on June 27, 2012. (Hovis Dep., p. 10). Although Mr. Vespie continued to experience soreness, Dr. Hovis stated that Claimant had reached MMI and released him to full duty at that time. (*Id.*)

Dr. Hovis’ report from the June 27, 2012, visit also noted that less than maximum effort was given when range of motion was being evaluated. (Hovis Dep., p. 11). Dr. Hovis explained that based on his forty years of experience, Mr. Vespie was “intentionally restricting his motions to give the appearance he had less motion than he actually had.” (*Id.*).

Dr. Hovis assigned a 10% impairment to the right upper extremity which is equivalent to a 6% impairment to the body as a whole. (Hovis Dep., p. 11, 19). Dr. Hovis based the right upper extremity rating on symptoms, diagnostic testing, surgical findings, personal evaluations and a review of the Sixth Edition of the AMA Guidelines. (Hovis Dep., p. 10-11). Dr. Hovis testified that the Sixth Edition of the AMA Guides address in some detail the various maladies that affect the shoulder, and that the most significant impairment should be the primary basis of an impairment rating, and that there should be no cumulative combined impairments given. (Hovis Dep., p 11,18). In this case, Dr. Hovis agreed with the Guides that the correct impairment rating is based on the resection of the distal clavicle. (Hovis Dep., p. 12).

Dr. Hovis disagreed with Dr. Kennedy’s impairment rating because it provided for additional impairment based on motion and the Quick Dash questionnaire regarding Mr. Vespie’s inabilities and symptomology. (Hovis Dep., p. 12-13). Dr. Hovis opined that the Quick Dash questionnaire was inaccurately completed in this case rendering it invalid and also that a grade modifier had been improperly used. (Hovis Dep., p. 13). Dr. Hovis testified that Mr.

Vespie initially presented himself as a minister, and as a correctional officer who worked out with weights and was highly motivated. (*Id.*) As time went on, Dr. Hovis recalled that he began to have concerns about Claimant's motivation to return to work as well as the genuineness of his symptomology. In fact, Dr. Hovis stated that he felt Mr. Vespie was exhibiting a great deal of "symptomatic magnification" as time went on. (*Id.*) Simply stated Dr. Hovis testified that in his opinion Mr. Vespie was magnifying his symptoms for "secondary gain", i.e. "money". (Hovis Dep., p. 13-14). Dr. Hovis also declined to assign an impairment rating for shoulder impingement because there are no functional limitations associated with a subacromial decompression and Claimant had very little crepitation on range of motion of the shoulder. (Hovis Dep., p. 14). It was Dr. Hovis' opinion that the impingement symptomology had been adequately addressed and if Claimant were experiencing the extreme difficulties in using his shoulder he described, some muscle atrophy would be expected.

On cross-examination, Dr. Hovis stated that there were many inconsistencies in this case, one of which was the physical appearance of Mr. Vespie's shoulder which was far better than he described symptomatically. (Hovis Dep., p. 15). Additionally, Dr. Hovis noted that on March 28, 2012, Mr. Vespie told him that he was extremely pleased and "[he] can tell [his] original problem is gone." (*Id.*) Then on April 25, 2012, Dr. Hovis again quoted Mr. Vespie as stating "you are a miracle worker." (*Id.*) Dr. Hovis testified that he believed those statements to be consistent with the results achieved from surgery, but as time went on the symptomology grew worse while his objective appearance continued to improve. (*Id.*)

On October 9, 2013, Dr. Hovis again saw Mr. Vespie and advised that the objective exam of the neck, shoulder and upper extremity was "excellent." (Hovis Dep., p. 16). Mr. Vespie again saw Dr. Hovis on November 27, 2013, and although Claimant continued to complain of pain, the

objective findings were that no change was present. (Hovis Dep., p. 17). On redirect examination, Dr. Hovis addressed the release of Claimant to return to work on October 9, 2012, and explained that if he had felt there were any reasons on which to modify Claimant's work duties, he would have done so. (Hovis Dep., p. 20).

Dr. Hovis explained that there are possibilities for deviation between his objective findings and Claimant's subjective complaints. Some of those possibilities exist because individuals have differing levels of pain and pain tolerance. (Hovis Dep., p. 17) Anxiety and angst may also contribute. (*Id.*). Dr. Hovis felt that there may have been some hesitation on the part of Mr. Vespie to return to his job as a correctional officer, but that it was not discussed in detail. (Hovis Dep., p. 17-18). Dr. Hovis also made the point that with a shoulder injury, impairment ratings are made based on the greatest impairment and that cumulative, combined impairments are not made. (Hovis Dep., p. 18).

Testimony of William E. Kennedy, M.D.

Dr. Kennedy is currently licensed in Tennessee and is certified by the American Board of Orthopedic Surgery.⁴ (Kennedy Dep., p. 4)

Dr. Kennedy conducted an independent medical examination of Mr. Vespie on February 14, 2013, and a report of his findings was generated the same day. (Kennedy Dep., p. 11). In performing the IME, Dr. Kennedy explained that he initially reviews the treatment and testing records available at the time of examination. (Kennedy Dep., p. 11-12). The next step is to interview the individual regarding the injury and any ongoing symptoms and loss of function attributable to the injury. (*Id.*). A physical examination is then performed. (*Id.*). Next, a general review of past medical history including current medications and conditions for which treatment is ongoing. Additionally, a brief social history and work history are taken. (*Id.*). After a

⁴ References to the transcript of Dr. Kennedy's deposition will be as follows: (Kennedy Dep., p. ____).

conclusion is reached regarding the diagnosis, Dr. Kennedy reviews the justification for the diagnosis, the evidence for the diagnosis and the future outlook as it may or may not correlate with the individual's ongoing symptoms and loss of physical function. (Kennedy Dep., p. 12-13). Dr. Kennedy also reviews any diagnostic images available at the time of the examination. (Kennedy Dep., p. 13). Finally, in cases involving permanent physical impairment under the AMA Guides, a calculation of the permanent physical impairment and recommendations for any appropriate restrictions are made to protect the individual from potentially worsening a post-traumatic condition. (*Id.*).

Dr. Kennedy testified that his general observation of Mr. Vespie was that he was 5 feet, 11 inches tall and weighed 217 pounds. (Kennedy Dep., p. 16). He also stated that Mr. Vespie appeared to ambulate through the office in a normal manner, moving both upper extremities with proper coordination indicating that the central nervous system had no disorders which would interfere with the right upper extremity and particularly the right shoulder. (*Id.*). Dr. Kennedy also noted scars consistent with the two previous surgeries performed by Drs. McKay and Hovis respectively. (Kennedy Dep., p. 17-18).

Dr. Kennedy's examination of the shoulder revealed a localized mild tenderness at the site of the acromioclavicular joint which had been resected Dr. Hovis. (*Id.*). There was also a readily palpable defect consistent with the resection of the distal end of the clavicle. (*Id.*). A deep tenderness was also found in the anterior aspect of the right shoulder and in the anterior subacromial region as well as over the bicipital groove of the proximal section of the humerus at the site of the transfer of the biceps tendon. (*Id.*).

Dr. Kennedy testified that he did not find any signs of impingement when looking for residuals of subacromial impingement syndrome. (*Id.*). Testing at the right glenohumeral joint

and the distal end of the clavicle showed stability in those areas. There was mild atrophy, but no shortening of the supraspinatus muscle in the right shoulder compared with the left. (Kennedy Dep., p. 17-18). Dr. Kennedy stated that he found “no other signs of atrophy or loss of coordination in any of the scapulothoracic or shoulder girdle muscles on the right compared with the left.” (Kennedy Dep., p. 18).

Dr. Kennedy also asked Mr. Vespie to move his shoulder in a circular motion which showed no signs of palpable crepitation or sense of grinding. (*Id.*). Testing for both active and passive range of motion revealed a mild loss of motion in all six directions commonly measured pursuant to the Sixth Edition of the AMA Guides. (Kennedy Dep., p. 18-19). Dr. Kennedy stated that he found some mild shortening of the biceps tendon in the biceps muscle, but there was no apparent atrophy in the biceps muscle. (Kennedy Dep., p. 19).

Dr. Kennedy’s diagnosis was divided into four parts. First, he concluded that Mr. Vespie had suffered post-traumatic subacromial impingement syndrome of the right shoulder which was treated by arthroscopic subacromial decompression and acromioplasty. (Kennedy Dep., p. 21-22). This procedure consists of removal of a portion of the bony shelf known as the acromion. (*Id.*). Second, Dr. Kennedy noted tearing of the superior glenoid labrum at the origin of the biceps tendon, otherwise known as a superior labral anterior posterior lesion or “SLAP” lesion. (*Id.*). This was first diagnosed by arthroscopic surgery on August 13, 2011, and repaired surgically on January 17, 2012. (*Id.*). The third portion of the diagnosis was biceps tendonitis and tendinopathy which was treated by biceps tenodesis, or transfer of the biceps tendon to the proximal humerus. (*Id.*). These procedures were performed by Dr. Hovis on January 17, 2012. (*Id.*). Finally, Dr. Kennedy diagnosed post-traumatic osteoarthritis of the right acromioclavicular

joint. (*Id.*). This was treated by arthroscopic resection of the distal end of the clavicle on January 17, 2012. (*Id.*).

Dr. Kennedy concluded that the work-related training incident of May 26, 2010, as described by Mr. Vespie, caused the post-traumatic subacromial impingement syndrome, the torn superior glenoid labrum as well as the biceps tendonitis and tendinopathy. (Kennedy Dep., p. 23). Dr. Kennedy likewise found that the same training incident had permanently aggravated and advanced the preexisting osteoarthritis in the right acromioclavicular joint thereby elevating the severity of that condition and removing it from a dormant state to one of continuing pain. (Kennedy Dep., p. 23-24).

Importantly, Dr. Kennedy noted that the described ongoing symptoms and losses of physical function in the right shoulder remained present at the time of his examination, and were consistent with the work-related injury of May 26, 2010. (Kennedy Dep., p. 25). Dr. Kennedy explained that Mr. Vespie's pain in the right side of the neck and also in the right parascapular region of the upper back and right side of the chest were consistent with pain referred from the right shoulder. (Kennedy Dep., p. 25-26).

Dr. Kennedy testified that all of the listed diagnoses appeared to be stable, and he did not expect any significant changes either with or without additional treatment in the foreseeable future.⁵ (Kennedy Dep., p. 27).

Having found that Mr. Vespie's conditions were stabilized, Dr. Kennedy rendered a permanent impairment rating pursuant to the Sixth Edition of the AMA Guides. (*Id.*). Dr. Kennedy testified that Mr. Vespie had suffered a 16% permanent physical impairment to the right upper extremity, which is the equivalent of a 10% permanent physical impairment to the

⁵ Dr. Kennedy noted that "foreseeable future" is defined as one year.

body as a whole, and that the injuries were attributable to the work related training incident underlying this cause. (Kennedy Dep., p. 28).

Based on his findings, Dr. Kennedy recommended certain restrictions on Mr. Vespie's daily activities and employment. (Kennedy Dep., p. 29). Dr. Kennedy opined that Mr. Vespie should not undertake activities that require "rapid repeated motions with his right hand, hammering or jerking ... , working with his right hand elevated above the level of his shoulder." (*Id.*). He also stated that Claimant could not be expected to either reach to a normal maximum level or possess normal strength in the right hand. Further, it was recommended that Mr. Vespie refrain from attempting to climb ladders or work at heights or under conditions such as activities requiring him to be on his hands and knees crawling requiring that his safety and stability depend on normal pain-free mobility and the strength of the right shoulder. (*Id.*). Finally, Dr. Kennedy stated that activities involving lifting, carrying, pushing and pulling should not exceed 20 pounds occasionally and 10 pounds frequently. (*Id.*). If the lifting, pushing or pulling activity is focused on the right hand only, then it should be limited to 5 pounds occasionally. (Kennedy Dep., p. 29-30).

On cross-examination, Dr. Kennedy was asked to explain whether or not range of motion can be used in assessing impairment. Dr. Kennedy explained that the AMA Guides provide for two methods of calculating permanent physical impairment. (Kennedy Dep., p. 35-36). He stated that when the range-of-motion method is used, it is to be applied in a standalone fashion with no further adjustment using any grade modifiers or by the diagnosis. (Kennedy Dep., p. 36). By contrast, Dr. Kennedy explained that the diagnosed-based impairment method, which he used in this case, allows for range of motion to be used as a physical examination grade modifier. (*Id.*). Dr. Kennedy then recounted that Mr. Vespie received a grade modifier value of 1. (Kennedy

Dep., p. 37). The grade modifier grade modifier had no diagnosis based effect on the final rating since the diagnosis factor of one conunterbalanced the physical non-key adjustment factor of one using the Guides' net adjustment formula for the subacromial impingement syndrome. (Kennedy Dep. 37-38).

Dr. Kennedy then explained that pursuant to the AMA Guides, when two diagnosis-based impairments are found in the same region of the body, the functional history non-key adjustment factor, or grade modifier, should only be applied to the highest diagnosis-based impairment. (Kennedy Dep. p. 39). In this case, the functional non-key adjustment factor was given a value of 3, and it only applied to the acromioclavicular post-traumatic osteoarthritis diagnosis-based impairment. (*Id.*). Simply stated, Dr. Kennedy testified that the subjective reports of pain and symptoms described by Mr. Vespie only impacted the impairment rating of the AC joint. (Kennedy Dep., p. 40). Dr. Kennedy acknowledged that if information provided by Mr. Vespie concerning what he could and could not do was shown to be inaccurate, the grade modifier adjustment could be affected. (*Id.*).

More specifically, Dr. Kennedy explained that a functional history rating would be much lower if a claimant showed no symptoms that were traceable to the site of the resection of the acromioclavicular joint or resection of the distal end of the clavicle. (Kennedy Dep., p. 47-48). For example, if very good function of the shoulder, with the exception of a mild loss of motion was demonstrated, and the loss of such motion was just an annoyance, then this lower functional history rating would be appropriate. (Kennedy Dep., p. 47-48).

Dr. Kennedy noted that while performing the more subjective portions of the examination, he did not go into detail with Mr. Vespie about the various ways in which the surgeries were of no benefit in both instances. (Kennedy Dep., p. 51-52).

Based on the examination, Dr. Kennedy opined that Mr. Vespie should have seen improvements following both surgeries. (Kennedy Dep., p. 52-53). However, Dr. Kennedy explained that there are times when surgeries are performed which should accomplish a certain goal, but from the patient's subjective perspective, they not. (Kennedy Dep., p. 51). According to Dr. Kennedy, it is a part of practicing medicine which is often not understood. (*Id.*).

Looking ahead, Dr. Kennedy testified that Mr. Vespie's shoulder issues should stay the same, but there is a risk of decreased function which led to the recommended restrictions discussed earlier. (Kennedy Dep., p. 53). In fact, Dr. Kennedy stated, Claimant's range of motion had decreased between January 17, 2012, and June 27, 2012. (Kennedy Dep., p. 54-55). Mr. Vespie's range of motion had decreased even more by the time of Dr. Kennedy's examination. (Kennedy Dep., p. 55-56).

Unlike Dr. Hovis, Dr. Kennedy did not note any less-than-maximum effort on the part of Mr. Vespie when assessing range of motion. (Kennedy Dep., p. 57). Dr. Kennedy testified that this is something he looks for specifically by studying the correlation and similarity between the passive and active ranges of motion. (*Id.*).

Dr. Kennedy reiterated that Mr. Vespie had actually suffered three injuries within the glenohumeral joint and a separate fourth injury to the acromioclavicular joint. (Kennedy Dep., p. 65-66). He went on to state that Dr. Hovis apparently selected only the acromioclavicular joint injury on which to base the impairment rating and neglected to address the remaining three diagnoses. (*Id.*). Dr. Kennedy disagreed with Dr. Hovis' decision to select only one of the diagnoses, and explained that the AMA Guides do not support the use of a diagnosed-based impairment method without including the other three diagnoses relating to the glenohumeral joint, including the subacromial impingement syndrome. (Kennedy Dep., p. 68-69). He made a

point of explaining that the acromioclavicular joint “is really a separate joint even though it is in the area of the shoulder.” (Kennedy Dep., p. 65).

Dr. Kennedy also testified that Mr. Vespie did have asymptomatic osteoarthritis of the acromioclavicular joint prior to this injury. (Kennedy Dep., p. 69). Dr. Kennedy explained that asymptomatic simply meant that this condition was not causing any pain or other symptoms and is very common in most people as they get older, particularly in their forties. (Kennedy Dep., p. 69-70).

Dr. Kennedy was asked whether the recommended restrictions discussed earlier in his testimony were permanent and he responded that they were. (Kennedy Dep., p. 71). Dr. Kennedy also explained the discrepancy of opinion between Dr. Hovis’ release of Mr. Vespie with no restrictions and his own recommended restrictions as a disagreement between two physicians. (Kennedy Dep., p. 71-72). It was Dr. Kennedy’s opinion that employees who have suffered some form of permanent injury or permanent loss of physical function should be protected, and the recommended restrictions are implemented to decrease vulnerability for additional injury. (Kennedy Dep., p. 72).

Finally, Dr. Kennedy testified that Mr. Vespie did not need additional treatment at this time, but that a wide range of options for future testing and treatment should be made available to him indefinitely. (Kennedy Dep., p. 74). Dr. Kennedy also stated that although no surgery or additional treatment is necessary at this time, it is expected that he would need assistance with controlling residual pain. (Kennedy Dep., p. 75). He further testified minor treatment options for pain such as prescription medications and occasional physical therapy would be expected indefinitely. (Kennedy Dep., p. 76).

DECISION

The sole contested issue in this case is the extent of Mr. Vespie's permanent vocational disability.⁶

There are several factual matters not in dispute. First, this injury did arise out of and in the course and scope of Mr. Vespie's employment with the Tennessee Department of Correction ("TDOC") while he was training at the State's Academy in Tullahoma, Tennessee on May 26, 2010. The injury occurred when new officers were practicing takedowns. Mr. Vespie is a large man who prior to his injury worked out four nights per week with a personal trainer in Morgan County, Tennessee, where he lives. Claimant testified that the officer with whom he was paired at Tullahoma took him down during practice, and that he bounced twice following the takedown. Claimant was seen at an urgent care clinic in Tullahoma before eventually coming under the care of an orthopedic surgeon in Oak Ridge, Tennessee, a Dr. McKay.

The parties also agree that Claimant's weekly compensation rate is \$384.78, and that all temporary total disability benefits have been paid. Additionally, the parties agree that Claimant should be provided future medical benefits provided for in Tenn. Code Ann. § 50-6-204 and that the State should provide to him a panel of physicians competent to provide those benefits.

Mr. Vespie worked for some six weeks after his injury but eventually Dr. McKay prescribed a certain surgical procedure which was carried out on August 13, 2010, in Oak Ridge. Because the results of the first surgery were not completely successful, Dr. McKay had requested permission from the State's third party workers compensation administrator to perform a second procedure. However, that request was denied.

On November 22, 2010, Dr. McKay dismissed Mr. Vespie from his practice apparently on the ground that his staff believed that Mr. Vespie was seeking narcotic drugs too frequently.

⁶ This case must be determined using the "old" Workers' Compensation Law since Mr. Vespie's injury occurred prior to July 1, 2014.

Mr. Vespie was not aware, according to his testimony, of the particulars of Dr. McKay's dismissal until recently when he was able to obtain copies of his medical records from that practice. According to Claimant, he dealt with a nurse in Dr. McKay's office named "Pepper" who seemed dismissive of his real need for pain medications.

Following this discovery, Mr. Vespie wrote Dr. McKay a strongly worded letter regarding the circumstances of the doctor's withdrawal from his care.

Eventually, Mr. Vespie came under the care of a respected orthopedic surgeon in Knoxville, Dr. William Hovis, who he saw for the first time on May 4, 2011. After a period of relatively conservative treatment, Dr. Hovis performed a second, more extensive surgical procedure on Mr. Vespie's shoulder in January of 2012. Following a three to four month recovery period, Dr. Hovis released Mr. Vespie to return to work with no restrictions. More will be said later regarding Dr. Hovis' opinions concerning Mr. Vespie's condition.

Following his return to work, Mr. Vespie went to Tullahoma again for training. While there, he fired a shotgun which according to all of the medical proof did not contribute to the current condition of his shoulder.

In the meantime, Mr. Vespie had been seen by his regular general practice physician in Morgan County, a Dr. Seiber. Dr. Seiber wrote TDOC a letter concerning Mr. Vespie's current condition and suggested that Claimant's work should involve no use of weapons, no lifting above shoulder level and no confrontational interactions with other individuals.

Consequently, on July 24, 2012, Mr. Vespie was sent a letter by the warden at the Morgan County Correctional Complex ("MCCX") terminating his employment with the State because of the restrictions recommended by Dr. Seiber but noting that he would be recommended for rehire with the State.

Mr. Vespie testified that he currently takes the following medications: Percocet, Ambien, Valium and a blood pressure medicine. He was taking blood pressure medication prior to his injury.

It is Mr. Vespie's position that he should be awarded permanent partial disability benefits based on a 50% vocational disability. The State on the other hand contends that the award made to the Claimant should be much less since Mr. Vespie's independent medical examiner, Dr. William E. Kennedy, did not correctly apply the provisions of the Sixth Edition of the AMA Guides to The Evaluation of Permanent Impairment.

Offered as proof in this case are the depositions of Claimant's second primary treating orthopedic surgeon, Dr. William Hovis, who as stated above returned Claimant to work with no restrictions. The Claimant offers the testimony, via deposition, of Dr. William E. Kennedy, a board certified orthopedic surgeon who left the active practice in 1998 but currently carries out a wide variety of examinations and evaluations for injured individuals. Dr. Kennedy has, like Dr. Hovis, an impressive academic and professional background and when questioned, conceded that 95% of his work is done on behalf of plaintiffs/claimants. Although Mr. Vespie was seen and treated by Dr. McKay and also by Dr. Seiber, there is no testimony from those two physicians in this record.

I. Testimony of John Vespie:

At the time of trial, Mr. Vespie was a forty-six (46) year old man who is a native of Morgan County. Mr. Vespie has two college degrees, a bachelors and a masters. However, those degrees are from unaccredited religious institutions in Florida and Iowa, a factor which impeded Mr. Vespie's attempts to gain employment with the State of Tennessee as a parole officer in 2014. It should be emphasized again that Mr. Vespie after his termination by the warden in

MCCX, had been recommended for rehire. Mr. Vespie is obviously proud of the fact that he is a religious man who has pastored churches in his home county on both full and part-time bases. Additionally, Mr. Vespie testified that he works as a chaplain in Knoxville, Tennessee, at a military induction center.

In addition to his religious vocational experience, Mr. Vespie has done work for twenty years in the auto body repair business and also in used car sales. Further, for three to four years, he worked as an installer for a cable television contractor. Mr. Vespie also testified that he has farming experience, and that he previously operated a business in Morgan County where horses were boarded. His plan was to have his daughter take over that business in the future. However, unfortunately, Mr. Vespie lost that farm in a bankruptcy.

As for his current condition, Mr. Vespie testified that his right arm becomes numb while performing such activities as weed-eating. He also testified that the biceps muscle in that arm "bunches up" and indeed, the Commission was able to view what appeared to be a knot in Claimant's right arm. Mr. Vespie went on to state that internally, his arm felt like it had a hot poker stuck into it. Claimant agreed that the grinding or crepitation which he was experiencing prior to Dr. Hovis' second surgery is much better. In fact, at one point during Hovis' treatment of him, Mr. Vespie described Dr. Hovis as a "miracle worker". Nevertheless, Mr. Vespie emphasized that his biceps feels like it is cramping and burns internally when he tries to do something. Claimant testified that he is impaired while attempting even simple things at home such as turning a screwdriver. He went on to state that it was his opinion that he is no longer capable of doing the usual chores around his home including gardening. He testified that he has difficulty sleeping, and that consequently he becomes irritable. He also described the difficulty he experienced while hooking up hay bailing equipment on the farm he previously owned.

In fact, Mr. Vespie described serious difficulties in even carrying out very simple functions such as carrying a brief case, lifting a cup of coffee and opening jars.

He went on to state that he is no longer involved in buying and selling cars and that when he receives body work jobs, he no longer personally performs the repairs.

Claimant testified that because of pain, he is limited in his ability to walk and move, and that due to sleep problems caused by his discomfort he “messed up” the prison count at MCCX when he returned to work. He does not believe that he could lift and tug objects in connection with any job.

Mr. Vespie testified that his pain has worsened over the course of the last three years. He insisted that Dr. McKay had never accused him, face to face, of drug seeking behavior, and that he believed it was the office nurse who had given the doctor that impression.

Mr. Vespie also testified that he had seen Dr. Hovis two times in 2014. Both Mr. Vespie and Dr. Hovis seemed somewhat puzzled as to why Claimant had returned to the doctor’s offices. Claimant testified that he actually worked at MCCX for two weeks following the second surgery.

II. Testimony of Richard Powers

Mr. Powers, a private investigator, surveilled Mr. Vespie on August 8, August 9, 2011 and also on October 25, 2011. The videotaped results of that surveillance are in this record.

The surveillance evidence is not impressive.

The August surveillance showed Mr. Vespie at his home beside a pickup truck. There was also another unidentified individual shown in this videotape. While Mr. Vespie did appear to move or throw some object on one or two occasions into the bed of the truck, there is nothing particularly strenuous shown in this film. At one point, Mr. Vespie appears to squat down on the

far side of the truck but what he was doing cannot be seen. Mr. Powers testified that it was his opinion that Mr. Vespie was perhaps using a tire jack but the video does not establish this. Powers went on to testify that he did not believe that Claimant had limited mobility.

During this same session, the surveillance shows that Mr. Vespie went to a tire store in Wartburg. Aside from entering the store and perhaps having some repairs done there, this segment of tape shows nothing.

The second surveillance exercise, carried out on October 25, 2011, supposedly shows Mr. Vespie in the town of Wartburg. It does not show the individual pictured engaging in any form of vigorous activity. In fact, Mr. Powers testified that he was not entirely sure that the individual shown in this video was Mr. Vespie. On the other hand, Claimant testified that the individual is not him.

III. Testimony of William Hovis, M.D.

As pointed out above, Dr. Hovis is Claimant's second treating orthopedic surgeon. There is no question concerning Dr. Hovis' training and expertise.

At his deposition, Dr. Hovis testified that when he first saw Mr. Vespie on May 4, 2011, he was not at maximum medical improvement. Dr. Hovis also testified that Dr. McKay had wanted to conduct a repeat arthroscopy, a repeat decompression of the shoulder and a Mumford Procedure. According to Dr. Hovis, the Mumford Procedure involves resecting (or removing) a part of the distal clavicle.

Dr. Hovis in fact did perform that procedure on January 17, 2012. At the same time, Dr. Hovis repaired a tear of Claimant's superior glenoid labrum and performed a biceps tenodesis and repeated the acromioplasty which Dr. McKay had originally carried out.

Dr. Hovis testified that Mr. Vespie reached maximum medical improvement on June 27, 2012, and at that time, Dr. Hovis rendered a permanent impairment rating of 10% to the right upper extremity which translates to a 6% to the body as a whole rating under the Guides. It was Dr. Hovis' opinion that the Guides, whose methodology he has some problems with, requires the evaluating physician to use only the most significant impairment in connection with rating a shoulder injury.

Dr. Hovis testified that he did not agree with Dr. Kennedy's rating procedure since it was his opinion Kennedy combined two injuries rather than rating Mr. Vespie with regard to only his most significant injury.

Particularly, with regard to Dr. Kennedy's opinions regarding internal derangement of the shoulder and thus, impingement of its structure, Dr. Hovis testified that Mr. Vespie had no muscle atrophy. Dr. Hovis stated that Claimant "had no signs of having an ongoing impingement problem". In fact, Dr. Hovis testified that if Mr. Vespie's condition was as Claimant describes, he would have expected to have seen some muscle atrophy. Again, his testimony describes no muscle atrophy.

Most pointedly, Dr. Hovis testified that it was his opinion Mr. Vespie was magnifying his symptoms in an attempt to get more "[m]oney".

The basis for Dr. Hovis' disagreement with Dr. Kennedy appears to be his opinion that the Guides mandate that the examining physician base his rating on only the most prominent injury.

Dr. Hovis did note in his testimony that Dr. McKay had wanted to perform a second surgery but the request had been denied. When Hovis saw Mr. Vespie, he was complaining of pain deep inside his shoulder. Therefore, Dr. Hovis ordered an arthrogram which he wanted read

by a specialized musculoskeletal radiologist. Dr. Hovis testified that Claimant's symptoms seemed to come from the area of his biceps indicating perhaps an "occult tear" of the labrum. During surgery, Dr. Hovis repaired the labrum and carried out a biceps tenodesis and repeated the acromioplasty originally performed by Dr. McKay.

Dr. Hovis opined that his rating should deal only with the most significant impairment and that other impairments caused by the injury should not be cumulated with the most serious injury. According to Dr. Hovis, Mr. Vespie's most serious problem involved the resection of the distal clavicle. He also believed that Dr. Kennedy agreed that was the most serious injury, but that Kennedy inappropriately had used more subjective criteria set out in the Quick Dash Method. He also questioned Dr. Kennedy's grade modification figures. His primary objection to Kennedy's testimony was his belief that Kennedy had rated three additional conditions in Claimant's shoulder rather than limiting his opinion to only the most serious problem (the acromioclavicular joint injury) which he believed resulted in a 10% impairment to the right upper extremity or 6% to the body as a whole.

IV. Testimony of William E. Kennedy, M.D.:

Dr. Kennedy conducted an independent medical examination of Mr. Vespie on February 14, 2013. As mentioned above, there is no dispute about the fact that both Dr. Hovis and Dr. Kennedy are extremely well educated, board certified and involved in orthopedic medicine for a number of years.

Dr. Kennedy testified that in his practice of evaluating injured persons, he predominantly appears on behalf of claimants. On the other hand at page 70 of his testimony, Dr. Kennedy pointed out section 2.3b, of the AMA Guides at page 23, where the following statement is found:

“Although treating physicians may perform impairment ratings on their patients, it is recognized that these are not independent and therefore may be subject to greater scrutiny.”

Dr. Kennedy’s report from his February 14, 2013, interview and examination of Mr. Vespie is expansive and very detailed.

At the time of that examination, Dr. Kennedy did note mild atrophy of the supraspinatus muscle. He also documented a mild loss of motion in the right shoulder in five directions with moderate loss of movement on external rotation. These measurements were carried out in a “passive” fashion, that meaning that the doctor and not the patient moved an area of the body. Conversely, with active range of motion (Claimant himself moving the affected area), Dr. Kennedy noted mild but not moderate, loss of motion in all six directions.

Dr. Kennedy testified that his 10% body to the whole rating (converted from a 16% rating to the right upper extremity) is based on four factors: 1) the need for acromioplasty; 2) the resection of the distal end of the clavicle; 3) the biceps tendon transfer; and 4) the tear of Claimant’s superior glenoid labrum. The increased risk of additional injury to Claimant’s right shoulder led doctor Kennedy to recommend “additional testing and treatment” as well as those recommendations for restrictions set out in his report. Dr. Kennedy also testified that the transfer of the biceps tendon in the biceps muscle resulted in some shortening of that muscle but no apparent atrophy.

As to why he combined two separate ratings in connection with his evaluation of Mr. Vespie, Dr. Kennedy, at pages 61-62 of his deposition, made the following statement:

“Because there were actually two different injuries, even though both of them were in the same region. There was a combination of injuries that included the glenoid labral tear and the biceps tendon injury and the subacromial impingement syndrome, the glenohumeral joint, but separate from that and not incidental to either one of those injuries was the injury to the acromioclavicular joint. And I think that’s very clear in

the record that those are the two separate injuries, both in Dr. McKay's record and in Dr. Hovis' record."

Dr. Kennedy testified that his use of the grade modifiers discussed in Chapter 15 of the AMA Guides was correct since he had used them only in connection with Mr. Vespie's diagnosis based impairment involving acromioclavicular post-traumatic osteoarthritis. (Kennedy Dep., p. 39). Dr. Kennedy agreed that if the patient reports his own abilities to perform certain functions inaccurately, this would result in a rating being moved from the default position under the Guides. Dr. Hovis had used the default setting in his rating for Claimant's acromioclavicular joint disorder. (Kennedy Dep., p. 46-47).

Dr. Kennedy went on to testify that he could not explain why Mr. Vespie's range of motion in his shoulder was not improved after the second surgery performed by Dr. Hovis. However, both he and Hovis noted decreased range of motion in the shoulder following the January, 2012, surgery and he observed the same thing in his February 2013 examination. In reaching his conclusions regarding the impingement syndrome, Dr. Kennedy referenced Table 15-5 at page 402 of the Guides and Table 15-9 at page 410 of that same work.

Dr. Kennedy opined that Claimant had four separate shoulder problems. He classified them as "post-traumatic subacromial impingement syndrome of the right shoulder, a tear of the superior glenoid labrum at the origin of the biceps tendon, biceps tendonitis and tendinopathy" and "post-traumatic arthritis of the right acromioclavicular joint". (Kennedy Dep., p. 21-22).

Dr. Kennedy also believed that the combined effects of the acromioplasty and removal of the end of the right clavicle, along with the transfer of the biceps tendon and tear to the superior glenoid labrum, caused the loss of motion in the right shoulder, and increased Claimant's risk of further injury and thus he recommended certain restrictions set out in his report. (Kennedy Dep., p. 26).

V. Analysis

The only issue in this case, as stated above, is the extent of Claimant's permanent vocational disability.

There are various considerations which go into that determination including such things as the worker's age, his level of education, any skills which he has developed during his working life, the state of the economy in the region where he or she lives, and of course, the ratings opined to by various physicians who may have seen, treated or carried out independent medical examinations of the injured worker. And of course, the impairment ratings prepared pursuant to the AMA Guides are a critical part of the decision making process under Tennessee's Workers' Compensation Law as it read at the time of Claimant's injury.

In that connection, in almost all contested workers' compensation cases, the issue of whose testimony bears more weight- that of the treating physician, who employers always argue has had more opportunity to interact with the claimant, as compared to that of the independent medical examiner who in most cases has been hired by the claimant himself. This is the quintessential "battle of the experts" as born out by the proof in this case.

What the accredited proof in this case shows is that Mr. Vespie lives and works in Morgan County, where the unemployment rate is at 8.6%, some 1.4% above that of the state as a whole.⁷ We also will take judicial notice of the fact that many individuals have worked successfully for years at various TDOC facilities in Morgan County, including the now closed Brushy Mountain prison. Traditionally, persons from Morgan and the surrounding counties have provided the large majority of TDOC's employees at prisons located there. Thus, for Mr. Vespie, obtaining steady employment with the state, which of course included very decent benefits, was

⁷ State unemployment statistical information was provided by the Department of Labor. The web address is <http://www.tn.gov/labor-wfd/lmr/pdf/2014/LMROct2014.pdf>.

a favorable development. Prior to that time, Mr. Vespie had worked as an auto body mechanic, a cable television installer and as a used car salesman. Further, Claimant engaged in farming. Perhaps most meaningful to Mr. Vespie himself is the fact that he has pastored, either on a full or part-time basis, several churches in Morgan County. Currently, he serves a small church which provides him with some in kind compensation when funds are available. Additionally, Mr. Vespie commendably works as a chaplain at an armed forces induction center in Knox County.

Dr. Hovis seemed to believe that the fact that Mr. Vespie presented himself as a religious person was somehow being used by Claimant in an attempt to convince the doctor that his continuing complaints were more serious than the doctor believed. Dr. Hovis was unabashed in his conclusion that Mr. Vespie exaggerated his symptoms in an effort to obtain more “money”.

If the Commission were to fully accredit Dr. Hovis’ testimony that Claimant is in fact a malingerer, we would have to discount completely Mr. Vespie’s own testimony concerning his ongoing involvement in religious affairs. Of course, the Commission has experienced witnesses over the course of a thirty-seven year legal career who attempted to convince various tribunals of the veracity of their testimony by referencing their ardently held religious beliefs. On occasion, the inferences which could be drawn from such testimony was diametrically different. In Mr. Vespie’s case, the Commission declines to infer that Claimant set out to perjure himself in connection with his testimony before us in an effort to get more “money” from the State.

The State apparently became concerned that Mr. Vespie was not telling the truth regarding the extent of his impairment following his first surgical procedure carried out by Dr. McKay on August 13, 2010. We say that since the proof showed that the State hired a private investigator to surveil Mr. Vespie in August and October of 2011, which was well before Claimant’s second surgery, involving the additional procedures carried out by Dr. Hovis in

January of 2012 and/or June of that same year when Hovis declared Claimant to be at maximum medical improvement. It is worth remembering that the undercover work was done before the second authorized physician performed the additional procedures which the first surgeon, McKay, had opined were necessary- an opinion apparently rejected by the State's then third party administrator.

Aside from the fact that the private investigator could not say with any degree of certainty that it was Mr. Vespie who he was filming in October of 2011, the proof from the investigator suggests, if anything, that the State must have concluded that Mr. Vespie had additional ongoing problems since it authorized surgery nearly three months after its surveillance efforts ended.

That brings us to an analysis of the deposition testimony of Drs. Hovis and Kennedy. As stated above, both of these individuals have extensive surgical work histories, as well as education and training at some of the best training grounds in the country.

While Dr. Kennedy wryly pointed out the passage from the Guides, at page 23, which states that an impairment rating from a treating physician may not be "independent" and therefore warrant "greater scrutiny", we are not particularly swayed by that passage.

In the Commission's own experience, as we believe most practitioners would agree, the fact is that practicing orthopedists usually want to be left alone to practice their specialty and not be diverted by attorneys from the actual care of their patients by demands for medical records, ratings, depositions, etc. In this case, Dr. Hovis expressed some well-founded reservations with regard to what the Commission called at trial the "byzantine" methodology found in the Guides. However, the General Assembly has mandated that the Guides be used in workers' compensation cases and accordingly, Dr. Hovis rendered, without a great deal of explanation, an opinion that

Claimant has been left with a 10% permanent impairment to his right upper extremity which translates to a 6% permanent impairment to the body as a whole. The principal parting of ways between Dr. Kennedy and Dr. Hovis comes from the fact that Dr. Hovis, and the State in fact, are of the opinion that the applicable rating in this case should only be based on injury to the acromioclavicular joint while Dr. Kennedy testified that Claimant also suffered a separate, discreet injuries to the internal structures of the shoulder which required additional work by the treating orthopedic surgeons. Those injuries addressed by Dr. Hovis during his January, 2012, surgery included a tear to the glenoid labrum, a biceps tendon injury and the subacromial impingement syndrome involving the glenohumeral joint. Both Dr. Kennedy's report, prepared after his examination of the Claimant, and his testimony are extensive and detailed in explaining his rationale for those conclusions. Accordingly, Dr. Kennedy concluded that Claimant suffered a 16% impairment to the right upper extremity (or shoulder) which converts to a 10% impairment to the body as a whole.

The Commission concludes that Dr. Kennedy's analysis of the underlying problems with Claimant's shoulder is supported by the proof. Preeminent among that proof is the fact that Drs. McKay and Hovis both concluded that Mr. Vespie needed more surgery. Dr. McKay's request to perform that surgery was declined. However, over a year later the State apparently authorized exactly what Dr. McKay had proposed and Dr. Hovis carried out an extensive procedure on Claimant's shoulder in January of 2012. This compels us to the conclusion that there in fact was more than one injury to Mr. Vespie's shoulder and that Dr. Kennedy was justified in rating them separately and then combining the rating.

Therefore, we find that Dr. Kennedy's impairment rating is more accurate and consistent with the provisions of the AMA Guides than is Dr. Hovis' since it addresses the reality of the

several different conditions which were present in Claimant's shoulder which under the Guides should be rated separately and then combined using the Combined Values Chart.

It should be noted that this conclusion does not discredit Dr. Hovis' medical work in connection with this Claimant. It is clear that the treatment of Mr. Vespie was excellent, and that Claimant derived certain benefits from it.

Nevertheless, the scope and depth of Dr. Kennedy's analysis is more convincing to us.

However, it must be kept in mind, and it is sometimes overlooked, that the medical rating is only one factor in determining the extent of Claimant's permanent vocational disability.

The majority of the work Mr. Vespie has done in the past should be categorized as heavy since it appears to have involved working on automobiles, farming and installing cable into homes and businesses. He also resides in a relatively deprived economic region.

On the other hand, Claimant obviously has some definite academic abilities given the fact that he has matriculated through both bachelors and masters programs. Although the schools from which Mr. Vespie has graduated are perhaps not accredited by certain bodies, the fact that he has gone through two college level degree programs cannot be ignored. Additionally, Claimant for a number of years has served in a very responsible position of either associate or primary pastor at churches in Morgan County. Additionally, Mr. Vespie admirably involves himself in advising young military inductees as they depart from an induction center in Knox County.

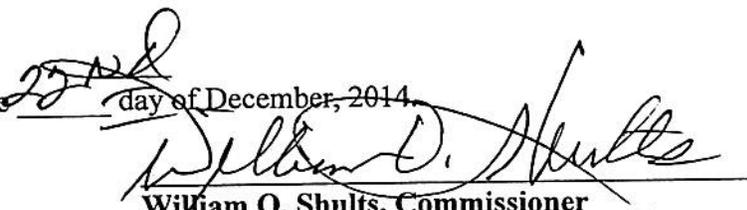
Finally, Claimant obviously has confidence in his own professional abilities since he has applied for work as a parole officer with the State of Tennessee. The duties involved with those jobs are obviously significant and lead us to the conclusion that in all likelihood there are jobs in the private or public sectors which Claimant is qualified for.

Based upon all the proof before us in this case, we find that under the dictates of the Tennessee Workers' Compensation Law, as it read on the date of Claimant's injury, Mr. Vespie has suffered a 41% permanent vocational disability.

Therefore, an award to that effect is ORDERED in this case. Of course, Claimant is also entitled to those future medical benefits provided for in Tenn. Code Ann. § 50-6-204.

Counsel for the Claimant is ORDERED to prepare a Judgment in this matter which may incorporate this Decision by reference, and which also shall include the usual Social Security offset language.

It is so ORDERED this the 27th day of December, 2014.


William O. Shults, Commissioner

P.O. Box 960

Newport, TN 37822-0960

CERTIFICATE

I certify that a true and exact copy of the foregoing DECISION has been forwarded to:

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Knoxville, TN 37909

Eric A. Fuller, Esq.
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

This the 5th day of ~~December~~, ^{January 2015} 2014.

Paula Swanson

Paula Swanson, Clerk of the Commission

Attorneys At Law
Tony Farmer
John P. Dreiser
Christopher H. Hayes

January 28, 2015

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**TN CLAIMS COMMISSION
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Re: John Vespie v. State of Tennessee
Tennessee Claims Commission Docket Number: 30100531316

Dear Sir or Madam:

Enclosed please find a Final Judgment, which we would appreciate you presenting to Commissioner Shults for consideration and filing with the court. Please provide us with a fully executed copy of the Final Judgment. For your convenience, I am enclosing a self-addressed stamped envelope. By copy of this letter, I am providing a copy of the enclosed to counsel of record.

Thank you for your attention to this matter.

Very truly yours,



Tony Farmer

TF/cvf
Enclosures

cc: Commissioner William O. Shults
Eric A. Fuller, Esq.

~ Representing the seriously injured since 1975 ~