

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

Injury No.: 08-008096

Employee: Jon David Barnhill  
Employer: Allied Kansas City  
Insurer: American Home Assurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

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

**Discussion**

*Affirmative findings vs. summaries of the evidence*

Section 287.460.1 requires the fact-finder in a workers' compensation case to issue the unequivocal affirmative factual findings that are necessary to resolve each of the disputed issues identified by the parties. The need for affirmative findings of fact is not merely of academic concern. In *Stegman v. Grand River Reg'l Ambulance Dist.*, 274 S.W.3d 529 (Mo. App. 2008), the Court held that an administrative law judge's summaries of testimony and evidence could not substitute for affirmative factual findings in the award itself, and that the Court could not resolve the issues that were appealed and instead was constrained to vacate the award and remand the case. *Id.* at 532, 537. Here, we agree with the ultimate determinations reached by the administrative law judge, but in order to avoid a result of the type seen in *Stegman*, we find it necessary to issue this supplemental opinion to provide the affirmative findings of fact required under § 287.460.1.

We note that the sole Application for Review pending before the Commission in this matter is from the Second Injury Fund challenging the conclusions of the administrative law judge assessing liability for permanent total disability benefits against the Second Injury Fund. It follows that the administrative law judge's conclusions relevant to the other disputed issues have now become final. Accordingly, although the parties discuss and dispute other issues in their briefs, we provide only those supplemental findings of fact and conclusions of law pertinent to the issue appealed by the Second Injury Fund.

*Preexisting conditions of ill-being*

At the time of the hearing before the administrative law judge, employee was 43 years of age. Employee did not graduate high school but received his GED in 1987. Employee served in the United States Marine Corps for four years and was honorably discharged. Employee attended some community college, but did not receive a degree.

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After his discharge from the military, employee worked as a construction foreman until 1994, when he went to work for an armored car service. Employee worked as a driver and also provided messenger, cashier, and vault supervision services, until he suffered a motorcycle accident in 1996. Employee was driving at highway speed when he rear-ended an SUV that stopped on the roadway.

Employee provided his own testimony and the parties have presented competing expert medical testimony on the question of what particular injuries and disabling conditions employee suffered as a result of the 1996 motorcycle accident; the administrative law judge has thoroughly summarized this evidence in his award, so we need not reiterate it here. Rather, we resolve the conflicting evidence with the following affirmative findings as to the injuries and disabling conditions that we believe resulted from this event.

We find that the 1996 motorcycle accident caused employee to suffer fractures of both arms; a left brachial plexus injury and injury to the left clavicle and left shoulder with fracture requiring surgical treatment; multiple fractures of the fingers of the left hand with subsequent contracture of the metacarpophalangeal joints requiring surgical treatment; a right thumb fracture; a left femoral head fracture and left knee dislocation requiring surgical repair in the form of anterior cruciate ligament, posterior cruciate ligament, and lateral posterior capsular reconstruction, as well as numerous additional surgical procedures in the form of arthroscopic debridements and arthrotomies to address heterotopic ossification; incomplete peroneal nerve palsy (or foot drop) on the left; a traumatic dislocation of the left hip requiring surgical treatment in the form of a bipolar left hip replacement; internal injury in the form of a low grade splenic laceration; a complete cervical C5-6 nerve root avulsion on the left and a partial cervical 7 thoracic 1 root avulsion; and a traumatic brain injury.

Employee's treatment following the 1996 motorcycle injury kept him out of the workplace until March 1998, when employee returned to full-duty work for the armored car service after undergoing a number of physical examinations and testing to determine his capability to work. Employee worked as a cashier, then was promoted to vault supervisor. Employee was able to work an average of 65 hours (and sometimes as much as 80 hours) per week from 1998 to 2001.

Employee worked for a bank from 2001 until 2005 where he worked as a teller and then as an ACH coordinator performing clerical duties. Employee was able to perform all of the mostly sedentary duties involved in this job without accommodation. In early 2007, employee briefly attempted to operate his own non-emergency ambulance service, but this concern went out of business after a couple of months. Employee drove one of the ambulances, helped load patients, and also did marketing work for the business.

Employee began working for employer in November 2007. Employee passed some physical examinations before he began working for employer. Employee's duties for employer included driving a roll-off garbage truck and occasional handling of trash dumpsters. This job involved the occasional performance of physical tasks such as stooping or getting on the ground to hook up cables, and handling heavy doors, chains, and tarps. Employee was able to successfully perform all of his duties for employer, and worked an average of about 12 hours per day.

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Employee's work history reveals that despite his numerous injuries resulting from the 1996 motorcycle accident, he was a motivated worker who was able to return to the open labor market and find jobs he could successfully perform. At the same time, however, the credible evidence reveals that employee did have some significant and permanent physical limitations. Employee's left foot drop, brain injury, and internal injuries resolved with little or no residual symptoms or limitations, but employee continued to experience problems referable to his left arm, left knee, and hip injuries.

Employee was forced to adjust from being left-hand dominant to right-hand dominant, avoided handling heavy objects with his left hand, and was generally very protective of his left upper extremity. Employee used a prescribed motorized scooter anytime he had to do prolonged walking. In addition, we note the evidence that employee reported certain problems to his evaluating expert, Dr. Koprivica, that he minimized or denied at the hearing before the administrative law judge. We find more credible Dr. Koprivica's testimony on this issue and find that employee did report those problems, and likewise find that employee's preexisting left knee injury caused difficulty with squatting, crawling, and kneeling, and that employee's multiple injuries reduced the pace at which he was able to perform his work, left him with reduced sitting tolerance, and reduced his endurance in lifting and carrying.

Ultimately, we find that, as of February 5, 2008, employee suffered from the following preexisting permanent and partially disabling conditions: 90% permanent partial disability of the left arm at the 232-week level for the multiple fractures and surgical intervention; 30% permanent partial disability at the 207-week level for the left hip fracture and partial hip replacement; and 50% permanent partial disability of the left leg at the 160-week level for the knee injury and numerous surgeries.

#### The primary injury

On February 5, 2008, employee was driving a garbage truck for employer when he was involved in a motor vehicle accident. Employee saw a motor vehicle accident occurring ahead of him, and slowed his truck down to avoid becoming involved. This is employee's last memory before waking up in a hospital several days later. Employee later learned that a tractor-trailer had rear-ended his truck when he slowed down.

Again, we note that the parties have presented conflicting lay and expert testimony and numerous medical records to demonstrate employee's injuries, and the administrative law judge summarized all of this evidence in his award. We hereby resolve the conflicting testimony and evidence regarding the primary injury with the following affirmative findings.

As a result of the primary injury, employee suffered a traumatic head injury in the form of a left temporal bone fracture and left basilar skull fracture with subdural hematoma and subarachnoid hemorrhage on the right; a left facial nerve paresis; a laceration of the external auditory canal with hemotympanum and an eighth cranial nerve injury; multiple rib fractures with pulmonary contusion; internal abdominal trauma in the form of liver contusion, splenic laceration, and subsequent gallbladder dysfunction; a new left tibial plateau (left knee) fracture requiring surgical treatment; a new peroneal nerve injury causing neuropathy and foot drop on the left; and a new acetabular (hip) fracture requiring surgical treatment.

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Employee remained in various hospitals or treatment centers for about a month after the primary injury, and continued to receive treatment thereafter. Employee underwent multiple surgical procedures for the left hip injury, including a partial and then total revision left hip arthroplasty. Employee also underwent multiple surgical procedures in connection with the left knee injury, including a total left knee arthroplasty and additional surgeries to address an infection.

Employee's multiple rib fractures, pulmonary and liver contusions, and splenic laceration were treated non-operatively and resolved with little to no residual disability. Employee's peroneal nerve injury resulted in a permanent foot drop on the left, a condition which prevents employee from lifting his foot at the ankle, and makes walking difficult and dangerous. This condition causes employee to suffer frequent falls. Employee must wear a left foot brace at all times as a result of this condition.

Employee saw various specialists for his head injuries and received non-operative treatment to address complaints of headaches, facial pain, hearing loss, and some loss of cognitive function. Ultimately, employee suffered a complete loss of hearing in his left ear, tinnitus, some mild short-term and long-term memory deficits, and daily headaches as a result of the head injury. Employee takes morphine to address pain from his headaches, left hip, left knee, and left upper extremity.

After careful consideration, we deem appropriate and hereby adopt the administrative law judge's determination that the various injuries and disabling conditions resulting from the primary injury are best quantified by an overall permanent partial disability of 50% of the body as a whole.

*Permanent total disability*

Employee's evaluating expert, Dr. Koprivica, opined that employee is permanently and totally disabled based on the combined effects of the February 5, 2008, primary injury in and of itself. Dr. Koprivica also provided his alternative opinion that, in the event it is determined that employee is not permanently and totally disabled as a result of the primary injury considered in isolation, employee is permanently and totally disabled when the effects of the primary injury are considered in combination with employee's preexisting conditions of ill-being. Dr. Koprivica assigned the following restrictions referable to the primary injury: no squatting, crawling, kneeling, or climbing, and only occasional lifting or carrying activities not to exceed 20 pounds. Dr. Koprivica opined that employee's complaints regarding an inability to perform prolonged standing and walking are results of the primary injury.

We do not find persuasive Dr. Koprivica's opinion assigning restrictions of the upper extremities to the primary injury; we find instead that employee's left arm deficits are a product of the 1996 motorcycle accident. Given the new left knee and left hip injuries and surgeries, we do find persuasive Dr. Koprivica's opinion that employee should be restricted from any squatting, crawling, kneeling, or climbing as a result of the primary injury. We also find that employee's preexisting difficulties with prolonged standing and walking have worsened as a result of the primary injury.

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Dr. Koprivica explained that he believes employee is permanently and totally disabled solely as a result of the primary injury because employee didn't go back to work after that injury, and because employee told him he was reclining during the day on an unpredictable basis, something employee didn't do prior to the primary injury. Dr. Koprivica conceded employee didn't tell him why he was reclining and that Dr. Koprivica assumed it was due solely to the effects of the primary injury. Dr. Koprivica also conceded employee didn't tell him that doctors had prescribed an electric scooter for him following the 1996 motorcycle accident, and that this fact would have been significant to his analysis.

Dr. McCaskill opined for the employer that employee could perform some work if it fell in a sedentary category and didn't require him to walk very much. Dr. McCaskill opined that all of employee's limitations are residuals from the 1996 motorcycle accident or preexisting arthritis in employee's left knee, and that employee doesn't have any new or additional restrictions or limitations as a result of the primary injury; this opinion stems, in part, from Dr. McCaskill's belief that employee didn't suffer any new left knee injury and that employee's complaints of left hip pain are not credible. We find Dr. McCaskill's opinions lacking persuasive force as to the left knee and left hip, and accordingly decline to adopt his opinion that employee has no new restrictions referable to the primary injury.

Mary Titterington provided expert vocational testimony for the employee and opined that employee is permanently and totally disabled owing to the primary injury considered in isolation. On cross-examination, Ms. Titterington conceded that, in her review of medical records, she did not attempt to identify whether the 1996 motorcycle accident or the primary injury was the source of employee's various physical limitations but rather focused on assessing employee's current functioning. We note that in assigning permanent total disability to the last injury alone, Ms. Titterington appears to have relied in part on Dr. Koprivica's imposition of upper extremity restrictions as a result of the primary injury; as noted above, we do not find Dr. Koprivica's opinion on that point to be persuasive. We note also that Ms. Titterington testified that employee told her his need to recline for as much as 70% of the day is a result of his daily headaches but also his left knee and left hip injuries. In other words, it appears that employee told Ms. Titterington that he needs to recline during the day owing to a combination of limitations stemming from both the primary and preexisting injuries. Finally, we note that Ms. Titterington, like Dr. Koprivica, was not aware that employee had been prescribed an electric scooter prior to the primary injury. These considerations weaken the persuasive force of Ms. Titterington's opinion assigning permanent total disability to the primary injury alone.

Terry Cordray provided expert vocational testimony for the employer and opined that employee is capable of performing sedentary work, and that given employee's young age, work background, and good presentation, an employer in the normal course of business could realistically be expected to hire him. Mr. Cordray conceded on cross-examination that employee's history of severe injuries might impact an employer's willingness to hire him, and that employee's need to use a brace on his left leg and left ankle would be a "red flag" for some employers.

We have taken extra care in this case to first isolate and consider the effects of the primary injury without taking into account any of employee's preexisting conditions. Considered in isolation, the primary injury caused new injuries to employee's left hip

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and left knee that have resulted in some increased pain and that have worsened employee's preexisting limitations with regard to prolonged standing and walking; a total and permanent foot drop on the left; a complete loss of hearing in the left ear; some mild cognitive deficits in the form of impaired short and long term memory; and tinnitus with daily headaches. We are persuaded that these conditions would significantly diminish employee's ability to compete in the open labor market. But especially given employee's young age, military service, and excellent job history, we are not persuaded that these conditions render employee unable to compete in the open labor market.

After careful consideration, we find the opinions from Ms. Titterington and Dr. Koprivica that employee is permanently and totally disabled to be more persuasive than the contrary opinions from Dr. McCaskill and Mr. Cordray, and we find most persuasive Dr. Koprivica's alternative opinion (and so find) that employee is unable to compete for work in the open labor market when the effects of the primary injury are combined with employee's preexisting injuries and limitations.

### **Conclusions of Law**

#### Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that he suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

*Knisley v. Charleswood Corp.*, 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from the following preexisting permanent partially disabling conditions at the time he sustained the work injury: 90% permanent partial disability of the left arm at the 232-week level for the multiple fractures and surgical intervention; 30% permanent partial disability at the 207-week level for the left hip fracture and partial hip replacement; and 50% permanent partial disability of the left leg at the 160-week level for the knee injury and numerous surgeries. We are convinced that each of these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in greater disability than would have resulted in the absence of the conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the

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question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove his entitlement to such an award, employee must establish that: (1) he suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

We have found employee sustained only permanent partial disability as a result of the primary injury, and credited the expert opinion from Dr. Koprivica that employee's permanent total disability results from a combination of his preexisting conditions of ill-being with the effects of the primary injury. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation. Rather, we conclude employee is permanently and totally disabled owing to a combination of his preexisting disabling conditions in combination with the effects of the work injury. As a result, the Second Injury Fund is liable for permanent total disability benefits.

### **Conclusion**

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

The award and decision of Administrative Law Judge Kenneth J. Cain, issued December 11, 2012, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 23<sup>rd</sup> day of January 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

## FINAL AWARD

Employee: Jon David Barnhill Injury No. 08-008096  
Dependents: N/A  
Employer: Allied Kansas City  
Insurer: American Home Assurance Company  
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: September 12, 2012 Checked by: KJC/pd  
Briefs Filed: October 12, 2012

### 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: February 5, 2008.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Wyandotte County, Kansas with contract of hire in Independence, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a trash truck driver for Allied Waste Industries, was rear-ended by a semi-truck on the highway on snow-packed roads.
12. Did accident or occupational disease cause death? No Date of death? N/A

13. Part(s) of body injured by accident or occupational disease: Body as a whole (See additional findings of fact and rulings of law.)
14. Nature and extent of any permanent disability: 50 percent to body as a whole
15. Compensation paid to-date for temporary disability: \$70,996.71
16. Value necessary medical aid paid to date by employer/insurer? \$602,691.35
17. Value necessary medical aid not furnished by employer/insurer? Undetermined
18. Employee's average weekly wages: \$959.37
19. Weekly compensation rate: \$639.61/\$389.04
20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:  
Unpaid medical expenses: undetermined (See additional findings of fact and rulings of law)  
200 weeks for permanent partial disability @ \$389.04 per week equals \$77,808  
111 weeks of temporary total disability benefits previously paid at \$639.61 per week equals \$70,966.71; plus 3-2/7 additional weeks owed for \$2,101.57 in additional benefits.  
N/A weeks for permanent total disability  
N/A weeks for disfigurement
22. Second Injury Fund liability: Yes.  
Second Injury Fund differential benefits at the rate of \$250.57 for the period April 21, 2010 to February 19, 2014.  
Permanent total disability benefits at \$639.61 per week effective with February 20, 2014.

**TOTAL: Undetermined**

23. Future requirements awarded: Undetermined

Said payments to begin upon receipt of Award 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 percent of all payments hereunder in favor of the following attorneys for necessary legal services rendered to the Claimant: Kip Kubin and Patrick Bottaro

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: Jon David Barnhill Injury No. 08-008096  
Dependents: N/A  
Employer: Allied Kansas City  
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Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund  
Hearing Date: September 12, 2012 Checked by: KJC/pd  
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Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. Liability of the employer for past temporary total disability benefits for the period March 28, 2010 to April 4, 2011;
2. Liability of the employer for past medical aid in the amount of \$4,522.65;
3. Liability of the employer for future medical aid;
4. The nature and extent of the disability sustained by the employee;
5. Liability of the Second Injury Fund for compensation;
6. Liability of the employer for fees and costs under §287.560 RSMo.2005 for failure to provide temporary total disability benefits and for medical treatment allegedly authorized by the employer's doctor; and
7. The extent of the employer's subrogation interest in the employee's third party settlements.

At the hearing, Mr. Jon David Barnhill (hereinafter referred to as Claimant) testified that he was born on April 11, 1969 and that he was 43 years old. He stated that he had a GED and about 20 credit hours at a community college. He stated that he served four years in the United States Marine Corp.

Claimant testified that he worked for a couple of years in the construction industry and that he became a foreman. He stated that he worked on several jobs at Brinks. He stated that he worked on some clerical positions at a bank. He stated that he operated his own business for a short period. He stated that his final job was driving a trash truck.

Claimant indicated that he sustained serious injuries in a 1996 motorcycle accident. He stated that the accident occurred when he was driving his motorcycle at highway speed and rear-ended a SUV which had stopped on the highway. He stated that he fractured his left hip, left arm

and both hands in the accident. He also stated that he injured his C5-C6 nerve root and that he sustained a subdural hematoma.

Claimant testified that he had reconstructive surgery on his left knee and left forearm. His medical records showed that he had provided a history of 15 surgeries on his left knee. He stated that he had a partial left hip replacement due to the accident. He complained of major restrictions in using his left arm. He told doctors that he lacerated his spleen in the accident. He told doctors of about 21 surgeries as a result of his injuries. He stated that he was prescribed an electric motor scooter due to his injuries in the accident. He stated that he was prescribed a handicapped parking permit due to his injuries. He stated that he remained off work for more than two years due to his injuries in the accident.

Claimant's medical records further showed that he sustained a skull fracture in the motorcycle accident and that he injured the peroneal nerve in his left lower extremity which caused him some problems with his left foot and ankle. Also, contrary to Claimant's testimony that he had no ongoing problems with his range of motion of his left knee; his medical records were replete with references to range of motion restrictions. He had numerous surgeries on his left knee in an attempt to improve his range of motion.

Claimant testified that he had no problems in standing, walking or sitting after he returned to work following his motorcycle accident. He stated that he worked an average of 65 hours per week from 1998 to 2001. He stated that sometimes he worked up to 80 hours per week. He stated that he had to pass two physical examinations before he was hired by Allied Waste Industries.

Claimant testified that he sustained injuries at work on February 5, 2008 when he was driving a trash truck for Allied Industries. He stated that he had no memory of the accident other than that he slowed down on the interstate at night when he saw the taillights of two vehicles. He stated that his next memory was waking up two days later in the hospital.

Claimant testified that he injured many of the same parts of his body in the 2008 work accident that he had injured in his 1996 motorcycle accident. He stated that he sustained fractures of his skull and some bleeding in his brain as a result of the 2008 accident.<sup>1</sup> He stated that he lost his hearing in his left ear. He stated that he developed floaters in his left eye and palsy in his facial muscles.<sup>2</sup> He complained of tinnitus. He also stated that he now stuttered.

Claimant complained of daily headaches behind his left ear. He complained of internal injuries, including a fractured sternum and injuries to his liver, gall bladder, spleen and pituitary gland.<sup>3</sup> He stated that he had surgery on his bile duct. He stated that he injured his left shoulder and collar bone. He stated that he had daily pain in his left upper extremity. He stated that he had a total left hip replacement due to his injuries in the accident.

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<sup>1</sup> Claimant's medical records from October 1996 noted that he had sustained a "very severe closed head injury with loss of consciousness" in the 1996 motorcycle accident.

<sup>2</sup> Claimant's medical records from January 1997 showed that he was complaining of severe, sharp and stabbing facial pain.

<sup>3</sup> Claimant's medical records following his 1996 motorcycle accident showed that he had a lacerated liver.

Claimant testified that he fractured his tibial plateau on the left side. He stated that he had a total left knee replacement.<sup>4</sup> He stated that afterwards he developed a staph infection and that he had to have his knee replaced again.

Claimant complained that he had constant pain since his 2008 accident. He stated that he had a left foot drop due to a severed nerve between his hip and his knee. He stated that he “overworked” his right knee due to his injuries on the left side. He stated that he takes pain medication. He stated that he had no problems from his 1996 left knee and left hip injuries until his 2008 accident.<sup>5</sup> He stated that his 1996 left knee injury involved an ACL but no broken bones.

Claimant complained of side effects from his medications. He complained of an inability to think clearly or to reason and focus. He stated that he was no longer sociable. He stated that he could no longer do prolonged standing or walking. He stated that he had to lie down and close his eyes two or three times daily. He complained of difficulty in sleeping.

Claimant testified that his employer had refused to provide a scooter or a lift for his truck as recommended by his treating doctor. He stated that his employer had refused to provide morphine as prescribed by Dr. Zarr, an authorized treating doctor.

Claimant alleged that some of his prescription medications had caused him to develop ulcers and gall stones. He stated that his employer refused to provide treatment for his gall stones. He stated that his employer terminated his temporary total disability benefits a year prior to when his treating doctor released him from treatment in April 2011.

On cross-examination by his employer, Claimant stated that he dropped out of high school at the time of his parents’ divorce. He admitted that when he worked as a foreman in the construction industry; that he did not do labor. He stated that he supervised more than 100 employees at Brinks. He stated that he used computers.

Claimant admitted that his doctor had prescribed a motorized scooter after his 1996 accident. He admitted that he still had the scooter when he sustained the 2008 injuries. He admitted that he was promoted on his job at the bank from teller to ACH Coordinator. He admitted that he could stand or sit as needed as a teller. He admitted that his other bank job was sedentary.

Claimant admitted that he was hospitalized for about 3 months after his 1996 motorcycle accident. He admitted that he fractured his clavicle and all the fingers of his left hand in the accident. He admitted that he severed the biceps in his left arm. He admitted that he severed the C5-C6 nerve in several places. He admitted to numerous surgeries on his left knee prior to February 2008.

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<sup>4</sup> Claimant’s knee replacement was in 2009, more than a year after the 2008 accident at work.

<sup>5</sup> Claimant’s medical records showed that he had severe end-stage tricompartmental arthritis in his left knee prior to the 2008 accident and that his treating orthopedic surgeon had noted prior to the 2008 accident that the only possible treatment remaining for his left knee was a total knee replacement.

Finally, Claimant identified Exhibits 40 and 41 as his third party settlements for his February 2008 injuries. One settlement was for one million dollars. The other settlement was for \$100,000.

On cross-examination by the Second Injury Fund, Claimant testified that his 2008 accident made his left shoulder pain worse. He stated that he now had constant pain and that due to his nerve damage it was difficult to keep his left hand steady or to use his hands for fine motor skills.

### **Medical Evidence**

Numerous medical exhibits were admitted into evidence. Claimant's Exhibit B was the deposition testimony of P. Brent Koprivica, M.D. Dr. Koprivica testified that he was board certified in emergency and in occupational medicine. He stated that he evaluated Claimant on November 23, 2009 and on June 18, 2010.

Dr. Koprivica provided a detailed history of Claimant's injuries in the 1996 and 2008 accidents. He noted that Claimant had reconstructive surgery to his ACL and PCL in his left knee as a result of the 1996 motorcycle accident. He noted that Claimant had a bipolar hip replacement on the left side. He noted that Claimant had a tendon lengthening procedure of his left lower extremity due to a shortening of the calf muscle. He stated that Claimant had multiple surgeries for his left knee and left lower extremity injuries.

Dr. Koprivica testified that Claimant fractured his left clavicle in the 1996 accident and that he had a muscle tendon transfer. He stated that Claimant required surgery on his left hand to allow him to straighten out his fingers. He noted Claimant brachial plexus injury.

Dr. Koprivica testified that Claimant's 2008 accident resulted in a "significant" traumatic head injury with a left basilar skull fracture, a subdural hematoma and a subarachnoid hemorrhage or bleeding inside the skull. He stated that Claimant's injuries caused him to lose his hearing in his left ear. He stated that Claimant sustained a left acetabular fracture, a left tibial plateau fracture, and a peroneal nerve injury which resulted in a left foot drop. He stated that Claimant lacerated his spleen in the accident. He also stated that Claimant developed facial pain and visual floaters due to the accident.

Dr. Koprivica concluded that Claimant's February 2008 accident was the direct, proximate and prevailing factor in causing each of the injuries as set out above. He stated that all the treatment Claimant received for his injuries, including the hearing aid was reasonable and necessary. He stated that Claimant developed stomach ulcers due to the medication required to treat his injuries. He stated that Claimant's back complaints were related to his hip, knee and foot injuries in the February 2008 accident. He stated that Claimant's inability to do prolonged standing, walking and sitting was due to the February 2008 accident.

Dr. Koprivica concluded that Claimant would need future treatment for his left hip and left knee. He stated that Claimant needed a scooter for gait assistance and that he needed a lift to transport the scooter in his vehicle. He stated that Claimant needed chronic pain management, aqua therapy, a left knee brace and an AFO brace. He stated that Claimant was temporarily and

totally disabled from February 5, 2008 to February 2010 or the last date in which Claimant received rehabilitation care from Corporate Care.

Finally, Dr. Koprivica concluded that Claimant was permanently and totally disabled due solely to the injuries Claimant sustained in the February 5, 2008 accident at work. He stated that if Claimant were found not to be permanently and totally disabled due solely to his injuries in the 2008 accident; that it would be his opinion that Claimant had sustained a permanent partial disability of 35 percent to his body as a whole due to his closed head injury which included his hearing loss, headaches, facial pain and weakness and all the "residuals from the head injury." He concluded that the February 5, 2008 accident had resulted in a permanent partial disability of 35 percent to Claimant's left hip at the 207 week level, and a 40 percent permanent partial disability at the 160 week level due to his knee injury and foot drop. He stated that Claimant needed major work restrictions.

On cross-examination by Claimant's employer, Dr. Koprivica admitted that he was not board certified in orthopedics, neurosurgery or neurology. He admitted that 98 to 99 percent of his evaluations during the preceding five years were at the request of claimants or plaintiffs.

Dr. Koprivica admitted that he understood that Claimant was left hand dominant until he sustained the severe injuries to his left upper extremity in the 1996 motorcycle accident. He admitted that he understood that Claimant had to become right hand dominant after his 1996 injuries. He admitted that he believed that Claimant's injuries from his 1996 motorcycle accident were a "significant" hindrance or obstacle to his employment or reemployment. He admitted that it was significant that Claimant required a scooter after his 1996 motorcycle accident.

Dr. Koprivica admitted that Claimant needed significant work restrictions after his 1996 accident and that he needed a job which would allow him to sit and stand as needed. He admitted that he had estimated that Claimant's disability from the 1996 motorcycle accident was 35 percent of the left knee, 35 percent of the left hip and 50 percent of the left upper extremity.

Claimant's employer offered into evidence the deposition testimony of Charles Tuen, M.D. and Bernie McCaskill, M.D. Dr. Tuen, board certified in neurology and clinical neurophysiology, testified that he examined Claimant on August 29, 2011. He noted that Claimant's memory, attention and concentration were not impaired. He noted that Claimant's speech was clear. He noted that Claimant's vision test results were normal.

Dr. Tuen found that Claimant had severe paralysis of most of the muscles in his left arm and some weakness of his right thumb. He stated that Claimant had a severely decreased range of motion of his left hip and left knee and a severe left foot drop. He stated that Claimant did not require any assistive devices to ambulate.

Dr. Tuen concluded that Claimant's subdural hematoma and the subarachnoid hemorrhage from the 2008 accident had resolved. He concluded that Claimant's cognitive functions were within normal limits. He concluded that Claimant's left hip and left knee replacements after the 2008 accident "most likely related to the 1996 motorcycle accident." He concluded that Claimant's left foot drop was caused by the 2008 accident.

Finally, Dr. Tuen concluded that the only disability caused by Claimant's 2008 accident was a 100 percent hearing loss in Claimant's left ear and a severe left foot drop. He concluded that the 1996 motorcycle accident had resulted in an almost complete loss of function of Claimant's left upper extremity, as well as Claimant's current left hip and left knee pain and stiffness and his left arm and back pain. He concluded that Claimant's left foot drop from the 2008 accident had resulted in a permanent partial disability of 7 percent of the whole person.

On cross-examination by Claimant, Dr. Tuen admitted that he had reviewed the AMA Guide to come "up with that number" for his disability rating. Later, he explained that "I cannot tell you exactly how I came to that number". On cross-examination by the Second Injury Fund, Dr. Tuen stated that he believed that Claimant was "trying to exaggerate his symptoms". He indicated that he believed that the 2008 accident may have accelerated Claimant's need for the hip and knee replacements.

Dr. McCaskill, a board-certified orthopedic surgeon, testified that he had performed hip and knee replacement surgeries and back and ankle surgeries. He noted Claimant's medical history. He stated that Claimant sustained a traumatic brain injury in the 1996 accident, a left clavicular fracture, a left brachial plexus injury, a fracture of both bones of his left arm, a right forearm fracture and multiple left metacarpal fractures. In addition, he stated that Claimant sustained a left femoral head fracture and a left knee dislocation. He noted that Claimant had injured his peroneal nerve on the left side causing foot and ankle problems.

Dr. McCaskill noted that as a result of the 2008 accident; that Claimant complained of intermittent headaches, memory loss, deafness in his left ear, a left dry eye and eye dysfunction, left sided facial sensitivity, intermittent and diffuse back and left arm pain, continuous and severe left hip pain, an inability to bear weight on his left lower extremity, continuous and diffuse left knee pain and weakness, left lower extremity weakness and numbness associated with his peroneal nerve palsy.

Dr. McCaskill concluded that Claimant's 1996 left knee dislocation and the subsequent numerous surgeries on Claimant's left knee had resulted in severe end stage posttraumatic tricompartmental degenerative arthritis of Claimant's left knee. He concluded that Claimant's left knee replacement in 2009 was due to the severe end stage arthritis and not any injury that Claimant allegedly sustained in the 2008 accident. He noted that it was not even certain that Claimant had sustained a tibial plateau fracture in the 2008 accident as diagnosed in the emergency room. He noted that it was not certain that Claimant had sustained any knee injury in the 2008 accident and that Claimant had not sustained any disability due to any alleged knee injury in the 2008 accident.

Dr. McCaskill concluded that Claimant's left hip total replacement in 2008 was due to the fracture in the 2008 accident. He concluded, however, that Claimant had not sustained any disability as a result of the total hip replacement, because afterwards Claimant's hip had returned to its pre-accident condition. He stated that he found no objective basis for the magnitude of Claimant's left hip complaints.

Dr. McCaskill also concluded that Claimant did not have any cognitive dysfunction. He stated that Claimant's basilar skull and temporal bone fractures and the hematomas had healed with no residuals. He stated that the 2008 accident did cause Claimant's complete loss of

hearing on the left side. He indicated that excluding the hearing loss, that Claimant had sustained a permanent partial impairment of 5 percent to the body as a whole due to his head injuries.

Dr. McCaskill concluded that Claimant's facial nerve paresis from the 2008 accident had resolved with no permanent impairment. He stated that Claimant's possible pulmonary contusion and rib fractures from the 2008 accident had resolved. He indicated that Claimant's possible splenic laceration and liver contusion from the 2008 accident had healed.

Dr. McCaskill concluded that Claimant's left peroneal palsy was caused by the 2008 accident and that it had resulted in a permanent partial impairment 17 percent to the whole body. He indicated that the treatment Claimant received for the peroneal nerve palsy was reasonable and necessary. He also concluded that Claimant's 2008 endoscopic gall bladder procedure was more likely than not caused by the 2008 accident.

Dr. McCaskill also rendered impairment ratings for Claimant's 1996 motorcycle accident injuries. He concluded that Claimant's hip fracture in the 1996 accident had resulted in a permanent partial impairment of 15 percent to the body as a whole. He stated that Claimant's severe left knee dislocation in the 1996 accident had resulted in a permanent partial impairment of 30 percent to the whole body.

Dr. McCaskill concluded that Claimant's cervical spine nerve injury on the left side was Claimant's most significant injury from the 1996 motorcycle accident. He stated that Claimant had a marked limitation of motion of his left shoulder and severe atrophy. He concluded that Claimant had essentially no function of his left upper extremity. He concluded that Claimant had sustained a permanent partial impairment of 54 percent to his body as a whole, or 90 percent of the left upper extremity due to the 1996 motorcycle accident. He noted that he had used the AMA Guides in rendering his rating.

Finally, Dr. McCaskill noted that Claimant had "significant" restrictions in his ability to walk and stand prior to his 2008 accident. He stated that Claimant's possible need for an electric scooter was due entirely to Claimant's injuries in the 1996 motorcycle accident. He noted that Claimant could move on and off the examining table without difficulty. He noted that Claimant's lack of use of ongoing pain medication was inconsistent with Claimant's complaints of "significant" pain. He concluded that Claimant could do light work as long he was not required to walk or stand for more than one hour in an eight hour work day. He stated that Claimant did not need any ongoing pain management and that any treatment Claimant needed for his left knee was due to the 1996 and not the 2008 accident.

On cross-examination by Claimant, Dr. McCaskill testified that he examined Claimant on April 4, 2011. He explained the differences between impairment and disability. He stated that Claimant's medical records showed that Claimant had told medical providers that he had 15 surgeries on his left knee prior to the 2008 accident. He acknowledged that Dr. Christensen had indicated in 2001 that Claimant had mild complaints regarding his left hip and left knee. He stated that the 1996 accident had effectively resulted in an amputation of Claimant's left upper extremity at the shoulder level because Claimant could basically no longer use his left arm.

On cross-examination by the Second Injury Fund, Dr. McCaskill reiterated that in his opinion that Claimant's left knee total replacement was due to Claimant's end stage posttraumatic degenerative arthritis caused by the 1996 accident and not to any alleged knee injury in the 2008 accident. He again stated that it was questionable that Claimant had sustained a tibial plateau or periarticular fracture in the 2008 accident and that if Claimant had sustained either type of fracture it would not have resulted in the need for a total knee replacement within one year of the accident.

On redirect examination, Dr. McCaskill indicated that Claimant needed an electric scooter due to his left upper extremity impairment which would prevent him from using a manual scooter or wheelchair.

### Medical Records

The numerous medical records were essentially cumulative of the testimony. October 25, 1996 medical records noted that Claimant had sustained a "very" severe closed head injury with loss of consciousness and a liver laceration in the 1996 motorcycle accident. The records noted that Claimant's left foot was extremely weak.

November 18, 1996 records from Baylor Rehab Hospital noted that Claimant had sustained a closed head fracture in a high speed motorcycle accident with a truck. The records noted that Claimant had dislocated his left knee, fractured his left femoral head, fractured his left radial ulnar bone and that there was evidence of a complete C5-6 root avulsion and a partial C7-T1 root avulsion. Discharge records from the hospital showed that Claimant was post open reduction with internal fixation of his left clavicular fracture, left metacarpal bone fractures and that he was post stabilization with metallic pins of his left brachial plexus injury.

In December 1996, Kevin Christensen, M.D., Claimant's treating orthopedic surgeon, noted that Claimant had significant pain in his left ankle due to an injury to Claimant's peroneal nerve. January 23, 1997 records noted that Claimant was complaining of severe, sharp and stabbing facial pain. February 3, 1997 records stated that Claimant's body was thrown several feet in the motorcycle accident and that due to his brachial plexus injury his left arm was functionally useless. The records noted that Claimant complained of an inability to sleep due to pain. The records noted that Claimant complained of headaches, neck pain, depression and loss of appetite and bone and joint pain. Claimant complained that medication provided "very" limited relief.

July 29, 1997, x-rays showed diffuse osteoporosis of Claimant's left foot and ankle. On that same date, Dr. Christensen noted that he had advised Claimant that a left knee arthrodesis was the only remaining possible surgery for Claimant. On August 13, 1997, Dr. Christensen noted that the heterotopic ossification in Claimant's left knee was the reason for the possible total knee replacement in the future. He also noted that Claimant would probably need an arthrodesis of his left shoulder in the future and possibly a tendon transfer in his left foot due to his nerve injury.

November 18, 1997 medical records noted that Claimant had inquired of Dr. Christensen about an electric wheelchair. On December 18, 1997, Dr. Christensen recommended a

wheelchair. He noted that a wheelchair would decrease Claimant's likelihood for further hip or knee surgery by limiting the weight bearing on Claimant's joints.

December 1997 records stated that Claimant had a pre-ganglionic rupture of the C7-C8 roots and post ganglionic findings at the C5-C6 level. The records stated that Claimant's left knee dislocation and the brachial plexus injury were his most serious injuries from the 1996 accident.

Claimant's Exhibit L contained records from Zale Lipshy Hospital. The records noted on May 20, 1999 that Claimant had heterotopic ossification of his left knee and a severely limited range of motion. The records noted that Claimant's knee had gotten progressively stiffer. The records noted that Claimant had required numerous left knee surgeries. The records noted that Claimant had suffered liver failure after his 1996 motorcycle accident.

Claimant's Exhibit J contained records from Rehabilitation Hospital dated February 21, 2008. The records noted that Claimant had 21 surgeries or more to repair his injuries from the 1996 motorcycle accident. Santa Clara Valley Medical Center Records from March 2008 noted that Claimant had been in a coma for 1-1/2 weeks after his 1996 accident.

Rehab Without Walls records dated July 31, 2008 noted that Claimant had provided a history of ongoing pain from his motorcycle accident. Claimant's Exhibit H was a November 11, 2008 report from C. Arthur Sciaroni, M.D. addressed to AIG Insurance Company. Dr. Sciaroni noted that Claimant's emergency room records following the 2008 accident had identified an acetabular fracture of undetermined age. He noted that Claimant's left knee x-rays showed advanced osteoarthritic changes. He noted that Dr. Jeffrey MacMillan, Claimant's initial treating orthopedic surgeon, following the 2008 accident had concluded that the 2008 accident had resulted in a fracture of a large medial tibial osteophyte rather than a true tibial plateau fracture.

Dr. Sciaroni concluded that any future knee replacement surgery Claimant might require would be due to the severe arthritis in his knee and not to any injury that Claimant sustained in the 2008 accident. He stated that Claimant should be able to return to sedentary employment after his hip replacement surgery.

Claimant's March 23, 2009, medical records noted that he had severe arthritis in his left knee with huge spurs due to multiple injuries and multiple previous surgeries on his left knee. X-rays of Claimant's left knee following the 2008 accident showed that Claimant had severe tri-compartmental arthritis of his left knee with huge lateral spurs in the knee.

Claimant's Exhibit I contained the records of Paul Linquist, MD. Dr. Linquist performed Claimant's left total knee replacement on March 23, 2009. His preoperative diagnosis was severe, traumatic degenerative arthritis of the left knee with "huge" osteophytes. He did not refer to a 2008 traumatic injury to the knee.

Claimant's Exhibit U contained the neuropsychology report of Neil Deutch, Ph.D. Dr. Deutch noted that Claimant's IQ of 95 was average. He noted that Claimant's reading score of 106 was average. Nevertheless, he diagnosed Claimant with a reading/ learning disorder and an

attention deficit/ hyperactivity disorder. He recommended psychological and vocational counseling.

Claimant's Exhibit W contained Discover Vision Center records from November 2009. The doctor's notes indicated that Claimant did not have tinnitus or any memory problems. The doctor noted Claimant's headache complaints but indicated that no treatment was needed.

Claimant's Exhibit BB contained the report of Chris Fevurly, M.D., dated April 20, 2010 and addressed to Claimant's employer's insurer. Dr. Fevurly concluded that Claimant had sustained a permanent partial impairment of 50 percent of his left lower extremity due to his left hip injuries. He stated that the 2008 accident had resulted in a permanent partial impairment of 13 percent of Claimant's left hip and that the 1996 motorcycle accident had resulted in a permanent partial impairment of 37 percent of the left hip.

Dr. Fevurly concluded that Claimant's two accidents had resulted in a permanent partial impairment of 50 percent of Claimant's left lower extremity due to Claimant's left knee injuries. He stated that each accident had resulted had resulted in half of the impairment. He also concluded that Claimant had sustained a permanent partial impairment of 42 percent of his left lower extremity due to his ankle impairment and that the impairment caused by the 2008 accident was 33 percent of the left lower extremity. He stated that when he combined his ratings for the left hip, knee and ankle, that Claimant had sustained a permanent partial impairment of 57 percent due to the 2008 accident.

Finally, Dr. Fevurly concluded that Claimant had not sustained any permanent impairment to his left upper extremity in the 2008 accident or to his face or due to a vision impairment. He stated that Claimant had a 100 percent hearing impairment to his left ear due to the 2008 accident.

Claimant's Exhibit CC contained a letter from Claimant's employer's attorney to Claimant's attorney dated October 21, 2010. Claimant's employer's attorney stated in the letter that Claimant's employer would pay temporary total disability benefits to Claimant for the period March 27, 2010 to April 20, 2010, representing 3-4/7 weeks. Claimant's employer's attorney also asked for notification if Claimant moved in the future, noting that the employer had spent the last 30 days trying to coordinate Claimant's medical needs in the Kansas City area. The letter stated that the employer would be willing to split the cost of a new scooter and lifting apparatus with Claimant. The letter stated that the employer would provide a two year membership in a fitness facility where Claimant lived in Texas.

Claimant's employer's medical records were essentially duplicative of those offered by Claimant. Exhibit 30 showed that as of April 19, 2011, \$70,996.71 had been paid in temporary total disability benefits to Claimant and that \$602,691.35 had been paid in medical aid.

Exhibit 40 showed that Claimant had settled a third party lawsuit against BRW Express, LLC and William Babcock for the payment of \$1,000,000.00 Exhibit 41 showed that Claimant had settled a third party action against Melissa Peterson for \$100,000.

### **Vocational Evidence**

The vocational evidence consisted of the deposition testimony and reports of Mary J. Titterington and Terry Cordray. Ms. Titterington, testifying for Claimant, stated that she had evaluated Claimant on July 8, 2010. She noted that he could not do any of his past jobs. She also concluded that Claimant's inability to work was due solely to the injuries he sustained in the 2008 accident.

On cross-examination, Ms. Titterington would not acknowledge that any of Claimant's disability from his 1996 high speed motorcycle accident constituted a hindrance or obstacle to his employment or reemployment. She admitted that she did not know that Claimant had been prescribed a scooter prior to the 2008 accident. She admitted to knowledge that Claimant had driven back and forth between Dallas, Texas and Kansas City two or three times in the preceding 18 months.

Mr. Cordray testified for Claimant's employer. He stated that he evaluated Claimant on April 3, 2012. He concluded that there were jobs that Claimant could do. He stated that Claimant could do such jobs as cashier in a parking garage, telemarketer and data entry. He stated that there were jobs listed in his Dallas area job market survey that Claimant could do such as bank teller, cashier, data entry clerk and gait guard. He also stated that Claimant could do his prior jobs as a bank vault supervisor and as automated clearinghouse coordinator.

Mr. Cordray testified that Claimant had transferable work skills from his prior jobs as a supervisor and in data entry to other employment. He stated that Claimant's age, good work history and military background were positive factors in a job search. He stated that Claimant was articulate and intelligent. He noted Claimant's IQ score. He stated that he did not notice any stuttering by Claimant. He also stated that Claimant's disability from his 1996 motorcycle accident was a "significant" impairment to employment or reemployment.

On cross-examination by Claimant, Mr. Cordray acknowledged Claimant's severe limitation in using his left upper extremity, but stated that Claimant had done data entry work with that impairment in the past. He admitted that the supervisor positions he had concluded that Claimant could do would require the worker to occasionally do the work of those he supervised. He admitted that Claimant would not be able to do the bank supervisor position he had listed because Claimant would not be able to do all the job tasks of those he supervised.

### **Law**

After considering all the evidence, including the testimony at the hearing, Drs. Koprivica, McCaskill and Tuen's deposition testimony and medical reports, the other medical reports and records, the vocational testimony and reports, the other exhibits and after observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove that he was rendered permanently and totally disabled due solely to the injuries he sustained in the February 2008 work accident. He did prove that he sustained a permanent partial disability of 50 percent to his body as a whole due to his February 2008 work injuries. At a rate of \$389.04 per week for 200 weeks, his employer is liable for \$77,808. Claimant's employer is ordered to pay that amount to him.

Claimant further proved his employer's liability for past and future medical aid and additional temporary total disability benefits as set out in the award. He did not prove his employer's liability for fees and costs.

Claimant did prove the Second Injury Fund's liability for permanent total disability benefits. Therefore, the Second Injury Fund is ordered to pay such benefits to him and to continue to pay such benefits to him as set out in the award for so long as he remains so disabled.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2<sup>nd</sup> 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3<sup>rd</sup> 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out above.

### **Nature and Extent of Disability**

Claimant argued that he was rendered permanently and totally disabled due solely to the injuries he sustained in the February 5, 2008 accident at work. The evidence did not support his allegation. The evidence clearly showed that Claimant sustained more serious injuries in his 1996 high speed motorcycle accident than in his February 2008 work accident. His more serious injuries in the 1996 motorcycle accident did not render him permanently and totally disabled. Claimant failed to explain how less serious injuries in the 2008 accident rendered him so disabled.

Claimant's February 2008 injuries involved a skull fracture and some bleeding, both of which essentially resolved and a left hip fracture, a questionable injury to his left knee, a left peroneal nerve injury resulting in a left foot drop and various internal injuries which resolved with no residuals. Claimant did require a left hip replacement. He also lost the hearing in his left ear. He did not sustain any injuries to his upper extremities in the 2008 accident. He complained of pain, disabling headaches and problems due to an inability to sleep.

Claimant sustained severe upper and lower extremity injuries in the 1996 high speed motorcycle accident. According to the medical records, he sustained a "severe" closed head injury. He was in a coma for 1 ½ weeks after the accident. There was bleeding in his skull. He severed nerves in his neck. Three physicians, Dr. McCaskill, an orthopedic surgeon, Dr. Tuen, a neurologist and neurophysiologist, and Dr. Ramon Diaz-Arrastia, a neurologist, concluded that Claimant had essentially no remaining use of his left upper extremity due to his injuries in the 1996 motorcycle accident. Claimant complained of pain, headaches and problems due to an inability to sleep after the 1996 motorcycle accident.

Claimant also severely dislocated his left knee in the motorcycle accident. He had an ACL and PCL reconstruction and 15 total surgeries on his left knee. He had severe restrictions in the range of motion of his left knee due to the accident. His treating orthopedic surgeon had advised him prior to the 2008 accident that the only remaining surgery possible was a total knee replacement.

Claimant had developed severe end-stage tricompartmental degenerative arthritis in his left knee with large osteophytes and hypertropic ossification in his knee prior to 2008. Drs. McCaskill and Tuen and Dr. Sciaroni, an orthopedic surgeon, noted that Claimant's need for a total left knee replacement in 2009 was due to his injuries in the 1996 motorcycle accident and not due to any alleged injury in the 2008 work accident. Drs. McCaskill and Tuen questioned whether Claimant had even injured his left knee in the 2008 accident.

In addition, Claimant sustained a severe brachial plexus injury in the 1996 motorcycle accident. He fractured his clavicle. He fractured his left forearm. He required an open reduction with internal fixation to repair the fracture. He also fractured most of the fingers of his left hand. He required multiple surgeries to repair the fractures. He had to become right hand dominant due to his injuries. He sustained internal injuries, including a lacerated liver.

Claimant also fractured his left hip in the 1996 accident. He had a partial left hip replacement. He injured his left peroneal nerve in the 1996 accident and he developed problems with his left foot and ankle. He was prescribed a motorized scooter after the 1996 accident. Dr. McCaskill noted that Claimant's problems in walking and standing were due to the 1996 accident and not the 2008 accident.

Claimant was able to work for more than 10 years after the 1996 motorcycle accident. He did not prove that his less serious injuries in the 2008 work accident in isolation rendered him permanently and totally disabled. He did not prove his employer's liability for permanent total disability benefits.

### **Permanent Partial Disability Due to 2008 Accident**

Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 35 percent of the left lower extremity at the hip level due to the 2008 accident. Dr. Fevurly concluded that Claimant had sustained a permanent partial impairment of 13 percent of the left lower extremity. Dr. McCaskill concluded that the 2008 left hip fracture had not resulted in any permanent disability because the hip replacement surgery had actually improved Claimant's hip. Based on all the evidence, Claimant proved that he sustained a permanent partial disability of 25 percent of his left lower extremity at the 207 week level, or 51.75 weeks of compensation due to his hip injury in the 2008 accident.

Dr. Koprivica concluded that Claimant had sustained a permanent partial disability of 40 percent of his left lower extremity at the knee or 160 week level due to Claimant's knee and foot drop injuries in the 2008 accident. Dr. Fevurly concluded that Claimant had sustained a permanent partial impairment of 25 percent of the left knee and 33 percent due to the foot drop.

Drs. McCaskill and Tuen, as noted earlier questioned whether Claimant had even injured his left knee in the 2008 accident and both indicated that any alleged injury in the accident was not of such severity as to necessitate an impairment rating. Dr. McCaskill did conclude that Claimant had sustained a permanent partial impairment of 17 percent to his body as a whole due to the peroneal nerve injury and the foot drop.<sup>6</sup>

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<sup>6</sup> Dr. Tuen, testifying for Claimant's employer, concluded that Claimant had sustained a 7 percent permanent partial disability of the whole person due to Claimant's foot drop. No credence, however, was given to Dr. Tuen's

Based on the evidence, Claimant proved that he sustained a permanent partial disability of 35 percent of his left lower extremity at the 160 week level due to his left foot drop impairment and his alleged left knee injury, or 56 weeks of compensation caused by the February 2008 accident.

Dr. Koprivca concluded that Claimant had sustained a permanent partial disability of 35 percent to the body as a whole due to his closed head injury in the 2008 accident. His rating included a 100 percent hearing loss in the left ear, facial pain and the "residuals from the head injury." Dr. Tuen noted that Claimant's bruise and bleeding had resolved and that results from the neurological examination were normal. He noted that Claimant's speech was clear and that Claimant had no language deficits.

Dr. McCaskill reached similar conclusions regarding the bruises and bleeding and noted that Claimant's facial paresis had resolved. He agreed with Dr. Koprivca that Claimant had a 100 percent hearing loss in the left ear. He concluded that Claimant had a residual permanent partial impairment of 5 percent to the body as a whole due to the skull fractures and the secondary hematomas.

Claimant's 100 percent hearing loss in his left ear resulted in 49 weeks of compensation plus an additional 10 percent based on the complete loss as set out in the statute for a total of 53.9 weeks of compensation. See § 287.190 RSMo (2005). Claimant also proved that he sustained an additional 5 percent permanent partial disability to his body as a whole due to the "residuals from the head injury" for a total of 73.9 weeks of compensation for both the hearing loss and the other disability.

The 73.9 weeks plus the 56 weeks plus the 51.75 equaled 181.65 weeks of compensation or a permanent partial disability of 45.4 percent to the body as a whole. Due to the combined effect of the disability as testified to by Dr. Koprivca, Claimant proved that he sustained a permanent partial disability of 50 percent to his body as a whole, or 200 weeks of compensation due to his injuries in the 2008 accident. At a rate of \$389.04 per week for 200 weeks, Claimant's employer is liable for \$77,808. Claimant's employer is ordered to pay that amount to him.

### **Preexisting Disability and Hindrance or Obstacle**

Claimant sustained significant disability as a result of his 1996 motorcycle accident. In accordance with Dr. McCaskill's opinion, he proved that he sustained a permanent partial disability of 90 percent of his left upper extremity at the 232 week level due to his injuries in the 1996 motorcycle accident. Drs. Tuen and Ramon Diaz-Arristia's opinions supported Dr. McCaskill's.

Dr. McCaskill rated Claimant's impairment to his hip from the 1996 accident as 15 percent of the whole person. Dr. Koprivca indicated that he "estimated" Claimant's permanent partial disability to be 35 percent of the lower extremity. Based on the evidence, Claimant

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disability rating based on the doctor's admission that "I cannot tell you exactly how I came to that number". He also admitted that he had never previously rendered a Missouri disability rating.

proved that his 1996 hip fracture which resulted in a partial hip replacement resulted in a permanent partial disability of 30 percent at the 207 week level.<sup>7</sup>

Dr. McCaskill concluded that Claimant's severe dislocation of his left knee in the 1996 accident had resulted in a permanent partial impairment of 30 percent to the body as a whole. Dr. Koprivica "estimated" Claimant's permanent partial disability to be 35 percent of the left knee. Claimant had the multiple surgeries on his left knee, the severe restrictions in his range of motion and the severe end-stage tricompartmental arthritis of his left knee prior to 2008 as noted above. He proved that he had sustained a permanent partial disability of 50 percent of his left knee prior to 2008.

Claimant also proved based on his testimony and the opinions of Dr. Koprivica and Mr. Cordray that his disability from the 1996 motorcycle accident was a hindrance or obstacle to his employment or reemployment. In addition, he proved that the disability from his 1996 motorcycle accident combined with the disability from his February 5, 2008 work injuries to render him permanently and totally disabled. He proved the Second Injury Fund's liability for such benefits. See § 287.220 RSMo. 2005.

### **Permanent Total Disability**

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. 1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

The evidence clearly showed that Claimant was rendered permanently and totally disabled due to a combination of the disability he sustained in the 1996 and 2008 accidents and that no employer in the usual course of business would reasonably be expected to employ him. Dr. Koprivica and Ms. Titterington, a vocational expert, concluded that Claimant was permanently and totally disabled. Claimant sustained serious injuries in his 1996 motorcycle accident and in his 2008 work accident as set out earlier. He has virtually no use of his dominant left upper extremity due to his 1996 accident. That precludes him from performing numerous jobs.

He had a partial left hip replacement in 1996 and a total left hip replacement in 2008. He had severe end-stage tricompartmental arthritis in his left knee prior to 2008. He had 15 surgeries on his left knee prior to 2008. He was impaired in his ability to walk, stand and sit prior to 2008. He has a severe left foot drop. He was prescribed a motorized scooter after both

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<sup>7</sup> The most credible evidence showed that the 1996 hip fracture was more severe than the 2008 hip fracture. Claimant required a total hip replacement after the 2008 accident. His hip had already been partially replaced due to the 1996 accident.

the 1996 and 2008 injuries. His lower extremity injuries from both the 1996 and 2008 accidents preclude him from performing numerous jobs.

Claimant also has no hearing in his left ear. He sustained skull fractures in both the 1996 and 2008 accidents. He had bleeding in his brain. He fractured his clavicle. He injured the nerves in his cervical spine. He sustained internal injuries in both accidents. He had approximately 21 surgeries due to his injuries in the 1996 motorcycle accident.

Claimant complained of severe pain and headaches. He complained of an inability to sleep due to pain. He complained of difficulty in walking, sitting and standing. He complained of low back and right knee pain due to compensating for his left knee and left hip injuries. He complained of the need to take narcotic medication.

The evidence supported Claimant's subjective pain complaints. Dr. Koprivica's opinions supported Claimant's pain complaints. The most credible evidence clearly showed that Claimant was permanently and totally disabled. The most credible evidence further showed that his permanent total disability was due to a combination of the disability he sustained in the 1996 and 2008 accidents and not the 2008 accident alone as Claimant argued. Thus, Claimant proved the Second Injury Fund's liability for permanent total disability benefits.

#### **Start Date for Permanent Total Disability Benefits**

Claimant proved that his disability from the February 2008 accident became permanent effective with April 21, 2010 as set out later in the award and that he became permanently and totally disabled effective with that date. Therefore, his employer's liability for 200 weeks of permanent partial disability benefits at the rate of \$389.04 per week became effective on April 21, 2010. The Second Injury Fund became liable for Second Injury Fund differential benefits based on the difference in the permanent total disability rate of \$639.61 per week and the permanent partial disability rate of \$389.04 per week, or for \$250.57 per week effective with April 21, 2010. The 200- week period ends on February 19, 2014. Effective with February 20, 2014, the Second Injury Fund shall be liable for permanent total disability benefits at the rate of \$639.61 per week. The Second Injury Fund is ordered to pay all benefits owed to Claimant and to continue to pay permanent total disability benefits to him at the rate as set out above for so long as he remains so disabled.

#### **Liability of Employer for Additional Temporary Total Disability Benefits**

Claimant's employer paid \$77,996.71 in temporary total disability benefits covering the period February 6, 2008 to March 27, 2010, or for 111 weeks. Claimant argued that his employer was also liable for temporary total disability benefits for the period March 28, 2010 until April 4, 2011. The evidence did not support Claimant's argument.

Dr. Koprivica, Claimant's testifying physician, examined Claimant on June 28, 2010 and concluded that Claimant's disability was permanent. Ms. Titterington, Claimant's vocational expert evaluated Claimant in July 2010 and concluded that he was permanently and totally disabled. Claimant did not explain how he was temporarily and totally disabled until April 2011, when according to his own experts he was permanently and totally disabled nearly a year earlier.

Claimant's employer also failed to explain why it terminated Claimant's temporary total disability benefits effective with March 27, 2010 when the evidence offered showed that Claimant's disability did not become permanent until April 20, 2010 when Dr. Fevurly examined Claimant at the request of Claimant's employer and rendered such an opinion.

Based on the evidence offered, Claimant proved that he was temporarily and totally disabled until April 20, 2010 when Dr. Fevurly rendered his opinion. Thus, Claimant proved his employer's liability for an additional 3 2/7 weeks of temporary total disability benefits. At a rate of \$639.61 per week, for 3 2/7 weeks, Claimant's employer is liable for an additional \$2,101.57. Claimant's employer is ordered to pay that amount to him.

### **Liability for Future Medical Benefits**

Claimant proved his employer's liability for future treatment needed to cure and relieve him of the effects of his injuries in the February 2008 accident at work. Claimant's employer is ordered to provide all future prosthetic left hip replacements needed by Claimant. His employer is ordered to provide all AFO braces and special shoes needed for his left foot drop. His employer is also ordered to provide all pain medications, hearing aids and pain management treatment needed to cure and relieve him of the effects of his injuries. His employer maintains the right to direct all future treatment.

Claimant did not prove that it would constitute reasonable and necessary treatment to order his employer to purchase an electric scooter when he already has such a scooter due to his 1996 motorcycle accident injuries. Because, however, he proved that a scooter was also necessary due to his 2008 injuries; his employer is ordered to provide any modifications and adjustments to his existing scooter and to provide a replacement scooter should one become necessary in the future. His employer is also ordered to provide a lift for the scooter to allow Claimant to place it in his vehicle to transport it.

Claimant failed to prove that he needed a left knee replacement due to any alleged injuries in the 2008 accident as set out earlier.<sup>8</sup> Therefore, he did not prove his employer's liability for any future knee replacements.<sup>9</sup>

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<sup>8</sup> The evidence clearly showed that Claimant's need for a left knee replacement was due to the severe end-stage tricompartmental arthritis in his left knee, resulting from the 1996 motorcycle accident. Drs. McCaskill and Sciaroni, orthopedic surgeons, and Tuen, a neurologist and neurophysiologist, so concluded. Dr. Christensen, Claimant's treating orthopedic surgeon after the 1996 motorcycle accident, had advised Claimant prior to the 2008 accident that the only remaining surgery possible for Claimant's knee was a total knee replacement. Their opinions were entitled to more weight than the opinions of Dr. Koprivica, a specialist in emergency medicine who testified for Claimant and concluded that the 2008 accident was the cause of Claimant's need for a knee replacement. The evidence did not support Dr. Koprivica's opinion. The evidence further showed that Claimant had 15 surgeries on his left knee prior to 2008. He had an ACL and PCL reconstruction prior to 2008. Drs. McCaskill and Tuen questioned whether Claimant had even injured his left knee in the 2008 accident. Dr. MacMillan, Claimant's treating orthopedic surgeon for the 2008 injuries, questioned the emergency room diagnosis of a left tibial plateau fracture on the day after the 2008 accident.

<sup>9</sup> In Tillotson v. St. Joseph Medical Center, 347 S.W.3d 511 (Mo. App. W.D. 2011) the Court addressed liability for a total knee replacement. In Tillotson, the employee sustained a meniscus tear in her knee in the accident at work. Both the employee's doctor and her employer's doctor agreed that her meniscus tear could not be repaired absent a total knee replacement. The employer argued that it was not liable for the total knee replacement because Ms. Tillotson's work injury was not the prevailing factor in causing the need for it. The Missouri Court of Appeals for

### **Liability of Employer for Past Medical Aid**

Claimant proved his employer's liability for the emergency room treatment he received at St. Luke's Hospital on January 28, 2010 for peptic ulcer disease, and for his gall bladder surgery. Drs. Koprivica and McCaskill's opinions supported Claimant's position. Claimant proved his employer's liability for the prescription bills recommended by Dr. Zarr, an authorized treating physician. He proved his employer's liability for the special shoes he required due to his ankle brace for the left foot drop.

Claimant did not show what treatment Drs. Willingham and Fried provided. Therefore, he did not prove his employer's liability for the medications prescribed by them.

### **Liability of Employer for Fees and Costs under § 287.560 RSMo. 2005**

Claimant did not prove his employer's liability for fees and costs under § 287.560. Fees and costs may be awarded based on an unreasonable defense. Landman v. Ice Cream Specialties, 107 S.W.3d 240 (Mo. banc 2003); Clark v. Harts Auto Repair, 274 S.W.3d 613 (Mo. App. W.D. 2009); Monroe v. Wal-Mart Associates, Inc., 163 S.W.3d 501 (Mo. App. E.D. 2005). In Monroe, citing Landman the Court conceded that costs should only be awarded when the issue was clear and the offense egregious. In Claimant's case, the issue was not clear and the alleged offense was not egregious.

It was not unreasonable for Claimant's employer to refuse to provide Claimant with an electric scooter when Claimant already had such a scooter due to his injuries from his 1996 motorcycle accident. Claimant's employer proved that it had authorized aqua therapy as prescribed and that the reason Claimant had not received it was due to Claimant's decision to move to Texas and to not inform his employer of his move. It was not unreasonable for

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the Western District pointed out that "prevailing factor" did not apply to medical treatment. The Court reasoned that the employer had an obligation to provide all reasonable and necessary treatment needed to cure and relieve the employee of the effects of the injury she sustained on the job. The Court noted that Ms. Tillotson's employer could not provide the treatment needed to cure and relieve her of the effects of her injury on the job absent a total knee replacement. Therefore, it found that Ms. Tillotson's employer was liable for the total knee replacement.

In Claimant's case, there was no certainty as to whether Claimant had even sustained an injury to his left knee in the February 2008 work accident. There was no evidence that the only way to cure and relieve him of the effects of whatever injury he allegedly sustained in the work accident was by doing a total knee replacement. In Tillotson, there was no evidence that she had been advised of her need for a knee replacement prior to the accident at work. Claimant's case was clearly distinguishable from Tillotson.

Also, there is an opinion from the Missouri Court of Appeals for the Eastern District of Missouri where the Court found that under the 2005 statute work had to be the prevailing factor in causing the need for treatment. See Gordon v. City of Ellisville and Treasurer as Custodian of the Second Injury Fund, 268 S.W.3d 454 (Mo. App. E.D. 2008). The Gordon Court also found that because under the 2005 statute, work had to be the prevailing factor in causing the alleged injury that an aggravation of a preexisting injury in a work-related accident was no longer compensable. Claimant's knee replacement was not compensable under either Tillotson or the more restrictive reasoning in Gordon.

Claimant's employer to refuse to pay prescription bills when Claimant did not provide accompanying medical records showing what the prescriptions were for. It was not unreasonable for Claimant's employer to refuse to pay the bills for Claimant's peptic ulcer or gall bladder disease given the numerous medications Claimant took due to his 1996 motorcycle injuries.

It was not unreasonable for Claimant's employer to fail to provide temporary total disability benefits until April 2011 when both Claimant and his employer had obtained permanent disability ratings, indicating that Claimant's disability had become permanent in 2010. Claimant's employer's conduct was not egregious. Claimant's employer is not liable for fees and costs.

### **Subrogation Interest**

Claimant was granted leave to file additional information on the third party lawsuits he settled. The additional information submitted by Claimant is admitted into evidence per this award and shall be Claimant's Exhibit DD.

Claimant and his employer admitted that Claimant had settled two third party lawsuits based on Claimant's injuries in the 2008 work accident. Employer Exhibits 40 and 41 indicated that the third party settlements totaled \$1,100,000. Claimant stated in his post trial submission that the third party settlements totaled \$1,170,000. Claimant acknowledged that his employer had a subrogation interest in the third party settlements. Claimant, however, stated that the third party settlements were not final because there were issues as to whether Claimant had any fault in causing the accident and that the District Court in Kansas had conducted a trial on the fault issues in July 2011 and had not rendered a decision. Claimant argued that depending on the fault ruling by the district court, the agreed upon settlements amounts could change.

The Kansas Court documents showed that the amounts of the third party settlements were not final and that it was possible that Claimant's actual payouts in the third party lawsuits might be less than the \$1,170,000. Therefore, until the settlements become final, it is impossible to determine the extent of Claimant's employer's subrogation interest in any recovery made by Claimant in his third party lawsuits. Claimant is however, ordered to honor his employer's third party subrogation interest in his recovery in any third party lawsuits when the final amounts of the settlements are determined.. The Second Injury Fund also has a subrogation interest in the third party recoveries.

Made by: \_\_\_\_\_

**Kenneth J. Cain**  
*Administrative Law Judge*  
*Division of Workers' Compensation*