

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

Injury No. 11-042143

Employee: Warren Cotner, deceased  
Claimant: Ruth Cotner  
Employer: Southern Personnel Management, Inc.  
Insurer: Lumbermen's Underwriting Alliance  
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**

*Claimant's Suggestion of Death and Motion for Substitution of Party*

On June 30, 2015, claimant Ruth Cotner filed a "Suggestion of Death and Motion for Substitution of Parties" (Motion) with the Commission. With the Motion, claimant provides a document purporting to be a copy of employee's death certificate; this document suggests employee died on May 18, 2015, and that Ruth Ann Cotner is employee's surviving spouse. In her Motion, claimant alleges that she was married to employee at the time of his death, and that she is the sole surviving dependent of employee pursuant to § 287.240 RSMo, and she requests that she be substituted in this matter as the claimant/employee in place of Warren Cotner.

On July 7, 2015, the Commission acknowledged claimant's Motion and instructed the parties to file any responses with the Commission within 10 days. The Commission has not received any response from the parties. On August 14, 2015, the Commission received an entry of appearance on behalf of counsel for claimant, as well as a copy of what appears to be a marriage certificate suggesting employee and claimant were married on November 11, 1975, in Ventura, California.

Section 257.580 RSMo provides:

If any party shall die pending any proceedings under this chapter, the same shall not abate, but on notice to the parties may be revived and proceed in favor of the successor to the rights or against the personal representative of the party liable, in like manner as in civil actions.

Employee: Warren Cotner, deceased

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The Commission hereby accepts the copies of the death and marriage certificates into the record, and finds that employee died on May 18, 2015. We additionally find that Ruth Ann Cotner is employee's surviving spouse.

We grant claimant's Motion. Pursuant to § 287.580 RSMo, these proceedings are revived and may proceed in favor of the successor to employee's rights. We substitute employee's surviving spouse, Ruth Cotner, as the claimant in this matter.

*Injury arising out of and in the course of employment*<sup>1</sup>

In his thorough and well-reasoned award, the administrative law judge determined that employee suffered an injury by accident which arose out of and in the course of his employment. We agree, but discern a need to provide some additional findings and comments of our own. The parties dispute whether employee suffered an injury arising out of and in the course of employment when he stumbled and fell after squatting down to check the sound of an air compressor in the air conditioning unit of the shuttle van he was driving for employer.

Section 287.020.3(2) RSMo provides, in relevant part, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if ... [i]t does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life.

As correctly noted by the administrative law judge, the courts have interpreted the foregoing provision to involve an inquiry into whether the employee was injured *because* he was at work, as opposed to becoming injured merely *while* he was at work. *Pope v. Gateway to the W. Harley Davidson*, 404 S.W.3d 315, 320 (Mo. App. 2012). In finding that employee was injured because he was at work, the administrative law judge pointed to a number of factors that arguably rendered employee's work activities at the time of the accident more risky or hazardous than they might otherwise have been: employee's stepping on a pebble or his foot sticking to the pavement; the existence of cracks in the pavement repaired with tar or asphalt sealant; the hot weather that day; and the significant slope going downhill from where employee was squatting to listen to the A/C compressor.

Employer argues that the administrative law judge's identification of various factors that may have contributed to employee's fall demonstrates that the administrative law judge engaged in speculation as to the specific risk or hazard from which employee's injuries came. Noting employee's somewhat tenuous testimony that he may have stepped on a pebble or that his foot otherwise stuck to the pavement, employer cites the case of *Porter v. RPCS, Inc.*, 402 S.W.3d 161 (Mo. App. 2013), and argues that employee has failed to identify the cause of his fall, and that his claim must be denied as a result. We are not persuaded, for the following reasons.

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<sup>1</sup> We note that the parties framed the issue as "whether the *accident* arose out of and in the course of [employee's] employment," *Transcript*, page 7 (emphasis added). Section 287.020.3(2) RSMo, however, makes clear that the relevant inquiry is whether employee sustained an *injury* arising out of and in the course of the employment.

Employee: Warren Cotner, deceased

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First, we note that the courts have specifically rejected the proposition that an employee is required to provide testimony identifying the specific reason for an injury-producing fall at work. “There is no requirement that [an employee] must personally identify the specific cause of her fall[.]” *Dorris v. Stoddard County*, 436 S.W.3d 586, 590 (Mo. App. 2014). Second, we note that employee agreed that the incline or slope of the parking lot in which he was performing his duties precipitated his “going backwards” upon arising from a squatting position. *Transcript*, page 210. We credit this testimony from employee, and infer therefrom as follows.

Employee’s action of squatting down upon a significant incline in employer’s parking lot was related to and was a direct function of his employment for employer on June 2, 2011. Employee’s work activity of squatting down on a significant incline *itself* exposed him to the risk or hazard of stumbling or falling upon returning to a standing position. We find, as a factual matter, that it was the risk or hazard of squatting down on a significant incline and subsequently stumbling or falling from which employee’s injuries “came”<sup>2</sup> for purposes of § 287.020.3(2)(b). It is therefore unnecessary to determine what (or whether) any additional, environmental factors may have contributed in causing employee to fall.

There is no evidence on this record to suggest that employee (or workers generally)<sup>3</sup> would be equally exposed to the risk or hazard of squatting down on a significant incline and subsequently stumbling or falling outside of and unrelated to employment in normal nonemployment life. This employee was nearly 68 years of age as of the date of the accident, and suffered from bilateral ankle instability. Especially in light of these facts, we deem the record sufficient to support a factual finding that employee’s work exposed him to the risk or hazard of squatting down on a significant incline and subsequently stumbling or falling to a greater extent and degree than he (or workers generally) faced in normal nonemployment life. We so find. We conclude, therefore, that employee’s injuries arose out of and in the course of employment.

### **Conclusion**

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

The award and decision of Administrative Law Judge L. Timothy Wilson, issued November 13, 2014, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

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<sup>2</sup> The language of § 287.020.3(2)(b) does not, in our view, imply or require an identification of each and every minute factor or physical force (e.g. gravity) that may have contributed to an accident, followed by an inquiry into the degree of work vs. non-work exposure attendant with each, especially where the legislature has specifically directed that “[a]ll proceedings before the commission or any commissioner shall be simple, informal, and summary[.]” § 287.550 RSMo.

<sup>3</sup> Although the statute suggests that the pertinent comparison class is that of “workers” generally, the decisions applying § 287.020.3(2)(b) have instead analyzed whether the *specific* employee’s nonemployment life equally exposed him or her to the injury-producing risk or hazard. See, e.g., *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504, 511-12 (Mo. 2012). Accordingly, we render our findings and conclusions herein in terms of workers generally, as well as this employee specifically, in order to give effect to both the language of the statute (which, of course, we must strictly construe) and the relevant and controlling case law.

Employee: Warren Cotner, deceased

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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 20<sup>th</sup> day of August 2015.

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

## AWARD

Employee: Warren Cotner

Injury No. 11-042143

Dependents: N/A

Employer: Southern Personnel Management, Inc.

Insurer: Lumbermen's Underwriting Alliance

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

Hearing Date: August 12, 2014

Checked by: LTW

### 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: June 2, 2011
5. State location where accident occurred or occupational disease was contracted: Taney 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: While engaged in employment and performing his work duties as a shuttle bus driver for Employer, Employee performed an inspection of the air conditioning compressor underneath the bus, which required him to bend forward and squat as much as possible, and put one leg behind him to stoop in such a position as to listen to the air conditioning compressor. As Employee attempted to stand up, he stepped backwards and his foot stepped on a pebble or otherwise got stuck on the pavement, causing him to stumble backwards and to fall to the ground, landing on the pavement. The slope of the parking lot increased the risk of stumbling and falling to the ground. As Employee stood up and stumbled backwards, the nature of the sloping parking lot enhanced the stumble backwards, resulting in the downhill slope propelling Employee to fall and land on the hard pavement surface in the direction of the downhill slope. As a consequence of this fall, Employee sustained injuries to his right hip, cervical spine and right shoulder.
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: Right Hip, Cervical Spine & Right Shoulder
14. Nature and extent of any permanent disability: 22.5% BAW (90 weeks)

- 15. Compensation paid to-date for temporary disability: None
- 16. Value necessary medical aid paid to date by employer/insurer? None
- 17. Value necessary medical aid not furnished by employer/insurer? \$89,244.74
- 18. Employee's average weekly wages: \$340.00
- 19. Weekly compensation rate: \$226.67 (TTD/PPD/PTD)
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

Unpaid medical expenses: ..... \$89,244.74

30 3/7 weeks of temporary total disability (or temporary partial disability): ..... \$ 6,897.24

Employee is entitled to \$ 6,897.24 in temporary total disability compensation, which represents 30 3/7 weeks of temporary total disability, payable at the applicable compensation rate of \$226.67 per week, payable for the period of June 2, 2011, to January 1, 2012.

90 weeks of permanent partial disability from Employer / Insurer: ..... \$20,400.30

Weeks of disfigurement from Employer / Insurer: ..... N/A

Permanent total disability benefits from Employer / Insurer: ..... Denied

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund: \$226.67 per week, for Employee's lifetime, effective as of June 20, 2012, and shall take into consideration 90 weeks of permanent partial disability, which is attributable to the employer and insurer. There is not a weekly differential between the amount of permanent partial disability compensation and permanent total disability compensation.

**TOTAL: \$116,542.28, PLUS \$226.67 PER WEEK, FOR EMPLOYEE'S LIFETIME**

- 23. Future requirements awarded: Future medical care and permanent total disability compensation (See Award)

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: E. Joseph Hosmer, Esq.

## **FINDINGS OF FACT and RULINGS OF LAW:**

Employee: Warren Cotner

Injury No. 11-042143

Dependents: N/A

Employer: Southern Personnel Management, Inc.

Insurer: Lumbermen's Underwriting Alliance

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

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 12, 2014. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about September 9, 2014.

The employee appeared personally and through his attorney E. Joseph Hosmer, Esq. The employer and insurer appeared through their attorney, Paula Green. The Second Injury Fund appeared through its attorney, Cara Harris, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about June 2, 2011, Southern Personnel Management, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Lumbermen's Underwriting Alliance.
- (2) On the alleged injury date of June 2, 2011, Warren Cotner was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) The above-referenced employment and alleged accident of June 2, 2011, occurred in Taney County, Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.
- (4) The employee notified the employer of his injury as required by Section 287.420, RSMo.
- (5) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (6) At the time of the alleged accident of June 2, 2011, the employee's average weekly wage was \$340.00, which is sufficient to allow a compensation rate of \$226.67 for temporary total disability compensation / permanent total disability compensation, and permanent partial disability compensation.

- (7) Temporary total disability compensation has not been provided to the employee.
- (8) The employer and insurer have not provided medical treatment to the employee.
- (9) SVR Surrey Sales Administration and Surrey Vacation Sales, Inc. are subsidiary corporations or businesses of Southern Personnel Management, Inc. Further, any reference or allegation of employment by the employee with either subsidiary shall constitute reference to employment with Southern Personnel Management, Inc.
- (10) The employee reached maximum medical improvement (“MMI”) on June 20, 2012.

The issues to be resolved by hearing include:

- (1) Whether the employee sustained an accident June 2, 2011; and, if so, whether the accident arose out of and in the course of his employment with the employer?
- (2) Whether the alleged accident of June 2, 2011, caused the injuries and disabilities for which benefits are now being claimed?
- (3) Whether the employer and insurer are obligated to pay for certain past medical care and expenses in the amount of \$90,848.00?
- (4) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?
- (5) Whether the employee is entitled to temporary total disability compensation?
- (6) Whether the employee sustained any permanent disability as a consequence of the alleged accident of June 2, 2011; and, if so, what is the nature and extent of the disability?
- (7) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

### **EVIDENCE PRESENTED**

The employee testified at the hearing in support of his claim. Also, the employee presented at the hearing of this case the testimony of one additional witness – Phillip Eldred, CRC. In addition, the employee offered for admission the following exhibits:

Exhibit A.....Deposition of P. Brent Koprivica, M.D. (Inclusive of Deposition Exhibits)  
Exhibit B-1 .....Photograph  
Exhibit B-2 .....Photograph  
Exhibit C..... Medical Bills (Inclusive of Itemization Summary)  
Exhibit D..... Stipulation for Compromise Settlement in Injury No. 03-144574 (B/T Employee & Herschend Family Entertainment Corp.)  
Exhibit E ..... Stipulation for Compromise Settlement in Injury No. 03-144574 (B/T Employee & SIF)  
Exhibit F..... CV of Phillip Eldred, CRC  
Exhibit G..... Vocational Report of Phillip Eldred, CRC  
Exhibit H..... Statement of Employee to SIF (Injury No. 03-144574)

The exhibits were received and admitted into evidence.

The employer and insurer presented one witness at the hearing of this case – Ryan Peebles. In addition, the employer and insurer offered for admission the following exhibits:

Exhibit 1..... Deposition of Warren Cotner (June 29, 2011)  
Exhibit 2..... Supplemental Deposition of Warren Cotner (May 22, 2013)  
Exhibit 3..... Deposition of Ted Lennard, M.D. (Inclusive of Deposition Exhibits)  
Exhibit 4..... Incident Report

The exhibits were received and admitted into evidence.

The Second Injury Fund did not present any witnesses at the hearing of this case. However, the Second Injury Fund offered for admission the following exhibit:

Exhibit I ..... Work History Questionnaire

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took administrative or judicial notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Answer of Second Injury Fund to Claim for Compensation
- Answer of Employer/Insurer to Claim for Compensation
- Claim for Compensation
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

## DISCUSSION

### *Background & Employment*

The employee, Warren Cotner, is 71 years of age, having been born on June 5, 1943. He resides in Highlandville, Missouri, with his wife, who is fully disabled.

Mr. Cotner attended high school in the State of California, and graduated in 1961. Following high school, in 1961, he attended Ventura Junior College and began working for the Ventura Police Department in January 1962. During the period of January through June 1962 Mr. Cotner attended the Police Academy through Ventura Junior College. During the period of 1961 through 1974 Mr. Cotner attended Ventura Junior College, Cal State North Ridge College, and La Verne College, on and off, completing approximately 144 credit hours in law enforcement.

Following his termination or separation from employment with the Ventura Police Department, Mr. Cotner entered the real estate business. For approximately 10 years, during the period of 1976 to 1986 he worked as a self-employed individual working in a real estate business.

In 1982 Mr. Cotner worked for Montgomery Wards, working in the loss-prevention department. He continued in this employment until in or around 1992. Thereafter, he purchased commercial property and eventually developed that property into a convenience store. In approximately 1998 Mr. Cotner sold the convenience store property and moved to several locations in Mexico and Central America.

In or around 2001 Mr. Cotner returned to the United States, and obtained part-time employment working for Branson Shuttle. Also, in 2003, and continuing for several years, he worked as a security officer for Herschend Family Entertainment Corporation (Silver Dollar City).

In or around September 2009 Mr. Cotner obtained employment with the employer, Southern Personnel Management, Inc., working as a shuttle bus driver. He continued in this employment to June 2, 2011.

### *Prior Medical Conditions*

Prior to sustaining the alleged work injury of June 2, 2011, Mr. Cotner suffered several injuries and/or medical conditions, which caused him to present with certain permanent disability. These prior medical conditions include:

- Neck: In 1950, when he was approximately 7 years old, he fell and fractured a vertebra in his neck.
- Hypertension: In 1957, at the approximate age of 14 years, Mr. Cotner was diagnosed with hypertension. However, since the 1960s Mr. Cotner has received prescription medication for the treatment of hypertension. For his hypertension, employee takes Norvasc and Lisinopril daily.

Low Back: In June 1974 Mr. Cotner sustained a work-related injury while working in the State of California. He received conservative treatment for this injury, having been diagnosed as having traumatic spondylolisthesis of his lumbar spine at L5-S1. Employee wore a back brace for the approximately 2 years as he continued to work for the Ventura Police Department, until receiving a medical discharge in 1976 because he could not perform the full duties of a police officer because of his lower back condition. According to Mr. Cotner, he settled his California workers' compensation claim based on an assessment of permanent partial disability of 29 <sup>3</sup>/<sub>4</sub> percent to the body as a whole. For pain in his lower back (as well as left ankle and right hip), he takes Norco 3 times a day. In addition, he takes Ibuprofen 2 to 4 times daily.

- Psychological: In 1975 Mr. Cotner experienced a psychological incident that caused him to be taken off the police force for three months, and to undergo psychological treatment. According to Mr. Cotner, following the three months of separation from employment as a police officer and undergoing psychological training in 1975, he did well psychologically until his brother died in 1996. With the passing of his brother, he experienced significant psychological problems, including anxiety, depression, paranoia, anger, as well as being suicidal at times.

He continues to experience psychological issues, and since 1996 has taken prescription medication to treat his psychological conditions. This prescription medication includes Xanax, Prozac and Wellbutrin daily for his psychological conditions.

- Right Ankle: In 1983 Mr. Cotner suffered a slip and fall episode, which caused him to sustain a fracture in his right ankle. The nature of this injury necessitated receipt of surgical repair, including internal fixation. He later aggravated this right ankle condition, when he sustained an injury to his left ankle, and began to suffer certain instability in both ankles.
- Left Ankle: In November 2003, while working as a security guard for Herschend Family Entertainment Corporation (Silver Dollar City), Mr. Cotner slipped on a step at night and sustained an injury to his left ankle. The severity of this injury necessitated receipt of medical care and resulted in him suffering residual permanent disability in his left ankle. The employer, Silver Dollar City, and Mr. Cotner settled this Missouri Workers' Compensation claim based on approximate permanent disability of 22.5 percent of the left ankle.

According to Mr. Cotner, after suffering this injury he was required to wear heavy-duty shoes with orthotics in each shoe, and he experienced difficulty walking significant distances. Additionally, this injury caused him to experience certain instability in both ankles, and because of this instability he was no longer able to perform the duties of a security guard. Consequently, Mr. Cotner terminated his employment with Silver Dollar City in March 2005.

- Right Shoulder: In 2008 Mr. Cotner was involved in a head-on motor vehicle accident, which resulted in him sustaining an injury to his right shoulder.
- Hearing Loss: According to Mr. Cotner, he was exposed to very loud noise at the police range shooting firearms without ear protection. In testifying as to his hearing loss, Mr. Cotner stated that he first noticed hearing loss and tinnitus in the late 1960s. In order to understand people and to engage in conversation Mr. Cotner testified that he must watch the lips of people to whom he is speaking. Additionally, he notes having significant problems hearing high-pitched voices and understanding speech where there is background noise.

### *Accident*

On June 2, 2011, while engaged in employment and performing his work duties with the employer, Southern Personnel Management, Inc., Mr. Cotner was working as a shuttle bus driver. Upon delivering prospective clients to the time share management building (“Sales Center”), situated on property owned and controlled by the employer, Mr. Cotner got out of the shuttle bus and walked to the front left side of the shuttle bus to determine whether the front air conditioning unit of the shuttle bus was properly working. Notably, prior to performing this inspection, Mr. Cotner had previously informed the shuttle bus mechanic about the problem with the front air conditioning unit. In turn, the mechanic requested Mr. Cotner to listen to the compressor and help determine whether the unit was grinding or making some other type noise in order to assist in identifying the problem. In the course of performing this inspection Mr. Cotner bent forward and squatted as much as possible, and put one leg behind him to stoop in such a position as to listen to the air conditioning compressor. As he attempted to stand up, he stepped backwards and his foot stepped on a pebble or otherwise got stuck on the pavement<sup>1</sup>, causing him to stumble backwards and to fall to the ground, landing on the pavement.

In falling to the ground, Mr. Cotner tried to protect his lower back by sticking his arms behind him. Upon falling to the ground Mr. Cotner experienced immediate pain and was unable to get up. Also, because his cell phone slid several feet away from him, he was not able to call for help; unable to get up or call for assistance, Mr. Cotner was forced to ly on the pavement for approximately 20 minutes before being noticed and receiving assistance from a colleague. As a consequence of this incident, Mr. Cotner sustained injuries to his right hip, neck and right shoulder.

Shortly after receiving assistance from a colleague, Mr. Cotner’s supervisor was informed of the accident, which resulted in him being notified of the injury and attending to Mr. Cotner at the accident scene. Also, the employer, or a staff worker at the scene, caused Mr. Cotner to be taken by ambulance to the Emergency Room of Skaggs Community Health Center.

### *Medical Treatment*

The attending Emergency Room physician provided initial examination and diagnosed Mr. Cotner with a right intertrochanteric hip fracture, resulting in Mr. Cotner being admitted into

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<sup>1</sup> At the hearing it was noted that this summer day the temperature was very hot, and near the place of accident parts of the pavement had been repaired with tar or asphalt sealant. This tar or asphalt sealant, impacted by the heat, could provide a sufficiently sticky substance to offer an explanation for the foot sticking to the pavement.

the hospital and referred to an orthopedic surgeon. Following an evaluation by both an orthopedic surgeon and an internal medicine physician, recommendations were made for surgery and repair of the right hip fracture. The following day Mr. Cotner underwent an open reduction and internal fixation of the right fracture with intramedullary screw fixation by Darin Talley, M.D.

Post-operatively, Mr. Cotner experienced complications that involved blood loss anemia. The nature of this post-operative medical condition necessitated receipt of extensive in-patient hospital treatment. Eventually, on or about June 10, 2011, Mr. Cotner received clearance to be transitioned into and transferred to the Acute Rehabilitation unit, although he remained hospitalized and a patient of Skaggs Community Health Center. He continued to receive and obtain follow-up treatment on the rehab floor, which allowed him to obtain intensive inpatient therapy.

On June 24, 2011, Dr. Talley discharged Mr. Cotner from the hospital, with a right hip fracture status post intramedullary screw fixation. Additionally, Dr. Talley offered the following as a secondary diagnosis:

1. Hypertension.
2. Neck and shoulder pain due to recent fall at the time of the hip fracture.
3. Histoplasmosis.
4. Prostate cancer.
5. Postop blood loss anemia.

At the time of this discharge, Dr. Talley continued to provide prescription medication for Mr. Cotner, as well as a prescription for equipment to assist Mr. Cotner in standing, walking and attending to his personal comfort. This equipment included prescription for being set up with "heavy duty shower chair with handles, toilet seat, and rails." Additionally, Mr. Cotner received prescription for follow-up medical care, to include in-home health care for "PT, OT, bath aid, and nursing."

Dr. Talley provided Mr. Cotner with follow-up medical treatment throughout 2011, and continuing into 2012. Additionally, during this period of follow-up treatment Mr. Cotner obtained physical therapy through St. John's Physical Therapy. Eventually, on June 20, 2012, Dr. Talley released Mr. Cotner from medical care, determining Mr. Cotner to be at maximum medical improvement.

Notably, at the time of his release from medical care, according to Mr. Cotner, in addition to the right hip pain he presented with neck and shoulder pain, as well as left ankle pain. Yet, according to Mr. Cotner, he did not get medical care for these concerns. The treatment provided in the hospital, and post-operatively by Dr. Talley, focused on treatment of the right hip.

### *Present Complaints*

Mr. Cotner continues to present with weakness and pain in his right lower extremity, and experiences difficulty with range of motion in his right hip. The pain in his right hip is aggravated by prolonged sitting, standing, and walking. He notes having problems in his ability to move his leg; his feet drag and he has to pick-up his legs in order to move. The pain in his

right hip is improved with hydrocodone and lying down. Additionally, Mr. Cotner notes that he does not have normal use in his left leg. He attributes the problems with his left leg due to having a prior bad left leg; but also because he has had to use his left leg more in order to compensate for the problems he is having with his right leg.

Also, Mr. Cotner presents with continuing complaints of constant neck pain that radiates bilaterally to his shoulders. In describing this pain Mr. Cotner notes that this residual pain is situated primarily in the neck region; and although he had a prior neck injury, he was not having any problems with his neck at the time of the work injury of June 2, 2011. According to Mr. Cotner the neck pain is aggravated by prolonged sitting or lying down, or by prolonged cervical extension or flexion. Additionally, Mr. Cotner notes that this pain is relieved by changing body positions, as well as prescription medication, including Norco and Ibuprofen.

On cross-examination Mr. Cotner described the right lower extremity pain as being in the right femur area. Also, on cross-examination Mr. Cotner noted that this pain, in combination with the back pain, makes it very difficult for him to drive. Although he has a handicap placard for his vehicle, he acknowledges that he continues to have a license to drive a taxi cab and shuttle bus; and he passed the DOT physical test in May 2014, which allowed him to continue to have a chauffeur's driving license.

In addition, on cross-examination Mr. Cotner acknowledged that he does not have any difficulty in reading or writing. Additionally, he has computer skills. He does not have any problems doing activities with his hands. However, he notes that the pain associated with his right lower extremity, as well as the pain in his back and left lower extremity, makes it difficult for him to engage in any prolonged activity, and he has to alternate sitting, standing and walking in order to obtain relief from this pain.

#### *Independent Medical Examinations*

##### ***P. Brent Koprivica, M.D.***

P. Brent Koprivica, M.D., a physician practicing in the specialty of emergency medicine and occupational medicine, testified by deposition on behalf of the employee, Warren Cotner. Dr. Koprivica performed an independent medical examination of Mr. Cotner on July 27, 2012. At the time of this examination, Dr. Koprivica took a history from Mr. Cotner, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Cotner, Dr. Koprivica opined that the slip and fall incident of June 2, 2011, was the direct, proximate and prevailing factor in causing Mr. Cotner to sustain an injury to his right lower extremity in the nature of a severe fracture to the right hip, which necessitated receipt of medical care, including surgery involving open reduction and internal fixation (use of intramedullary rod).

In addition, relying principally upon the complaints and medical history provided to him by Mr. Cotner, Dr. Koprivica opined that the work incident of June 2, 2011, caused the employee to sustain an aggravating injury to the right shoulder in the nature of development of a "mild chronic impingement syndrome." Dr. Koprivica similarly opined the work incident of June 2, 2011, caused Mr. Cotner to suffer an injury in the nature of a chronic cervicothoracic strain / sprain injury.

In reviewing the medical treatment obtained by Mr. Cotner, Dr. Koprivica opined that the treatment he received for the aforementioned injuries, including the extended hospitalization and surgery for the right hip fracture was “medically reasonable and a direct necessity in an attempt to cure and relieve Mr. Cotner of the effects of the permanent injuries on June 2, 2011.” Further, Dr. Koprivica opined that Mr. Cotner presents with “chronic pain issues that will need to be addressed on an ongoing basis based on the June 2, 2011, injury... The actual ongoing clinical course will dictate the specifics of those future treatment needs.”

Finally, in considering the nature and extent of the permanent disabilities attributable to the work injury of June 2, 2011, Dr. Koprivica propounded the following opinions:

- Mr. Cotner sustained a permanent partial disability of 25 percent to the right lower extremity, referable to the hip or 207-week level (51.75 weeks).
- Mr. Cotner sustained a permanent partial disability of 5 percent to the right upper extremity, referable to the shoulder or 232-week level (11.6 weeks).
- Mr. Cotner sustained a permanent partial disability of 5 percent to the body as a whole, referable to cervicothoracic region of the spine (20 weeks).

Further, Dr. Koprivica noted that the multiple injuries attributable to this work injury and noted above, considered in isolation, combine to cause Mr. Cotner to present with an overall permanent partial disability of 22.5 percent to the body as a whole (90 weeks).

In considering the nature and extent of the permanent disability existing prior to the work injury of June 2, 2011, Dr. Koprivica propounded the following opinions:

- Mr. Cotner presented with a permanent partial disability of 30 percent to the body as a whole, referable to the lumbar spine (120 weeks). (This rating takes into consideration the California work injury and the traumatic spondylolisthesis.)
- Mr. Cotner presented with a permanent partial disability of 25 percent to the left lower extremity, referable to the ankle or 155-week level. (This rating takes into consideration the prior history of posterior tibialis insufficiency and the other deformities of the left foot.)
- He would defer to a mental health expert to address or assess any psychological or psychiatric disability predating the injury of June 2, 2011.

Dr. Koprivica opined that the aforementioned disabilities present hindrances and obstacles to employment. Additionally, he opined that these disabilities cause Mr. Cotner to be governed by permanent restrictions and limitations. In this regard, Dr. Koprivica prescribed specific restrictions and limitations referable specifically to the work injury, as well as specific restrictions and limitations referable specifically to the preexisting medical conditions.

In light of these governing restrictions, Dr. Koprivica opined that the work injury of June 2, 2011, in combination with the preexisting disabilities create “significant synergism.” In this

regard, Dr. Koprivica opined that the combined effect of these disabilities warrant a formal vocational evaluation, and if the vocational expert expresses the belief that Mr. Cotner is permanently and totally disabled, he would consider Mr. Cotner to be permanently and totally disabled as a consequence of the work injury, in combination with the preexisting disabilities. In this regard, Dr. Koprivica opined specifically that the work injury of June 2, 2011, considered alone and in isolation, does not render Mr. Cotner permanently and totally disabled.

***Robert E. Paul, M.D.***

Robert E. Paul, M.D., testified on behalf of the employee, Warren Cotner, through the submission of medical reports dated May 9, 2005, and June 15, 2005. Dr. Paul performed a medical records review of Mr. Cotner's medical history in lieu of a physical examination of Mr. Cotner. This review was for the purpose of rendering medical opinions relating to the prior work injury of November 29, 2003. In light of his medical records review, Dr. Paul opined that the work injury of November 29, 2003, caused Mr. Cotner to sustain an injury to his left ankle, which was in the nature of a left ankle sprain/strain with a tear (rupture) and sprain/strain of the tibialis tendon. Additionally, Dr. Paul opined that this injury caused Mr. Cotner to experience gait disturbance and shifting weight to his right side, which in turn caused a consequential injury to the right ankle.

In considering the nature and extent of the permanent disabilities attributable to the prior work injury of November 29, 2003, Dr. Paul propounded the following opinions:

- Mr. Cotner sustained a permanent partial disability of 20 percent to the left lower extremity; referable to the ankle or 155-week level (31 weeks).
- Mr. Cotner sustained a permanent partial disability of 5 percent to the right lower extremity; referable to the ankle or 155-week level (7.75 weeks).

In considering the nature and extent of the permanent disability existing prior to the work injury of November 29, 2003, Dr. Paul propounded the following opinions:

- Mr. Cotner presented with a permanent partial disability of 30 percent to the body as a whole, referable to the lumbar spine (120 weeks).
- Mr. Cotner presented with a permanent partial disability of 15 percent to the right lower extremity, referable to the ankle or 155-week level (23.25 weeks).
- Mr. Cotner presented with a permanent partial disability of 10 percent to the body as a whole, referable to the psychological problems (anxiety, depression) (40 weeks).
- Mr. Cotner presented with a permanent partial disability of 10 percent to the body as a whole, referable to the hypertension (40 weeks).

***Ted A. Lennard, M.D.***

Ted A. Lennard, M.D., a physician practicing in the specialty of physical medicine, testified by deposition on behalf of the employer and insurer. Dr. Lennard performed an

independent medical examination of Mr. Cotner on August 14, 2013. At the time of this examination, Dr. Lennard took a history from Mr. Cotner, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Cotner, Dr. Lennard opined that the slip and fall incident of June 2, 2011, caused Mr. Cotner to sustain an injury to his right lower extremity in the nature of a proximal femur fracture, which required surgical repair in the nature of an ORIF. Dr. Lennard further opined that this work injury caused Mr. Cotner to sustain an injury to his cervical spine and right shoulder. According to Dr. Lennard, the injury to the cervical spine was in the nature of a cervical strain; and similarly the injury to the right shoulder was in the nature of a strain.

In considering the nature and extent of the permanent disabilities attributable to the work injury of June 2, 2011, Dr. Lennard propounded the following opinions:

- Mr. Cotner sustained a permanent partial disability of 20 percent to the right lower extremity; referable to the hip or 207-week level (41.4 weeks). Dr. Lennard attributed the entire percentage of disability to the work injury of 207 week-level.
- Mr. Cotner sustained a permanent partial disability of 5 percent to the cervical spine; referable to the cervical strain (20 weeks). In apportioning the permanent disability referable to the cervical spine, Dr. Lennard opined that Mr. Cotner presents with a permanent partial disability of 25 percent to the body as a whole referable to the cervical spine. Dr. Lennard apportioned 5 percent to the work injury of June 2, 2011, while he apportioned 20 percent to the pre-existing severe multi-level degenerative changes, C3-C5 fusions, and C2-C3 instability.
- Mr. Cotner sustained a permanent partial disability of 5 percent to the right shoulder (11.6 weeks). In apportioning the permanent disability referable to the right shoulder, Dr. Lennard opined that Mr. Cotner presents with a permanent partial disability of 10 percent to the right shoulder. Dr. Lennard apportioned 5 percent to the work injury of June 2, 2011, while he apportioned 5 percent to the pre-existing condition.

Also, in evaluating Mr. Cotner's presenting medical condition and need for treatment, Dr. Lennard testified that Mr. Cotner should obtain a neurosurgical consultation due to his C2-3 retrolisthesis and instability. Dr. Lennard further testified that Mr. Cotner may require pain-management and medications. In this regard, Dr. Lennard propounded the following comments:

In the absence of any other pain conditions of Mr. Cotner in limiting his pain complaints only to the events of 6/2/11, he may do fine with over-the-counter anti-inflammatories or analgesics such as Tylenol. In combination with his additional complaints, the combination of the two may lead to requirements of prescription medications for pain.

Also Dr. Lennard testified as follows:

Q. Now, that prescription medication you're talking about would probably be something along the line of hydrocodone or some type of narcotic?

A. That's what he takes presently, yes.

Q. And the reason for a narcotic is that his type of condition needs a very strong pain medication; is that a fair way to put it, or do you have a different way of putting it?

A. Well there are different types of medications that can be used for this. His doctor at this time apparently believes that's what he requires.

Q. And you don't have any reason to have a different opinion at this point, do you?

A. No. Again, I would certainly be open to other types of medications besides narcotics. That's not the only type that's required to treat his condition.

Q. At some point down the road, you're saying, or are you saying right now?

A. Currently.

Q. Ok. Now, narcotics or other types of prescription medication need to be monitored by a physician; is that correct?

A. Yes.

Q. Why is that?

A. For side effects.

Q. And the side effects could be?

A. Drowsiness, sleepiness, constipation, tolerance.

Q. And what's "tolerance" mean?

A. That more medication is required to get the same effect.

Q. In other words, as you take it longer and longer, you need to take more and more of it?

A. Yes, and that's why these medications are frequently not recommended for what he has or his current condition.

Q. Now, is there also long-term damage that can be done to the body from taking these types of medications over a long period of time?

A. When monitored, not usually.

Q. And when you say "when monitored" you're talking about when monitored by a physician?

A. Yes. (Dr. Lennard deposition page 38-40)

In his deposition testimony, Dr. Lennard testified he would leave the decision of whether employee could return to work to the expertise of a vocational expert. Although Dr. Lennard did not address the combination of preexisting and last injury disability, he did note that Mr. Cotner's cervical condition is "severe multilevel cervical disc degeneration with evidence of autofusions from C3 to C5 and instability at the C2-3 level". Further, Dr. Lennard testified the condition of employee's neck would be expected to cause pain, including severe pain at times depending on movement.

As to Mr. Cotner's psychological condition, Dr. Lennard testified that Mr. Cotner "has a lifelong history or a long-time history of depression and anxiety and demonstrated some abnormal findings on his psychometric scores".

### *Vocational Opinion*

#### ***Philip Eldred, CRC***

Philip Eldred, CRC, testified at the hearing on behalf of the employee, Warren Cotner. Mr. Eldred performed a vocational evaluation of Mr. Cotner on December 12, 2012. At the time of this vocational evaluation, Mr. Eldred took a vocational history of Mr. Cotner, reviewed the various medical records, and reviewed the deposition testimonies of Dr. Koprivica and Dr. Lennard. The review of the medical records and medical testimony included review and consideration of the permanent restrictions imposed upon Mr. Cotner by the various physicians. Also, Mr. Eldred administered several vocational tests, including the following: Back Function Questionnaire; Functional Capacity Checklist; Wide Range Achievement Test-Reading (WRAT-4), PTI-Oral Directions Test; and Purdue Pegboard Test.

In light of his vocational evaluation of Mr. Cotner, Mr. Eldred opined that Mr. Cotner is unemployable in the open and competitive labor market as a consequence of the disability resulting from the work injury of June 2, 2011, in combination with the pre-existing disabilities. In rendering this opinion, Mr. Eldred testified that the restrictions imposed by Dr. Koprivica render Mr. Cotner unemployable in the open and competitive labor market. Mr. Eldred further opined that the restrictions imposed by Dr. Koprivica, which render Mr. Cotner unemployable in the open and competitive labor market, relate to the work injury of June 2, 2011, in combination with the restrictions relating to the preexisting disabilities. According to Mr. Eldred, these restrictions restrict Mr. Eldred vocationally to less than sedentary employment. Additionally, Mr. Eldred noted that while Dr. Lennard provided a disability opinion, he did not identify or mention specific restrictions that would govern Mr. Cotner's vocational activity.

## **FINDINGS AND CONCLUSIONS**

The workers' compensation law for the State of Missouri underwent substantial change on or about August 28, 2005. The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation is on the employee, Section 287.808 RSMo. Administrative Law Judges and the Labor and Industrial Relations Commission shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts, and are to construe strictly the provisions, Section 287.800 RSMo.

### **I. Accident & Injury**

The employer and insurer readily acknowledge that the employee sustained an injury to his right hip on June 2, 2011. However, the employer and insurer dispute liability, contending that Mr. Cotner did not sustain a compensable injury. The employer and insurer argue that the incident of June 2, 2011, did not constitute an accident arising out of and in the course of employment. In denying liability, and citing Section 287.020.3(2)(b), RSMo, the employer and

insurer assert the injury did “not come from a hazard or risk unrelated to the employment to which [Mr. Cotner] would have been equally exposed outside of and unrelated to employment in normal nonemployment life.” In presenting this argument the employer and insurer cite *Miller v. Missouri Highway & Transp. Comm’n*, 287 S.W.3d 671 (Mo banc 2009); *Johme v. St. John’s Mercy Healthcare*, 366 S.W.3d 504 (Mo. banc 2012).

The facts presented in this case are distinguishable from *Miller* and *Johme*. These two cases generally “stand for the proposition that an unexplained injury is not compensable merely because the injury occurred at work.” See, *Dorris v. Stoddard County*, 436 S.W.3d 586, 592 (Mo. App. 2014). Notably, in *Pope v. Gateway to the West Harley Davidson*, 404 S.W.3d 315, 320 (Mo. App. 2012) the court explained that adjudication of this issue requires consideration of whether the employee “was injured because he was at work as opposed to becoming injured merely while he was at work.” *Id.* at 320. Similarly, in *Duever v. All Outdoors, Inc.* 371 S.W.3d 863 (Mo. App. 2012), which involved a fall on an icy parking lot; the court distinguished the facts in *Duever* from those presented in *Miller* and *Johme*. In doing so, the court in *Duever* stated that the employee “sustained an injury due to an unsafe condition (the ice itself).” The employee was in the icy parking lot “as a function of his employment;” and he was exposed to the risk of slipping on ice because of his employment.

In the present case, Mr. Cotner sustained the injury to his right hip, cervical spine and right shoulder because he was at work; not merely while he was at work. At the time of this incident Mr. Cotner was engaged in employment and performing his work duties as a shuttle bus driver for the employer. The parties acknowledge that on this summer day the temperature was very hot. Additionally, Ryan Peebles, a security manager employed by the employer, and a person attending to the accident on June 2, 2011, acknowledged the heat on this particular day. Mr. Peebles further noted that parts of the pavement in the area of the accident had been repaired with tar or asphalt sealant.

Further, at the time of the accident Mr. Cotner had just completed the delivery of prospective clients to the time share management building (“Sales Center”), situated on property owned and controlled by the employer. With the prospective clients off of the shuttle bus, Mr. Cotner got out of the shuttle bus and walked to the front left side of the shuttle bus to determine whether the front air conditioning unit of the shuttle bus was properly working. He was performing this inspection because he had previously informed the shuttle bus mechanic about the problem with the front air conditioning unit, and the mechanic had requested Mr. Cotner to listen to the compressor and help determine whether the unit was grinding or making some other type noise in order to assist in identifying the problem. In order to perform this inspection Mr. Cotner bent forward and squatted as much as possible, and put one leg behind him to stoop in such a position as to listen to the air conditioning compressor.

Subsequently, when Mr. Cotner attempted to stand up, he stepped backwards and his foot stepped on a pebble or otherwise got stuck on the pavement, causing him to stumble backwards and to fall to the ground, landing on the pavement. Further, the slope of the parking lot increased the risk of stumbling and falling to the ground. Photographs of the parking lot and this accident scene demonstrate there was a significant slope going downhill from where employee was squatting to listen to the air conditioning compressor. As Mr. Cotner stood up and stumbled backwards, the nature of the sloping parking lot enhanced the stumble backwards, resulting in

the downhill slope propelling Mr. Cotner to fall and land on the hard pavement surface in the direction of the downhill slope.

After consideration and review of the evidence, including consideration of the medical opinions, and recognizing that the legal test governing liability involves applicable law governed by the 2005 amendments to the Workers' Compensation Act, I find and conclude that on or about June 2, 2011, the employee, Warren Cotner, sustained an injury by accident, which arose out of and in the course of his employment with the employer, Southern Personnel Management, Inc. I further find and conclude that the work injury of June 2, 2011, caused Mr. Cotner to sustain an injury to his right hip, neck and right shoulder. The nature of the injuries sustained by Mr. Cotner on June 2, 2011, is as follows:

- The injury to the right hip was in the nature of a tear of right lower extremity in the nature of a proximal femur fracture, which necessitated receipt of medical care, including surgery involving open reduction and internal fixation (use of intramedullary rod).
- The injury to the cervical spine was in the nature of a chronic cervicothoracic strain / sprain injury.
- The injury to the right shoulder was in the nature of a strain with development of a "mild chronic impingement syndrome."

## II. Medical Care

### *Past Medical Expenses*

In falling to the ground, Mr. Cotner tried to protect his lower back by sticking his arms behind him. Upon falling to the ground Mr. Cotner experienced immediate pain and was unable to get up. The nature and severity of the injuries Mr. Cotner sustained as a consequence of this fall necessitated receipt of immediate medical treatment, including the need to be transported by ambulance to the Emergency Room of Skaggs Community Health Center.

The attending Emergency Room physician provided initial examination and diagnosed Mr. Cotner with a right intertrochanteric hip fracture, resulting in Mr. Cotner being admitted into the hospital and referred to an orthopedic surgeon. Following an evaluation by both an orthopedic surgeon and an internal medicine physician, recommendations were made for surgery and repair of the right hip fracture. The following day Mr. Cotner underwent an open reduction and internal fixation of the right fracture with intramedullary screw fixation by Darin Talley, M.D.

Post-operatively, Mr. Cotner experienced complications that involved blood loss anemia. The nature of this post-operative medical condition necessitated receipt of extensive in-patient hospital treatment. Eventually, on or about June 10, 2011, Mr. Cotner received clearance to be transitioned into and transferred to the Acute Rehabilitation unit, although he remained hospitalized and a patient of Skaggs Community Health Center. He continued to receive and obtain follow-up treatment on the rehab floor, which allowed him to obtain intensive inpatient

therapy. Mr. Cotner remained hospitalized with Skaggs Community Health Center until receiving a medical discharge from the hospital by Dr. Talley on June 24, 2011.

Thereafter, as a consequence of this work injury, Mr. Cotner received post-operative care provided by Dr. Talley, which included prescription for physical therapy. Mr. Cotner obtained this physical therapy through St. John's – Physical Therapy.

In light of the foregoing, the evidence is supportive of a finding, and I find and conclude that as a consequence of the June 2, 2011, accident and resulting injury to his right hip, right shoulder and cervical spine, Mr. Cotner incurred medical care and expenses in the amounts and as follows:

Health Care Provider	Date of Treatment	Amount Billed	Insurance Adjustment / Write-off	Insurance Payment	Out-of-Pocket Expenses Paid by Employee	Amount Owed by Employee
ALS I (Ambulance)	06-02-11	\$ 760.99	\$ 0.00	\$ 0.00	\$ 0.00	\$ 760.99
Skaggs Emergency Physicians Services	06-02-11	\$ 490.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 490.00
Skaggs Community Health Center	06-02-11 to 06-10-11	\$48,529.05	\$ 0.00	\$ 0.00	\$ 0.00	\$48,529.05
White River Anesthesia	06-03-11	\$ 1,395.00	\$ 0.00	\$ 0.00	\$ 0.00	\$ 1,395.00
Skaggs Community Health Center	06-10-11 to 06-24-11	\$37,407.80	\$ 0.00	\$ 0.00	\$ 0.00	\$37,407.80
St. John's Regional Health Center – St. John's Physical Therapy	07-26-11 to 08-22-11	\$ 2,266.00	\$1,604.10	\$381.90	\$ 0.00	\$ 280.00
<b>Total:</b>		<b>\$90,848.84</b>	<b>\$1,604.10</b>	<b>\$381.90</b>	<b>\$ 0.00</b>	<b>\$88,862.84</b>

The aforementioned medical care was reasonable, necessary, and causally related to the June 2, 2011, accident. Further, the medical expenses were fair and reasonable.

Notwithstanding, the employer and insurer declined to pay the medical expenses incurred by Mr. Cotner. The employer and insurer deny liability principally based upon the defense that Mr. Cotner did not sustain an accident arising out of and in the course of employment. For reasons noted above, this defense is denied or otherwise rejected. Accordingly, the employer and insurer are ordered to pay to the employee the sum of \$89,244.74 in unpaid medical expenses.

In rendering this decision it is noted that the medical expenses of St. John's Regional Health Center – St. John's Physical Therapy identify a bill in the amount of \$2,266.00; an insurance adjustment that reduced the bill in the amount of \$1,604.10; and an insurance carrier payment in the amount of \$381.90. It is further noted that the health care provider accepted the insurance adjustment and payment, resulting in the employee having a balance owed to the health care provider in the amount of \$280.00. It is believed that the insurer paying this bill is a group insurance carrier, insofar as the parties' stipulation states that the employer and insurer did not provide any medical treatment to the employee. However, the parties did not present any evidence identifying the insurer paying this bill.

The Missouri Workers' Compensation Law directs that an employer's liability is not to be reduced by the amount of contributions to the employee from another source. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818, 822 (Mo. 2003). Section 287.270 reads, "No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder". "Payments from... any source other than the employer or the employer's insurer for liability for Workmen's Compensation are not to be credited on Workmen's Compensation benefits." *Shaffer v. St. John's Reg'l Health Ctr.* 943 S.W.2d 803, 807 (Mo. App.1997). Accordingly, without proof that the bill was paid by the employer and/or insurer in this case, no credit can be awarded to the employer and insurer for the payment of \$381.90.

Yet, the Missouri Courts have determined that an employee may not be entitled to compensation for healthcare provider write-offs. *Farmer-Cummings v. Personnel Pool of Platte County*, 110 S.W.3d 818 (Mo. 2003). In the context of payments made by Medicaid, the Missouri Courts have "ruled that an employee is not entitled to compensation for Medicaid write-off amounts when the total amount submitted to Medicaid will never be sought from claimant." *Id.*, citing *Mann v. Varney Construction*, 23 S.W.3d 231, 233 (Mo.App. E.D. 2000). Similarly, acceptance of an insurance adjustment with acceptance of an insurance payment by a health care provider is an example of a write-off, for which the health care provider is not entitled to seek collection against the employee.

In the present case, in order for the employer and insurer to obtain a reduction for write-downs, write-offs, or adjustments, it must be shown that Mr. Cotner had no reimbursement obligation or other liability to pay such sums. See *Farmer-Cummings*, 110 S.W.3d at 822-23; *Treasurer of Missouri v. Hudgins*, 308 S.W.3d 789, 792 (Mo.App. 2010); *Ellis v. Missouri State Treasurer*, 302 S.W.3d 217, 225 (Mo.App.2009). The employer and insurer presented no evidence to suggest Mr. Cotner's liability for payment of the \$381.90 has been extinguished. Without proof that the bill was paid by the employer and/or insurer in this case or contractually he is not obligated to pay this amount, no credit can be awarded to the employer and insurer for the payment of \$381.90. On the other hand, because the itemized statement of account submitted by St. John's Regional Health Center – St. John's Physical Therapy reflects an insurance adjustment of \$1,604.10, an amount that the employee does not owe to the health care provider, this adjustment is sufficient to merit a reduction or elimination of employer liability for payment of this medical expense.

In light of the foregoing, the employer and insurer are liable to the employee for payment of past medical care and expenses incurred as a consequence of the accident of June 2, 2011, and are ordered to pay to the employee, Warren Cotner, the sum of \$89,244.74 in past medical care and expenses. (This sum represents expenses billed by the health care providers in the amount of \$90,848.84, less the insurance adjustment accepted by the health care provider in the amount of \$1,604.10.)

#### *Future Medical Care*

The employee seeks an award for future medical care. In order to receive an award of future medical benefits under Chapter 287, RSMo, an employee does not need to show "conclusive evidence" of a need for future medical treatment. Instead, the employee need only

show a “reasonable probability” that because of her work related injury, future medical treatment will be necessary. *Stevens v. City of Citizens Memorial Healthcare Foundation*, 244 S.W. 3d 43 (Mo. App. 2008). In this context it must be shown that the need for future medical care “flows(s) from the accident.” *Landers v. Chrysler Corp.*, 963 S.W. 2d 275 (Mo. App. 1997) at 283. Further, the phrase “to cure and relieve” has been construed to mean treatment that “give comfort even though restoration to soundness is beyond avail.” *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo. App. 1996) (parenthesis omitted).

In considering the question of future medical care Dr. Koprivica testified, credibly, that Mr. Cotner presents with “chronic pain issues that will need to be addressed on an ongoing basis based on the June 2, 2011, injury... The actual ongoing clinical course will dictate the specifics of those future treatment needs.” The employer and insurer are thus ordered to provide the employee, Warren Cotner, with such medical care as may be reasonable, necessary and causally related to the work injury of June 2, 2011. This future medical care shall be limited to treatment of the right hip.

### III. Temporary Disability Compensation

The evidence is supportive of a finding that the employee, Warren Cotner, was temporarily and totally disabled for the period of June 2, 2011 (date of injury), to June 20, 2012 (date of maximum medical improvement). However, on cross-examination Mr. Cotner acknowledged that during this period he received unemployment compensation. In this regard, Mr. Cotner testified that in December 2011 he applied for unemployment compensation, and began receiving the unemployment compensation in or around January 2012; he continued to receive the unemployment compensation until in or around December 2012. Additionally, the parties have stipulated that the employer and insurer have not provided Mr. Cotner with any temporary disability compensation.

Accordingly, after consideration and review of the evidence, I find and conclude that the employee, Warren Cotner, is entitled to temporary total disability compensation payable for the period of June 2, 2011, to January 1, 2012 (30 3/7 weeks). Therefore, the employer and insurer are ordered to provide to the employee temporary total disability compensation in the amount of \$6,897.24. This sum represents payment of temporary disability compensation at the applicable compensation rate of \$226.67 per week for the period of June 2, 2011, to January 1, 2012 (30 3/7 weeks).

### IV. Nature & Extent of Permanent Disability

The evidence is supportive of a finding, and I find and conclude that the work injury of June 2, 2011, caused the employee, Warren Cotner, to be governed by certain restrictions and limitations, which constitute a hindrance or obstacle to employment. In rendering this decision I accept as true the restrictions imposed by Dr. Koprivica, who I find credible, reliable and worthy of believe, and persuasive on the issue of permanent restrictions.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the June 2, 2011, accident, the employee, Warren Cotner, sustained a permanent

partial disability of 22.5 percent to the body as a whole referable to the right hip, right shoulder and cervical spine (90 weeks). Also, while this work injury presents a hindrance or obstacle to employment or reemployment, I find and conclude that the work injury of June 2, 2011, considered alone and in isolation, does not render Mr. Cotner permanently and totally disabled. Therefore, the employer and insurer are ordered to pay to the employee, Warren Cotner, the sum of \$20,400.30, which represents 90 weeks of permanent partial disability compensation, payable at the compensation rate of \$226.67 per week.

## V.

### Liability of Second Injury Fund

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as a result of the last compensable injury, and that disability has combined with a prior permanent partial disability to result in total disability. Section 287.220.1, RSMo.; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo. App. 1990); *Anderson v. Emerson Elec. Co.*, 698 S.W.2d 574, 576 (Mo. App. 1985).

This standard was most simply set forth when the Missouri Court of Appeals held:

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 366 (Mo. App. 1992)

In determining the extent of disability attributable to the employer and Second Injury Fund, the extent of the compensable injury must be determined first. *Roller v. Treasurer of the State of Missouri*, 935 S.W.2d 739, 742-43 (Mo. App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is therefore necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

In the present case, after consideration and review of the evidence, I find and conclude that the work injury June 2, 2011, causes Mr. Cotner to suffer residual pain and discomfort, and to be governed by limitations and restrictions. I further find and conclude that while this work injury presents a hindrance and obstacle to employment or potential employment, this injury considered alone does not render the employee permanently and totally disabled. The restrictions resulting from the June 2, 2011, work injury relate primarily to the use of Mr. Cotner's right hip.

Notably, Philip Eldred, CRC, credibly testified that Mr. Cotner was permanently and totally disabled, but as a result of a combination of the June 2, 2011 work injury and the pre-existing medical conditions. Further, Dr. Koprivica deferred to the opinion of Mr. Eldred in the vocational assessment and determination of whether Mr. Cotner is permanently and totally disabled. In rendering this decision, I find Mr. Eldred credible, reliable and worthy of belief.

Further, prior to June 2, 2011, Mr. Cotner suffered from significant pre-existing disabilities referable to the low back, psychological condition, right ankle and left ankle. These pre-existing conditions physically impacted Mr. Cotner's ability to perform certain activities, and to be governed by limitations and restrictions. These preexisting medical conditions caused Mr. Cotner to suffer certain permanent partial disabilities, which meet the statutory threshold set forth in Section 287.230 RSMo.

In considering the nature and extent of these preexisting permanent disabilities, I find and conclude that at the time of the work injury of June 2, 2011, Mr. Cotner presented with several preexisting medical conditions that were industrially disabling, and caused him to suffer permanent disability as follows:

- Mr. Cotner presented with a preexisting permanent partial disability of 30 percent to the body as a whole, referable to the lumbar spine (120 weeks).
- Mr. Cotner presented with a preexisting permanent partial disability of 25 percent to the left lower extremity, referable to the ankle or 155-week level (38.75 weeks).
- Mr. Cotner presented with a preexisting permanent partial disability of 15 percent to the right lower extremity; referable to the ankle or 155-week level (23.25 weeks).
- Mr. Cotner presented with a preexisting permanent partial disability of 10 percent to the body as a whole, referable to the psychological problems (anxiety, depression) (40 weeks).

Synergistically, considering the preexisting disabilities together, Mr. Cotner presented with a preexisting permanent partial disability of 60 percent to the body as a whole. This disability relates to Mr. Cotner's low back condition, left ankle condition, right ankle condition, and psychological condition. I further find and conclude that these preexisting disabilities presented a hindrance and obstacle to employment or potential employment.

The work injury of June 2, 2011, in combination with the pre-existing medical disabilities, causes Mr. Cotner to be governed by significantly greater permanent restrictions and limitations. Both Dr. Koprivica and Mr. Eldred testified that Mr. Cotner is unable to compete in the open labor market due to a combination of the primary work incident and pre-existing conditions.

Accordingly, after consideration and review of the evidence, I find and conclude that as a consequence of the accident of June 2, 2011, and the resulting injury and disability to his right hip, right shoulder and cervical spine, in combination with the preexisting industrial disabilities referable to the low back condition, left ankle condition, right ankle condition, and psychological condition, Mr. Cotner is permanently and totally disabled. Therefore, the Second Injury Fund is ordered to pay to the employee, Warren Cotner, the sum of \$226.67 per week for the employee's lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of June 20, 2012. (The employee reached maximum medical improvement on this date.) Further, the payment of permanent total disability compensation shall take into consideration 90 weeks of permanent partial disability, which is attributable to the employer and insurer.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

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

L. Timothy Wilson  
*Administrative Law Judge*  
*Division of Workers' Compensation*