

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

Injury No.: 05-143549

Employee: Vickie Harrah
Employer: Tour Saint Louis
Insurer: Uninsured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated August 17, 2012. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued August 17, 2012, is attached and incorporated by this reference.

The Commission further approves and affirms 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 2nd day of July 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

DISSENTING OPINION FILED
Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Vickie Harrah

DISSENTING IN PART

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the majority errs in denying employee's request for an award of prejudgment interest on her past medical expenses.

Employee worked as a bus driver for 35 years. During the summer of 2005 she took a job driving employer's trolley. On September 1, 2005, a drunk driver crashed into the trolley while employee was driving it. Employer did not have workers' compensation insurance at the time of the accident.

Employee suffered neck, low back, and right shoulder injuries that necessitated extensive medical treatment, including multiple surgeries to employee's right shoulder. Employee was initially forced to bear the cost of this medical treatment, but has now secured an award of her past medical expenses against the Second Injury Fund under § 287.220.5 RSMo. The question is whether employee is entitled to prejudgment interest on this award.

As recognized in *Eason v. Treasurer of State*, 371 S.W.3d 886 (Mo. App. 2012), the plain language of § 287.220.5 is silent regarding whether an employee may recover prejudgment interest on an award of past medical expenses from the Second Injury Fund. *Id.* at 891. This is true both before and after the 2005 amendments to the Missouri Workers' Compensation Law. But legislative silence on the question of prejudgment interest cannot be interpreted to mean the legislature intended to cut off such relief for injured employees. See *McCormack v. Stewart Enters.*, 956 S.W.2d 310 (Mo. App. 1997). This is because the legislature would undoubtedly have been aware of Missouri's general interest statutes when it crafted the language of the Missouri Workers' Compensation Law. See § 408.020 RSMo. If the legislature intended to prohibit an award of prejudgment interest in the context of workers' compensation, it easily could have said so. As the *McCormack* and *Eason* courts reasoned, the failure of the legislature to address the issue of prejudgment interest means that Missouri's general interest statutes are applicable. See *McCormack*, 956 S.W.2d at 313; *Eason*, 371 S.W.3d at 891.

In rejecting *Eason* and *McCormack*, the majority reasons that the 2005 amendments work the effect that an employee can no longer recover an award of prejudgment interest on past medical expenses because of the requirement under § 287.800 RSMo to strictly construe the language of Chapter 287. The majority correctly cites the case law rule that "[a] strict construction of a statute presumes nothing that is not expressed." *Carver v. Delta Innovative Servs.*, 379 S.W.3d 865, 874 (Mo. App. 2012)(citations omitted). But the majority then takes the unwarranted step of presuming that the legislature in 2005 intended to deprive an injured employee of relief in the form of prejudgment interest under § 287.220.5, where no such intention is expressed in the language of the statute. In other words, the majority can only reach the conclusion that it reaches herein by presuming something that is not expressed anywhere in the 2005 amendments.

Employee: Vickie Harrah

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I would apply § 408.020 and the *McCormack* factors and find that employee met her burden of proving her entitlement to prejudgment interest. Employee showed that the expenses were due, because she paid for them; the amount of the claim is readily ascertainable, in that employee has provided the bills themselves; and employee has made a demand for payment by filing her claim for compensation against the Second Injury Fund. See *McCormack*, 956 S.W.2d at 314. Employee has met each of the requirements under § 408.020 and is entitled to prejudgment interest on her medical expenses.

For the foregoing reasons, I would modify the award of the administrative law judge to find the Second Injury Fund liable for the payment of prejudgment interest on the award of past medical expenses. I respectfully dissent from that portion of the majority's decision denying employee's request for an award of prejudgment interest.

Curtis E. Chick, Jr., Member

AWARD

| | | |
|------------------|--------------------|--|
| Employee: | Vickie Harrah | Injury No.: 05-143549 |
| Dependents: | N/A | Before the |
| Employer: | Tour Saint Louis | Division of Workers' Compensation |
| Additional Party | Second Injury Fund | Department of Labor and Industrial Relations Of Missouri |
| Insurer: | N/A | Jefferson City, Missouri |
| Hearing Date: | May 16, 2012 | Checked by:KOB |

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: September 1, 2005
5. State location where accident occurred or occupational disease was contracted: Saint Charles
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? No
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant was involved in a motor vehicle accident while operating a trolley.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: shoulder, neck and back
14. Nature and extent of any permanent disability: 40% shoulder, 5% back, 5% neck
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$0.00

- 17. Value necessary medical aid not furnished by employer/insurer? \$159,232.51
- 18. Employee's average weekly wages: \$148.85
- 19. Weekly compensation rate: \$99.23 for TTD/\$240.00 for PPD
- 20. Method wages computation: 30-hour rule

COMPENSATION PAYABLE

21. Amount of compensation payable:

| | |
|---|--------------------|
| Unpaid medical expenses (including interest as provided by law): | \$159,232.51 |
| 22 5/7 weeks of temporary total disability (or temporary partial disability): | \$2,253.93 |
| 132.8 weeks of permanent partial disability from Employer | <u>\$31,872.00</u> |
| Total from Employer: | \$193,358.44 |

22. Second Injury Fund liability: Yes

| | |
|--|---------------------|
| 19.2 weeks of permanent partial disability from Second Injury Fund | \$4,608.00 |
| Uninsured medical benefits (excluding interest – see Award): | <u>\$159,232.51</u> |
| Total from Second Injury Fund: | \$163,840.51 |

23. Future requirements awarded: None.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Dean Christianson

FINDINGS OF FACT and RULINGS OF LAW:

| | | |
|------------------|--------------------|--|
| Employee: | Vickie Harrah | Injury No.: 05-143549 |
| Dependents: | N/A | Before the Division of Workers' Compensation |
| Employer: | Tour Saint Louis | Department of Labor and Industrial Relations |
| Additional Party | Second Injury Fund | Of Missouri |
| Insurer: | N/A | Jefferson City, Missouri |
| Hearing Date: | May 16, 2012 | Checked by:KOB |

PRELIMINARIES

The matter of Vickie Harrah (“Claimant”) proceeded to hearing to determine the rights and obligations of the parties under the Missouri Workers’ Compensation Act (the “Act”). Attorney Dean Christianson represented Claimant. Attorney Marcus Raymond represented Tour Saint Louis (“TSL” or “Employer”). Assistant Attorney General Rachael Houser represented the Second Injury Fund.

The parties stipulated that on or about September 1, 2005, Claimant sustained injury in a accident while operating a TSL vehicle. The parties also stipulated Employer had notice of an injury, Claimant filed her claim for compensation within the time prescribed by law, and venue is proper in the St. Louis office of the Division of Workers’ Compensation. Finally, there is agreement that on the date of the accident, TSL was not insured for workers’ compensation liability.

The issues to be resolved in this proceeding are:

1. Is Claimant an employee of TSL for workers’ compensation purposes;
2. Is TSL is a covered employer under the Act;
3. Are Claimant’s injuries medically caused by the accident of September 1, 2005;
4. Is Claimant entitled to payment of past medical bills in the amount of \$159,232.51;
5. Is Claimant is entitled to future medical care;
6. Is Claimant entitled to temporary total disability (“TTD”) benefits from December 22, 2008 through September 30, 2009;
7. What is the average weekly wage, and corresponding rates of compensation;
8. What is Claimant’s permanent partial disability (“PPD”); and
9. Is the Second Injury Fund liable for uninsured medical and/or disability benefits?

Claimant offered the following exhibits, which were admitted without objection:

- A. Deposition of Dr. Volarich
- B. Medical records of Northland Mid America Orthopedics
- C. Medical records of St. Peters Family Medicine

- D. Medical records of Dr. Milne
- E. Medical records of Crosby Chiropractic
- F. Medical records of Crosby Chiropractic
- G. Medical records of Dr. Stahle
- H. Medical records of DePaul Health Center
- I. Medical records of Northwest Infectious Disease
- J. Medical records of NYDIC Open MRI
- K. Medical records of Radiology Consultants Midwest
- L. Medical records of St. Charles Sports & Physical Therapy
- M. Medical records of Surgical Center of St. Louis
- N. Medical records of St. Peters Open MRI
- O. Medical records of Barnes-Jewish St. Peters Hospital
- P. Medical records of Barnes-Jewish St. Peters Hospital
- Q. Medical records of Optioncare Enterprise Inc.
- R. Medical bills and summary
- S. Police report

TSL offered the following exhibits, which were admitted without objection:

- 1. Contractor pay sheet
- 2. Letter from Unemployment
- 3. Year 2005 Form 1099
- 4. Correspondence between contractors
- 5. Release and trust agreement

The Second Injury Fund did not offer any exhibits.

FINDINGS OF FACT

Based upon the above exhibits, and the testimony of Claimant and other witnesses at hearing, I make the following findings.

Claimant's Testimony

Claimant is a 52-year-old woman who has been a bus driver for 35 years. Since 2003, she has worked during the school year for the Fort Zumwalt School District. She made \$12 per hour during the 2004-05 school year, working 35-40 hours per week.

In 2005, Claimant's friend Dianne told her about a job opportunity with TSL. She described TSL as a company that runs buses, designed as trolley cars, for weddings and other special events. TSL also operated regular routes in several St. Louis communities like Winghaven. Claimant met with the owners of TSL at a parking lot where a trolley was kept, was "hired on the spot," and began driving the Winghaven trolley. She testified she worked in the summer only, driving five days per week, between 6-10 hours a day - typically eight - at a \$12 hourly rate. She received a weekly check from which no withholdings were made. The 1099-MISC indicated payments of \$1,935.00 from TSL to Claimant in 2005. She had no written

contract or formal agreement as to how long she would be working for TSL, although she considered it a temporary summer job. There was no uniform, employee handbook, or mandatory meetings, and Claimant provided her own CDL.

Claimant was responsible for driving the trolley car on a specific route through the Winghaven Subdivision. The subdivision had designated trolley stops at places such as pools and shops. Stops and schedules were posted on signs throughout the subdivision. Claimant had no discretion as to where or when she could drive the trolley along the route. She did not take a lunch break but would take two fifteen minute breaks when things were slow or she was refueling. She drove the hour-long route six to eight times per day.

TSL provided three different trolley buses for the Winghaven route. The exterior of each of the buses said "Tour St. Louis". TSL provided basic training, fuel, cleaning and maintenance of the trolleys. The vehicles and keys were kept under a building on the Winghaven route. TSL did not allow Claimant to take the trolley home. There were four other drivers for the Winghaven route. The owners occasionally operated the Winghaven trolleys, and TSL had other routes and jobs in the St. Louis area.

Claimant was not required to purchase any type of insurance for the trolley. After it was damaged in the accident, it was repaired at the direction of TSL. Neither she nor her private insurance company contributed to fixing the vehicle. She also did not purchase any special insurance to cover herself or members of the public while she drove the vehicle.

Claimant's accident occurred on September 1, 2005. She was driving the trolley at approximately 28 miles per hour on Phoenix Parkway. As she rounded a curve, the two vehicles in front of her swerved to avoid a Dodge Neon approaching head on. Claimant was not able to swerve, and the car struck her trolley twice, once on the left side by the rear wheel and again in the back of the trolley. The police later apprehended the hit-and-run driver, who admitted to being drunk. Claimant declined treatment at the scene, but did not continue the route because the vehicle was damaged, her shift was almost over, and she was shaken up despite the fact she had been wearing her seatbelt. Claimant collected a \$50,000 uninsured motorist settlement in the civil lawsuit associated with the event.

She immediately called TSL and reported the accident. Later that evening, she had headaches, neck pain, back pain and right shoulder pain. TSL did not authorize any medical care, so she sought medical treatment through the Barnes-Jewish St. Peters Hospital Emergency Room, where she was treated conservatively and told to follow up with her primary care physician, Dr. Radel. He ordered x-rays, physical therapy and medications, before referring her to an orthopedic surgeon. She saw Dr. Stahle once, and got a second opinion from Dr. Milne. She then began receiving adjustments from the Crosby Chiropractic clinic. She came under the care of Dr. Farley, another orthopedic surgeon, who diagnosed a torn rotator cuff and performed surgery on her right shoulder on December 22, 2008. After this initial surgery, she developed an infection that required hospitalization and three subsequent surgical procedures. Claimant continues to treat with Dr. Radel for her ongoing complaints. He prescribes Mobic for soreness and limited mobility in her shoulder. The Mobic also helps soreness in her lower back, left knee and neck. She does not take this medication continuously because she is concerned about the

effect on her liver. Claimant identified the medical bills that had been marked as Exhibit R. She confirmed she had received these bills for the treatment she had described.

Claimant missed time from work, at the direction of her treating physicians. She did not miss work until December 22, 2008, when she had her first surgery. Dr. Farley returned her to work the first week of May 2009. She drove for the remainder of the school year, into June of 2009. She then worked as a trainer throughout the summer, until her fourth surgery occurred on August 14, 2009. After that, she was off work again for one week.

Claimant is right handed. She continues to have problems with her right shoulder and arm. She can only raise her arm forward or sideways to chin level. She has to use her left arm to assist her right arm above her head. Her right arm is very painful over the top of the shoulder and down towards the elbow. She can lift a glass of water though there are other items she has dropped. She is not able to lift a milk jug with her right arm. She has difficulty sleeping at night on her right side and has to use extra pillows in order to do this. She has difficulty performing activities in her kitchen such as baking, or brushing her hair. She sometimes uses ice in addition to her Mobic prescription. She has soreness in the left side of her neck and low back.

Before this accident, Claimant saw a chiropractor for neck and back complaints, although her symptoms are now continuous, not just occasional. She also had a prior injury to her left knee, and in 2002, she had a total knee replacement. She has had pain in her left knee since then, especially with sitting, standing and driving. It affects her in the way she performs activities at home such as housework and interaction with children. There were no physician-imposed restrictions associated with Claimant's pre-existing conditions.

Testimony of Terri Grotpeter

Ms. Terri Grotpeter was the president of Tour St. Louis, LLC, a business her family owned and operated for twenty-eight years. On May 12, 2011, the company was sold. As president and manager respectively, she and her husband Ed Grotpeter were considered the only employees of TSL. Her company provided tours and transportation throughout the St. Louis metropolitan area, either for individuals or groups. The only function of TSL was to transport people. Although TSL had all necessary licenses in 2005 when Claimant was injured, they did not have workers' compensation insurance.

Ms. Grotpeter considered Claimant an "independent contractor" for Tour St. Louis, not an "employee." She suggested Claimant started working because Dianne needed someone to fill in her hours. Claimant had a CDL, the only job requirement, so she began working sporadically for a couple of months. She stated that when she hired Claimant she told her that she would be an independent contractor because "this is the way we do things." Ms. Grotpeter suggested that Winghaven set the range of hours, but the drivers (specifically mentioned were Claimant, Dianne and Kristy) arranged among themselves to fill the schedule. Exhibit 4 was offered as an example of how drivers covered shifts between themselves. She acknowledged at least six drivers in addition to Claimant who were "independent contractors" as listed on Exhibit 1, and testified she guessed they had 10 drivers in 2005. Mr. and Mrs. Grotpeter occasionally drove as well. She stated the Winghaven Neighborhood Association designed Claimant's route and installed the street signs.

Ms. Grotpeter indicated that from 1983 to 2003, TSL's drivers were employees. However, after talking with some other business owners in town, she decided that TSL could save money by declaring their workers to be independent contractors and no longer carrying workers' compensation insurance. She identified Exhibit 2 as a letter from the Division of Unemployment Security indicating that they were declaring TSL's file inactive since they were not paying wages. She stated that Claimant would submit bills to TSL for her services, though she did not have any of the bills with her and did not know where they were.

Expert Witness Testimony

Dr. David Volarich evaluated Claimant on June 22, 2011, performed a full exam, reviewed medical records and testified by deposition on her behalf. Noteworthy findings included a 30% loss of strength, lost motion, crepitus, atrophy and a positive impingement test of the right shoulder. He also found lost range of motion in her cervical spine, which he attributed both to the work accident and to pre-existing causes. With regard to pre-existing conditions, Dr. Volarich found that she had patellar mistracking in the knee, and weakness in her left leg, which he attributed to the previous knee replacement surgery.

Dr. Volarich diagnosed the following conditions attributed to the work accident: internal derangement right shoulder which was impingement and a rotator cuff tear status post subacromial decompression, acromioplasty, debridement of the glenohumeral joint and mini open rotator cuff repair; wound infection of the right shoulder status post manipulation under anesthesia with incision and drainage of the wound; methicillin resistant staphylococcus aureus infection of the right shoulder, status post incision and drainage; osteomyelitis right humeral head at the site of the repair anchor, status post open right shoulder incision and drainage, removal of the anchor, bone grafting, and placement of antibiotic beads; cervical strain/sprain with posttraumatic headaches; and lumbar strain/sprain. He testified that these diagnoses have resulted in Claimant suffering from disability of 50% of the right shoulder, 15% of the body referable to the cervical spine, and 15% of the body referable to the lumbar spine.

Dr. Volarich also testified to pre-existing disability of 15% of the body referable to the cervical spine (chronic cervical syndrome), 15% of the body as a whole referable to the lumbar spine (chronic lumbar syndrome), and 45% of the left knee (advanced medial compartment arthritis that required medial compartment hemiarthroplasty). He testified and explained how the disability from the primary injury would combine with the disability from the pre-existing conditions to create a greater overall disability. He recommended that Claimant be provided with future options for medical care to treat her ongoing pain complaints. He also recommended restrictions on Claimant's activities.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri:

1. Claimant an employee of Tour St. Louis for workers' compensation purposes.

The cornerstone issue in this case is whether TSL is an “employer” and Claimant an “employee” subject to the Act. An *employer* is defined by the Act as any entity that uses the service of another. § 287.030.1(1)¹. An *employee* is defined as every person in the service of any employer under any contract of hire, whether express or implied, verbal or written, or under any appointment or election, including executive officers of corporations. § 287.020.1. The employer-employee relationship, by the statutory definition, is based on the concept of service, which has been construed by judicial definition to mean controllable service. *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo.App. 1979); *Hinton v. Bohling Van & Storage Co.*, 796 S.W.2d 87 (Mo.App. 1990). So, in seeking to determine whether an employment relationship exists, Missouri courts first apply a “controllable services test”, and if that test does not clearly indicate whether an employment relationship exists, the courts then undertake an analysis based upon the “relative nature of the work” test.

An *independent contractor* is not deemed to be an employee subject to the jurisdiction of the workers' compensation law. *Maltz v. Jackoway-Katz Cap Co.*, 82 S.W.2d 909 (Mo. 1935). An independent contractor is defined as someone who contracts to do work according to his or her own methods without being subject to the control of the other party to the contract, except as to the ultimate result of the work being performed. *White v. Dallas & Mavis Forwarding Co.*, 857 S.W.2d 278 (Mo.App. 1993). It has been said that a contractual designation of a person as an independent contractor will carry at least some weight, though it will not be dispositive of the issue. *Id.*

The *controllable services test* requires that the worker be both “in the service” of the employer, and “controllable” by the employer. *Howard v. Winebrenner*, 499 S.W.2d 389 (Mo. 1973). The word “control” is defined as the employer’s ability to direct the worker’s physical conduct in the performance of the service in question, *Miller v. Municipal Theatre Association of St. Louis*, 540 S.W.2d 899 (Mo.App. 1976), as opposed to the simple right to control the ultimate results of that service. *Howard*, 499 S.W.2d at 389. With regard to “control”, the determination is said to be a question based upon the individual facts in each case, though the one factor that is found to carry the most weight is the factor of whether the employer can end the service of the worker whenever it wants to, without being sued for breach of contract. *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo.App. 1979); *Cope v. House of Maret*, 729 S.W.2d 641 (Mo.App. 1987)². Other relevant factors considered by the courts have been these: the actual exercise of control; the extent of control; the duration of the employment; the method of payment for the services; the furnishing of equipment to the worker by the employer; the relationship of

¹ All statutory references are to RSMo 2000, unless otherwise noted.

² This is one of several cases cited herein that were among those overruled, on an unrelated issue, by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 224-32 (Mo. banc 2003). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus I will not further note *Hampton's* effect thereon

the services to the regular business of the employer; and the contract of employment. *Ceradsky*, 583 S.W.2d 193. It has been said that the control of the worker by the employer does not need to be actually exercised, so long as the employer has the right to do so. *Coy v. Sears, Roebuck & Co.*, 253 S.W.2d 816 (Mo. 1953).

The word “service” is defined as meaning the performance of labor for the benefit of another. *Id.* It is the overall nature of the worker’s service that is to be given the greatest weight over factors such as the particular work being performed at the time of the injury, the place where the work was performed, or the nature and scope of the employer’s business. *Albin v. Hendrich Bros. Implement Co.*, 382 S.W.2d 734 (Mo.App. 1964).

When the controllable services test does not resolve the question of whether an employer/employee relationship exists, Missouri courts apply the “*relative nature of the work*” test in a further attempt to determine the presence of an employment relationship. *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo.App. 1979); *Leach v. Bd. of Police Comm’rs of Kansas City*, 118 S.W.3d 646 (Mo.App. 2003). This analysis does not eliminate any inquiry into the extent of control, but where the right to control is not clear in the analysis, then the “*relative nature of the work*” test focuses the inquiry on the economic and functional relationship between the type of work being performed and the operation of the business served. *Id.* If the worker’s work activity is of a kind necessary in the operation of the business -- so that if not done by the worker it would be done by a direct employee of the business -- or if the services form a regular and continuing part of the cost of the product being produced by the business, then the worker is generally designated as an employee of the business.

The courts have looked to these factors as being relevant in the application of the relative nature of the work test: whether the worker’s services are a regular part of the regular business of the employer; whether the worker’s service is rendered continuously or intermittently; whether the duration of the worker’s services is sufficiently long to constitute the hiring by the alleged employer of continuous services as opposed to the simple contracting by the employer for the completion of a particular job; the skill required of the worker in rendering the services; whether the worker is engaged in an occupation that is distinct and separate from that of the employer; the extent to which the worker’s occupation may be expected to cover itself for work injuries; the extent of control that, by agreement, the alleged employer may exercise over the details of the performance of the services to be rendered by the worker; whether the services are usually performed under the direction of an employer or by a specialist without supervision; which party supplies the tools for the worker; which party supplies or directs the place of service for the worker; the method of payment; whether the parties believe they are creating an employment relationship; and whether the alleged employer operates a business. The Courts have also looked to the method of payment of the alleged employee, saying that payment by wages rather than by the job is strong evidence of the presence of an employment relationship. *Ceradsky*, 583 S.W.2d 193.

Among these various factors, it has been said that proof that an employer furnishes valuable equipment for the performance of the worker’s services almost invariably implies an employment relationship based on the assumed interest of the employer in protecting its investment in the equipment as a matter of sound business practice. *Id.*; *Travelers Equities Sales, Inc. v. Div. of Employment Sec.*, 927 S.W.2d 912 (Mo.App. 1996).

The various factors establish that Claimant was an employee of TSL. From 1983 to 2003, TSL had employees who drove their vehicles. In 2004, with no changes other than the company's desire to save money, TSL declared its employees to be independent contractors, and made some bookkeeping changes. But simply declaring employees to be independent contractors does not make them so. *White v. Dallas & Mavis Forwarding Co.*, 857 S.W.2d 278 (Mo.App. 1993)(facts were sufficient to overcome the designation in an agreement that driver was an independent contractor).

The "controllable services test" shows that an employment relationship existed. The Court in *Ceradsky* said the one factor that is found to carry the most weight is whether the employer can end the service of the worker whenever it wants to, without being sued for breach of contract. *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo.App. 1979). TSL was able to terminate Claimant without incurring liability. There was no contract between the parties, or between TSL and any union organization. There was also no agreement between the parties as to how long the relationship would last. This means that either party, including TSL, could terminate the relationship at any given time, without incurring further liability.

Tour St. Louis not only had the right to exercise control, it also actually exercised it. *Coy v. Sears, Roebuck & Co.*, 253 S.W.2d 816 (Mo. 1953). Other factors found critical by the courts establish TSL controlled Claimant as an employee: TSL furnished, maintained, fueled and insured the equipment; TSL directed the hours when the trolley would be driven, the route that would be driven, the stops to be made (together with the neighborhood association), and the gasoline stations to be used. Claimant did not have use of the vehicles other than while driving the route, and she had to park the vehicles as directed by TSL.

A similar result is reached under the "relative nature of the work" test. This test asks whether the worker's work activity is of a kind necessary in the operation of the business, so that a direct employee of the business would do the work if the worker did not. It also asks whether the services form a regular and continuing part of the cost of the product produced by the business. In the current case, the regular course of TSL's business is to drive trolley cars, and nothing else. Claimant drove their trolley cars. If Claimant did not do it, then -- as was done prior to 2004 -- a direct employee of TSL would have to do so. In fact, Ms. Grotpetter testified that she and her husband -- both direct employees of TSL -- would drive the trolley cars from time to time. Not only was driving the trolley cars a regular and continuing part of the business of TSL, it was the *only* business of TSL.

The court in *Ceradsky* said that proof that the alleged employer furnishes valuable equipment for the performance of the worker's services almost invariably implies an employment relationship based on the assumed interest of the employer in protecting its investment in the equipment as a matter of sound business practice. *Ceradsky*, 583 S.W.2d 193; *Travelers Equities Sales, Inc. v. Div. of Employment Sec.*, 927 S.W.2d 912 (Mo.App. 1996). In the present matter, TSL provided, insured, maintained and fueled valuable equipment: the trolley.

Documents produced by TSL are not competent to establish Claimant's independent contractor status. The letter from Employment Security (Exhibit 2) only shows that unemployment insurance premiums were no longer being paid to the State; it does not address

whether other benefits should have been paid. The TSL-created 1099 tax form (Exhibit 3) shows TSL was treating Claimant as an independent contractor: a designation that has no bearing on the decision making of this tribunal.³ The handwritten document discussing scheduling (Exhibit 4) documents the drivers switching shifts for vacation or other conflicts, which is a practice that is commonplace among employees in various industries and endeavors. It does not show the drivers set the initial schedule or that TSL had no control over scheduling.

Under both the controllable services and relative nature of the work tests, I find the overwhelming substantial and competent evidence establishes that Claimant was an employee of TSL as the term is defined by the Missouri Workers' Compensation Act.

2. Tour St. Louis is a covered employer under the Act.

Missouri law states that if an employer has five or more employees, it is deemed to be an employer for purposes of the workers' compensation law. § 287.030.1(3). Having found Claimant to be an employee, I also find that all similarly situated drivers are also employees for purposes of the application of the Act.

All the evidence produced on the issue establishes TSL had the requisite number of employees. Claimant testified that TSL had at least four other drivers. Ms. Grotpeter testified that she and her husband were employees. She identified Exhibit 1 as a seven-person list of other drivers, not including Mr. and Mrs. Grotpeter. Thus, there were at least nine employees. I find that Tour St. Louis is an employer covered by the Missouri Workers' Compensation Act.

3. Claimant's injuries were medically caused by the accident of September 1, 2005.

There are legitimate questions regarding the nature and extent of the injuries caused by the September 1, 2005 accident. The force of the impact is unclear: although the trolley was not operable afterwards, the drunk driver, who was operating a much smaller vehicle, was able to drive off. Furthermore, after an initial but brief series of treatments following the accident, Claimant did not have any surgical treatment until three years post-accident. Even then, the injury was to her right shoulder, which arguably did not involve the seat belt as the source of the injury.

Despite these questions, TSL has failed to successfully challenge Claimant's medical causation evidence. The Missouri Court of Appeals has said that when the Commission is dealing with complex medical issues it must have expert medical support for its conclusions. *Griggs*, 503 S.W.2d at 704-705. Another court said "[the Commission's] personal views of the evidence cannot provide a sufficient basis to decide the causation question, at least where [the Commission] fails to account for the relevant medical testimony." *Angus v. Second Injury Fund*, 328 S.W.3d 294 (Mo.App. 2010).

³ Just as a Social Security Administration determination of "total disability" does not prove total disability under Missouri's workers' compensation law, the U.S. tax code also does not set the standard by which the employer/employee relationship is adjudicated for Missouri workers' compensation purposes. Even if the Internal Revenue Service had designated Claimant as an independent contractor for income tax purposes, such a designation would have no effect on the determination of this tribunal.

There was only one medical expert to testify in this matter. Dr. David Volarich diagnosed Claimant with the following conditions which he attributed to the work accident: internal derangement right shoulder which was impingement and a rotator cuff tear status post subacromial decompression, acromioplasty, debridement of the glenohumeral joint and mini open rotator cuff repair; wound infection of the right shoulder status post manipulation under anesthesia with incision and drainage of the wound; methicillin resistant staphylococcus aureus infection of the right shoulder, status post incision and drainage; osteomyelitis right humeral head at the site of the repair anchor, status post open right shoulder incision and drainage, removal of the anchor, bone grafting, and placement of antibiotic beads; cervical strain/sprain with posttraumatic headaches; and lumbar strain/sprain. No other physician countered these opinions.

Claimant testified credibly with respect to the injuries that resulted from the accident, as well as to the lack of prior problems with her right shoulder. The suggestion by TSL's witness that Claimant made a statement regarding a prior right shoulder injury is not believable. There is a lack of credible evidence to counter Dr. Volarich's medical opinions or to undermine Claimant's otherwise credible factual description of the accident. The credible evidence leads to the conclusion Claimant sustained injury to her right shoulder, neck and back, in the compensable accident.

4. Past medical treatment/expenses and future medical care.

Claimant alleges that she is entitled to reimbursement for the medical bills she incurred in seeking treatment for her injuries. Claimant testified at trial that she was never offered medical care by Tour St. Louis. She therefore obtained treatment on her own. At trial, she identified an exhibit containing the medical bills totalling \$159,232.51 that she has incurred to date treatment of her injuries. (Exhibit R). Dr. Volarich testified that the medical treatment rendered to Claimant was reasonable and necessary to cure and relieve Claimant's condition.

Since Claimant sustained a compensable injury, it was therefore imperative upon Employer to offer and provide medical care. Employer did not do so. The workers' compensation law states that an injured worker is free to seek medical care from physicians of her own choosing if the employer fails or refuses to provide such care. *Farmer-Cummings v. Future Foam, Inc.*, 44 S.W.3d 830 (Mo.App. 2001). Claimant proved that she was not tendered medical treatment, and she proved that she incurred total medical bills in the amount of \$159,232.51 as a result of the injury of September 1, 2005.

Once Claimant establishes her liability for the medical bills, Employer then has the burden of proving that Claimant's liability for the bills was extinguished. *Farmer-Cummings v. Personnel Pool*, 110 S.W.3d 818 (Mo.banc 2003). This burden requires a showing that Claimant is not required to pay the bills, that Claimant's liability for the bills is extinguished, and that the reason her liability is extinguished does not fall within the provisions of §287.270 of the Missouri workers' compensation law. *Id.* Employer did not offer any such proof, and it is therefore found that Employer is liable to Claimant for \$159,232.51, the cost of her medical treatment. Claimant reached maximum medical improvement on September 30, 2009 at the last visit with Dr. Farley. Interest shall accrue from October 1, 2009 as provided by law.

I find there is insufficient credible evidence on which to base an award for future medical treatment.

5. Temporary Total Disability

Claimant is entitled to past temporary total disability (“TTD”) benefits. She did not begin to miss work until her first surgery, and was off work from December 2, 2008 to early May 2009 (21 5/7 weeks). After returning to work in the first week of May 2009, she continued driving for the remainder of the school year, into June of 2009. She then worked as a trainer throughout the summer. She missed one week after her fourth surgery on August 14, 2009. The total period of TTD due is 22 5/7 weeks.

6. Rates of Compensation

The evidence regarding Claimant’s earnings is imprecise. Claimant testified she drove for TSL during the summer of 2005. She earned \$12 per hour. She testified she typically worked five days per week, and worked 6 to 10 hours a day, usually 8. Yet she only received \$1,935.00 in payments from TSL for the year 2005. Given the credible evidence of Claimant’s annual earnings from TSL, I find her testimony as to near full-time hours not credible. I find credible the fact she regularly worked during the summer of 2005 to September 1, earned \$1,935 for the summer, and was paid an hourly rate of \$12. I take administrative notice that there are 13 weeks in the summer months of June, July and August. I find the average weekly wage to be \$148.85 ($\$1,935 \div 13$ weeks), and the rate for TTD to be \$99.23 ($\$148.85 \times 2/3$).

The evidence is clear Claimant was not a full time employee. Assuming a \$12 hourly rate, which is the only evidence as to hourly rate, Claimant worked 161.25 hours for TSL in 2005. The PPD wage rate for a part-time employee is calculated under §287.250.3 as follows:

If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

Based upon an hourly rate of twelve dollars per hour and thirty hours per week Claimant’s compensation rate for permanent partial disability benefits is \$240.00 per week.

7. Permanent Partial Disability

Claimant seeks to recover compensation from Employer for her permanent partial disability. The employee must prove the nature and extent of any disability by a reasonable degree of certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995); *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. 1974). The determination of the degree of disability sustained by an injured employee is not strictly a medical question, because while the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves

factors which are both medical and non-medical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo. App. 1989). The fact finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo. App. 1975).

There is competent and substantial evidence regarding Claimant's disability. Dr. David Volarich found lost strength, limited motion, positive impingement test, crepitus and atrophy in the shoulder. He also found lost range of motion in her cervical spine, which he attributed both to the work accident and to pre-existing causes. Dr. Volarich found permanent disability of 50% of the right shoulder, 15% of the body referable to the cervical spine, and 15% of the body referable to the lumbar spine.

Claimant's testimony is also competent evidence of disability. She has pain, limited motion, and must use her opposite hand to assist her arm over her head. She can lift a glass of water but not a milk jug. She drops things and has difficulty sleeping at night on her right side. Baking and brushing her hair are difficult. She sometimes uses ice in addition to her Mobic prescription. She also continues to have soreness in the left side of her neck, which is more noticeable when she drives, and occasional has soreness in her lower back.

Based on the substantial and competent evidence, I find Claimant sustained permanent partial disability equivalent to 40% of the right shoulder, 5% of the body as a whole referable to the cervical spine, and 5% of the body as a whole referable to the lumbar spine. Employer TSL is liable to Claimant for 132.8 weeks of PPD benefits.

8. Liability of the Second Injury Fund

In order to recover from the Second Injury Fund, a claimant must first prove a pre-existing permanent partial disability whether from a compensable injury or otherwise, pursuant to §287.220.1. The permanent disability pre-dating the injury in question must "exist at the time the work-related injury was sustained and be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment, should the employee become unemployed." *Messex v. Sachs Electric Co.*, 989 S.W.2d 206, 214 (Mo.App. 1999), cited in *Karoutzos v. Treasurer*, 55 S.W.3d 493, 498 (Mo.App. S.D. 2001).

Claimant seeks Second Injury Fund benefits based on prior complaints to her neck, back and left knee. Prior to the work injury, Claimant occasionally saw a chiropractor for neck and back complaints. She also had a prior left knee injury, and in 2002, she had a total knee replacement. As a result, her knee is painful, uncomfortable and is aggravated by activities. Activities like driving and housework are difficult. There were no physician-imposed restrictions associated with Claimant's pre-existing conditions. Dr. Volarich diagnosed the following pre-existing conditions: chronic cervical syndrome causing disability of 15% of the body; chronic lumbar syndrome causing 15% of the body; and advanced medial compartment arthritis that required medial compartment hemiarthroplasty causing 45% of the left knee. He testified and

explained how the disability from the primary injury would combine with the disability from the pre-existing conditions to create a greater overall disability.

It is found that the prior disability of Claimant's cervical spine and lumbar spine is equal to 5% PPD each of the neck and low back respectively. There is no credible evidence that the prior disabilities to the neck and back were serious enough to have constituted a hindrance or obstacle to employment. Nor do they meet the statutory thresholds of §287.220. The prior conditions of the spine are not considered for purposes of the Second Injury Fund liability calculation. Claimant does, however, have a pre-existing left knee disability that is serious enough to constitute a hindrance or obstacle to employment, and which is equal to 37 ½% PPD of her left knee. The prior disability of the left knee combines with the disability from the primary claim to create a greater overall disability than their simple sum.

Section 287.220 RSMo. sets forth the statutory authority for the determination of Second Injury Fund liability. Assuming the employee is entitled to receive compensation on the basis of a combined disability and the injuries under consideration meet the statutory threshold, the Administrative Law Judge is charged with making three determinations: 1) the degree of disability attributable to all injuries or conditions existing at the time the last injury was sustained; 2) the degree of disability which would have resulted from the last injury considered alone and of itself; and 3) the degree of disability which existed prior to the last injury. The sum of the second and third determinations is then subtracted from the first, with the balance representing the liability of the Second Injury Fund.

I find the degree of Claimant's disability that is attributable to all injuries existing at the time of the last injury is equivalent to 212 weeks of disability. The sum of the primary injury/disability (132.8weeks) and the preexisting disability (60 weeks) is 192.8 weeks. The Second Injury Fund is liable for 19.2 weeks (212 weeks – 192.8 weeks = 19.2 weeks). The Second Injury Fund is found to be liable to Claimant 19.2 weeks of permanent partial disability benefits.

Claimant also seeks to recover uninsured medical expense benefits from the Second Injury Fund. The Act provides additional Second Injury Fund liability where the employer fails to insure its liability under the law. §287.220.5, RSMo. (2005) states:

[i]f an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer. Any funds received by the employee or the employee's dependents, through civil or other action, must go towards reimbursement of the second injury fund, for all payments made to the employee, the employee's dependents, or paid on the employee's behalf, from the second injury fund pursuant to this subsection. The office of the attorney general of the state of Missouri shall bring suit in

the circuit court of the county in which the accident occurred against any employer not covered by this chapter as required in section 287.280.

Employer TSL is uninsured. The Second Injury Fund is liable to Claimant for \$159,232.51 in medical expenses that should have been paid by Employer and/or its insurer.

Claimant is denied pre-judgment interest on the medical expenses from the Second Injury Fund. Counsel for Claimant cited *Eason v. Treasurer of the State of Missouri as custodian of the Second Injury Fund*, --- S.W.3d ----, 2012 WL 1854147, Mo.App. W.D., May 22, 2012 (NO. WD74209) as a case where the claimant recovered interest from the Second Injury Fund. However, because Eason was injured prior to the effective date of the 2005 statutory amendments, and Claimant was injured after the effective date, the *Eason* case is inapplicable. Key to the *Eason* decision was the fact the Act then required its provisions to be liberally construed. Since Claimant was injured after the effective date of the 2005 statutory changes, strict construction is required. Section 287.800 now provides, “Administrative law judges... shall construe the provisions of this chapter strictly.” Strict construction requires this court to interpret and apply the Act based on its plain language. *Robinson v. Hooker*, 323 S.W.3d 418, 424 (Mo.App. W.D.,2010). “[A] strict construction of a statute presumes nothing that is not expressed.” *Allcorn v. Tap Enterprises, Inc.*, 277 S.W.3d 823, 828 (Mo.App. S.D.,2009), citing 3 Sutherland Statutory Construction § 58:2 (6th ed. 2008). There is no express language authorizing recovery of interest from the Second Injury Fund. See *Eason v. Treasurer of State*, 2012 WL 1854147, 4 (Mo.App. W.D.) (Mo.App. W.D.,2012)(“We first note that the plain language of the statute makes no provision for an award of interest against the Second Injury Fund”). The Second Injury Fund is not obligated to pay prejudgment interest in this case.

CONCLUSION

Claimant was an employee of Employer TSL when she was injured in the course and scope of her employment. She is entitled to recover benefits as set for herein. The Second Injury Fund is liable for PPD benefits due and uninsured medical expenses, but not for prejudgment interest. Attorney Dean Christianson shall have a 25% lien for his attorney fee.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation