

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

Injury No.: 12-003592

Employee: Eric Hartman
Employer: DJSCMS, Inc./Suntrup Kia
Insurer: Accident Fund National Insurance Company

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 March 10, 2014. The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued March 10, 2014, 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 16th day of July 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Eric Hartman	Injury No.: 12-003592
Dependents:	N/A	Before the
Employer:	DJSCMS Inc, /Suntrup Kia	Division of Workers' Compensation
Additional Party	N/A	Department of Labor and Industrial Relations Of Missouri
Insurer:	Accident Fund National Insurance	Jefferson City, Missouri
Hearing Date:	December 12, 2013	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: January 13, 2012
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? See Award.
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: Claimant was going to his employer-provided car immediately after being fired, when he slipped on ice and fell.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Back/Body as a whole
14. Nature and extent of any permanent disability: 60% PPD of the body as a whole
15. Compensation paid to-date for temporary disability: \$0
16. Value necessary medical aid paid to date by employer/insurer? \$8,249.82

- 17. Value necessary medical aid not furnished by employer/insurer? \$273,016.01
- 18. Employee's average weekly wages: \$827.76
- 19. Weekly compensation rate: \$551.83 /\$425.19
- 20. Method wages computation: Statutory

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses:	\$273,016.01
43 2/7 weeks of temporary total disability (or temporary partial disability):	\$ 23,886.36
240 weeks of permanent partial disability from Employer:	\$102,045.60

- 22. Second Injury Fund liability: No

TOTAL: \$398,947.97

- 23. Future requirements awarded: Yes. 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: James Hoffman

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Eric Hartman	Injury No.: 12-003592
Dependents:	N/A	Before the
Employer:	DJSCMS Inc, /Suntrup Kia	Division of Workers' Compensation
Additional Party	N/A	Department of Labor and Industrial Relations Of Missouri
Insurer:	Accident Fund National Insurance	Jefferson City, Missouri
Hearing Date:	December 12 and 28, 2013	Checked by: KOB

PRELIMINARIES

The matter of Eric Hartman (“Claimant”) proceeded to hearing to determine whether Claimant sustained a compensable injury when he fell on an icy parking lot immediately after being fired. Attorney James Hoffman represented Claimant. Attorney Eric Eickmeyer represented Suntrup Kia/DJSCMS Inc. (“Employer”) and its insurer, Accident Fund National Insurance.

The parties stipulated that on January 13, 2012, Claimant sustained an accidental injury in St. Louis County. Venue is proper in the City of St. Louis, Employer received proper notice, and Claimant filed a timely claim. Employer paid no benefits, other than \$8,249.82 in medical benefits.

The issues are: 1) Did Claimant’s accidental injury arise out of and in the course of employment; 2) What is the proper rate of compensation; 3) Is Employer liable for past medical expenses in the stipulated amount of \$273,016.01; 4) Is Employer liable for future medical care to cure and relieve the effects of the injury; 5) Is Claimant entitled to recover temporary total disability (“TTD”) benefits; 6) What is the nature and extent of Claimant’s permanent partial disability (“PPD”); and 7) Should the undersigned Administrative Law Judge exercise her discretion to sanction Employer for not producing a corporate designee, or for raising a defense?

The exhibits consisted of the following:

- A. Medical & Billing records from Mehlville Fire Protection District
- B. Medical & Billing St. Anthony’s Medical Center
- C. Medical & Billing St. John’s Mercy Corporate Health
- D. Medical & Billing PRO-Rehab
- E. Medical & Billing William Droege, D.C.
- F. Medical & Billing Dr. Matthew Ruyle
- G. Medical & Billing Open Sided MRI & CT
- H. Medical & Billing R. Peter Mirkin
- I. Medical & Billing Ernst Radiology
- J. Medical & Billing Dr. Ken Smith

- K. Medical & Billing Des Peres Hospital
 - L. Medical & Billing Dr. Petre I. Anguelinin, LLC
 - M. Medical & Billing Therapeutic & Diagnostic Imaging
 - N. Medical & Billing Metro West Anesthesia
 - O. Medical & Billing Dr. Richard Gahn
 - P. Deposition of Larry Esterlen
 - Q. Deposition of Dr. Mirkin
 - R. Deposition of Dr. Volarich
 - S. Letter dated August 21, 2012 from James Hoffmann to Dale Weppner
 - T. Letter dated September 10, 2012 from James Hoffmann to Dale Weppner
 - U. Letter dated September 12, 2012 from James Hoffmann to Dale Weppner
 - V. Letter dated September 24, 2012 from James Hoffmann to Dale Weppner
 - W. Letter dated November 2, 2012 from Dale Weppner to James Hoffmann
 - X. Letter dated January 24, 2013 from Dale Weppner to James Hoffmann
 - Y. Expenses of James Hoffmann
 - Z. Employee's Motion to Sanction Employer/Insurer for Failing to Produce Corporate Designee for Two Corporate Designee Depositions
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- 1. Wage Statement

FINDINGS OF FACT

Claimant is a 48-year old man with over 20 years experience in car sales. Employer employed Claimant as a new and used car salesperson from April 2011 to January 13, 2012. Employer's facilities spanned two locations: the main showroom and business office on Lemay Ferry Road, and the used car-only satellite office down the street on South Lindbergh Road. Claimant worked primarily at the satellite office. Employer required Claimant to wear a button-down shirt, khakis, and formal dress shoes.

Employer paid Claimant a \$300.00 weekly draw plus commission. He also received the use of a demonstration vehicle (the "demo"), with insurance and maintenance included, for business and personal use, which was valued at \$200 per week. At the end of 2011, Employer was in the process of winding up business at the satellite office and moving inventory off the lot. Accordingly, sales were down, markups were cut, and Claimant only earned an average of \$351.42 in the last thirteen weeks leading up to January 13, 2012. Claimant testified that \$645.47, which represents his average weekly earnings for the 2011 calendar year (he earned \$23,882.54 over 37 weeks) to Christmas, is a better and fairer representation of his overall average earnings from Employer. Considering the two additional weeks Claimant worked in 2012 and earned \$600, the average weekly earnings for 39 weeks of employment is \$627.76.

The St. Louis area was hit with an ice storm on Friday, January 13, 2012. Claimant was scheduled to work from 9 a.m. to 9 p.m., but Employer fired him sometime in the 4:00 p.m. hour. Immediately after he was fired, Claimant slipped and fell in the parking lot. There is conflicting evidence as to the details of the firing. Claimant testified his manager Jeremy called a meeting at the satellite office with one other person present, at which time Jeremy told Claimant they had to "part ways at the end of the day" and gave him "five hours to get everything together." Claimant felt rushed to try to get credit for the deals he had in process, and drove his demo to the main

office to talk to the finance department. Upon arrival at the main office, Claimant discovered the finance office door closed, so he said he decided to return to his car to get his paperwork. It was while he was retrieving necessary paperwork that Claimant fell.

Michael Schrieber, Employer's GM, presented a slightly different version of facts leading up to the accident. He testified Claimant was in his Lemay Ferry office when the sales manager, Chris Dixon, terminated Claimant's employment. Claimant walked out of the sales office, and within seconds had fallen in the parking lot. Although he did not witness the event, Mr. Schrieber testified Claimant was leaving the building to have a porter take him home in the demo when he fell. In his many years in the car sales industry, Mr. Schrieber had never known of a salesman who finished deals after termination. He also thought it was unlikely Claimant had deals to finish up since he was not selling cars due to the winding down of business at the satellite office. Lawrence Esterlen, a salesperson who worked with Claimant at the satellite office, testified Employer fired people two different ways: 1) take the demo keys and call a cab; or 2) let the salesperson finish his business. Mr. Esterlen, who did not participate in Claimant's firing but claimed to know it was coming, said the second option was used in Claimant's case.

Regardless of the disputed facts leading up to the accident, there is no dispute that Claimant exited the main office and began walking around a box truck toward the demo, when he slipped on the ice, his feet went out from under him, his buttocks hit the pavement, and he felt something in his back pop. Claimant had not closed out any deals, emptied his desk, or cleaned out/turned over the demo. Although he is not sure whether he saw the fall or just the aftermath, Tim Nothum, a salesman in the main office, was immediately at Claimant's side. He counseled Claimant to stay put, rolled up his jacket as a pillow, and arranged for an ambulance, which was dispatched at 5:18 p.m. and which transported Claimant to St. Anthony's Medical Center.

The emergency room records indicate Claimant slipped on ice, and fell striking his pelvis, head and elbow. Claimant stated that he twisted his back in the fall and his primary complaint was right lower back pain. Claimant complained of sharp lower back pain, following a fall that "occurred at work slipping on icy pavement." The nurse's notes indicate that in the fall he "twisted lower back and heard a pop." X-rays of Claimant's lumbar, thoracic, and cervical spine and pelvis were negative for fractures. Claimant was discharged with a prescription for Vicodin for his back pain and instructions to follow up. A porter came to the emergency room to give Claimant a ride home and to retrieve the demo.

At Claimant's request, a workers' compensation adjuster authorized treatment at St. Johns Mercy Corporate Health, where Claimant reported on January 31, 2012, with back pain. Claimant received conservative care including medications and physical therapy through March 9, 2012, when he was discharged to full duty. Because he was still symptomatic, Claimant requested more treatment. Employer/Insurer denied the claim and refused to provide any additional healthcare.

Claimant testified that as of March 9, 2012, he was unable to work and unable to look for work as a result of his injury. Claimant applied for and received unemployment of \$300.00 per week for six (6) months just after this incident occurred through September of 2012.

Claimant obtained further treatment on his own from Dr. Droege, a chiropractor, Dr. Ruyle, who provided a series of injections, and Dr. Peter Mirkin, a surgeon. The series of lumbar epidural steroid injections only provided temporary relief. On October 16, 2012, at Des Peres Hospital, Dr. Mirkin performed a discectomy with decompression of the L4-L5 nerve roots; an anterior interbody fusion and placement of a cage and internal fixation. Dr. Mirkin released Claimant from care on May 13, 2013, stating that he is doing "reasonably well" that his "range of motion is 75% of normal" and that he is "medically stable". Claimant received more steroid and trigger point injections from Dr. Gahn, who noted overall improvement as of June 11, 2013. The medical bills for all the reasonable and necessary treatment Claimant obtained to cure and relieve the effects of his injury total \$273,016.01.

Claimant currently reports problems with simple tasks such as tying his shoes, getting around the house, and doing laundry. His pain is worse when he is bending, climbing stairs, resting, standing, sitting, stretching, with stress/tension, sneezing, at night, with weather changes, walking and moving from a sitting to standing position. He is unable to coach his children. Claimant tried doing computer work for a friend for a day in September 2013, but was unable to finish out the first day, and lasted only two hours the second day. He told Dr. Volarich he could not work sales because pain makes it hard to focus and concentrate, and he cannot interact properly with customers. Claimant does not have any insurance or a job, is in constant pain, and is often sleepy in the day. He is not currently on any medications or actively seeking treatment.

Dr. Mirkin, an orthopedic surgeon who primarily treats spinal conditions, testified by deposition on Claimant's behalf. Dr. Mirkin confirmed that Claimant had degenerative disc disease, a herniated disc, and a disruptive disc at L4-L5 and underwent an anterior/posterior fusion procedure. On March 13, 2013, Dr. Mirkin told Claimant he could start looking for a sales job, which was a better option than getting into heavy labor. At his last visit on May 15, 2013, Claimant had tightness in his back and his range of motion was 75% of normal. Dr. Mirkin did not formally impose any restrictions or limitations on Claimant.

On causation, Dr. Mirkin testified, "after reviewing these medical records it appears [Claimant] became acutely symptomatic with back pain and buttock pain after a fall at work. It is my opinion that the prevailing factor and his need for treatment is the fall at work." Dr. Mirkin felt Claimant's medical treatment was reasonable and necessary, as were the various medical bills. Dr. Mirkin did not offer any opinion as to permanent partial disability.

Dr. David Volarich examined Claimant on November 15, 2013, issued a report and testified by deposition. Dr. Volarich's opinion was that Claimant suffered an injury on January 13, 2012, resulting in lumbar bilateral lower extremity radicular syndrome secondary to discogenic pain and disc herniation at L4-5, status post anterior and posterior lumbar fusions with instrumentation and post-laminectomy syndrome. He felt Claimant was not at MMI because he was having too much pain, although no further surgical repairs were indicated. Rather, Claimant would benefit from pain treatment, including NSAIDs and various injections or blocks from a pain clinic. If no additional care is provided, Dr. Volarich felt Claimant had permanent partial disability equal to 60% of the body as a whole at the lumbar spine.

With regard to Claimant's ability to work, Dr. Volarich assigned several restrictions, including avoiding bending, twisting, pulling, and other similar tasks to an as needed basis,

careful and limited lifting of weights over 20 pounds, no lifting away from the body, change position and avoid fixed positions, and exercise. He also recommended smoking cessation. However, Dr. Volarich's report did not contain any opinion that Claimant was unable to work on a temporary or permanent basis. At deposition, the following exchange took place between Claimant's attorney and Dr. Volarich:

- Q. Considering his condition and ongoing pain, was he able to work at the time he saw you?
- A. No.
- Q. Has he been able to work since the surgery?
- A. No.
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- Q. If [Claimant] does not receive pain management, will he be able to return to work?
- A. No.

In response to a question on cross examination, Dr. Volarich testified that based on his restrictions, it was possible for Claimant to perform a sales job, "(a)s long as he's able to get up and move around, change positions frequently.... You'd have to wait and see how he does." Dr. Volarich confirmed that the surgeon took Claimant off work for a period of four or five months post surgery, and no other doctor has issued Claimant an off-work order. Other than Dr. Volarich's equivocal and contradictory testimony, there is no other expert testimony indicating Claimant is permanently and totally disabled.

RULINGS OF LAW

Based on the substantial and competent evidence, and the law of the State of Missouri, I find Claimant is entitled to compensation under the Missouri Workers' Compensation Act (the "Act").

I. Claimant's accidental injury arose out of and in the course of employment.

Claimant's injury is compensable in workers' compensation only if it arose out of and in the course of his employment. Section 287.020.3(2) states an injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) It 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.

Pope v. Gateway to West Harley Davidson, 404 S.W.3d 315, 318 (Mo. Ct. App. 2012). Contrary to Employer's assertions, §287.020.3 does not bar Claimant's claim.

Employer's allegation that Claimant's accident did not arise out of and in the course of his employment because he was fired immediately before his accident is in conflict with Missouri

law. In *Jones v. Jay Truck Driver Training Ctr., Inc.*, 736 S.W.2d 468, 469 (Mo. Ct. App. 1987), with relevant facts nearly identical to those in this case, the court addressed whether a recently terminated employee's injury on the employer's premises is compensable under the Act. Because the issue had not been developed in Missouri before 1987, the court examined other jurisdictions, discovering most have found that an employee discharge does not altogether dissolve the employment relationship for purposes of Workmen's Compensation where an employee sustains injuries while leaving the premises within a reasonable time after termination. *Id.*, citing *W.B. David & Son v. Ruple*, 222 Ala. 52, 130 So. 772 (1930); *Nicholson v. Industrial Commission*, 76 Ariz. 105, 259 P.2d 547 (1953); *Peterson v. Moran*, 111 Cal.App.2d 766, 245 P.2d 540 (1952); *Hill v. Gregg, Gibson & Gregg*, 260 So.2d 193 (Fla.1972); *Woodward v. St. Joseph's Hospital of Atlanta*, 160 Ga.App. 676, 288 S.E.2d 10 (1981); *Carter v. Lanzetta*, 249 La. 1098, 193 So.2d 259 (1966); *Zygmuntowicz v. American Steel & Wire Co.*, 240 Mass. 421, 134 N.E. 385 (1922); *Leonhardt Enterprises v. Houseman*, 562 P.2d 515 (Okla.1977). The *Jones* Court only cited a Texas case for the proposition that once the employee resigns or is dismissed, any injury occurring after the severance is not within the scope of Workmen's Compensation regardless of the temporal and proximal circumstances. *Ellison v. Trailite, Inc.*, 580 S.W.2d 614, 615–616 (Tex.Civ.App.1979)

The authority on Workmen's Compensation asserts the prevailing position. Larson, *Workmen's Compensation Laws*, p. 5–287, § 326.10 (1985)¹ advances the following proposition:

Injuries incurred by an employee while leaving the premises, collecting pay, or getting his clothing or tools within a reasonable time after termination of the employment are within the course of employment, since they are normal incidents of the employment relation.

The act of discharging an employee is intrinsic to the employment relationship. *Hill v. Gregg, Gibson & Gregg*, *supra*, 260 So.2d at 195, and the employee is allowed a reasonable time to finish up his affairs with regard to that association. *Jones v. Jay Truck Driver Training Ctr., Inc.*, 736 S.W.2d at 469-70. Whether an employee voluntarily quits his employment or is discharged by his employer, such employee is entitled to a reasonable time to leave the premises of his employer, before it can be said that the relation of employer and employee is so completely severed. *Gardner v. Stout*, 342 Mo. 1206, 1215, 119 S.W.2d 790, 793 (1938).²

Thus, the law of Missouri is consistent with many other jurisdictions that allow a terminated employee a reasonable time to wind up his affairs before he leaves “employment” for

¹ More recently, the court in *Price v. R & A Sales*, 773 N.E.2d 873, 876-77 (Ind. Ct. App. 2002), quoted Arthur Larson & Lex K. Larson, *Larson's Worker's Compensation* § 26.01 (2002) as observing:

Compensation coverage is not automatically and instantaneously terminated by the firing or quitting of the employee. He or she is deemed to be within the course of employment for a reasonable period while winding up his or her affairs and leaving the premises.... Moreover, the allowed interval should be long enough to encompass the incidents that flow directly from the employment, although they may take effect after employment has technically ceased....

The *Price* Court followed Missouri's *Jones v. Jay Trucking* in finding the fired employee entitled to workers' compensation benefits.

² *Gardner v. Stout* was favorably cited with cases from other jurisdictions in *Peterson v. Moran*, 111 Cal. App. 2d 766, 769, 245 P.2d 540, 541 (1952), which held, “The discharge of the employee after quitting time and while he was in the act of traversing the premises, in order to leave them, terminated his further employment as a carpenter for hire, but not his right to leave the premises—as he had come to them—in the capacity of an employee under the protective scope of the Workmen's Compensation Act.”

Workers' Compensation purposes. Whether Claimant was fired at the satellite office and given time to wind up business, or fired in the main office and told a porter would drive him home in the demo, is a distinction without a difference. Claimant was walking to his company car, which contained work-related and/or personal items, and would serve as his transportation home, when he fell on Employer's premises. He was within the course and scope of his employment.

Employer's alternative argument based on § 287.020.3(2) is that the accident comes 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. Employer would have me deny the claim because every St. Louisian could have slipped on ice on January 13, 2012 due to the region-wide inclement weather. The same argument was rejected by the court in *Duever v. All Outdoors, Inc.*, 371 S.W.3d 863, 868 (Mo. Ct. App. 2012), where the claimant, who ran a snow and ice removal company, slipped on an icy office parking lot after a safety meeting regarding the company trailers. *Id.* The appellate court held the claimant was not equally exposed to the risk of slipping on ice because his job required him to be in an unsafe location. *Duever*, 371 S.W.3d at 867–68. That is, by rejecting the employer's argument the court implicitly determined the hazard was not the hazard of slipping on ice in general, but the hazard of slipping on that ice in that particular parking lot. See, *Dorris v. Stoddard Cnty.*, SD32830, 2014 WL 350422 (Mo. Ct. App. Jan. 31, 2014) (Claimant's injury from a fall on a cracked street arose out of and in the course of employment as contemplated by the 2005 amendments).

In the instant case, Claimant would not have been equally exposed to the ice on the dealership parking lot in his non-employment life. The conditions of employment required him to venture outside in inclement weather, walk on the ice covered dealership lot in shoes that were ill-suited for the weather at a dangerous pace. As in *Duever* and *Dorris*, the injury-causing hazard was greater in Claimant's employment life, and his fall is within the course and scope of his employment.

II. Rate of Compensation.

The parties failed to agree on the applicable rate of compensation. Section 287.250.1(4) provides:

If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured.

Section 287.250.2 states in relevant part:

For purposes of this section, the term "gross wages" includes, in addition to money payments for services rendered, the reasonable value of board, rent, housing, lodging or similar advance received from the employer, except if such benefits continue to be provided during the period of the disability, then the value of such benefits shall not be considered in calculating the average weekly wage of the employee. ... "Wages", as used in this section, does not include fringe benefits such as retirement, pension, health and

welfare, life insurance, training, Social Security or other employee or dependent benefit plan furnished by the employer for the benefit of the employee.

Section 287.250.4, RSMo.2000 provides:

If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Section 287.250.4 gives the Commission "considerable discretion in determining an employee's average weekly wage" when there are exceptional facts present. *Nielson v. Max One Corp.*, 98 S.W.3d 585, 590 (Mo. App. 2003)³ quoting *Oberley v. Oberley Engineering, Inc.*, 940 S.W.2d 953, 958 (Mo.App. 1997).

I find that the average weekly wage cannot be fairly and justly determined by the standard calculation under §287.250.1(4). Claimant worked for commission, but his sales location was in the process of being shut down. The inventory was low, the markups were cut, and the sales were atypical. In the 13 weeks prior to his termination, Claimant barely earned more than the minimum draw. I find that a fair and just determination of Claimant's average weekly wage requires the inclusion of all Claimant's earnings in the 39 weeks of employment. As such, based on his credible testimony, I find Claimant's average weekly earnings to be \$627.76.

In addition to his take-home pay, Employer provided Claimant with the use of a demo with the weekly value of \$200 so long as he was employed. This is the type of benefit to be included in "gross wages" pursuant to §287.250.2 because it is a real economic gain received in consideration for work. Missouri courts have endorsed the view expressed by Professor Larson in his treatise on workers' compensation: "In computing actual earnings as the beginning of wage point of wage basis calculations, there should be included not only wages and salary but any thing of value received as consideration for the work, as, for example, tips, bonuses, commissions and room and board, constituting real economic gain to the employee." 2 Larson's Workmen's Compensation Law, Sec. 60.12(a) (1969); *Grimes v. GAB Bus. Servs., Inc.*, 988 S.W.2d 636, 638-39 (Mo. Ct. App. 1999). A car to use 24/7 for work and personal purposes is such a thing of value.

With the inclusion of the value of the demo car, I find Claimant's average weekly wage to be \$827.76. The rate of compensation for TTD and PTD is \$551.83. The rate of compensation for PPD is \$425.19, the maximum rate provided by law.

³This 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. 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.

III. Past and Future Medical Expenses.

Once a compensable injury is found, the inquiry turns to the calculation of compensation or benefits to be awarded. *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 517 (Mo.App. W.D.2011). The compensation or benefits which can be awarded an injured employee include medical treatment (§ 287.140), temporary total disability (§ 287.170), and permanent partial or permanent total disability (§ 287.190 and § 287.200). *Id.* at 517–18; *see also Maness v. City of De Soto*, ED100074, 2014 WL 703342 (Mo. Ct. App. Feb. 25, 2014).

The right to medical aid is a component of the compensation due an injured worker. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. S.D.1996). A worker is entitled to medical treatment as may reasonably be required to cure and relieve from the effects of the injury. *Id.* A sufficient factual basis to award past medical expenses exists when employee identifies all of the medical bills as being related to and the product of his work related injury and the medical bills are shown to relate to the professional services rendered by medical records in evidence. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989). When employee “presents testimony and evidence relating medical bills to an injury and places in evidence the accompanying medical bills and records, the burden of going forward with the evidence shifts to the employer or insurance carrier to prove that such medical bills were unreasonable and unfair.” *Esquivel v. Day's Inn*, 959 S.W.2d 486, 489 (Mo.App S.D. 1998)(same analysis applies to employees as to healthcare providers regarding proving reasonable medical expenses). If the employer refuses to provide treatment, the employee is free to seek treatment on his own and assess the costs to the employer. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 84-85 (Mo.App. E.D. 1995).

Due to his accidental injury, Claimant needed medical treatment was reasonably required to cure and relieve the effects of the injury. Employer knew of the need, but denied the claim and refused to provide treatment. Claimant has provided a sufficient factual basis, through testimony and the stipulations, to award past medical benefits in the stipulated amount of \$273,016.01.

Claimant also seeks to hold Employer responsible for future medical care. His burden is set forth in *Conrad v. Jack Cooper Transp. Co.*, 273 S.W.3d 49, 51 (Mo. Ct. App. 2008), which held, with citations omitted:

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “flow [s] from the accident.”

I find the credible evidence establishes a reasonable probability that Claimant will need future medical care to cure and relieve the effects of his injury. The nature of the injury and subsequent treatment was severe. Claimant has had ongoing complaints and limitations, making pain management a reasonable option. Dr. Volarich did not find surgery indicated, but persuasively testified Claimant might benefit from epidural steroid or trigger point injections, nerve root blocks, TENS units, radiofrequency ablation procedures, or a spinal cord stimulator. I find Employer must provide future medical care to Claimant to cure and relieve the effects of his injury.

IV. Temporary Total Disability.

Claimant seeks to recover temporary total disability benefits. The burden of proving entitlement to temporary, total disability benefits is on Claimant. The purpose of temporary, total disability awards is to cover the employee's healing period, so ...temporary total disability awards are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. *Boyles v. USA Rebar Placement, Inc.* 26 S.W. 3d 418, 424 (Mo.App. W.D.2000), citing *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App.1997). The ability to perform some work is not the test for temporary total disability, but rather, the test is whether an employee is able to compete in the open labor market given the employee's present physical condition. *Boyles* at 425.

Claimant seeks total disability benefits from the date of the accident. During the 39 and 3/7th weeks between the date of the accident and the surgery, I find his physical condition prohibited Claimant from competing in the open labor market. Claimant was on "transitional duty" by order of the authorized treating physician from the date of accident to February 17, 2012, when he was released from care. However, Claimant was still symptomatic and continued to be so through surgery. The credible evidence establishes Claimant was off work under Dr. Mirkin's orders from the day of surgery, October 16, 2012 to May 13, 2013 (29 6/7ths weeks). Dr. Mirkin placed Claimant at MMI as of May 13, 2013. Thus, Claimant was unable to compete in the open labor market for 69 2/7 weeks.

However, Claimant received 6 months, or 26 weeks, of unemployment compensation, and is disqualified from receiving TTD for that time pursuant to §287.170.3, which provides, 'An employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation.' Therefore, Claimant shall recover 43 2/7 weeks of TTD.

V. Permanent Disability.

Claimant seeks to recover permanent total disability compensation. Total disability is defined by statute as the "inability to return to any employment and not merely [the] inability to return to the employment in which the employee was engaged at the time of the accident." §287.020.6; *Mell v. Biebel Bros., Inc.*, 247 S.W.3d 26, 29 (Mo. Ct. App. 2008). "Any employment" means any reasonable or normal employment or occupation. *Id.*, citing *Reeves v. Midwestern Mortgage*, 929 S.W.2d 293, 296 (Mo.App. E.D.1996). Permanent total disability means that "no employer in the usual course of business would reasonably be expected to employ the Claimant in [his or] her present physical condition." *Gassen v. Lienbengood*, 134 S.W.3d 75, 80 (Mo.App. W.D.2004) The burden of establishing permanent total disability lies with the claimant. *Schuster v.State, Division of Employment Security*, 972 S.W.2d 377, 381 (Mo.App. E.D.1998); see *Cardwell v. Treasurer of State*, 249 S.W.3d 902, 911 (Mo.App. E.D.2008)(the claimant has the burden to establish permanent total disability by introducing evidence to prove his claim); see also *Clark v. Harts Auto Repair*, 274 S.W.3d 612, 615-16 (Mo. Ct. App. 2009).

Claimant has not met his burden of proving permanent total disability. Claimant is an articulate person with a history of success in sales, a profession that presents minimal physical challenges. Dr. Mirkin, Claimant's chosen treating physician, indicated he thought it possible for

Claimant to return to work in sales. The report of Dr. Volarich, Claimant's rating physician, was silent as to total disability. Rather, under the heading "Ability to Work," Dr. Volarich listed six vocational restrictions and did not defer to a vocational expert as to employability. I am not convinced by Dr. Volarich's deposition testimony two weeks after he issued his report that Claimant was unable to work since the date of surgery, and specifically on the date of the exam. Furthermore, Dr. Volarich testified on cross-examination that as long as Claimant could get up and move around, he thought it was possible Claimant could perform a sales job based on the restrictions provided. Based on the record as a whole, I find Claimant is not permanently and totally disabled.

There is substantial and competent evidence to establish Claimant has significant permanent partial disability. "Permanent partial disability" means a disability that is permanent in nature and partial in degree. §287.190.6(1). "For permanent partial disability, which shall be in addition to compensation for temporary total disability ..., the employer shall pay to the employee compensation...." §287.190.1; *Maness v. City of De Soto*, ED100074, 2014 WL 703342 (Mo. Ct. App. Feb. 25, 2014). "[T]he extent and percentage of disability is within the special province of the Commission to determine." *Id.*, citing *Taylor v. Labor Pros L.L.C.*, 392 S.W.3d 39, 45 (Mo.App.W.D.2013). "The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability." *Id.* "The Commission is not bound by the experts' exact percentages of disability and is free to find a disability rating higher or lower than that expressed in medical testimony." *Manes*, citing *Tillotson*, 347 S.W.3d at 523 (quotation omitted).

Claimant has presented convincing and undisputed evidence that he has significant disability as a result of his work-related injury. He is in pain. As result, he cannot sleep at night and is therefore drowsy in the daytime. His formerly athletic lifestyle is now limited. He has trouble tying his shoes, getting around the house and doing laundry. His testimony is essentially consistent with the medical records. Dr. Volarich found objective evidence of his subjective complaints, including limited lumbar motion, paresthesias, limited reflexes, surgical hardware/scarring, and gait abnormalities. Dr. Volarich is the only medical expert to opine as to permanent partial disability, assigning a 60% permanent partial disability of the body as a whole due to lumbar radiculopathy that required anterior and posterior fusions at L4-5. The rating accounts for ongoing back pain syndrome, lost motion and recurrent buttocks and leg pain paresthesias consistent with post-laminectomy syndrome.

Based on the record as a whole, including Claimant's testimony, the medical records, and Dr. Volarich's unrebutted testimony, I find Claimant has permanent partial disability of 60% of the body as a whole. Employer is liable to Claimant for 240 weeks of permanent partial disability compensation.

VI. Sanctions.

Claimant seeks sanctions for Employer's failure to produce a corporate designee and assertion of an allegedly unreasonable defense under §287.560 RSMo. Trial courts are vested with discretion as to whether to impose sanctions. *Brewer v. Republic Drywall*, 145 S.W.3d 506, 510 (Mo. Ct. App. 2004), citing *Sher v. Chand*, 889 S.W.2d 79, 82 (Mo.App.1994). The trial court's exercise of discretion is subject to review, but it will not be disturbed unless exercised

unjustly. *Id.*; see also *Dobbs v. Dobbs Tire & Auto Ctrs., Inc.*, 969 S.W.2d 894, 898–99 (Mo.App.1998).

The parties did not resolve their pre-trial discovery disputes. Discovery allows access to relevant, non-privileged information, while minimizing undue expense and burden. *State ex rel. Gamble Constr. Co. v. Carroll*, 408 S.W.2d 34, 38 (Mo. banc 1966)(emphasis added). Discovery should be conducted on a “level playing field,” without affording either side a tactical advantage. *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992). The workers' compensation scheme does not include interrogatories, requests for admissions, and other wide ranging discovery devices found in th[e] Court's rules that could make the process more complicated and extended than it needs to be. *Fisher v. Waste Mgmt. of Missouri*, 58 S.W.3d 523, 527 (Mo. 2001). There is...a provision for the taking of depositions, along with the power to subpoena witnesses and materials. In many, perhaps most, workers' compensation cases, such a formal mode of discovery is neither necessary nor desirable for economic reasons. *Id.*

The purpose of deposing a corporate representative is not to uncover the representative's personal knowledge or recollection of the events at issue. Instead, Rule 57.03(b)(4) required the representative to testify regarding the Defendant's knowledge of these matters. *State ex rel. Reif v. Jamison*, 271 S.W.3d 549, 551 (Mo. 2008). This assumes the corporation “knows” more than personal knowledge of the individuals. Under certain circumstances, corporate designee depositions have been found annoying, burdensome, expensive, and oppressive. An opposing litigant may not use the threat of a burdensome deposition as a bargaining chip or annoying tactic. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 606 (Mo. 2002), citing *Fogelbach v. Director of Revenue*, 731 S.W.2d 512, 513 (Mo.App.1987).

In the pre-trial process, Claimant’s attorney requested a corporate designee deposition pursuant to Rule 57.03(b)(4) to solicit witness names, facts that would be in the court file, and facts otherwise known to Claimant. Claimant also wanted Employer to reveal the factual basis for its defense and other legal conclusions. Employer agreed to voluntarily produce multiple fact witnesses to address most of the information sought, but refused to reveal its legal conclusions. Employer filed a motion to quash, not a protective order.

The information Claimant sought was either privileged, admitted, or available by less burdensome means. The relevant facts could be developed by the individual fact witnesses already identified, without the necessity of a corporate designee. Employer voluntarily produced much of the information sought, but did not properly raise its challenge because a protective order should issue if annoyance, oppression, and undue burden and expense outweigh the need for discovery. *State ex rel. Ford Motor Co. v. Messina*, 71 S.W.3d 602, 607 (Mo. 2002).

While technically, Claimant has the right to seek a corporate designee deposition, in this case, because the information sought was either undisputed, privileged, or available by other means, Claimant’s pursuit of the deposition is inconsistent with the simplicity of workers’ compensation discovery rules and borders on annoyance with undue burden and expense. Employer is cautioned to follow the appropriate means to challenge such legal maneuvers in the future, but will not be sanctioned in this case.

Employer is also not liable for sanctions for an unreasonable defense. Employer had a legal defense, and although it ultimately proved unsuccessful, it was not an unreasonable

position. It should be noted that neither party cited the pivotal case of *Jones v. Jay Truck Driver Training Ctr., Inc.*, 736 S.W.2d 468, 469 (Mo. Ct. App. 1987) which determined the outcome of the legal argument.

CONCLUSION

Claimant's accidental injury occurred immediately after he was fired, but while he was still in the course and scope of his employment. The claim is compensable, and Employer is liable for benefits as set forth in this Award. The motion for sanctions is denied.

Attorney James Hoffman shall have a lien for attorney fees in the amount of 25%.

Date: _____

Made by: _____

KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation