

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 07-098439

Employee: Mark Harvath
Employer: United Parcel Service
Insurer: LM Insurance Corporation
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated August 25, 2008.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Administrative Law Judge Matthew D. Vacca, issued August 25, 2008, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 2nd day of February 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

TEMPORARY OR PARTIAL AWARD

Employee:	Mark Harvath	Injury No.:	07-098439
Dependents:	N/A	Before the	
Employer:	United Parcel Service	Division of Workers'	
Additional Party:	N/A	Compensation	
Insurer:	LM Insurance Corporation	Department of Labor and Industrial	
Hearing Date:	June 3, 2008	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	MD:cw

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: October 15, 2007
5. State location where accident occurred or occupational disease contracted: St. Louis, County
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
- 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 happened or occupational disease contracted: Driving truck when jerked wheel and twisted injuring neck.
12. Did accident or occupational disease cause death? Date of death?
13. Parts of body injured by accident or occupational disease: Neck and left upper extremity
14. Compensation paid to-date for temporary disability: N/A
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? \$3,962.00

Employee: Mark Harvath

Injury No.: 07-098439

- 17. Employee's average weekly wages: \$1,114.08
- 18. Weekly compensation rate: \$742.72/\$389.04
- 19. Method wages computation: Agreed

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses:	\$3,962.00
Future medical care:	*
Temporary total disability benefits:	**

- Second Injury Fund liability: Open

(Use of an asterisk denotes a continual future benefits)

TOTAL:	\$3,962.00 * **
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22. Future requirements awarded: See award

Each of said payments to begin and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Gary Wolfe

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark Harvath

Injury No.: 07-098439

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: United Parcel Service

Department of Labor and Industrial
Relations of

Additional Party: N/A

Missouri

Jefferson City,

Missouri

Insurer: LM Insurance Corporation

Checked by: MD:cw

ISSUES

The issues presented for resolution at trial are accident, course and scope of employment and medical causation. Claimant also requests past and future medical benefits and temporary total disability benefits during any such future periods of medical care when he is unable to work.

FACTS

1. Claimant was 52-years old at the time of trial with a high school education and two years of junior college. Mr. Harvath has been working as a package car driver for United Parcel Service (UPS) for more than thirty (30) years. The claimant's job duties require him to lift, move and deliver approximately 120 to 140 packages per day to a primarily residential area. The claimant must drive and operate the UPS package truck in delivering the packages to various locations.
1. At the time of accident, the package car truck driven by the claimant was approximately twenty-five (25) years of age and had nearly one (1) million miles driven on it. The suspension of the truck reflected the age and use of the truck and the low back seat was fixed with no separate suspension. The ride was described by the claimant as "brutal". The seatbelt restraint was a lap belt only.
1. On October 15, 2007, claimant was driving approximately fifty (50) miles per hour on Babler Access Road or Highway 109 when due to inattention, he hit a series of rough pavement, depressions, grates and/or a low road shoulder which caused him to nearly lose control of his truck. As he tried to jerk the truck back into the middle of his lane, Claimant over corrected and jerked back the other way. During this incident, Claimant was suddenly and violently thrown to the left while restrained only by a lap belt. The claimant alleges this accident was sudden and unexpected and while he was not thrown out of his truck, he was violently thrown to the left in a manner that had never occurred to him before.
1. There were two specific portions of the roadway that were deteriorated and which he drove over during the incident. The first patch was adjacent to 850 Babler Access Road and the second near 813 Babler Access Road. Claimant alleges the first incident at 850 Babler Access Road was sudden and violent and resulted in him feeling immediate pain in his neck and the second incident at 813 Babler Access Road unnerved him so as to cause him to pull off the road and compose himself. Claimant reported the injury to his supervisor from the field within an

hour of its occurrence, but completed his route that day before seeking medical treatment.

1. The claimant had a pre-existing injury to his neck which resulted in a January 5, 1995 cervical fusion surgery. The claimant was released at full duty from that injury and surgery on approximately October 23, 1995, and had few, if any, continuing neck and left arm problems. The claimant testified at trial he did not recall ever seeking medical treatment or missing work due to his 1995 neck injury and surgery after his release from treatment by his physician at the time on October 23, 1995, until the occurrence of the October 15, 2007 injury on Babler Access Road.
1. After completing his work on the day of the accident, the claimant went to the emergency room at St. Joseph Health Center. The claimant reported a neck injury with shooting pains after hitting a pothole while driving his UPS truck. The claimant was also evaluated by the employer/insurer chosen physician, Dr. Cynthia Byler, on October 16, 2007. The claimant gave a history of hitting a dip in the road or grate and being violently banged around in his vehicle. Dr. Byler ordered a cervical MRI which showed a diffuse cord compression and foraminal narrowing at C3-4, C4-5 and C5-6. Dr. Byler prescribed physical therapy which began on October 18, 2007. On October 24, 2007, the claimant began to experience numbness on the back of his left hand and Dr. Byler decided to refer him to an orthopedic specialist, Dr. Keith Wilkey.
1. The claimant was initially seen by Dr. Wilkey on October 25, 2007. The claimant gave a history of driving his delivery truck over the road and being thrown up in the air sustaining a twisting injury to his neck. The neck pain started immediately and then a week or so later he developed left arm radicular symptoms. The claimant advised Dr. Wilkey of his prior cervical fusion, but stated he had no continuing problems in the intervening years. After an examination of the claimant and review of diagnostic testing, Dr. Wilkey recommended a cervical epidural injection, diagnosed an acute C6 radiculopathy and recommended a power steering truck for the claimant. An epidural injection was administered to the Claimant on November 20, 2007 by Dr. Wilkey.
1. On November 28, 2007, in order to more fully diagnose the claimant's cervical radiculopathy, Dr. Byler referred the claimant to Dr. Daniel Phillips for a nerve conduction and EMG report. Dr. Phillips diagnosed a C4-5 and C5-6 radiculopathy with the C5-6 level appearing more active. Dr. Wilkey then saw the claimant again on December 11, 2007, on a follow-up visit. Dr. Wilkey noted the findings of the EMG report and claimant's slow response to conservative care. Dr. Wilkey provided his written opinion that his findings and diagnosis were directly and causally related to the work injury that was sustained while working at UPS and he recommended cervical decompression at C4-5 and C5-6. The claimant was advised at this medical appointment that his cervical fusion surgery would be scheduled shortly after the first of year, in early January of 2008.
1. On January 8, 2008, Christina Gerritsen, insurance adjuster for Gallagher Bassett Services, the third-party administrator for the employer in this case, sent correspondence including a photo of a street to Dr. Wilkey after receiving a request for surgical authorization for the Claimant. Adjuster Gerritsen posed numerous facts in this correspondence to Dr. Wilkey, not questioning the need for surgical intervention, only questioning whether the work accident was the prevailing cause of the need for the medical treatment. After reviewing this correspondence from the insurance adjuster questioning the causation of the work accident, Dr. Wilkey reversed his December 11, 2007 medical causation opinion and determined the work accident was not the prevailing cause of the Claimant's need for surgery. Once Dr. Wilkey reversed his medical causation opinion, the Claimant was denied additional medical treatment and medical bills of Open MRI and Advanced Training and Rehab were refused for payment by adjuster Gerritsen.

1. Claimant was examined and evaluated by neurosurgeon, Dr. David Kennedy, on February 28, 2008. After reviewing relevant medical records and films, after taking various histories from the claimant, after performing a physical examination on the claimant, and based on his background as a board certified neurosurgeon, Dr. Kennedy was of the opinion the October 15, 2007 work accident was the prevailing cause of the claimant's neck injury. Dr. Kennedy agreed with Dr. Wilkey that the claimant required surgical intervention to correct the C4-5 and C5-6 radiculopathies in his cervical spine.

1. Dr. Kennedy opined the prevailing factor or cause of the claimant's neck injury and need for surgery was the October 15, 2007 work accident. The basis for this opinion was fourfold, 1) Claimant's history of the work accident, 2) Immediate neck pain, 3) the EMG study showing recent denervation of the cervical levels of C4-5 and C5-6, and 4) Claimant's description of the torque to his neck that this was sufficient impact or injury to produce the symptoms.

1. Dr. Kennedy found the EMG report to be critical to his causation opinion because the affected levels of Mr. Harvath's cervical spine were acute and the denervation could not have existed very long or the atrophy of the Claimant's left arm would have been much more profound. Dr. Kennedy testified that the electrical study results were more likely of a recent injury and by history, clearly relating to the October 2007 event.

1. The specific condition of the roadway where the Claimant drove on October 15, 2007, had little significance to Dr. Kennedy, but it was the twisting and torque to the neck that formed the basis for his medical opinion. Dr. Kennedy had no evidence that the claimant's neck complaints began from any source other than the October 15, 2007 work accident and he stated that all medical records from Dr. Byler, Dr. Wilkey and St. Joseph Health Center all supported his diagnostic conclusions and the occurrence of the work accident.

1. Testifying on behalf of the employer/insurer on medical causation was orthopedic surgeon, Dr. Keith Wilkey. Dr. Wilkey was the chosen and authorized treating orthopedic specialist for the claimant and he examined Mr. Harvath on two occasions in 2007. Dr. Wilkey's two medical evaluations of the Claimant formed the basis of his December 11, 2007 medical report where he determined "[i]t is within a reasonable degree of medical certainty that these findings and diagnoses are directly and causally related to the work injury that he sustained while working at UPS when his vehicle was struck." This medical opinion clearly found Mr. Harvath's neck injury and need for surgery to be work related. Dr. Wilkey advised the claimant the surgery would be scheduled for early January, 2008, during the December 11, 2007 office examination.

1. The insurance adjuster sent Dr. Wilkey a letter with a single photograph incorrectly identified as the roadway driven by the Claimant and questioning the doctor's medical opinion and asking Dr. Wilkey to reconsider his medical causation opinion. Dr. Wilkey changed his medical causation opinion, the surgery for Mr. Harvath was never scheduled and his injury claim was denied. The photograph sent to Dr. Wilkey was of a portion of the roadway of Babler Access Road, but for some reason was not the portion of the road specifically identified by the claimant as the site of his accident. Employer took a single still photograph of a different location on October 16, 2007. This mistake was not realized for about six (6) months and resulted in no contemporaneous photograph being taken of the accident site at 850 Babler Access Road. There is no proof the condition of the

roadway near 850 Babler Access Road is any different than as described by Claimant.

1. The UPS Report of Injury clearly documents UPS was notified of this work injury on the day it occurred, that the time of injury was 12:50 p.m., that the claimant's neck was injured in the accident and that the accident occurred at 850 Babler Access Road in Chesterfield, Missouri.

1. Employer's adjuster took an Accident Statement from Claimant which corroborates the same accident information as the Report of Injury with an even more specific description.

1. Medical records from St. Joseph Health Center dated the same day as the accident document Claimant injured his neck when driving his UPS truck over a pothole. (Claimant's Ex. C). Medical records of the UPS clinic doctor, Dr. Byler, corroborate the work accident on October 15, 2007. Dr. Byler's medical note of the day after the accident, contains a medical history from the Claimant that he was driving his 1983 package car when he drove over a dip in a road/grate and was violently banged around in the vehicle causing left sided neck pain that was felt behind his shoulder blade. (Claimant's Ex. B). Finally, the October 25, 2007 medical note of Dr. Keith Wilkey, another employer authorized physician, documents a twisting injury to the neck when the claimant's truck hit a bump and he was thrown up in the air.

CONCLUSIONS OF LAW

Accident/Prevailing Factor

“As of the date of this accident § 286.120.1 RSMo, as amended in 2005, provided, in pertinent part, as follows:

Every employer subject to the provisions of this chapter shall be liable, irrespective of negligence, to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment,

The definitions of both accident and injury were significantly changed in the 2005 legislation. The definitions are set forth in § 287.020.2 RSMo and § 287.020.3 RSMo, and are as follows:

2. The word “accident” as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.
3. (1) In this chapter the term “injury” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
 - (2) 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 non-employment life;
 - (3) An injury resulting directly or indirectly from idiopathic causes is not compensable;
 - (4) A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the resulting medical condition;
 - (5) The terms “injury” and “personal injuries” shall mean violence to the physical structure of the body and to the personal property which is used to make up the physical structure of the body, such as artificial dentures, artificial

limbs, glass eyes, eyeglasses, and other prostheses which are placed in or on the body to replace the physical structure and such disease or infection as naturally results therefrom. These terms shall in no case except as specifically provided in this chapter be construed to include occupational disease in any form, nor shall they be construed to include any contagious or infectious disease contracted during the course of the employment, nor shall they include death due to natural causes occurring while the worker is at work.

In addition to these definitions the legislature also provided the following additional legislation contained in § 287.020.10 which is as follows:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of “accident”, “occupational disease”, arising out of”, and in the course of the employment” to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W. 3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Construing these statutory sections, in order for an employee to prove a compensable case, the employee must prove he or she sustained an injury due to an accident arising out of and in the course of employment. In the instant case, the employee described the occurrence of the accident and injury sustained. There was no evidence proffered to impeach or contradict [claimant’s] testimony and accordingly the Commission finds [claimant’s] description of the accident and injury sustained to be credible and worthy of belief.

Pursuant to the statutory changes enacted in 2005, accident is defined as: an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. Furthermore, an injury is not compensable because work was a triggering or precipitating factor.

The definition of “trauma” includes (1) “an injury (as a wound) to living tissue caused by an extrinsic agent” as well as (2) “an agent, force or mechanism that causes trauma” (Merriam-Webster Collegiate Dictionary, 10th Ed.).

The occurrence, as described by the employee, consisted of the presence of some agent, force, mechanism or circumstance that subjected [claimant’s] body to unusual and unexpected forces which resulted in injury.” *Norman v. Phelps County Regional Medical Center*, 06-001823, (LIRC, January 8, 2008).

Applying the plain meaning of this language to the facts in the instant case, employee satisfied his burden of proof as to the existence of an accident. Employee testified that while driving his route he became inattentive, crossed the center line and jerked the vehicle back to the right and onto the shoulder and hit some rough pavement and jerked the wheel again to regain control. During this mishap he jerked and twisted violently to the left and injured his neck. This described activity constitutes a traumatic stimulus or unexpected traumatic event clearly identifiable by time and place of occurrence and clearly producing at the time objective symptoms of an injury caused by a specific event during a single work shift. The UPS Report of Injury, Employer’s Accident Statement from claimant, and the testimony indicate Claimant lost control of his truck on October 15, 2007, and injured his neck.

Medical records from St. Joseph Health Center dated October 15, 2007, Medical records of the UPS clinic doctor, Dr. Byler, Dr. Byler’s medical note of October 16, 2007, the October 25, 2007 medical note of Dr. Keith Wilkey, another employer authorized physician, all document, corroborate and establish the happening of the accident exactly as described by claimant. There is no contrary evidence and employee’s description satisfies the statutory definition of an accident.

I further conclude that the statutory definition of injury was proven by the employee. There was violence to the physical structure of employee’s body, i.e., a neck injury. I find the testimony of Dr. Kennedy credible, reliable and worthy of belief, in that employee’s neck injury and need for surgery was directly related to his jerking motion while driving over rough pavement, and this injury at work was the primary factor leading to his neck and shoulder conditions. The activity of employee having an accident while driving a truck was a clearly a hazard or risk related to his employment as a delivery truck driver, in that driving was the primary function of his job and the injury clearly

arose out of and in the course of the employment.

I find that at the time the injury and accident occurred, employee was within his period of employment where he might reasonably be and where he was fulfilling the duties of his employment, i.e., driving a delivery truck as required by employer. Accordingly, employee was in the course of his employment.

I find the employee sustained an injury due to an accident arising out of and in the course of his employment, and is entitled to workers' compensation benefits as provided by law.

Testimony of the Claimant at trial, the Report of Injury, the Accident Statement generated by the employer or insurer and all medical records in this case fully support the occurrence of a work related accident by the claimant on October 15, 2007.

Certainly the accident sustained by Claimant here was much more violent and harrowing than the accident as proven by the Claimant in Norman, Supra, wherein there was a slight mishap while putting on surgical booties.

Medical Causation / Prevailing Factor

Under Missouri law, it is well-settled that the claimant bears the burden of proving all the essential elements of a workers' compensation claim, including the causal connection between the accident and the injury. Landers v Chrysler Corp., 963 S.W. 2d 275, 279 (Mo.App. E.D. 1997) (overruled on other grounds); see also Davies v. Carter Carburetor, 429 S.W.2d 738, 749 (Mo.1968); McCoy v. Simpson, 346 Mo. 72, 139 S.W.2d 950, 952 (1940). While the claimant is not required to prove the elements of his claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." Sanderson v. Porta-Fab Corp., 989 S.W.2d 599, 603 (Mo.App. E.D.1999) (citing Cook v. Sunnen Prods. Corp., 937 S.W.2d 221, 223 (Mo.App. E.D.1996)).

§287.020.3(1) provides, in relevant part, ...the term “**injury**” is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “**The prevailing factor**” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

(2) 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.

An injury is compensable when the performance of the usual and customary duties of an employee leads to physical breakdown or change in pathology. Smith v. Climate Engineering, 939 S.W.2d 429, 435 (Mo. App. E.D. 1996). The question of causation is one for medical testimony, without which a finding for the claimant would be based on mere conjecture and speculation and not on substantial evidence. Jacobs v. City of Jefferson, 991 S.W.2d 693, 696 (Mo. App. W.D. 1999).

As with “accident”, § 287.020.2 RSMo (2007), the statute requires certain elements on medical causation to be proven by the Claimant. There is no dispute that on October 15, 2007, at approximately 12:50 p.m., the claimant was driving the UPS package car in performance of his normal and customary duties for his employer. There is also no argument amongst the medical experts that the claimant has a C4-5 and C5-6 radiculopathy and that surgery on the cervical spine is necessary to correct the medical problem. The disputed issue is whether the work is the prevailing factor in causing Claimant’s medical condition and need for surgery. Resolution of this issue falls heavily on the medical experts who testified at trial via deposition, Dr. David Kennedy for the claimant and Dr. Keith Wilkey, for the employer/insurer.

The deposition testimony of Dr. Kennedy was fully credible and his medical opinions were supported by medical

records from Dr. Byler and Dr. Phillips. The Claimant had a prior neck surgery in 1995 and there was no evidence Mr. Harvath experienced neck or arm complaints between his release from medical care in October of 1995, until his October 15, 2007 work accident. The EMG study ordered by UPS physician, Dr. Byler, fully supports Dr. Kennedy's medical causation opinion because the study shows recent or acute cervical radiculopathies and only mild findings at the prior surgery site. There is no evidence of any event causing the Claimant's neck pain in October of 2007, other than the work injury where the Claimant was thrown around in his truck, twisting his cervical spine and nearly crashing. The Claimant's trial testimony, the medical records in evidence as and the deposition of Dr. Kennedy prove the claimant suffered an unexpected work accident on October 15, 2007, resulting in an injury to his neck and the need for further medical treatment, including surgery.

Dr. Wilkey's medical opinions were not based on facts in evidence and hence not credible due to the meddling insurance adjuster giving him incorrect photographic information, and more importantly by his internally contradictory and unbelievable testimony. Besides being based on inaccurate information, Dr. Wilkey's testimony is not credible for the reasons outlined below.

The Claimant's description of the mechanism of his work injury and accident was provided to UPS and all medical personnel and treating physicians repeatedly by the Claimant and the description never varied. From the Report of Injury to UPS on the date of injury to medical histories from Mr. Harvath at the St. Joseph Health Center emergency room, Dr. Byler and Dr. Wilkey, his story remained the same. He was driving the UPS truck at 50 miles per hour near 850 Babler Access Road; he hit a depression, or dip, or grate in the road and was violently thrown around in his vehicle and nearly lost control of his truck. This history plus examination was sufficient for Dr. Byler to order an MRI, provide physical therapy and refer the claimant to Dr. Wilkey. Claimant's unwavering description of the mechanism of his injury was sufficient for Dr. Wilkey to treat the Claimant for two months, order physical therapy, order and administer an epidural steroid injection, recommend surgery and provide a work related medical causation opinion in December of 2007. At no point in 2007 did any healthcare provider challenge the work related nature of this injury based on the Claimant's unwavering description of how the accident occurred.

However, once the claims adjuster meddled with Dr. Wiley's opinion, the mechanism of injury causing Mr. Horvath's neck injury was a subject of intense focus. After the adjuster's intervention, Dr. Wiley claims employee would have had to have hit an unusually deep "sinkhole" or had a violent motor vehicle collision at 50 miles per hour, decelerating his vehicle to zero miles per hour in about one-tenth of a second! (this would be the equivalent of hitting a brick wall). Nowhere in any of the medical records, in Dr. Wiley's own notes, or anywhere else is there a history of accident anywhere similar to this requirement by Dr. Wilkey. It is not as if Dr. Wilkey was originally fooled by Mr. Harvath's history. At no point did Dr. Byler or Dr. Wilkey ever question the history of accident from Mr. Harvath and extensive medical care was provided by both these physicians based on the Claimant's original unwavering version of accident.

Incredibly, in his deposition testimony, Dr. Wilkey also testified that the cause of claimant's neck injury was from a "little vibration" and that the neck was in a condition of "fatigue failure." (Employer's Ex. 1, pgs. 59-60). If claimant's cervical spine was in such a fragile state that a "little vibration" could cause serious injury, it boggles the mind to reconcile this opinion with his other opinion that the road accident would require hitting a deep sink hole or the equivalent of hitting a brick wall at 50 miles per hour and decelerating to zero in 1/10 of a second!

Dr. Wilkey testified Claimant's neck injury was caused by "fatigue failure", as opposed to the road incident. "Fatigue failure" is a term which is not written or found in any medical record during the entire time the Claimant was treated. However, in his deposition, Dr. Wilkey uses this term to describe both the condition of the Claimant's cervical spine and cause of his neck injury. (Employer's Ex. 1, pgs. 56 and 59-60).

Regardless of causation, it is remarkable that Dr. Wilkey would treat a patient with fatigue failure in his cervical spine and at the same time order aggressive physical therapy. Physical therapy included manipulation of his cervical spine, with a therapist pushing and twisting his neck. If the claimant's spine was in such a fragile condition of "fatigue failure" it would be absurd for Dr. Wilkey to order this type of therapy. Dr. Wilkey also allowed the claimant to work full duty as a package car driver. This work activity should have been prohibited by Dr. Wilkey if he truly felt the claimant's spine was in a fragile condition of "fatigue failure".

Similarly confusing, Dr. Wilkey initially thought the Claimant had a herniated disc in his neck, but the MRI of the cervical spine showed he did not. (Employer's Ex. 1, pgs. 14-15). However, when Dr. Wilkey wrote the insurance adjuster in 2008, after reversing his medical causation opinion, he stated Claimant did have a herniated disc in his neck. This note was written by Dr. Wilkey months after the cervical MRI was done personally reviewed by him. This is yet another example of Dr. Wilkey's poor credibility or absolute confusion.

More mistrust of Dr. Wilkey is generated between his April 15, 2008 medical note to the adjuster where Dr. Wilkey specifically states that a basis for him changing his medical causation opinion is that the Claimant's previous history of neck surgery would predispose him to continued symptoms. (Employer's Ex. 1, Ex. 2 to Dr. Wilkey depo, 4/15/08 medical note). And yet, in his deposition testimony, Dr. Wilkey states this is no longer his opinion. (Employer's Ex. 1, pgs. 32-33 and 46).

It is apparent Dr. Wilkey is extremely confused, cannot make up his mind or is subject to bias. I could not in good conscience base any decision on his opinion and his opinion would no doubt change within weeks anyway.

Finally, according to law, this injury cannot 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 non-employment life. § 287.020.3.2(b). Driving the UPS truck every day exposed Claimant far more than usual to risks of just the type of vehicular accident he experienced. There is simply no comparison to the vehicular risks he experienced at work and those outside the employment.

Payment of Unpaid Medical Expense

Under Missouri law, an employer shall provide reasonable medical treatment to cure and relieve the effects of the injury. §287.140(1) RSMo (2007). Employer authorized treating physician, Dr Byler, ordered all this medical testing and therapy and these bills were to be paid by the employer/insurer until the insurance adjuster was able to convince Dr. Wilkey to change his medical causation opinion. At that point, the medical bills were denied and the claimant became liable for these charges. Based on my finding claimant's neck injury is work related, the employer/insurer is ordered to pay these outstanding medical bills. (Claimant's Ex. A, pgs. 16 and 19,). Claimant was referred for an MRI by employer authorized physician, Dr. Byler, and then referred to physical therapy at Advanced Training and Rehab in an attempt by Dr. Byler to diagnose and treat his symptoms. (Claimant's Ex. B, 10/16/07 and 10/17/07 medical notes). As a result of this authorized testing and physical therapy, the employer is liable for outstanding medical bills to Open MRI of St. Louis in the amount of \$1,451.00 (Claimant's Ex. E) and Advanced Training and Rehab in the amount of \$2,511.00 (Claimant's Ex. F).

Additional Medical and Temporary Total Disability Benefits

Employer shall provide reasonable medical treatment to cure and relieve the effects of the injury. §287.140(1) RSMo (2007). An award of temporary total disability benefits is intended to cover the claimant's period of time during which he is healing from a work related injury. Lane v. G&M Statuary, Inc., 156 S.W.3d 498, 506 (Mo. App. S.D. 2005). These benefits are due Claimant until he is at a point where an employer would reasonable be expected to employ the Claimant in his current physical condition, or until the claimant's condition has reached maximum medical improvement. Boyles v. USA Rebar Replacement, Inc., 26 S.W. 3d 418, 424 (Mo. App. W.D. 2000).

Claimant's requires cervical fusion and further treatment with Dr. Kennedy and other health care providers Dr. Kennedy may direct. Based on my finding this injury is work related and that the prevailing factor test has been met, the employer/insurer shall pay all Dr. Kennedy's expenses and all other necessary medical expenses and temporary total disability benefits until the claimant is at maximum medical improvement from this injury.

Date: _____

Made by: _____

Matthew D. Vacca
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

Without further citation, this award liberally intermixes the facts herein with language in Norman v. Phelps County Regional Medical Center, 06-001823, (LIRC, January 8, 2008), where The LIRC construed accident under the new 2005 law.