

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

Injury No. 09-106524

Employee: David M. Horne
Employer: Price Gregory (Quanta)
Insurer: Old Republic Insurance Company

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction

The parties asked the administrative law judge to resolve the following issues: (1) medical causation as it relates to the right upper extremity; (2) future medical care; (3) the nature and extent of disability; (4) employer's contention employee's injuries were caused by his violation of a safety rule for purposes of § 287.120.5 RSMo; and (5) employee's contention that his injuries were caused by employer's violation of a statute for purposes of § 287.120.4 RSMo.

The administrative law judge rendered the following findings and conclusions: (1) employee's right arm symptoms are directly related to the motor vehicle accident; (2) employee is permanently and totally disabled; (3) employee satisfied his burden of proof on the issue of future medical aid; (4) employer failed to show employee violated any safety rules and thus is not entitled to a reduction of benefits pursuant to § 287.120.5 RSMo; and (5) employee's accident was caused by employer's violation of Department of Transportation regulations and thus employee's compensation is subject to a 15% increase under § 287.120.4 RSMo.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in interpreting § 287.120.4 RSMo; (2) in interpreting § 287.120.5 RSMo; (3) in ignoring or failing to give proper legal consideration to employee's receipt of unemployment benefits when there was an allegation of permanent total disability; and (4) because the award of permanent total disability benefits is not justified.

Discussion

Evidentiary rulings

The parties raised a number of objections to the evidence offered at the hearing before the administrative law judge. The administrative law judge provided his rulings as to some of these objections on pages 4 and 5 of his award. We agree with, and hereby adopt as our own, the administrative law judge's ruling that Employer's Exhibit 5 is

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inadmissible because it is irrelevant to any issue involved in these proceedings. Otherwise, however, we modify the administrative law judge's rulings as follows.

We hereby overrule each of the parties' evidentiary objections. All exhibits (save Employer's Exhibit 5) are hereby admitted into evidence. Those portions of the exhibits that amount to hearsay will be given the evidentiary weight to which they are entitled.

Medical causation regarding the right arm

The parties asked the administrative law judge to resolve the issue of medical causation regarding employee's claimed right arm injury. On page 30 of his award, the administrative law judge resolved the issue as follows: "I find the right arm symptoms are directly related to the motor vehicle accident." Employer, in its application for review, does not challenge this determination by the administrative law judge, and for this reason we will not disturb it on appeal. We do, however, wish to note that the test for medical causation applicable to this claim is set forth in § 287.020.3(1) RSMo, which provides, in relevant part, as follows:

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.

In light of the foregoing statutory test, we must supplement the findings and conclusions of the administrative law judge on this point as follows. We conclude that the accident was the prevailing factor in causing employee to suffer the resulting medical condition of right arm pain, numbness, and related symptoms, and associated disability.

Maximum medical improvement and TTD vs. PTD

The administrative law judge determined that employee reached maximum medical improvement on April 29, 2010, and that employer was liable for weekly permanent total disability benefits as of that date. Based on this finding, the administrative law judge rejected employer's claim that it is entitled to a credit under § 287.170.3 RSMo because it paid temporary total disability benefits to employee during periods that he applied for and received unemployment compensation. While we agree with the ultimate result reached by the administrative law judge as to this issue, we discern a need to provide some supplemental findings and analysis.

We note that the administrative law judge stated, at page 31 of his award, that "[a]ll of the evidence establishes that Mr. Horne reached maximum medical improvement on April 29, 2010." This statement is somewhat inaccurate, in that the record contains a number of different dates of maximum medical improvement from various practitioners and from various medical standpoints. For example, the treating psychologist Dr. Lisa Goulden opined that employee reached maximum medical improvement from a psychological standpoint as of February 16, 2012; employer's evaluating physician Dr. Steven Hendler opined in December 2012 that employee's last active treatment in June 2012 would be the date of maximum medical improvement; and the treating pain management physician Dr. Andrew Revelis opined that employee was at maximum medical improvement from a pain management standpoint on July 6, 2012.

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After careful consideration, however, we find most persuasive the opinions from Dr. Wilson and Dr. Koprivica that employee reached maximum medical improvement on April 29, 2010. This is because it does not appear to us that employee achieved any improvement in his level of permanent disability as a result of any medical care he received after April 29, 2010, and that further pain management and psychiatric treatment, while reasonable and necessary as a result of the work injury, were more in the nature of palliative rather than curative measures. It follows that any weekly benefits that employer paid to employee after April 29, 2010, are properly characterized as permanent total disability benefits. See *Cardwell v. Treasurer of Mo.*, 249 S.W.3d 902, 910 (Mo. App. 2008). The administrative law judge correctly notes that the Missouri Workers' Compensation Law, which we must strictly construe by operation of § 287.800.1 RSMo, does not contain any provision disqualifying injured employees from receiving permanent total disability benefits while receiving unemployment compensation.

Employer's claim for a credit under § 287.170.3 additionally fails because employer failed to prove that it paid disability benefits (whether these are characterized as temporary or permanent total disability benefits) to employee for any week that he received unemployment compensation. The parties stipulated that employer paid employee weekly disability benefits at the rate of \$807.48 from October 8, 2009, through April 22, 2010, and from November 11, 2011, through July 12, 2013. Because employer's claim for a credit amounts to a defense based on a factual proposition, employer had the burden under § 287.808 RSMo of proving that employee applied for and received unemployment compensation during these time periods.

The only evidence employer presented to prove when employee received unemployment compensation is a single page that appears to be a screenshot of an electronic document. See *Transcript*, page 2687. Employer did not present any testimony to explain this document, and even if we credited it, the only findings we could derive therefrom would be that employee received unemployment compensation during the third and fourth quarters of 2010 in the amount of \$8,580.00. But consistent with the parties' stipulations recited above, employer did not pay any weekly disability benefits to employee during the third and fourth quarters of 2010, so this evidence is not supportive of employer's claim for a credit under § 287.170.3.

Employee testified that he claimed and received unemployment compensation after he was released by Dr. Wilson in April 2010, and that he stopped claiming unemployment compensation when employer resumed the payment of disability benefits in November 2011. See *Transcript*, page 55-6. Employee's testimony thus does not support a finding that he applied for and received unemployment compensation during any time period that employer paid him weekly disability benefits. Given employer's failure of proof as to this issue, we find that employee did not apply for or receive unemployment compensation during any week that employer paid him weekly disability benefits.

For the foregoing reasons, we affirm the administrative law judge's determination that employee reached maximum medical improvement on April 29, 2010, and that employee is not disqualified from the receipt of temporary total disability benefits during any time period

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(nor is employer entitled to any credit associated therewith) for purposes of § 287.170.3 RSMo.

15% increase under § 287.120.4 RSMo

The administrative law judge concluded, on page 38 of his award, that employee's accident was caused by employer's violation of § 307.400 RSMo and Department of Transportation regulations, and awarded a 15% increase in the amount of employee's compensation under the provisions of § 287.120.4 RSMo. We disagree with this result for the following reasons.

As admitted in its brief, employer violated § 307.400 RSMo when it permitted employee to drive in excess of the maximum hours permitted under 49 C.F.R. 395. In order to satisfy § 287.120.4, however, employee must show that his injuries were caused by employer's violation of that provision.

Employee remembers very little about the motor vehicle accident of October 7, 2009. Asked to identify a reason for the accident, employee testified that it was either the load shifting or the fact that he was tired from working and his reaction time was slow. Employee's testimony as to the potential cause of the accident thus strikes us as speculative, and we do not find it sufficient to support a finding that employee's injuries were caused by employer's violation of § 307.400 RSMo.

The administrative law judge cited testimony from employee's vocational expert, Terry Cordray, on the topic of the relationship between employee fatigue and workplace accidents. But Mr. Cordray did not offer any opinion that employee's fatigue caused *this* accident, nor is it clear to us what value such opinion might have where Mr. Cordray's expertise is on the topic of one's employability (or lack thereof) rather than the issue of what caused employee's accident. We do not find Mr. Cordray's testimony in this matter supportive of a finding that employee's injuries were caused by employer's violation of § 307.400 RSMo.

The administrative law judge also cited testimony from employer's safety manager at the time of the accident, Michael Ezzell, whose investigation report cited employee's heavy work schedule as a potential contributing factor causing the accident. But Mr. Ezzell testified that he didn't ultimately believe that fatigue was an issue, and also indicated that the investigation report itself included information from hearsay sources and involved unspecified input from various individuals. Although it may have been sufficient for employer's purposes, given this testimony from Mr. Ezzell, we deem the investigation report to lack any probative value in the context of our inquiry. More to the point, Mr. Ezzell's own testimony regarding fatigue strikes us as purely speculative. We do not find Mr. Ezzell's testimony supportive of a finding that employee's injuries were caused by employer's violation of § 307.400 RSMo.

In sum, we find the evidence on this point to be primarily speculative and ultimately unconvincing, and therefore we cannot find that employer's violation of § 307.400 RSMo caused employee's injuries. Accordingly, we must modify the administrative law judge's

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award on this point. We conclude that employee's compensation is not subject to a 15% increase under § 287.120.4.

Penalty under § 287.120.5 RSMo

Employer argues that a penalty should be imposed under § 287.120.5 RSMo, based on employee's purported violation of employer's policy prohibiting employees from using cell phones while driving. We agree with the administrative law judge that employer failed to prove that employee was using a cell phone at the time of the accident in such a way as to violate the policy, and that employer also failed to prove that employee's purported use of the cell phone caused the motor vehicle accident and his subsequent injuries.

We note that the administrative law judge stated, on page 36 of his award, that "there is absolutely no evidence [employee] was using a cell phone." This statement is inaccurate in that there is some evidence that employee was using a cell phone, namely, the testimony from David Blackledge that his review of employee's cell phone suggested to him that employee was sending and receiving text messages. But this testimony was nonspecific and amounts to hearsay, and we deem it insufficiently persuasive to support a finding that employee was using his cell phone at the time of the accident, much less that any such use caused the accident.

Employer also argues that a safety penalty should be imposed based on employee's purported failure to wear his seatbelt and/or his exceeding the posted speed limit, and because employer had a general policy that employees were to obey all laws. We agree with the administrative law judge that employer's argument fails. This is because employer failed to prove, as a factual matter, that employee either failed to wear a seatbelt or exceeded the speed limit.

We note that the administrative law judge affirmatively found that employee was wearing a seatbelt at the time of the accident. We, however, deem the evidence on this point of fact to be inconclusive. Rather than make an affirmative finding that employee was wearing his seatbelt, we resolve the factual question this way: we decline to make a finding that employee wasn't wearing his seatbelt, because employer failed to meet its burden of proof on this point.

On page 34 of his award, the administrative law judge additionally concluded: "While this general statement of conduct ['obey all laws'] may have a safety benefit, it is too vague to conclude it is a policy the employers adopted for the statutory required purpose: safety of employees." We must disclaim the administrative law judge's conclusion on this point. We agree that vague, overbroad admonitions of this sort may not always be viewed as a policy or rule, but this will require a case-by-case analysis. Such admonitions, e.g., regarding speed limits and seatbelt laws, may be deemed a rule or policy vis-à-vis truck drivers.

Corrections

Finally, we note that the administrative law judge's award contains some apparent typographical or clerical errors, which we hereby correct.

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In the third full sentence of the first paragraph on page 26, the administrative law judge's award states: "Additionally, Dr. Karschner felt Mr. Horne was capable of working in at least a sedentary level and possibly at a lighter heavier level of exertion." This sentence should read instead as follows: "Additionally, Dr. Karschner felt Mr. Horne was capable of working in at least a sedentary level and possibly at light duty or heavier levels of exertion for periods of time."

In the fourth sentence of the second full paragraph on page 31, the administrative law judge's award states: "Although I believe the right arm complaints are directly related to the work accident, given Mr. Horne's testimony and the testimony of Dr. Koprivica and Dr. Hill, I believe Mr. Horne is permanently and totally without consideration of the symptoms in Mr. Horne's right upper extremity." This sentence should read instead as follows: "Although I believe the right arm complaints are directly related to the work accident, given Mr. Horne's testimony and the testimony of Dr. Koprivica and Dr. Hill, I believe Mr. Horne is permanently and totally disabled without consideration of the symptoms in Mr. Horne's right upper extremity."

Conclusion

We modify the award of the administrative law judge as to the issue whether employee's compensation is subject to a 15% increase under § 287.120.4.

The award and decision of Administrative Law Judge Mark S. Siedlik, issued June 9, 2014, is attached hereto and incorporated by this reference to the extent not inconsistent with our findings, conclusions, decision, and modifications herein.

This award is subject to a lien in favor of Kristi L. Pittman, Attorney at Law, in the amount of 25% for necessary legal services rendered.

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

Given at Jefferson City, State of Missouri, this 23rd day of October 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

FINAL AWARD

Employee: David M. Horne Injury No: 09-106524
Employer: Price Gregory (Quanta)
Insurer: Old Republic Company, c/o Gallagher Bassett Services
Hearing Date: February 21, 2014 Checked by: MSS/lh

FINDINGS OF FACT AND CONCLUSIONS 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 7, 2009
5. Location where accident occurred or occupational disease was contracted: Carroll County, Missouri
6. Was the above employee in the employ of the above employer at time of alleged accident or occupational disease? Yes
7. Did the employer receive proper notice? Yes.
8. Did the accident or occupational disease arise out of and in the course of employment? Yes.
9. Was the claim for compensation filed within time required by Law? Yes.
10. Was the employer insured by the above insurer? Yes.
11. Describe the work employee was doing and how the accident occurred or the occupational disease contracted. Operating a semi-truck which was in a rollover collision.
12. Did the accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Body as a whole, neck, left clavicle, left and right arms, head and psyche

14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date: Employer paid benefits to employee for \$94,475.16, during the periods of October 8, 2009, to April 22, 2010, and November 4, 2011, to July 12, 2013, which also includes two advances of \$10,000.
16. Value of necessary medical aid paid to date by employer? \$136,321.57
17. Value of necessary medical aid not furnished by employer? -0-
18. Employee's average weekly wages: Sufficient for maximum rate
19. Weekly compensation rate: \$807.48/\$422.97
20. Method of wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of Compensation payable from the Employer:

Permanent Total Disability benefits from Employer, beginning on April 29, 2010, and thereafter, for claimant's lifetime at the rate of \$807.48 per week, pursuant to the Missouri Workers' Compensation Laws. Employer is entitled to a credit of \$20,000.00, pursuant to the stipulations, and for benefits paid from November 4, 2011, through July 12, 2013, for 88 1/7 weeks in the amount of \$71,173.59, towards permanent and total disability. Employer is also subject to a 15% penalty on all future benefits as well as benefits paid and those that are due and owing.

22. Second Injury Fund Liability: N/A
23. Future requirements awarded:

Future medical care and treatment to cure and relieve claimant as it relates to this injury.

Said payments to begin April 29, 2010, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Kristi L. Pittman

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Employee: David M. Horne Injury No: 09-106524

Employer: Price Gregory (Quanta)

Insurer: Old Republic Company, c/o Gallagher Bassett Services

Hearing Date: February 21, 2014 Checked by: MSS/lh

Employee's Exhibits:

- A. Medical Records of Dr. Timothy Pettingell
- B. Medical Records of Dr. Lisa Goulden
- C. Medical Records of Tulsa Pain Consultants
- D. Medical Records of St. Luke's Hospital
- E. Medical Record of Hillcrest Medical Center
- F. Medical Records of Dr. W.E. Gupton/Warren Clinic
- G. Medical Records of Oklahoma Physical Medicine and Rehab
- H. Medical Records of Dr. Gregory Wilson
- I. Medical Records of Dr. Matthew W. Karshner
- J. Medical Records of LifeNet
- K. Medical Records of Braymer Fire & Rescue
- L. Medical Records of Carroll County Ambulance
- M. Medical Records of Epic Medical Center
- N. Medical Report of Dr. Steven Hendler dated June 6, 2011
- O. Medical Report of Dr. Steven Hendler dated December 17, 2012
- P. Medical Report of Dr. Denise LaGrand dated October 4, 2011
- Q. Medical Report of Dr. James Appelbaum dated July 6, 2011
- R. Deposition and Exhibits of Terry Cordray dated March 8, 2011
- S. Deposition and Exhibits of Dr. P. Brent Koprivica dated January 23, 2014
- T. Deposition and Exhibits of Dr. Todd Hill dated February 19, 2014
- U. CFR Regulations
- V. Wage Statement
- W. Photograph
- X. Photograph
- Y. Photograph
- Z. Educational Records of Sikeston R-6 School District
- AA. Educational Records of Southeast Missouri State University
- BB. Deposition of David Horne taken on May 12, 2011
- CC. Deposition of David Horne taken on August 9, 2013

Employer's Exhibits:

1. Personnel file
2. New Employee Safety and Health Orientation Program
3. Price Gregory Investigation Report
4. Circuit Court Records of Carroll County
5. Certified Records from Pittsburg County
6. Surveillance video and the corresponding dates of surveillance
7. Dr. Goulden's deposition and exhibits
8. Dr. Kitchen's deposition and exhibits
9. William Nelson's deposition and exhibits
10. Court approved advances to employee
11. Unemployment benefits from the Missouri Department of Employment Security
12. Jim England's vocational evaluation and C.V.

Rulings on Exhibits Offered into Evidence

There were several exhibits the Court took under advisement. After reviewing those documents, I make the following findings:

Employer and Insurer objected to Employee's Exhibit J on the grounds of hearsay, basing the objection on the same grounds as Employee's objection to Employer's Exhibit 4. I will allow this exhibit into evidence and sustain the objection. I believe the information contained therein goes to the weight of the evidence and the credibility of the records. I do note however, the LifeNet records reflect they arrived on the scene of the accident to transport Mr. Horne.

Employee objected to the Exhibits 4, 5 and 9. With regards to Exhibit 4, the employee objected to the records from the Carroll County Circuit Court, specifically portions of the police report that did not contain any present sense impressions of the officer. I will allow the police report into evidence which was contained in Exhibit 4. However, I think the report goes to the weight of the evidence, particularly given the Highway Patrolman arrived on the scene of the accident two hours after the accident occurred and gave no information as to why he believed Mr. Horne was not wearing a seatbelt nor why he believed Mr. Horne was traveling too fast for the conditions. There were no witness statements or any other evidence to document the basis of this information.

With regards to Exhibit 5, the certified records from Pittsburg County, Oklahoma, employee objected on the grounds they were irrelevant, hearsay and any probative value was outweighed by the prejudicial nature of the records. The records contained prior criminal circuit court records. During the course of the trial, the employer's attorney began to ask questions regarding those records. Employee's attorney renewed her objection, adding the records contained a suspended imposition of sentence, which cannot be used for impeachment. Employer's attorney claimed they were for prior inconsistent statements. Employer also abandoned his line of questioning with regards to any inconsistent statements. Pursuant to MAB v. Nicely, 909 S.W.2d 669, 671 (Mo. Banc 1995), a suspended imposition of sentence is not considered a conviction and cannot be used

to impeach a witness as to whether he or she had a criminal conviction. As employer stated, the records were being used for a prior inconsistent statements without any specifics as to what part of his testimony he sought to prove was inconsistent, this is impeachment and disallowed. Furthermore, employer's attorney abandoned his line of questioning and never offered any portion of the records to show any inconsistent statements. Employer also failed to demonstrate their relevance. As such, I find the records are irrelevant and not allowed to be used for impeachment. Accordingly, Employee's objection is sustained.

With regards to Exhibit 9, the admissibility of the deposition will be allowed and Employee's objection is overruled. All specific objections contained in the deposition itself are preserved.

I also want to note I took judicial notice of the Code of Federal Regulations relating to truck driving regulations as well as R.S.Mo. §307.400, which adopts the Code of Federal Regulations as state law.

STIPULATIONS:

1. Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Old Republic Insurance Company, c/o Gallagher Bassett Services;
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Price Gregory and was working under the Workers' Compensation Act;
3. On or about October 7, 2009, the employee suffered an accident arising out of and in the course of his employment;
4. Employer had notice of employee's accident;
5. Employee's claim was filed within the time allowed by law;
6. Employee's average weekly wage was sufficient for maximum rate of \$807.48 for PTD/TTD and \$422.97 for PPD;
7. Employee's injuries, with exception to the right upper extremity, were causally related to the accident;
8. Medical aid was furnished by the employer and insurer in the amount of \$136,321.57; and
9. Benefits were paid in the amount of \$94,475.16 for dates of October 8, 2009, through April 22, 2010, and November 4, 2011, through July 12, 2013, and two advances of \$10,000.00.

ISSUES:

The issues to be determined by the hearing are as follows:

1. Whether employee's right upper extremity conditions are causally related to the accident;
2. Whether employee requires further medical care and treatment to cure and relieve him of his injuries;
3. Nature and extent of disability;
4. Safety violation against employee pursuant to R.S.Mo. §287.120.5; and
5. Penalty against the employer pursuant to R.S.Mo. §287.120.4.

FINDINGS OF FACT

A hearing was held on February 21, 2014, before the Honorable Mark Siedlik. Claimant appeared in person and was represented by Kristi L. Pittman. Employer and Insurer were represented by William Lemp.

Accident

Mr. Horne was driving a truck in rural Carroll County, Missouri when he attempted to navigate a curve and his truck went off the road, causing it to roll onto the passenger's side and then onto the roof of the cab. There were three employees of Price Gregory, including Jarod Phillips, who saw the accident and were on the scene of the accident very soon after the accident occurred. Although Mr. Phillips testified he was on the scene of the accident in 20 seconds, he acknowledged he was approximately one quarter of a mile away when he saw the tire of the trailer leave the road and then the truck roll over. Mr. Phillips then drove up to the truck, turned left across the highway to park near the truck and then got out and went to the truck. He leaned down one time to see Mr. Horne and then called 911. He testified he did not see Mr. Horne again until his co-workers pulled him from the vehicle.¹ EMS arrived on the scene and called for a LifeFlight helicopter to transport Mr. Horne due to the severity of his injuries. LifeNet medical records state Mr. Horne was a restrained driver.

Medical Evidence

Mr. Horne was flown from the scene of the accident by LifeFlight and was admitted to St. Luke's Hospital in Kansas City, Missouri, on the date of the injury after his semi-truck rolled over.

¹ This is contrary to several of the medical records in which they report a prolonged extraction.

The medical records reflect Mr. Horne had a prolonged extrication and lost consciousness. On initial examination he had a left clavicular fracture as well as C5 and C7 transverse process fractures and C6-7 articular pillar fracture. It was noted Mr. Horne had an occlusion of the left vertebral artery at origin and had been evaluated by trauma, orthopedics and neurosurgery. It was also noted he had left C7 radiculopathy with triceps weakness and numbness in the thumb, index, and middle fingers.

A CT of the head and cervical spine was done which showed the left C5 transverse process fracture as well as a left pedical and articular pillar at C6 vertebrae and minimally displaced transverse process fracture at C7. An MRI of the cervical spine was ordered as well as an MRA of the neck. Shoulder x-rays were obtained which showed minimally displaced midclavicular fracture and orthopedic consult placed Mr. Horne's left arm in a sling. A CT of the face was obtained which showed no acute osseous abnormalities. X-rays of the thoracic and lumbar spine showed no acute fractures or misalignments. It was noted that an MRI of the cervical spine and the MRA of the neck were performed which showed impressions of a left vertebral artery dissection with no appreciable spinal cord abnormality. Although there was trace edema present within the prevertebral soft tissues and a sense of edema present in the posterior soft tissues and posterior elements at the levels of the C4-C6. A CT angiogram of the neck confirmed a left vertebral artery dissection with no pseudoaneurysm. Mr. Horne was transferred to NSICU to start systemic anticoagulation.

Mr. Horne remained hospitalized at St. Luke's Hospital until October 18, 2009. Discharge diagnosis was history of motor vehicle collision, concussion with loss of consciousness, C5-C7 transverse process fracture, C6-C7 articular pillar fracture, left vertebral artery dissection, C7 radiculopathy, left clavicular fracture, cephalohematoma and nasal bridge laceration. He had a neurosurgical consultation with Dr. Lovick, orthopaedics with Dr. Shriwise, physical medicine and rehabilitation with Dr. Poecker and medicine with Dr. Tovrea. It was also noted a nasal bridge laceration repair had been performed by Dr. King on October 7, 2009.

Mr. Horne was able to walk without assistance but continued to use a Miami J collar in place at all times and was voiding without difficulty. Discharge instructions were to keep the Miami J Collar on at all times, refrain from driving, or operating any heavy machinery, and continue Coumadin for three months. He was also to follow up with Dr. Lovick the week of his release after obtaining AP and lateral x-rays of his cervical spine as well as the follow up for his INR and adjustment of his Coumadin. It was also noted he was to follow up with Dr. Bowling of orthopedic surgery in approximately two weeks.

Mr. Horne lived in Oklahoma and was to return to the local job site in Carrollton, Missouri, which is approximately one hour from Kansas City, and stay there the week following his release and then return for the follow up appointment with Dr. Lovick. It was anticipated he would then return to Oklahoma and establish medical treatment there. Mr. Horne was on Percocet, Coumadin, Metoprolol, Amlodipine and Lisinopril upon release from the hospital.

Mr. Horne's follow up care in Oklahoma was primarily with Dr. Gregory Wilson of Oklahoma Neurosurgical Associates in Tulsa. Mr. Horne was initially seen by Dr. Wilson on October 27, 2009. Dr. Wilson reported on physical examination Mr. Horne was wearing a cervical

collar as well as a sling for the clavicular fracture. He also noted Mr. Horne had a healing contusion on the right parietal scalp. He was suffering weakness of the triceps on individual muscle testing and had hypesthesia in the C7 dermatome on the left. Dr. Wilson's impression was cervical spine fracture and vertebral artery occlusion. He directed Mr. Horne to continue with the Miami J Collar and refill his prescription for Percocet. Dr. Wilson noted he wanted Mr. Horne to follow up in one month and repeat an MRI scan and MRA of the vertebral arteries and noted Mr. Horne was temporarily totally disabled.

Mr. Horne saw Dr. Wilson again on November 24, 2009. He continued to have weakness of triceps and biceps on the left. Dr. Wilson requested additional testing as he suspected Mr. Horne would require an anterior cervical discectomy with fusion but wanted to check for vertebral artery occlusion.

Dr. Wilson saw Mr. Horne on December 7, 2009, and noted the MRI demonstrated a disc herniation at the C6-7 fracture facet. He noted Mr. Horne was still suffering nerve root impingement and the MRI demonstrated total occlusion of left vertebral artery. Dr. Wilson recommended surgery and subsequently performed the C6 anterior cervical discectomy and interbar fusion on December 21, 2009. His preoperative and postoperative diagnosis was C6-7 disk herniation and facet fracture with subluxation.

Mr. Horne was seen for follow up two weeks post fusion. Dr. Wilson reported the procedure had improved his neck pain. He continued to have pain at the base of the skull on the left but his radiculopathy had improved. Unfortunately, Mr. Horne continued to suffer burning paresthesias in his fingers. He was directed to wean off of the cervical collar but was given a prescription for Lyrica to reduce neuropathic symptoms. Dr. Wilson indicated he would see Mr. Horne for follow up in approximately a month and likely begin physical therapy at that time.

On February 4, 2010, Dr. Wilson noted Mr. Horne continued to suffer residual numbness and weakness in the left upper extremity and that his cervical range of motion was somewhat limited. It was also noted he was experiencing symptoms of occipital neuralgia on the right. Dr. Wilson directed him to begin physical therapy for one month, kept him on temporary total disability, but noted he would evaluate his work status on his follow up visit.

Mr. Horne saw Dr. Wilson on March 4, 2010, and was suffering soreness in the trapezial border on the left and still had tingling paresthesias. Dr. Wilson reported Mr. Horne could return to work with limitations of no lifting, carrying, pushing or pulling greater than 20 pounds. He was given a prescription of Amrix for muscle spasms and Lidoderm for the local trapezo pain and directed to follow up in one month.

Mr. Horne saw Dr. Wilson next on April 1, 2010, and April 29, 2010, after two months of physical therapy. Dr. Wilson noted Mr. Horne was still suffering residual numbness and tingling in the left and loss of dexterity. Dr. Wilson noted on physical examination Mr. Horne's cervical range of motion was reduced in rotation both left and right. He was also suffering diffuse hypoesthesia in the left hand. Dr. Wilson released Mr. Horne at that time noting he could return to work with permanent restrictions of no lifting, carrying, pushing or pulling greater than 20 pounds.

Mr. Horne had additional problems noted in physical therapy records which Dr. Wilson did not note in his records. On the final report from April 28, 2010, from Excel Therapy Specialists it was noted Mr. Horne continued to suffer pain rated as a 5 on a 10 point scale and was tender to touch in the mid-cervical region. He also continued to suffer headaches and a numb sensation in his skull. It was noted his pain was disturbing his sleep and it seemed like he had tingling in his fingers (left hand first three digits) getting worse. Mr. Horne also reported occasional numbness that occurred with head movement and sometimes even occurred when he rolled in bed. He reported a sensation of having water moving around in his ears when he moves his head in certain positions. On assessment he had minimal improvement demonstrated from cervical AROM and no upper extremity strength gains noted since his prior progress note of March 31, 2010. His right grip strength had decreased from 120 to 85 pounds of force. Reports of pain had increased on the final three sessions since he had reported moving to a different house. It was noted Mr. Horne had three remaining visits on his current prescription secondary to cancelled appointments.

Mr. Horne received follow up care with his family physician, Dr. William Gupton at the Saint Francis Warren Family Medicine Clinic in McAllister, Oklahoma. Dr. Gupton saw Mr. Horne on August 16, 2010, and noted Mr. Horne was suffering post traumatic headaches and he was taking Latrel and Ambien. The initial report stated Mr. Horne was post motor vehicle accident on October 7, 2009, with head and neck injuries. He had cervical spine surgery and he had been off all prescribed medications since then. He now had six months post history of suffering posterior headaches.

On July 6, 2011, the employer/insurer sent Mr. Horne's medical records to Dr. James Appelbaum, a neurologist, at Kanza Multi-Specialty Group for review. He noted the numerous injuries Mr. Horne suffered and after review of the medical records, concluded Mr. Horne's headaches were a result of the collision.

Mr. Horne began having pain in his neck and numbness in his right arm around November 1, 2011. He turned his neck and felt sharp pain that radiated down his arm. The pain caused him to be nauseous. He also had a headache with vomiting. Mr. Horne went to the emergency room and reported his symptoms. The medical records reflect he had radiating pain in his arms and they were cold and numb. Mr. Horne testified he was told he had the flu and sent home. He has continued to have problems with his right arm. This visit was reported to Dr. Wilson on his November 8, 2011, visit which Dr. Wilson records that Mr. Horne went to the emergency room after having severe pain in his neck and right arm numbness. Dr. Wilson noted he felt the cervical fusion was solid and there were no further difficulties with it.

The employer/insurer then sent Mr. Horne to see Dr. Timothy Pettingell in Broken Arrow, Oklahoma, who noted Mr. Horne was status post cervical fusion and that he suffered daily headaches due to chronic hypertension. There was also a question of whether the interbody fusion was solid and it was noted a CT scan had been performed but he deferred to Dr. Wilson as to the status of the fusion. He stated Mr. Horne should be restricted from no lifting, carrying, pushing, and pulling not to exceed 20 pounds.

Mr. Horne was also treated at the Tulsa Pain Consultants Group by Dr. Andrew Revelis. Dr.

Revelis initially saw Mr. Horne on January 24, 2012, as a referral from Dr. Pettingell. He treated Mr. Horne for axial neck pain and headaches. Dr. Revelis diagnosed Mr. Horne with post-cervical fusion syndrome, headache, and right upper extremity pain. He recommended occipital nerve root blockade and possible consideration of cervical facet injection to manage his neck and arm pain and headaches. Dr. Revelis provided the bilateral occipital nerve block in conjunction with his evaluation. Mr. Horne was seen for follow up on April 6, 2012. He reported Mr. Horne was still suffering intractable neck pain and based upon his findings on examination, Dr. Revelis recommended further cervical epidural injections. Dr. Revelis saw Mr. Horne on May 3, 2012, and provided a cervical epidural injection. His post-operative diagnosis was cervical disk displacement without myelopathy and upper extremity radiculopathy. Dr. Revelis provided an additional injection on June 7, 2012, and then saw Mr. Horne on July 6, 2012, at which time Mr. Horne reported he was still suffering intractable neck pain and right upper extremity tingling and numbness. Dr. Revelis reported Mr. Horne continued to suffer post cervical fusion syndrome and right upper extremity dysesthesia with burning and tenderness. He also reported he felt Mr. Horne was at MMI from a pain management standpoint but would likely require medication management long-term including MS Contin and Lyrica.

Dr. Revelis saw Mr. Horne again on September 7, 2012, to monitor his medications. Unfortunately, Mr. Horne gained considerable weight after taking Lyrica and his pant size had gone from a 34 to a 44. Mr. Horne's legs were swelling from the medication, but he tried to walk for exercise, however, walking any distance caused his neck to start hurting. His right hand and arm were sensitive to temperature changes. Dr. Revelis suggested transitioning from MSCR to Methadone and to wean off the Lyrica.

Dr. Hendler saw Mr. Horne on December 17, 2012, for evaluation, but no treatment as noted in his report. Mr. Horne was on Methadone and was receiving counseling from Dr. Goulden for that time frame. Dr. Hendler noted cervical spine fractures, status post discectomy, and fusion with instrumentation at C6-7 level, radiculopathy, headaches, vertebral artery dissection, mood disturbance, and hypertension. He noted there was no specific treatment recommended but he needed ongoing pain management including mental health evaluation. He placed him on physical limitations recommended by Dr. Wilson

Mr. Horne was last seen by Dr. Revelis on February 1, 2013. Mr. Horne had been using Methadone but wanted to reduce the use of the medication. He still suffered numbness, tingling and burning in his right hand which bothered him considerably. Dr. Revelis increased his Methadone and added Gralise.

Mr. Horne was most recently treated by Dr. Matthew Karshner in Cape Girardeau. Dr. Karshner tried a series of epidural injections which, unfortunately, did not provide any relief for Mr. Horne. The treatment was from May 6 through July 1, 2013.

Testimony of P. Brent Koprivica, M.D.

Dr. P. Brent Koprivica is an occupational medical physician who saw Mr. Horne on January 28, 2011, and December 20, 2013. In conjunction with those evaluations, Dr. Koprivica authored three separate reports. On January 28, 2011, during the course of a three-hour examination, Dr.

Koprivica performed a physical examination and interviewed Mr. Horne. Dr. Koprivica noted there was a prolonged extraction due to the severity of his injuries, and Mr. Horne had to be flown by helicopter to St. Luke's Hospital from the accident site. He had multiple traumatic injuries including a scalp hematoma, nasal fracture with laceration, left clavicle fracture and a cervical injury with C5 transverse process fracture, C7 transverse process fracture and left-sided articular pillar fracture at the 6-7 level. Additionally, he had a traumatic vascular injury with a dissection of the vertebral artery with occlusion. He noted Mr. Horne was hospitalized for 11 days due to the injury. Following the injury, Mr. Horne underwent an anterior cervical discectomy and fusion at the C6-7 level on December 21, 2009, by Dr. Wilson. Dr. Koprivica noted Mr. Horne was released at maximum medical improvement by Dr. Wilson on April 29, 2010, and given permanent restrictions of no lifting, pushing, pulling or carrying more than 20 pounds.

At the time of the evaluation, Dr. Koprivica noted Mr. Horne had several disabling features due to his multiple traumas from the motor vehicle accident. He reported Mr. Horne was suffering from headaches that would last as long as three to four days during which he was totally incapacitated. He also noted the headaches were unpredictable and occurred on an average of once a month. Mr. Horne was also suffering from persistent neck pain with resistant numbness into the left upper extremity involving his left thumb, left index and left middle fingers. Dr. Koprivica reported a weakness of the left tricep as well as a loss of grip strength on the left. Unfortunately, his sleep was also interrupted to the point where he got less than two hours of sleep per night due to his injuries.

Dr. Koprivica felt Mr. Horne suffered from several significant disabilities following his October 7, 2009, injury. He stated Mr. Horne's truck accident of October 7, 2009, was the direct, proximate prevailing factor in causing his multiple traumatic injuries following the event including his traumatic brain injury with loss of consciousness, his cervical injury, and left vertebral artery dissection. Dr. Koprivica concurred with Dr. Wilson in that Mr. Horne was at maximum medical improvement on April 29, 2010. Dr. Koprivica felt Mr. Horne had ongoing treatment needs attributable to the October 7, 2009, injury, including psychological issues that needed to be addressed. He also felt Mr. Horne's chronic pain and headaches needed to be addressed as well.

Due to the severity of the injuries, Dr. Koprivica felt Mr. Horne was permanently and totally disabled. Dr. Koprivica felt Mr. Horne was clearly, totally, occupationally disabled as a truck driver with his limitations. He believed there was some question regarding Mr. Horne's ability to sustain activities and noted Mr. Horne had attempted to return to work for an auctioneer performing sedentary work and was unable to do so. Dr. Koprivica recommended a vocational expert to assist in the assessment of permanent and total disability but stated it was clear any permanent and total disability would be attributable solely to the injuries and residual impairments from the October 7, 2009, truck accident in isolation. Dr. Koprivica felt restrictions were appropriate, including no overhead lifting types of tasks and avoiding sustained or awkward positions of the cervical spine. He also felt Mr. Horne should avoid exposing himself to whole body vibrations or jarring, such as operating heavy equipment. Mr. Horne was instructed to avoid all climbing activities and avoid repetitive pushing or pulling activities and avoid lifting or carrying activities less than 20 pounds for below chest level activities. Dr. Koprivica also felt Mr. Horne should have postural allowances and reported Mr. Horne was reclining at home because of the cervical pain symptoms. He felt Mr.

Horne would need to have ad lib ability to change positions, limiting captive sitting to less than one hour intervals, and standing and walking to less than one hour, with the flexibility of changing more frequently. In the event Mr. Horne was found to be employable, he felt Mr. Horne has suffered 50% permanent partial disability to the body as a whole due to his work injury.

Dr. Koprivica performed a reevaluation on December 20, 2013. In conjunction with that evaluation, he received additional medical records from the first responders as well as from the psychological treatment and evaluations Mr. Horne had received since his prior evaluation. Dr. Koprivica interviewed Mr. Horne with regards to whether he was wearing a seatbelt at the time of the injury. He reported Mr. Horne stated he always wore his seatbelt. Mr. Horne also reported he paid the fine of \$10.00 for not wearing his seatbelt as it would require another trip from Oklahoma to challenge the \$10.00 ticket. Dr. Koprivica also noted the additional vocational report of Terry Cordray, who opined Mr. Horne was permanently and totally disabled as a result of the October 7, 2009, accident in isolation. He also reported Mr. Horne was evaluated by Dr. Todd Hill for a psychiatric evaluation and diagnosed with major depressive disorder, single episode, severe without psychotic features as well as a pain disorder associated with both psychological factors and general medical condition and had an estimated GAF of 45. He also noted Mr. Horne had been evaluated by Dr. Steven Hindler regarding his pain symptoms. He also noted Dr. Hindler opined Mr. Horne had a legitimate basis for his neck pain and headaches that were attributable to the motor vehicle accident.

Upon physical examination, Dr. Koprivica noted Mr. Horne's symptoms, "really represent overwhelming disability." Dr. Koprivica noted he was driven to the appointment by a friend as he is not comfortable driving for long distances. He also reported in addition to the pain in the left upper extremity, Mr. Horne was suffering pain in his right upper extremity. Additionally, the frequency of his severe headache was about once a month. He took Percocet to manage his pain, but was not taking any other pain medication because he could not afford to see a physician on his own. Dr. Koprivica reported there was severe pain with cervical motion testing. He also noted with regards to Mr. Horne's right arm, it had not progressed to the atrophic phase of complex regional pain syndrome on inspection, but did have allodynia involving his right arm.

Based upon the evaluation of the subsequent records, Dr. Koprivica stated Mr. Horne's work injury of October 7, 2009, represented the prevailing factor in his development of major depressive disorder as well as a chronic pain disorder that involved psychological factors as well as his multiple medical conditions. He noted that although there were some psychological stressors in Mr. Horne's life, it was his conclusion that the October 7, 2009, injury was a prevailing factor in that regard. He was also very specific in noting the severe uncontrolled headaches Mr. Horne was currently suffering from were not present prior to October 7, 2009.

As to the issue of the seatbelt, Dr. Koprivica felt it would be speculative to believe Mr. Horne was not wearing a seatbelt. Dr. Koprivica noted he had photographs available for review of the tractor following the accident, which showed severe damage to the tractor which basically collapsed the passenger side of his cab. Dr. Koprivica felt if he was not wearing his seatbelt, it would be unlikely that he would have even survived the accident in light of the severe damage. He also felt one would not have expected him to remain on the driver's side of the cab if he was not

wearing a seatbelt. He felt any conclusions that Mr. Horne would not have suffered the injuries he did if he were wearing a seatbelt was speculative and in direct conflict with his opinions. In an addendum report of January 18, 2014, Dr. Koprivica noted he received additional records from the in-flight transportation of Life Net. He also pointed out the records recorded Mr. Horne was a "restrained driver of a tractor trailer unit that failed to negotiate a curve, lost control, and rolled an unknown number of times." Dr. Koprivica felt these records were consistent with the history provided to him as well as his beliefs, based upon the information he received and his assessments in his evaluations.

Dr. Koprivica's deposition was taken on January 23, 2014. At that time, the mechanics of the rollover accident was discussed. Dr. Koprivica reported the truck rolled to the right of the road and the depression was off to the right on the passenger side. He noted the passenger side of the cab was basically destroyed more than the driver's side as well as damage on the top of the roof. He evaluated the cause of injuries and he explained what forces caused the transverse process fracture. Dr. Koprivica felt those types of fractures were due to rotational forces, back and forth forces, translational forces on the transverse process. Dr. Koprivica was very clear in that recreating what happened in any type of a motor vehicle wreck is impossible as the forces are so complex and there are vector forces from all different directions. In collisions such as Mr. Horne's, he felt you would be coming to a stop which would produce the whiplash type of movement on the head and neck. He also noted if there was any type of rolling on the vehicle, there would be some additional rotational forces and depending upon where your head ends up, if forward, there will be an axial load whenever it comes to a stop. Dr. Koprivica felt in evaluating what specifically caused the injuries during the course of the collision, you are guessing in hindsight as to what structural injuries are attributable to the different forces that are put on the neck and it is not an exact science.

However, based upon his experience as an emergency medical physician, he did not believe Mr. Horne would have survived had he been on the passenger side of the vehicle. Dr. Koprivica felt if Mr. Horne did not have a seatbelt on and fell to the passenger side, he would not have survived this wreck. Although Dr. Koprivica notes these determinations are somewhat speculative, he reported that, "If I was going to bet my house that's what I would bet on."

In conjunction with the seatbelt issue, Dr. Koprivica presented research to support his opinions. Statistically, he felt rollover accidents caused the types of injuries Mr. Horne suffered from, whether you have a seatbelt on or not, just at a different rate. He also noted Mr. Horne suffered a left clavicle fracture which was consistent with a shoulder harness injury. Dr. Koprivica noted while you are restrained, your head is like a bowling ball with your muscles trained to hold it still, which was not happening in accidents such as Mr. Horne's. Dr. Koprivica also noted when someone is trying to get out of a vehicle, they will unhook the seatbelt and fall, a situation he has seen a number of times. He stated obviously if you come even a minute later and the seatbelt is already undone, it is going to appear they were unrestrained, but, the fact is, you don't know. It was his belief that if you were rolling over to the passenger side, the force would drive you out of your seat and if you were unrestrained, you would fall into the passenger component. He did not feel that there was any force if you were unrestrained to bring you back to the driver's side so that you would not have been crushed in the accident.

Dr. Koprivica felt the psychological evaluations performed by Dr. LaGrand and Dr. Hill were significant. He noted the second time he saw Mr. Horne, he had findings that were not physiologic findings, meaning they were not explained purely in the nature of his physical injuries. He testified the mental health experts were important to validate the behavioral responses to the injury as to whether or not they are true impairments or if a person is malingering. He felt in this case, Mr. Horne's psychological condition had been, in fact, validated that he had profound psychological disability.

Dr. Koprivica concluded that he questioned whether Mr. Horne was permanently and totally disabled from a physiological standpoint alone and wanted a vocational expert to evaluate those issues. However, when the psychological component was added, he did not feel he needed a vocational expert to know Mr. Horne was permanently and totally disabled.

Testimony of Daniel L. Kitchens, M.D.

Dr. Daniel Kitchens saw Mr. Horne for evaluation on October 22, 2013, on behalf of the employer. Dr. Kitchens gave a history of the injury and noted Mr. Horne was unable to return to his regular duties as a truck driver for Quanta INTI but tried to drive a dump truck which caused more pain in his neck. He also noted around Thanksgiving in 2010 or 2011, Mr. Horne was sitting in a truck and turned his neck and felt a pop in his neck with pain into his right side of his head and right shoulder and into his entire right arm. He noted Mr. Horne had therapy and pain management treatments, but those had not significantly helped. After performing a physical examination, there was pain with range of motion in his neck as well as a loss of pinprick sensation on sensory examination in his entire right arm, as well as his left thumb, left index finger, and a portion of his left long finger as well as into his left little finger and ulnar aspect of his left hand.

Dr. Kitchens assessed Mr. Horne as being status post motor vehicle accident in 2009 with fractures to the left side of the posterior element at C5 through C7 as well as vertebral artery occlusion and a facet fracture at C6-7 to the left. He stated Mr. Horne was treated with anterior cervical discectomy infusion at C6-7 which resulted in some improvement in the pain but residual numbness in his left hand. Dr. Kitchens did not recommend any additional testing or treatment as a result of the work related injury. He did not feel the MRI of the cervical spine revealed any evidence of a cervical disk herniation or nerve root impingement to explain the symptoms in Mr. Horne's right arm. He felt Mr. Horne's physical examination findings were suggestive of symptom magnification. He also felt Mr. Horne should not continue narcotic pain medication and concurred with the restrictions of Dr. Wilson which included 20 pounds lifting and limited range of motion of his neck. Dr. Kitchens stated there was no medical record or documentation of the pain beginning around Thanksgiving of 2010 or 2011. He noted the medical records indicate an onset of pain was November 2, 2011, which, in his opinion, was "obviously not around Thanksgiving in 2010 or 2011." Dr. Kitchens authored a second report dated January 9, 2014, in response to a letter from Mr. Lemp. Dr. Kitchens felt it was within a reasonable degree of certainty that if Mr. Horne had worn his seatbelt, he would not have sustained the cervical spine fractures during the rollover truck accident. He felt seatbelts were designed to prevent injuries associated with particular rollover motor vehicle accidents.

Dr. Kitchens' deposition testimony was taken on January 22, 2014. Dr. Kitchens testified that as a result of the motor vehicle accident, Mr. Horne had fractures, spinal fractures to the left of the posterior elements at C5 through C7, a vertebral artery occlusion, a facet fracture at C6-7 to the left, which was treated with discectomy and fusion at C6-7 and residual numbness in his left hand. He felt the symptoms in Mr. Horne's right hand were non-physiologic, non-anatomic which was suggestive of symptom magnification. His basis of explaining the right arm symptoms was symptom magnification. While Dr. Kitchens felt it may be important to know whether someone is suffering from a psychological condition in relation to their physiological injuries, he replied it would depend upon whether it was relevant. When asked whether it would be important to know whether someone is suffering from depression when they are accused of symptom magnification, Dr. Kitchens responded that symptom magnification was its own diagnoses which he felt was a different issue than other illnesses or other diagnoses such as major depressive disorder.

Dr. Kitchens testified he was not provided with reports from the first responders, including Life Net, Carroll County Ambulance and the Braymer Fire Department. Additionally, Dr. Kitchens testified he did not know which side of the road Mr. Horne's truck went off. He did not know which side of the truck was crushed or how much the roof was crushed in on the driver's side. Despite this lack of knowledge, Dr. Kitchens felt patients that are unrestrained have more severe injuries. When asked more specifically: "Are you telling the Judge that Mr. Horne would not have been injured in this collision rollover, crushed the cab of a semi-truck, if he had been wearing a seatbelt?" He answered, "I do not have enough information." Dr. Kitchens felt historically when somebody is non-restrained in a rollover vehicle, they are likely to suffer more injuries than somebody who is restrained. Dr. Kitchens testified the cervical spine fractures Mr. Horne suffered are consistent with a sudden, violent twisting movement or side movement of the head which he felt is what happens when you are thrown around unrestrained. He also added it was not only movement but also force applied to the head, axial force, loading. However, Dr. Kitchens did not make any evaluation in the case to determine whether this crush of the roof of the cab was such that would have struck Mr. Horne in the head if he were sitting in the driver's seat. Dr. Kitchens further testified that pure axial loading injuries were more consistent with the force of falling abruptly from being unrestrained.

At the conclusion of his deposition, Dr. Kitchens testified:

Q. Okay. And are you saying that the transverse process fractures were caused by Mr. Horne's head coming into contact with something or being thrown violently in the collision?

A. It's my opinion it's from being thrown violently in the collision.

Q. Okay. Not that it had to have struck something to have caused the injuries he did (sic)?

A. Well, that's highly possible also. I just don't have enough information to say which of those is possible, and it would depend on if he's wearing a seatbelt. If he was wearing a seatbelt, then the answer would be those fractures were sustained

by his head violently moving. If he was not wearing a seatbelt, then my opinion would be that he sustained the fractures from his head striking some other part of the cab during the rollover collision.

Q. Okay. So as I listen to your answer, you've given an explanation for why he suffered the injuries both whether he was restrained or non-restrained, and either one of them could have accounted for the injuries he suffered; is that correct?

A. Either he wore the seatbelt or he didn't...(Kitchens depo. At 49-50)

He further added:

Q. There's a lot of explanations for how he hurt himself?

A. No. Either he was or he wasn't. That's the fact. Either he was wearing it, or he wasn't wearing it. If he was wearing it, then these are the injuries he had. If he wasn't wearing, then these are the injuries he had, and not wearing it certainly contributed to his injuries. (Kitchens deposition, P. 52-53)

Opinion of Denise LaGrand, Licensed Clinical Psychologist

Mr. Horne applied for social security disability and, in that process, he was evaluated by Dr. Denise LaGrand at the request of the Social Security Administration on October 4, 2011. Dr. LaGrand noted Mr. Horne reported he was suffering chronic pain due to the discectomy and fusion of the spine which also created numbness of his left arm, severe headaches and depression. Dr. LaGrand reviewed the medical records, performed a clinical interview and also gave Mr. Horne the Wechsler Adult Intelligence Scale, wide-range achievement test and mental status exam-Montreal Cognitive Assessment. Mr. Horne reported he had constant pain and insomnia as well as an inability to lift over 20 pounds or to sit and stand for very long. He also reported he does not like to be around others and avoids social relationships. Mr. Horne reported when he had a headache, he would get up and lie around and watch TV, but couldn't sit for very long. Dr. LaGrand also reported Mr. Horne previously enjoyed taking care of his horses and cattle, riding four-wheelers, welding and hunting but was no longer able to engage in those activities due to the pain and limited mobility. Dr. LaGrand noted Mr. Horne described his current mood or affect as depressed and anxious. She reported Mr. Horne's affect that she observed during the exam was appropriate and consistent with his reported affect. She also reported he appeared to be in pain after sitting for long periods of time. Dr. LaGrand assessed Mr. Horne with the following:

Axis I:

1. Pain Disorder, due to general medical condition
2. Major Depressive Disorder
3. Generalized Anxiety Disorder

Axis II:

1. No diagnosis

Axis V:

1. GAF: 50

Dr. LaGrand noted the combination of mental and physical symptoms lead to greater impairment and would make Mr. Horne less likely to be successful in a job setting. She also stated she did not expect any significant improvement in the next twelve months.

Testimony of Todd P. Hill, M.D.

Dr. Todd Hill is a psychiatrist who evaluated Mr. Horne on two separate occasions, May 12, 2011, and February 12, 2014. Dr. Hill reported Mr. Horne denied any previous psychiatric history, and had never seen a psychiatrist or psychologist or hospitalized for psychiatric issues prior to the work related injury on October 7, 2009. He also reported he had never been on any psychiatric medications prior to the injury. Mr. Horne reported his problems with depression had worsened over the prior six months and he stays at home for several weeks without getting out. He also described symptoms of extreme fatigue. Dr. Hill also reported Mr. Horne worries constantly about his future. He also noted Mr. Horne was divorced in 2008. Dr. Hill also noted Mr. Horne was very financially secure, but is now financially “ruined”. Mr. Horne also reported he worked hard both at his regular job and on the farm, and one of his major sources of pleasure was working. However, since the injury, he has been unable to work.

Dr. Hill administered the Zung Questionnaire and reported Mr. Horne scored in the range of extreme to severe depression. Following the review of the records, Dr. Hill’s evaluation and mental status examination, he assessed the following:

Axis I:

1. Major depressive disorder, single episode, severe, without psychotic features
Pain disorder associated with both psychological factors and a general medical condition

Axis II:

1. None identified at the time

Axis III:

1. Chronic neck pain, headaches and left upper extremity weakness and numbness

Axis IV:

1. Severe colon problems with chronic pain, personal stressors and inability to work

Axis V:

GAF of 50

Dr. Hill stated Mr. Horne met the criteria for major depressive order, termed as a single episode as this was the first episode of depression and had been ongoing for more than two weeks. Dr. Hill noted there was no previous episode of depression reported throughout the medical records

or by Mr. Horne. He noted Mr. Horne described symptoms of worthlessness, helplessness, hopelessness and severe guilt as well as fatigue and suicidal thoughts at times. He also had disrupted sleep, consistent with severe depression. He felt Mr. Horne's symptoms all indicated significant change from his previous level of functioning prior to the work related injury of October 7, 2009. Dr. Hill noted the GAF score of 45 indicates serious symptoms and a serious level of impairment and social and occupational functioning. He noted Mr. Horne has never been given a previous GAF score. But, given the fact he was a highly functioning individual for most of his life, he believed Mr. Horne's GAF score would have been 75 or greater, indicating an ability to function in almost all areas.

Dr. Hill also reported Mr. Horne met the criteria for pain disorder. He stated the pain in Mr. Horne's particular situation causes significant clinical distress and/or impairment of his social, occupational or other areas of functioning. He noted patients with a pain disorder have psychological factors in such a case that are judged to play an important role in the severity, exacerbation, and/or maintenance of the pain as is found in Mr. Horne's depression. Dr. Hill specifically reports the pain is not intentionally produced or feigned as in malingering. He also felt in Mr. Horne's case, the pain appears to be chronic and its duration has been for six months or longer. Dr. Hill stated Mr. Horne has a serious to marked level of impairment and, as a result, felt he had suffered a 60% disability to the body as a whole for his diagnosis of major depressive disorder and pain disorder. He noted this rating was separate from the rating of any physical impairment. However, it was his professional medical opinion that when one combined the physical disability and the psychological disability, Mr. Horne was permanently and totally disabled and these physical and psychological disabilities were the direct result of the October 7, 2009, accident.

Dr. Hill assigned restrictions based on the chronic pain and chronic depression, anxiety, fatigue, and lack of motivation as well as periods of insomnia. He felt these restrictions have risen to a level of severity that would not allow him to adhere to the persistence, pace and concentration needed for full-time employment. He did not feel as a result of these symptoms, that Mr. Horne would be able to adapt to a stressful environment consistent with employment. He also felt Mr. Horne should have additional treatment in terms of psychiatric and psychological treatment consisting of counseling as well as pharmacological management of his depression. Dr. Hill specifically reported it was his professional medical opinion that there is not any level of malingering on Mr. Horne's part. He noted patients who malingering often consciously overreact and describe symptoms that are not clear and lack detail. He felt Mr. Horne was an excellent historian when describing his symptoms and his level of pain as well as his experiences following the work-related accident. He also felt Mr. Horne was able to provide significant details regarding his past social history and level of functioning prior to the work accident as well as his current symptoms.

Dr. Hill authored an addendum report dated November 10, 2011, after receiving the evaluation and records of Dr. Lisa Goulden, Dr. Timothy Pettingell, and Dr. Denise LaGrand. Dr. Hill reviewed Dr. Goulden's report as well as the testing results. He noted that the MMPI-2 is a personality test that is used to put people into a "personality profile." He felt a diagnosis should never be made solely on the results of an MMPI test and, in fact, it is not used in psychiatric practice to help direct medication recommendations or make diagnosis. He noted the Million

Behavioral Medicine Diagnostic test results were described as having symptoms consistent with a pain disorder. He also noted Dr. Goulden felt Mr. Horne's psychological condition was fairly complicated and very likely chronic in nature, listing many stressors including his divorce, problems in his relationship with his wife, pain, history of illicit drugs involvement and criminal charges associated with illicit substance. However, Dr. Hill felt it should be noted that the stressors listed by Dr. Goulden did not interfere with his ability to be actively employed throughout his adult life and he did not have any symptoms of major depressive disorder or pain disorder until after the work-related accident on October 7, 2009. Dr. Hill was very clear that Mr. Horne's psychiatric illness did not appear until after October 7, 2009.

Dr. Hill also reviewed Dr. LaGrand's report and felt it was significant that she believed Mr. Horne was "open and honest and provided adequate information about his situation. He appears to be putting forth his best effort on the exam. The results of the exam appear to be a valid estimate of overall functioning." Dr. Hill reported Mr. Horne presented consistent descriptions of his current and ongoing symptoms of depression and pain. He reiterated patients with a pain disorder have psychological factors such as depression which play an important role in the exacerbation, severity and/or maintenance of pain which he felt was consistent with what was described throughout any reports of symptom magnification.

Dr. Hill re-evaluated Mr. Horne on February 12, 2014, and reviewed the additional psychological evaluation and progress notes of Dr. Goulden. He noted Dr. Goulden was in agreement with his initial recommendation of starting Cymbalta, but also noted it did not appear that it was prescribed until late January, 2012, and there was no further mention of it in the records. Dr. Hill stated he was in agreement with Dr. Goulden's opinion that Mr. Horne's psychological condition remains unchanged. He noted Mr. Horne still does not go out very often and often isolates himself at the lake house. He also had Mr. Horne complete another Zung Depression Rating Scale and compared the results to May, 2011, and noted the results were unchanged. Dr. Hill did not feel Mr. Horne was given an adequate trial of Cymbalta. He recommended Mr. Horne get back on Cymbalta and have his medication monitored and adjusted by a psychiatrist. He also felt Mr. Horne would benefit from seeing a psychologist that specializes in behavioral pain management as well. Additionally, Dr. Hill felt Mr. Horne's symptoms involving his right upper extremity should be evaluated with an MRI.

Dr. Hill defined chronic pain disorder or somatic symptom disorder as virtually the same. He defined it as usually somebody who has an underlying medical condition that causes the pain and then the pain also is the primary focus of attention with the patient. He added there are times when a patient will even have some over exaggeration of pain because of the pain disorder and it can affect their mood. Further, they actually have a psychological pain cycle set up at that point. When asked about Dr. Kitchen's claims that there is no anatomical basis for the right arm pain, Dr. Hill responded that a pain disorder is just that: you will experience pain. He added that Mr. Horne has a medical condition from a cervical fracture and the pain disorder is still the pain disorder in his opinion. He felt it was unclear whether there was an anatomical dysfunction because there are not any detailed images that he is aware of. But the fact is, Mr. Horne suffered an injury to his cervical spine and now has additional symptoms.

Dr. Hill felt one of the main limitations of depression is the function of sleep. He felt Mr. Horne's sleep was disrupted. Additionally, there was trouble with maintaining attention and the ability to get fatigued easily. Also, Mr. Horne avoided socializing with people. He recommended a trial of an anti-depressant combined with psychotherapy

Testimony Lisa Goulden, Clinical Psychologist

Dr. Lisa Goulden is a licensed clinical psychologist who performed an evaluation on October 10, 2011. Dr. Goulden gave a history of the injury and reported Mr. Horne stated he was in pain every day, including neck pain and headaches. Mr. Horne reported difficulties with sleeping, concentration and mood, in addition to the physical pain. Mr. Horne reported he had no contact with mental health professionals before his date of injury. He denied a history of mental health concerns and stated he had not taken any medication for his mood. He also reported to Dr. Goulden he saw a mental health professional in McAlister several times in the spring of 2010. Dr. Goulden gave several tests as part of her assessment. In her summary, she reported Mr. Horne presented with an evaluation of continued neck pain with headaches in addition to sleep disturbance, low energy, loss of interest, impaired memory and concentration, and mood disturbance with suicidal ideation. He reported those symptoms were present since the motor vehicle accident with a new disturbance for the past year. She noted several contributing factors, including his divorce before the date of the injury, conflict with his ex-wife, and an emotionally and physically distance relationship with his teenage daughter as examples. Based on this information, she gave the following diagnosis:

Axis I:

1. Depressive disorder not otherwise specified
2. Pain disorder associated with the psychological factors and a general medical condition

Axis II:

1. Personality disorder not otherwise specified

Axis III:

1. Status post MVA and cervical fracture; cervical fusion; uncontrolled hypertension per medical records

Based upon her evaluation, Dr. Goulden recommended individual behavioral and cognitive psychotherapy to assist him in increasing his functioning so that he may begin to meet his goal of getting help. She did not feel the prognosis was favorable given the psychological testing scores and what she felt was his lack of eagerness for appointments. She also recommended antidepressant medication. Dr. Goulden performed nine counseling sessions in addition to her initial assessment. She re-evaluated Mr. Horne on January 28, 2014, and he again reported to Dr. Goulden that he needed something to fix his arm and neck to take care of the pain that he was suffering all the time. Mr. Horne continued to report pain symptoms in his right and left arm as well as his neck and headaches. Dr. Goulden performed much of the same testing she had in her prior evaluation and reviewed additional records that were made available to her. She noted that

while there appeared to be some reductions and symptom severity noted in his MMPI-2 scores, his profile was largely unchanged compared to the profile obtained in 2011. Dr. Goulden also stated Mr. Horne had a history of low back and right shoulder pain prior to this injury, as well as reports of insomnia and depression at the time of the divorce, which she believed to be around March of 2009. It was her opinion that life was not good for Mr. Horne in 2009. She reported Mr. Horne's spouse of 16 years filed for divorce and he gave her their home and also had a relationship with the teenage daughter that was not good, in addition to avoiding phone calls from his ex-wife. He then was involved in a motor vehicle accident, lost his job, and gave up his home. She believed he had contact with a mental health professional in March of 2009 around the time of his divorce.

Dr. Goulden was asked whether the motor vehicle accident was the prevailing factor in causing the diagnoses that she had assessed. Dr. Goulden felt a review of the medical records revealed there was a consensus about the prevailing cause of the psychological conditions being the work-related motor vehicle accident. She stated she believed, given the extent of his injuries at the time, it would be reasonable to conclude it was the prevailing factor. She noted, however, there was some documentation he was suffering from some level of depression prior to the motor vehicle accident attributable to the end of his marriage of 16 years and the loss of his home and sought mental health treatment. Dr. Goulden said she could not state with certainty whether the motor vehicle accident or the divorce and the loss of his home was the prevailing factor, given what she characterized as his "inconsistencies in his report and impression management." She reported she did not have any records from the psychiatrist who saw Mr. Horne so she could not draw any conclusions. What she felt she could say with a reasonable certainty was that, based on the evidence, Mr. Horne is an individual who possessed limited resources for coping in stressful circumstances, who in 2009 suffered a divorce, loss of his home, and motor vehicle accident with the injuries requiring hospitalization for about two weeks and subsequent surgery, followed by some degree of chronic pain. She believed his psychological status was due to those factors and events put together.

Dr. Goulden felt Mr. Horne would be capable of employment if it was absolutely necessary for him. However, given his passive dependent personality traits and his chronic depressive condition, she felt he lacked the internal resources and the external incentives to motivate himself to better his situation. Dr. Goulden felt there was no indication for further treatment as he had been provided with both medical and psychological care with no change in his functional status, pain level or self-reported mood. She also felt there was potential for symptom magnification, but did not find clear evidence of exaggeration to the point of malingering or psychological inventories. She felt it was most likely he had some degree of legitimate pain and mood disturbance and a subjective experience/report is an exaggeration of his condition. As a result of his psychological condition, she felt he had suffered at 25% permanent partial disability.

Dr. Goulden noted in her deposition that overall, she felt he was giving a valid report with some exaggeration in his endorsement of his symptoms. However, she clarified this was not "malingering or faking bad." She repeated the tests at her second evaluation on January 28, 2014, and noted the results were essentially the same. At the time of her deposition, Dr. Goulden began to waiver on her prior statement as to whether the work was the prevailing factor. She seemed to put an emphasis on whether he had any prior mental health treatment. However, ultimately she

acknowledged there was no evidence of any pre-existing treatment or diagnosis of any prior psychiatric condition.

Interestingly, Dr. Goulden testified attorneys for the employer and insurer instructed her not to have any contact with the employee's attorney despite being the authorized treating physician. Additionally, she withheld correspondence on this case due to those instructions. Those instructions came in a letter dated October 26, 2011, wherein Ms. Anthony stated, "I just read your October 10, 2011, report and I believe there has been some confusion as to your role in this matter." The letter further read "All future medical reports and responses to these questions should only be sent to the employer/insurer and me as an attorney." Dr. Goulden also testified she recommended Mr. Horne receive pharmacological treatment, including Cymbalta, from a physician. However, Mr. Horne was not given the prescription for Cymbalta. Dr. Goulden testified she contacted the case manager and told her he needed Cymbalta. Unfortunately, she cannot recall the response she received. Nonetheless, Mr. Horne never received a prescription for Cymbalta with Dr. Goulden and she was unable to gauge the benefit of the medication.

Employee's Testimony

David Horne was born on July 22, 1957. He was working at Price Gregory when he suffered an injury on October 7, 2009. Mr. Horne obtained his high school diploma as well as some college. He testified he did not have enough credits to graduate received C's and D's in his classes.

Subsequent to high school, David began to work for a bank as a teller. He worked mainly for banks from 1978 until 2006. From approximately 1978 to 1987, he worked as a teller. He then worked in management from 1987 to 2000. In 2000, he left the banking industry because of the stress of supervising 200 employees, which also required hiring and firing. He testified during this time he developed insomnia and obtained a prescription for a sleep aid from his primary care physician. However, he does not remember ever taking it. After leaving First Missouri Bank and Trust in 2000, he began working for Boeing as an assembler of aircraft parts. This was a manual labor job he worked from 2000 to 2002. After working for Boeing, he worked at Overton State Bank after being recruited to come to work at this bank in management. While working at that job, he was only required to supervise approximately 20 employees. He left the job with Overton State Bank to begin working for Price Gregory Pipeline. He was initially recruited by a friend, Mike Hartsfield, who was his immediate supervisor. Mr. Horne drove a truck, hauling pipe and any other products necessary for the pipeline project. Mr. Horne testified he worked significant hours at this job. Typically, he began his work week on Monday and by Wednesday at noon, they had already worked a 40-hour week. From July 22, 2009, through October 11, 2009, he had worked 544 hours of regular time and 525 hours of overtime. For that timeframe, which was less than 14 weeks, he grossed \$35,289.02, significantly more than he was making at the bank prior to working for Price Gregory.

Mr. Horne testified he was injured on October 7, 2009, while driving a truck for Price Gregory. He began the day around approximately 5:00 a.m. His job for the day was to haul mats. He described the mats as essentially pallets made from railroad ties used on the ground for equipment to drive over. On that particular day, he recalled the mats were particularly muddy. He

had others helping him to secure the mats, but had difficulty securing them due to the mud. Apparently, the mats kept sliding off the bed of the truck. His delivery destination was on a route he had driven many times. He testified he knew the curve as well as the speed limit.

With regards to whether Mr. Horne was wearing a seatbelt, Mr. Horne testified he did not specifically recall whether he put his seatbelt on that day. However, he testified he always wore his seatbelt out of habit. This applied not only to home but also to work. Mr. Horne also testified he had a dash light that would indicate when he did not have his seatbelt on. He always reviewed the gauges and lights of his truck prior to driving. If he did not have his seatbelt on, he would have noticed the light and immediately put it on. Mr. Horne testified he would not have seen the light indicating he did not have his seatbelt on and then disregard it.

Mr. Horne typically worked from 5:00 a.m. until they were done for the day. His supervisor was Mike Hartsfielt who gave him his instructions as to what needed to be done each day. Mr. Horne testified the pace was strenuous as urgency was always stressed to get the project done. Unfortunately, the number of hours he drove led to him feeling tired. He felt that it had an impact on his driving and his ability to react. He believes that was the case on the date of the accident.

Mr. Horne testified he did not remember anything from the accident until he woke up in the hospital. He spent several days in the hospital and subsequently had surgery on his neck. He continued to have follow-up treatment for headaches as well as neck pain. He developed psychological issues attributable to the accident, for which he sought treatment. Mr. Horne testified he currently is not receiving any treatment for his injuries. However, he would like to receive psychological treatment as well as pain management for his neck pain, arm pain, and headaches.

Mr. Horne testified he received two tickets as a result of the accident. One ticket was for failure to wear a seatbelt and the second was for driving too fast for the conditions. He testified he went to court shortly after he had had his neck surgery. He wanted to contest the charges but that would require a second appearance on another date. Due to the time, distance, and expense involved, Mr. Horne decided it was more economical to pay the tickets that amounted to \$210.50 than it was to drive from Oklahoma back to Carrollton to contest those tickets.

Mr. Horne continues to suffer pain in his neck, right and left arm and shoulder, as well as headaches, and has difficulties from a psychological standpoint. With regards to his neck, he has significant pain in his neck that affects his ability to sleep as well as his range of motion. He limits his trips when he is driving because he has difficulty turning his head to check for blind spots. The only thing that really helps his neck pain is to recline. His abilities to sit, stand, and walk are significantly impacted by his neck pain. He limits his grocery trips to just a few items so that he doesn't have to walk too far nor carry too many groceries into the house. He often wakes up during the middle of the night because of the neck pain and is unable to go back to sleep. He also has pain in his left arm and shoulder that radiates from his neck. He has a loss of range of motion in his shoulder due to the clavicle fracture. Additionally, he continues to suffer headaches that are incapacitating when they strike. With regard to his psychiatric condition, he has difficulties wanting to be around very many people. He now suffers from pain and depression. Mr. Horne testified he never had a diagnosis of a pain disorder or depression prior to this injury. Although

there was some indication he had counseling before, he testified the only counseling he ever received prior to this collision was marriage counseling prior to his divorce. He also testified that although he had stress from his prior job, he was never diagnosed nor treated for depression.

Mr. Horne is currently limited in his activities of daily living. He resides in a house of a friend. He has limited upkeep on the house as there is no grass to mow. He does very limited chores inside, only vacuuming or sweeping when absolutely necessary. He attempted to work following the accident. He worked as a dump truck driver during the summer 2010, but was unable to do that job because of significant pain in his neck. He also worked as an auctioneer for just a few hours trying to write the bills of sale, but was unable to do that as well. Mr. Horne testified he also called Price Gregory to see if he could come back to work but was told he could not due to the restrictions placed by the physicians. He filed for unemployment benefits the first time after he was released from the doctor and those ran out in approximately November 2011. Mr. Horne has applied for and is currently receiving social security disability due to his injuries from this accident. Mr. Horne testified he would rather return to his job at Price Gregory than remain on Social Security Disability. He only receives approximately \$15,600 before reductions from his social security disability compared to Price Gregory where he was on pace to make \$141,156.08 a year when this accident occurred. He testified he would rather work than stay at home.

Prior to this accident, Mr. Horne was involved in numerous activities around his farm. He maintained cattle and participated in calf roping. He always worked 80 hours a week between his job and the activities at home and on the farm. He did not like to sit down.

Mr. Horne testified he did not believe he was on his cell phone at the time of the accident. However, cell phones were allowed to use for company business if he used a hands free. Although he was not required to work the number of hours that he did, he testified if he did not, he believed he would be fired.

Testimony of Vocational Rehabilitation Expert Terry L. Cordray

Mr. Cordray evaluated Mr. Horne on January 28, 2011, and also reviewed the medical records and performed vocational testing at that time. Mr. Cordray testified Mr. Horne was a high school graduate with some college credits. However, he had poor grade point averages and did not complete his degree. For vocational purposes, Mr. Horne was considered a high school graduate. Mr. Cordray noted Mr. Horne's work background primarily consisted of working for banks prior to working for Price Gregory Pipeline. After reviewing the vocational testing results, Mr. Cordray testified Mr. Horne could not realistically participate in academic vocational retraining programs. He felt this was hampered by Mr. Horne's severe headaches and his lack of concentration because of fatigue in addition to the need to alternate sitting and standing, which would not be appropriate for a classroom setting.

Mr. Cordray felt Mr. Horne presented as an individual who had a cervical fusion surgery and, as he personally observed, needed to frequently alternate between sitting and standing. He also reported Mr. Horne had headaches at least once a month that lasted three to four days in duration. He noted Dr. Koprivica felt Mr. Horne was clearly totally occupationally disabled as a truck driver

and restricted from overhead lifting, avoiding sustained or awkward postures of the cervical spine, avoid exposing himself to whole body vibration or jarring and avoid all climbing activities. He also felt Mr. Horne should avoid repetitive pushing or pulling, and lifting or carrying to less than 20 pounds below chest level. Mr. Cordray further noted Dr. Koprivica also stated Mr. Horne should have posture allowances with the ad lib ability to change postures. Noting, captive sitting would be limited to less than one hour, and standing and walking limited to less than one hour. Mr. Cordray testified those restrictions prevented Mr. Horne from performing his job as a truck driver and as an aircraft assembler. He also felt he would not be able to perform a job such as an operation manager, as he would not be capable of the ad lib ability to change positions. Mr. Horne also could not be constantly sitting at and operating a computer due to the restrictions. Accordingly, he felt that this would prevent him from returning to any of his previous jobs as a bank operation manager. Mr. Cordray testified Mr. Horne was not capable of performing any job in the open labor market and was totally disabled as a result of the October 7, 2009, accident in isolation.

Mr. Cordray testified he also took into consideration the GAF scores by Dr. LaGrand and Dr. Hill, which were 45 and 50 respectively, in analyzing Mr. Horne's employability. Mr. Cordray testified Mr. Horne did not have any permanent medical problems or any restrictions resulting in a vocational alteration or impairment prior to 2009, and he worked full duty with no restrictions. Mr. Cordray was also asked to consider how sleep deprivation affected one's ability to perform and he felt it affected their ability to concentrate and stay on task. He stated he was involved in the railroad industry for 30 years and did many studies on fatigue because of train wrecks due to people falling asleep when they were working a 24-hour, 7-days a week schedule. Mr. Cordray testified chronic fatigue impacts your safety abilities as it impacts your ability to be alert and attentive and stay on task.

In summary, Mr. Cordray felt the easiest job Mr. Horne ever had was the bank teller, which he wouldn't be able to do with a GAF of 50 and serious depression which would require him to interact with people on a daily basis. Mr. Cordray felt even the sedentary jobs Mr. Horne could do in the past, he would now be unable to do because of the need to move about and not stand in one position for a period of time. Coupled with his psychological impairment, this would result in Mr. Horne being taken out of all jobs in the open labor market.

Vocational Evidence by James England

James England evaluated Mr. Horne on August 26, 2013, and also reviewed the depositions of Mr. Horne as well as Mr. Cordray. He reported he did not perform any additional testing, as he did not see any purpose in repeating the testing performed by Mr. Cordray. Mr. England's educational and vocational history was consistent with that of Mr. Cordray's. Mr. England noted Dr. Wilson felt in March of 2010, Mr. Horne would be able to return to work with limitations of no lifting, carrying, pushing or pulling of more than 20 pounds. He also noted the restrictions of Dr. Koprivica that included Mr. Horne being totally occupationally disabled from truck driving based on the limitations. He also noted the specific limitations to avoid overhead lifting type of tasks and sustain awkward positions of the cervical spine. This is in addition to avoiding vibration or jarring types of activities as well as all climbing activities, and pushing or pulling. Dr. Koprivica also restricted Mr. Horne to avoid lifting or carrying more than 20 pounds below chest level with captive

sitting limited to less than an hour and the ability to change postures as needed. Standing or walking were limited to less than an hour with the flexibility of changing more frequently. Mr. England noted Dr. Pettingell agreed with the permanent restrictions assigned by Dr. Wilson. Additionally, Dr. Karschner felt Mr. Horne was capable of working in at least a sedentary level and possibly at a lighter heavier level of exertion. Mr. England also stated Dr. Hill assigned a GAF score of 45 and reported Dr. Hill felt those restrictions did not allow Mr. Horne to adhere to the persistent pace and concentration needed for full time employment.

Mr. England reported Mr. Horne described himself as not sleeping well, getting two hours of sleep at a time. He also reported Mr. Horne spent a lot of time in the recliner and would visit with a friend in his shop for an hour or so occasionally. Mr. Horne also reported to Mr. England he could generally sit for about an hour, lift about 20 pounds, walk for about 30 minutes, climb a few steps at a time and can drive for about an hour at a time.

In conclusion, Mr. England felt Mr. Horne was a man in his mid-50's who had worked a good part of his career in the banking industry, not getting into truck driving until 2007 or 2008. Based only upon the physical restrictions of any of the doctors, Mr. England believed Mr. Horne would still be able to handle essential functions of being an operations manager in a bank as he had successfully done in the past. He also felt Mr. Horne would be able to do a variety of other entry level types of clerical and service employment, such as being a night clerk at a motel, a general cashier, a sales clerk, or a security officer. However, Mr. England noted that if one assumes his psychiatric conditions noted by Dr. Hill, Mr. Horne was precluded from all forms of employment.

Testimony of William Nelson

William Nelson has an educational background in the area of ergonomics. At the request of Employer's attorney, he was requested to perform a biomechanical assessment involving an accident on October 7, 2009, involving Mr. Horne. He was specifically asked if Mr. Horne was wearing his lap/shoulder belt at the time of the incident would he have sustained the reported injuries to the same extent. Mr. Nelson concluded, "I believe without the lap belt or shoulder belt on, the injuries were more severe than if he would have had his lap and shoulder belt on."

Mr. Nelson explained he reached that conclusion by finding a vehicle of the same year and model and took measurements of the vehicle including the interior cab area as well as the height and weight of Mr. Horne and then used anthropometric table to show with it what his height and weight should have been in the seated position and compared that to the space inside the cab and how much space he would have taken within the cab itself. He felt it did not indicate that the crush of the cab area would have invaded his space Mr. Horne was occupying at the time if he would have had his seatbelt and shoulder belt on. When asked when he typically saw that this type of injury with a seatbelt versus without a seatbelt he responded

Without a seatbelt, you will see a lot more injuries. Actually, I'm surprised there's not a lot more on this type of incident to be honest with you. Usually you will get a lot more glass, lacerations and cutting of the body, as well as a lot of times broken ribs, other

types of broken bones and internal damage. With a seatbelt on, you'll see a lot less of that, especially in a situation like this where you don't have anything that's really invading the space that the driver is occupying.

Mr. Nelson did not think it was unusual to see some neck injuries from a whiplash standpoint or from a lateral standpoint in a roll over situation.

Mr. Nelson was clear that his report did not assert that had Mr. Horne been wearing his seatbelt he would not have been injured when the truck rolled over. Mr. Nelson testified he was asked to make an assumption Mr. Horne was not wearing his seatbelt in reaching his conclusions and he stated it was obviously an assumption and he had to base his analysis on the documents that were provided.

Mr. Nelson testified he was not provided the records from LifeNet or the Carroll County Ambulance District by the Employer/Insurer. Mr. Nelson testified he never received any information as to what the crush level was in the interior of the truck. Mr. Nelson testified the only picture that shows the interior of the cab shows the deformation of the roof is, whether it is the liner or the metal, is below the headrest. Mr. Nelson concluded by saying that some of the injuries Mr. Horne suffered would have occurred whether as restrained or unrestrained.

Testimony of Jared Boone Phillips

Mr. Phillips testified he was working for Price Gregory and was travelling towards Mr. Horne when he saw the accident occur. He testified he saw the trailer go off the road first and then the truck flip on its side and then its roof. Mr. Phillips pulled across the road into a driveway area right by the accident. He got out of his vehicle and ran towards the truck. He testified he knelt down and saw Mr. Horne's head nearest the driver's window and his feet to the passenger side. Mr. Phillips then called 9-1-1 on his cell phone and moved away from the truck. One of his co-workers extinguished the fire and then attempted to extract Mr. Horne. Although the records from the first responders indicate there was a prolonged extraction, Mr. Phillips believes that the co-workers completely extracted Mr. Horne from the truck. Mr. Phillips testified Mr. Horne was not restrained by his seatbelt by the time he arrived on the scene. He did not believe Mr. Horne was wearing a seatbelt at the time of the accident because he felt Mr. Horne was unconscious when he arrived. He based this decision on the brief time in which he leaned down, peered in the cab, and did not see Mr. Horne flaying around or talking. However, he acknowledged the window was rolled up and the door was closed.

Testimony of David Blackledge

Mr. Blackledge testified he was an assistant supervisor on the project and was second in charge. He came upon the accident scene and waited for Life Net. While walking around, he found Mr. Horne's phone as it was emitting sounds. He testified there was a text message and he opened the text message. He testified he saw text messages "in that time frame." Mr. Blackledge testified personal cell phone use was not allowed while on duty. However, he acknowledged that it was

allowed for company business with a hands' free. He believed cell phone use would be unnecessary as there are radios in each truck and it was the employee's job to make sure they were working. He did acknowledge there would be reasons to use a cell phone rather than a radio if you did not want people around you to hear the conversation. He testified seatbelt usage was enforced but couldn't recall the last time he saw it enforced.

Testimony of Mike Ezell

Mr. Ezell was a corporate director of safety for Price Gregory until his retirement in February of 2013. He was part of a safety committee that investigated the accident and completed a report two days after the accident. He personally went to the scene to understand the environment. He testified there were also interviews conducted at the field level. They made their conclusion that Mr. Horne was speeding based upon a report by someone on the scene who was told by the officer that the officer's opinion was he was exceeding the speed limit. At the time, they did not believe fatigue was a factor. However, he acknowledged he did not look at fatigue as a source of the accident. At the time he prepared his report, he was unaware of the number of hours Mr. Horne had worked immediately prior to this accident. Union employees were not required to drive a truck for more than 60 hours, but acknowledged there could be consequences if someone refused to work the additional time. Mr. Ezell also acknowledged the number of hours Mr. Horne drove immediately prior to the accident violated the regulations set by the Department of Transportation. Mr. Ezell testified there was no one on the site to monitor the number of hours the drivers put in. He also testified he understood the urgency of the jobs to get them completed. He believed that fatigue would affect someone's ability to react which is why the DOT places the regulations that they do. He testified he listed in his report as a contributing factor, Mr. Horne had driven 10 days without a single day off. He did not believe reasonable efforts were made to enforce seatbelts on this site. Mr. Ezell felt it was possible the load could have shifted causing the accident if the trailer went off the road first and the load was difficult to secure due to the slippery surface. Mr. Ezell testified that a load shift can happen if things are not properly secured, particularly on a curve.

Mr. Ezell never personally observed the scene while the truck was still there. All the information he received was from others and their reports. He did not receive the police report prior to issuing their investigative report nor did he talk to the trooper who wrote the incident report. He also had not received any medical records at that time as the report was issued two days after the accident. He acknowledged there is a difference between the speed limit and a speed advisory which was what was present at the curve. Mr. Ezell acknowledged there was nowhere in any reports that gave an estimated speed Mr. Horne was travelling and there was no evidence Mr. Horne was travelling over the speed limit of 55 miles per hour.

RULINGS:

Causation of the right arm

Employer and Insurer have challenged whether Mr. Horne's right arm symptoms were caused by or a direct and natural consequence of the accident that occurred in the course and scope of his employment.

The courts have “for an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding...An injury may be of such a nature (however) that expert opinion is essential to show that it was caused by the accident to which it is ascribed.” (Citations omitted). Griggs v. A. B. Chance Company, 503 S.W. 2d 697, 704 (Mo.App. 1974).

Mr. Horne began having pain in his neck and numbness in his right arm around November 1, 2011. He turned his neck and felt sharp pain that radiated down his arm. The pain caused him to be nauseous. He also had a headache with vomiting. Mr. Horne went to the emergency room and reported his symptoms. The medical records reflect he had radiating pain in his arms and they were cold and numb. Mr. Horne testified he was told he had the flu and sent home. He has continued to have problems with his right arm. This visit was reported to Dr. Wilson on his November 8, 2011, visit which Dr. Wilson records that Mr. Horne went to the emergency room after having severe pain in his neck and right arm numbness. He also reported the symptoms to Dr. Pettingell on December 1, 2011. From there he was referred to the Tulsa Pain Management Clinic and was seen by Dr. Revelis and reported the same pain, and was treated with a cervical injection. He saw Dr. Karshner in May 2013 and he also notes the same history. On physical examination, he reported he could reproduce the burning sensation in the right arm with palpation of the trigger point in the upper trapezius. He assessed myofascial pain and recommended treatment upon approval by the insurance company. Mr. Horne treated with Dr. Karshner through June 2013, with injections and physical therapy. The last MRI was performed on October 27, 2011, prior to the onset of pain. No physician questioned the authenticity of his symptoms until he was seen for an independent medical examination on behalf of the employer with Dr. Kitchens. In his evaluation, Dr. Kitchens did not believe the right shoulder symptoms were explained by the MRI results. However, he notes the MRI and CT scan he reviewed were taken on October 27, 2011, prior to this incident. He also discredits the right arms symptoms because Mr. Horne reported the symptoms were around Thanksgiving in 2010 or 2011, and the records show it was on November 2, 2011², which in his opinion “was obviously not around Thanksgiving in 2010 or 2011.”

The physicians selected for treatment of his work injury by the employer and insurer treated the right arm symptoms. There was no question of the symptoms until Dr. Kitchen’s opinion. It appears Dr. Kitchens based his opinions in part on diagnostic testing that was performed prior to November 1, 2011, when Mr. Horne was seen in the emergency room and discredited Mr. Horne’s symptoms because approximately three weeks prior to Thanksgiving was “obviously not around Thanksgiving.” I do not find Dr. Kitchen’s testimony credible. I believe the right arm symptoms are a direct result and causally related to the motor vehicle accident. However, even if I accept the argument that the pain is not anatomically correlated, the mental health experts as well as Dr. Koprivica explain his psychological condition is also a source of the pain in his right arm. Dr. Hill felt Mr. Horne’s symptoms involving his right upper extremity should be evaluated with an MRI. He also felt Mr. Horne would benefit from seeing a psychologist that specializes in behavioral pain management as well. Dr. Koprivica reiterated patients with a pain disorder have psychological

² This is contrary to the medical records from the emergency room which show a date of service of November 1, 2011.

factors such as depression which play an important role in the exacerbation, severity and/or maintenance of pain which he felt was consistent with Mr. Horne's report of symptoms.

Accordingly, I find the right arm symptoms are directly related to the motor vehicle accident.

Nature and Extent of Claimant's Disability

Mr. Horne has asserted a claim for permanent and total disability benefits. Section 287.020.7, R.S.Mo., provides, "The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee' was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowaiski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001), overruled in part on other grounds by Hampton, 121 S.W.3d at 225; Reiner v. Treasurer of the State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

The evidence demonstrates that Mr. Horne was injured on October 7, 2009, following the injury he underwent continual medical treatment. As a result of the injury, Mr. Horne testified he suffers severe pain and physical restrictions. He takes chronic narcotic medications to help control and decrease his pain. As a result of the medications, Mr. Horne suffers side effects including drowsiness. Further, he needs to lie down and change positions frequently and unpredictably to decrease the pain. Mr. Horne testified he has good days and bad days but his condition consistently deteriorates from the beginning of the day through the end of the day.

After observing Mr. Horne throughout the course of the hearing and reviewing all of the evidence, I find Mr. Horne credible. Throughout the hearing, both the appearance of Mr. Horne and his observed behavior patterns support the conclusion that he is suffering from a significant level of pain in his neck. During the course of the hearing which began at 9:00 a.m., Mr. Horne was unable to sit comfortably, changed positions and alternated between sitting and standing in an effort to reduce his pain. This observed behavior is consistent with the testimony of Mr. Horne.

"When expert opinions conflict, the Commission decides which to accept." Lytle v. T-Mac, Inc., 931 S.W.2d 496, 502 (Mo.App. W.D. 1996). Further, the trier of fact is "free to disregard

testimony of a witness **even if** no contradictory or impeaching evidence is introduced.” Cahill v. Cahill, 963 S.W.2d 368, 372 (Mo.App. E.D. 1998) emphasis added.

I find Mr. Horne to be credible. I also find the testimony of Dr. Koprivica and Mr. Cordray to be more persuasive than that of Dr. Kitchens.

Based upon the evidence presented, I find that Mr. Horne is permanently and totally disabled. I find that no employer could reasonably be expected to hire Mr. Horne in his current condition, particularly when one considers the chronic pain Mr. Horne experiences, the need for narcotic medications and the requirement to lie down unpredictably throughout the day. I further find the total disability is a result of his neck injury and psychological condition caused by the October 7, 2009, accident. Although I believe the right arm complaints are directly related to the work accident, given Mr. Horne’s testimony and the testimony of Dr. Koprivica and Dr. Hill, I believe Mr. Horne is permanently and totally without consideration of the symptoms in Mr. Horne’s right upper extremity.

There is some question as to when Mr. Horne reached maximum medical improvement. All of the evidence establishes Mr. Horne reached maximum medical improvement on April 29, 2010. Both Dr. Wilson and Dr. Koprivica opined Mr. Horne reached maximum medical improvement on that date. Although he was paid benefits from November 4, 2011, through July 12, 2013, and these were deemed to be temporary total disability benefits by the employer and insurer, the treating doctor, Dr. Pettingell, opined he was not temporarily and totally disabled. No other physician during this time opined Mr. Horne was not at maximum medical improvement.

The timing of maximum medical improvement is important given the employer’s claim for credit for unemployment benefits. Mr. Horne testified he believed he received unemployment benefits from April 2010 through May 2011, a time frame in which he tried to return to work but was unsuccessful. The evidence from the State of Missouri Department of Employment Security put into evidence by the employer shows unemployment benefits were only paid during the third and fourth quarter of 2010, in the amount of \$8,580.00. Regardless of whether the benefits were paid from April 2010 through May 2011 (which encompasses the time period the Division of Employment Security reports), there is no evidence what amounts were retroactive, if any, or the date they may or may not have been retroactive.

According to §287.170.3, the employer and insurer receive a credit for unemployment benefits paid while an employee is receiving *temporary* total disability benefits.³ There is no such credit in the statutes for permanent total disability benefits. Accordingly, I find the employer and insurer are not entitled to a credit for unemployment benefits Mr. Horne received.

³ While there are not any Court of Appeals’ cases on this specific topic, this issue was recently addressed by the Labor and Industrial Relations Commission in Lewis v. Second Injury Fund, Injury No. 07-133175, wherein they found unemployment benefits are only credited for temporary benefits.

The Employer and Insurer is therefore directed to pay Mr. Horne the sum of \$807.48 per week for permanent total disability commencing on April 29, 2010, and continuing for the remainder of Mr. Horne's life pursuant to Missouri Workers' Compensation laws.⁴

Future Medical Care and Treatment

Mr. Horne seeks an award leaving open future medical care and treatment to relieve and cure him of the work related injuries he has suffered.

Section 287.140, R.S.Mo., requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment...as may reasonably required...to cure and relieve [the employee] from the effects of the injury." Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo.App. 1996). The standard of proof for entitlement to an allowance for further medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need further medical treatment. Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo.App. 1995). Employees are required to show by a reasonable probability that they will need future medical treatment. Sharp v. New Mac Elec. Co-op., 92 S.W.3d 351, 354 (Mo.App. 2003), overruled in part on other grounds by Hampton, 121 S.W.3d at 224; Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo.App. 1997), overruled in part on other grounds by Hampton, 121 S.W.3d at 227.

When the standards for awarding future medical aid are applied to the facts of this case, I find that Mr. Horne has satisfied his burden of proof on this issue. Dr. Koprivica opined Mr. Horne requires further medical care in the form of psychological treatment and pain management and noted adjacent segment disease must to be monitored as well. Additionally, Dr. Hill opined Mr. Horne requires further psychological care in the form of counseling and medication. Dr. Hill also believed Mr. Horne would benefit from an MRI of the neck. I find the testimony of Dr. Koprivica and Dr. Hill be credible.

Based on this evidence, Employer and Insurer is directed to provide all additional medical treatment reasonable and necessary to cure and relieve Mr. Horne from the effects of his October 7, 2009, injury in accordance with the provisions of Section 287.140, R.S.Mo. This requirement for future medical aid shall include any care and treatment that is causally related to the October 7, 2009, accident.

Safety violation pursuant to §287.120.5

Employer and Insurer have asserted a safety violation by the employee pursuant to §287.120.5 in that employee failed to obey or follow safety rules of the employer in that he failed to wear a seatbelt, was speeding and/or was using his cell phone.

Section 287.120.5, R.S.Mo., states:

⁴ The parties stipulated Mr. Horne received two advances in the amount of \$10,000.00, for which the employer and insurer are entitled to a credit for those amounts.

Where the injury is caused by the failure of the employee to use safety devices where provided by the employer, or from the employee's failure to obey any reasonable rule adopted by the employer for the safety of employees, the compensation and death benefit provided for herein shall be reduced at least twenty-five but not more than fifty percent; provided, that it is shown that the employee had actual knowledge of the rule so adopted by the employer; and provided, further, that the employer had, prior to the injury, made a reasonable effort to cause his or her employees to use the safety device or devices and to obey or follow the rule so adopted for the safety of the employees.

The protection to the employer provided by this section is an affirmative defense and therefore, the burden of proof is on the employer and insurer. To prevail, the employer and insurer must prove each of the following elements:

1. The employer must have adopted a rule for the safety of employees;
2. The rule must be reasonable;
3. The employee failed to obey the rule;
4. The employee's injury was caused by his or her failure to obey the rule;
5. The employee had actual knowledge of the rule; and
6. The employer had, prior to the injury, made a reasonable effort to cause his or her employees to obey or follow the rule so adopted for the safety of the employees.

See, Thompson v. ICI American Holding, 347 S.W.3d 624 (Mo.App. 2011) and Carver v. Delta Innovative Services, 379 S.W.3d 865 (Mo. App. 2012).

In this case, employer and insurer allege Mr. Horne failed to wear his seatbelt, failed to obey the speed limit and/or was using his cell phone while driving. As to seatbelt and speed limit, these alleged violations were contrary to state law and the employer required its employees to follow all state laws. With regard to cell phone usage, this was specific to a rule by the employer.

However, Employer and Insurer failed to prove the essential elements. First, the employer did not adopt a policy specifically requiring employees to drive a motor vehicle within the posted limits. Second, there was no testimony or evidence to demonstrate Mr. Horne violated the rules. Third, it is questionable at best as to whether employer made reasonable effort to enforce the rules. Lastly, and most importantly, there is no credible evidence the violation of any of the rules asserted by the employer caused the injuries Mr. Horne suffered.

The employer did not adopt a policy specifically requiring employees to drive within the posted limits while operating a motor vehicle. Rather, the employers simply communicated employees were to obey all laws. Words in statutes must have meaning and the statute requires the employer to adopt a policy. Merely informing employees to "obey all laws" is not a policy, and is no more of an adopted policy than an employer simply telling its employees to "not be negligent."

Such a general “policy” provides no meaningful guidance to the employees above what all members of society are expected to do- obey our laws. While this general statement of conduct may have a safety benefit, it is too vague to conclude it is a policy the employers adopted for the statutory required purpose: safety of employees.

Regardless, there is no evidence Mr. Horne violated any speed limits. The police report indicates the speed limit was 55 miles per hour. While there was a speed advisory sign on the curve, this was not a speed limit. Additionally, Mr. Nelson, the employer and insurer’s expert, opined Mr. Horne was traveling between 30 and 52 miles per hour, which was below the posted limit and advisory speed

Furthermore, the evidence the employer submits to support its claim Mr. Horne was not wearing a seatbelt came from the state patrol’s report, medical records of St. Luke’s Hospital, the testimony of Junior Phillips and the conclusory opinions found in the investigative report prepared by Price Gregory only two days after the accident. The state patrol’s report, however, was prepared by a highway patrolman who arrived on the scene two hours after the accident. He did not take any witness statements and gave no indication how he reached the conclusion Mr. Horne was unrestrained. Additionally, the records from St. Luke’s contain two conflicting notations of seatbelt usage. In the handwritten progress notes on the date of the accident list, “unrestrained driver. ?” in the notes. It is only in the discharge records where it states Mr. Horne was an unrestrained driver. There is no indication who made the statement or whether it was someone with a firsthand account of the accident. Although Mr. Phillips testified he did not believe Mr. Horne was wearing his seatbelt because he arrived on the scene within twenty seconds and Mr. Horne was not “flailing around” or talking, and therefore could not have had his seatbelt on at the time of the accident, and subsequently released it, I do not find this credible. I have no doubt the accident seemed to happen that quickly to Mr. Phillips, but he was a quarter of a mile away and still had to approach the accident, turn across the highway, stop his truck, and run to Mr. Horne’s truck. I believe this would have taken longer than 20 seconds. Additionally, Mr. Phillips acknowledged he only leaned down one time and the window was rolled up and the door was shut, leaving him unable to hear Mr. Horne if he was in fact talking. Mr. Phillips testified there was a fire on the undercarriage of the truck. I do not believe this testimony is sufficient to conclude Mr. Horne was not wearing a seatbelt when the accident occurred. Further, I think it is reasonable that one’s first reaction would be to unbuckle their seatbelt if they were upside down inside of a truck that had just rolled over.

When the evidence is considered as a whole, I believe Mr. Horne was wearing a seatbelt at the time of the accident. Mr. Horne testified he always wore his seatbelt, regardless of whether he was working or traveling for personal reasons. Had he not been wearing his seatbelt, there would have been a warning light to notify him he failed to put his seatbelt on. I find Mr. Horne’s testimony credible. However, his testimony is also supported by the Dr. Koprivica who believes Mr. Horne’s injuries would have been significantly worse, and possibly fatal, had he not been wearing his seatbelt. Based upon his experience as an emergency medical physician, he did not believe Mr. Horne would have survived had anyone been on the passenger side of the vehicle. Dr. Koprivica also noted when someone is trying to get out of a vehicle, they will unhook the seatbelt and fall, a situation he has seen a number of times. He stated obviously if you come even a minute later and the seatbelt is already undone, it is going to appear they were unrestrained, but, the fact is,

you don't know. It was his belief that if you were rolling over onto the passenger side, the force would drive you out of your seat and, if you were unrestrained, you would fall into the passenger compartment. He did not feel there was any force if you were unrestrained to bring you back to the driver's side so that you would not have been crushed in the accident. Although Dr. Koprivica notes these determinations are somewhat speculative, he reported that, "If I was going to bet my house that's what I would bet on." Dr. Koprivica also stated Mr. Horne suffered a left clavicle fracture which was consistent with a shoulder harness injury.

Dr. Koprivica's explanation is logical in that he points out the truck rolled onto the passenger side and then landed on the roof. I find Dr. Koprivica's opinions are logical. He is the only expert to address the effect of the roll over onto the passenger side.⁵ It seems illogical to believe Mr. Horne would have remained on the driver's side of the compartment had he not been wearing his seatbelt. Additionally, viewing the pictures of the vehicle damage also supports this position. Although Mr. Horne was given a ticket for failure to wear a seatbelt and he plead guilty for failing to wear a seatbelt, I believe Mr. Horne's testimony in that it was an economical decision not to challenge a \$10 ticket as it would require a second trip to Missouri, traveling a few hundred miles from Oklahoma while he was still recovering from the cervical fusion.

Although I believe Mr. Horne was wearing his seatbelt, I do not believe the employer made reasonable efforts to enforce the rule and even if they did, there is no credible evidence any alleged failure to wear a seatbelt *caused* Mr. Horne's injuries. Mr. Ezell testified he did not believe reasonable efforts were made to enforce the rule on this job site. No one had been terminated or disciplined for failure to wear a seatbelt on this job site. Regardless, I do not believe any alleged failure caused his injuries.

In conjunction with the seatbelt issue, Dr. Koprivica presented research to support his opinions. Statistically, he felt rollover accidents caused the types of injuries Mr. Horne suffered from, whether you have a seatbelt on or not, just at a different rate. And given the type of accident Mr. Horne was involved in, to say all his injuries were caused by the failure to wear a seatbelt, was speculative. Even the employer and insurer's expert fails to give an opinion that the failure to wear a seatbelt *caused* Mr. Horne's injuries. Dr. Kitchens testified:

Q. Okay. Not that it had to have struck something to have caused the injuries he did?

A. Well, that's highly possible also. I just don't have enough information to say which of those is possible, and it would depend on if he's wearing a seatbelt. If he was wearing a seatbelt, then the answer would be those fractures were sustained by his head violently moving. If he was not wearing a seatbelt, then my opinion would be that he sustained the fractures from his head striking some other part of the cab during the rollover collision.

⁵ Dr. Koprivica is the only physician who addressed the effect of the truck rolling onto the passenger side prior to landing on its roof. Dr. Kitchens testified he did not know which way the truck rolled.

Q. Okay. So as I listen to your answer, you've given an explanation for why he suffered the injuries both whether he was restrained or non-restrained, and either one of them could have accounted for the injuries he suffered; is that correct?

A. Either he wore the seatbelt or he didn't... (Kitchens deposition, P. 49-50)

He further added:

Q. There's a lot of explanations for how he hurt himself?

A. No. Either he was or he wasn't. That's the fact. Either he was wearing it, or he wasn't wearing it. If he was wearing it, then these are the injuries he had. If he wasn't wearing, then these are the injuries he had, and not wearing it certainly contributed to his injuries. (Kitchens deposition, P. 52-53)

As that statute requires the injuries be caused by the failure to wear a seatbelt, the employer and insurer's argument must fail. Merely proving the accident contributed to the injuries is not sufficient for a penalty pursuant to §287.120.5.

Lastly, employer and insurer assert a violation for using a cell phone. All of the testimony and evidence demonstrate cell phone usage is allowed for company business and when using a hands free device. The only evidence to establish Mr. Horne was using his cell phone at the time of the accident was from Mr. Blackledge who testified he found Mr. Horne's phone and looked at his text messages. Mr. Blackledge testified there were texts "around that time frame." There was no testimony as to what specific time, let alone the proximity to the accident, Mr. Horne was allegedly using his cell phone. Accordingly, there is absolutely no evidence he was using a cell phone, let alone the use of a cell phone caused the accident.

Accordingly, I find the employer and insurer have failed to show Mr. Horne violated any of the safety rules at issue. However, even if he did, there is no evidence the failure caused Mr. Horne's injuries. Therefore, I find the employer and insurer are not entitled to a reduction of benefits pursuant to §287.120.5.

Safety violation pursuant to Section §287.120.4

Section 287.120.4, allows for an enhancement of benefits for a safety violation against the employer. Specifically, the statute states:

Where the injury is caused by the failure of the employer to comply with any statute in this state or any lawful order of the division or the commission, the compensation and death benefit provided for under this chapter shall be increased fifteen percent.

As with the safety penalty statute governing actions of employees, the safety penalty statute requires the injury suffered by the employee to be causally related to the safety violation. To be entitled to the penalty, the employee must establish:

1. The existence of a statute;
2. A violation of the statute; and
3. A causal connection between the violation of the statute by an employer and its employee's injury or death.

See Akers v. Warson Garden Apartments, 961 S.W.2d 50 (Mo. 1998). In this case, Mr. Horne cites to §307.400 R.S.Mo., a statute with regard to commercial vehicles and the operation thereof. That statute in part, adopts the Code of Federal Regulations as it relates to commercial motor vehicles. 49 CFR 395.3, governs the maximum driving time for property-carrying vehicles and specifically states:

- (b) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after --
 - (1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or
 - (2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.
- (c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or
 - (2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

Mr. Horne testified he worked seven days a week. During the work week which began on Monday, he typically reached 40 hours on duty by Wednesday at noon. The wage statement entered into evidence shows between July 12, 2009, and October 4, 2009, twelve weeks, Mr. Horne worked 1033 hours. This is an average of 86.08 hours per week. From October 4, 2009, through the date of the accident, Mr. Horne had already worked 36 hours. This included a Monday start and the accident occurred on a Wednesday. Mr. Horne worked 76 hours from September 27, 2009, through October 3, 2009, with no days off before the accident. Essentially, Mr. Horne worked 112 hours over the course of 10 days, clearly more than 70 hours during 8 consecutive days as prohibited by the Department of Transportation ("DOT").

Mr. Ezell, the safety manager for the employer at the time of the accident, testified the employer violated the DOT rules as Mr. Horne drove more than the maximum hours. He also acknowledged the DOT regulations were to prevent driver fatigue as well as accidents. Mr. Horne testified he was tired every day he worked and his tiredness led to inattentiveness and delayed his reaction time. He believed his fatigue left him unable to prevent the accident from occurring after the truck tire went off the shoulder. Terry Cordray testified as to the effects of fatigue and how it leads to accidents.

I find there was a statute and the employer violated the DOT regulations and, therefore, the statute with regard to the number of hours Mr. Horne could legally drive. Furthermore, the employer's own safety expert testified the DOT regulations were designed to prevent accidents and acknowledged the excessive hours Mr. Horne worked at a least contributed to the accident. I also believe the evidence demonstrates Mr. Horne's accident was caused by the violation of the statute. Accordingly, I award a 15% penalty against the employer for violation of §287.120.4, for all benefits paid pursuant to the Missouri Workers' Compensation Act, including amounts already paid and those ordered to be paid⁶.

Interest shall be provided as by law.

Made by: _____
Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

⁶ Pursuant to Hornbeck v. Spectra Painting Inc., 2011 WL 3897856 (Mo.App. 2011), the penalty applies to all benefits including medical, ttd and permanent benefits. The Missouri Supreme Court accepted transfer of this case but did not address this issue as they deemed the employer had abandoned the issue and therefore, let the prior decision stand. See Hornbeck v. Spectra Painting Inc., 370 S.W.3d 624 (Mo. En Banc. 2012).