

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

Injury No.11-014882

Employee: Scott B. Hunt
Employer: Hendrick Automotive Group/Superior Buick Cadillac
Insurer: Hartford Accident & Indemnity Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 25, 2016. The award and decision of Administrative Law Judge Mark Siedlik, issued January 25, 2016, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 13th day of July 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Scott B. Hunt

Injury No: 11-014882

FINAL AWARD

Employee: Scott B. Hunt

Injury No: 11-014882

Dependents: N/A

Employer: Superior Buick Cadillac

Insurer: Harford Accident and Indemnity Company, c/o Specialty Risk Services

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

Hearing Date: October 6, 2015

Checked by: MSS/drl

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: February 19, 2011
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: While in the course and scope of Employee's work, Employee sustained an injury when he was walking from one part of the Employer's premises to another and he was tripped, causing him to twist and fall against a 4 foot wall.
12. Did accident or occupational disease cause death? No Date of death? N/A

Employee: Scott B. Hunt

Injury No: 11-014882

13. Part(s) of body injured by accident or occupational disease: : left lower extremity at or about the knee, low back, left hip and right knee.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to date for temporary disability: \$77,502.54
16. Value necessary medical aid paid to date by employer/insurer? \$96,487.03
17. Value necessary medical aid not furnished by employer/insurer? Undetermined
18. Employee's average weekly wages: \$894.70
19. Weekly compensation rate \$596.49/\$418.58
20. Method wages computation: By Agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Permanent total disability benefits from the Employer at the rate of \$596.49 per week from and after August 18, 2013 which is 131 1/7 weeks from the date of accident (Employee returned to work for two weeks in July 2011) to continue for the balance of the Employee's life.

Unpaid medical expenses: Undetermined.

Weeks for temporary disability: 129.17 weeks paid at rate of \$600 per week for a total of \$77,502.54.

22. Future medical awarded: Yes, from the Employer/Insurer.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Scott B. Hunt Injury No: 11-014882

Dependents: N/A

Employer: Superior Buick Cadillac

Insurer: Harford Accident and Indemnity Company, c/o Specialty Risk Services

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

Hearing Date: October 6, 2015 Checked by: MSS/drl

This case comes on for hearing before Administrative Law Judge Mark Siedlik on October 6, 2015 in Kansas City, Missouri. The Employee, Scott Hunt, was present with his counsel, Mr. James Martin. The Employer and its insurance carrier appeared by their attorney, Jeff Bloskey. The Second Injury Fund was represented by its counsel, Jacob Colling.

This case involves injuries sustained by Mr. Hunt on February 19, 2011 while Mr. Hunt was in the employ of Superior Buick Cadillac (n/k/a Hendrick Buick Cadillac). The injuries resulted from an accident which arose out of and in the course of his employment with the aforesaid Employer in Jackson County, Missouri. At the time of the injuries, the parties were subject to the Missouri Worker's Compensation law and the Employer's liability was insured by Specialty Risk Services. The Employer had notice of the injury and claim was timely filed.

Compensation rates are agreed to be \$596.49/\$418.58 for the purposes of this proceeding.

The evidence at trial consisted of the testimony of the Employee together with deposition testimony of James A. Stuckmeyer, M.D. with attached exhibits, Michael J. Dreiling with attached exhibits, Terry Cordray with attached exhibits, Danny Gurba, M.D. with attached exhibits and Bernard M. Abrams, M.D. with attached exhibits.

The issues are:

- 1) Was the accident of February 19, 2011 the prevailing cause of the Employee's injuries and need for medical care;
- 2) Whether the Employee will require future medical care at the expense of the Employer and its insurance company;
- 3) What is the nature and extent of disability;
- 4) What is the Second Injury Fund Liability, if any.

The Employee testified he was born in 1961 and was 50 years old when this accident occurred. At that time he was employed at Superior Buick Cadillac in Kansas City, Missouri as a service writer. His duties included greeting customers as they drove their cars into the garage, reviewing with the customers the reason they brought their car in, writing up service orders, inspecting vehicles to determine the cause of a problem, and working with the service technicians who actually perform the maintenance on the customer's vehicle. Generally, he worked five days a week and would be on his feet anywhere from 10 to 14 hours per day. His education included graduation from high school, approximately two years of college at Central Missouri State University and, finally, he participated in a vocational technical training course and completed a certificate program in electronics theory at Control Data Institute. His employment history is lengthy and, generally, revealed that he'd worked as a copier technician, a service writer for Roach Cadillac-Jaguar, as a warranty claims adjuster, and was in sales for Gateway 2000 and APS Technologies. All of these jobs required that he be on his feet most of the day and be able to move around and carry some small amount of weight, at a minimum, to perform his job duties.

He became employed at Superior Buick Cadillac in July, 2010 in the same capacity in which he was employed on the date of the accident. At the time he was hired and, thereafter, he testified he did not have any restrictions upon his ability to perform any activities or any limitations on his ability to do any work. Likewise, although he had prior workers' compensation claims and, in 2008, had sustained an injury to his left lower extremity which did require surgery, he was symptom-free thereafter. He had no limitations or loss of ability to perform any of his normal daily activities, hobbies or activities outside of work, nor did he have any physical limitation on his ability to obtain employment.

He testified the accident occurred on a Saturday afternoon about 2:30 o'clock p.m. He was going from the area where the customers bring their vehicles out to the garage to check with a service technician about a particular job when a couple of young co-employees stuck a broom handle between his legs as he walked by. This caused him to jam his leg into the door and he tripped. He twisted his leg falling through the doorway landing against a 4 foot wall in the garage. He collected himself and then walked out to the service technician who noted that he was limping. He finished the work day and went home hoping the injury was something minor and that it would go away. The next two days he lay at home with his leg elevated to see if he could get some relief but he did not so, on the next work day, he notified his employer of the accident, how it occurred, and the difficulties he was having. He told them that on Monday, his day off, he had contacted Dr. Dugan and was scheduled to see him that week. Initially, that was approved but he received a call later that day advising he had to go to the company occupational physician. He then called the occupational physicians for an appointment and was told that he should proceed to see an orthopedic physician. He then spoke with the adjuster for the insurance company who, in fact, authorized Dr. Dugan.

Dr. Dugan examined him, tried some medication, physical therapy and restrictions before recommending and then performing surgery. At that point he was having significant swelling and

pain and was unable to stand on his leg except for very brief periods. All weight-bearing caused pain to the point he would have to lay down and put ice on it.

He testified that in 2008 he was in Mexico on vacation and was running toward the water when his heel got stuck in the sand and he sustained an injury to his left knee. Dr. Dugan became the treating physician and did surgery, releasing him in 2009 with no restrictions. Mr. Hunt said he came back in 2009 to see Dr. Dugan and, although Dr. Dugan's records indicated he had the onset of symptoms and they were gone by the time of the appointment, Mr. Hunt said that, actually, the reason he was there was for a one-year follow-up and that he had not had any difficulties whatsoever. In fact, despite the fact that he had a small metal plate inserted at the time of the 2008 surgery, he really had no symptoms whatsoever until the injury of February 19, 2011. He had not missed any time from work as a result of the 2008 injury, nor were his personal hobbies and activities restricted in any way. Additionally, while he did have some previous accidents and injuries, none of the others had affected his left knee, left hip, low back or right knee. In fact, it was after the 2008 injury that he applied for and was hired as a service writer for the Employer in this case as he was hired in July, 2010.

Mr. Hunt testified that following the February 19, 2011 accident, Dr. Dugan performed two more surgeries which provided him no relief. Ultimately, although Dr. Dugan did not believe that it was related in any way, Dr. Dugan did a third surgery to remove the plate that had been put in the leg in 2008. More therapy and medication did not relieve the continuing symptoms of swelling and pain. Therefore, Dr. Dugan told him that it would probably be a good idea to get a second opinion. The insurance company agreed and referred him to Dr. Danny Gurba, another orthopedic surgeon.

He next saw Dr. Gurba as he continued to experience the same symptoms that he had ever since the February 19, 2011 accident and Dr. Gurba quickly concluded the only treatment available was a total knee replacement followed by physical therapy. Mr. Hunt testified that while he obtained some improvement, he developed other problems and a second surgery was required and performed by Dr. Gurba. He did more therapy while continuing on medication but did not improve so Dr. Gurba performed yet another or third operation. The second and third operations were attempts to modify the knee that was implanted at the time of his first surgery with Dr. Gurba. It did not help. He testified he has continued to experience excruciating pain where he is limited to almost no weight-bearing. Additionally, he developed symptoms in his left hip which he reported to Dr. Gurba as well as to Dr. Prostic. Finally, as he was getting out of bed one day he experienced one of the usual locking episodes which caused him to twist the right knee following which he developed more symptoms in that leg. Dr. Gurba performed diagnostic testing but provided little or no treatment. Finally, Dr. Gurba released him from his care in 2014 and referred him to his primary care physician to provide pain management. He became depressed and went to see a psychiatrist who prescribes medication. When he was terminated by his employer, he lost his insurance so he cannot counsel with the psychiatrist as often as he

would like but he still receives prescription medication from him. Following his release by Dr. Gurba, he also developed low back pain.

Mr. Hunt testified that following the accident he attempted to return to work for a short period of time. He was unable to perform the work assigned as his various surgeries kept taking him off work until the Employer terminated him in July, 2012. He did receive temporary total disability compensation for various periods of time between the date of accident to December 31, 2013. He has not been employed since that time. He has sent out resumes to many staffing companies and employers and not received any offers for interviews, much less work which, he testified, in reality he did not believe he could perform as he could not tell an employer in good faith that he would be able to come to work on a daily basis and do the work which he was hired to perform. He testified that he continues to have pain and swelling in his leg and is unable to put any weight on it for any period of time. He often walks with a walker when he has to leave his home and he continues to have pain in his low back, left hip and his right knee. He does not sleep well at night and, as a result, he must lay down during the day to sleep on the couch or in his recliner. He also testified that it's been 4-½ years since this accident occurred and, except for a brief period of time when he returned to work in a modified duty position for the Employer, he has been unable to work or even seek employment.

He testified he has been advised by more than one physician that he will require future medical care which will include the replacement of the current total knee replacement and pain management.

He was evaluated by Michael Dreiling, a vocational consultant, on behalf of the Employee and by Terry Cordray, a vocational consultant, on behalf of the Employer.

The claimant never sought unemployment benefits following this accident since he did not believe he could say that he was actually ready, willing and able to work as required by Unemployment. He doesn't have any job prospects at this time, nor does he know of any employment he could perform. His current pain causes limitation in all physical movement requiring that he constantly alternate sitting, standing and lying down. The pain inhibits his ability to do personal activities such as cooking and cleaning and family members do most of that for him. He lives in a two-story condominium with the bedroom on the second floor and he testified that he has so much difficulty traversing steps to the second floor that he only goes up and down the stairs once a day. When he wakes up during the night, he props himself up using pillows. The pain is so severe that he is fearful of driving and has not done so for a long time. His personal physician, Dr. Konduri (Gannavaram), continues to prescribe medication for the symptoms of pain and depression caused by this accident.

Dr. James A. Stuckmeyer testified that he is a board-certified orthopedic surgeon who examined the Employee at the request of his attorney for the purpose of performing an independent medical examination and rendering opinions. The examination was completed on April 7, 2014 following which he generated a report which was offered into evidence.

(Stuckmeyer depo., pp. 3, 4) He testified that he reviewed some records, obtained a history of the accident in question from the Employee, discussed his initial complaints, his course of his treatment, detailed the medical records from several other physicians, performed an orthopedic examination and then reached certain conclusions and opinions. (Id., pp. 7, 27-36) Specifically, he opined that the Employee did have an injury in 2008 following which Dr. Dugan provided treatment including surgery, but Mr. Hunt had done well following the open reduction and internal fixation of the left tibial plateau fracture and was working 12 hours a day on his feet without difficulty (Id., p. 27) but he still had a pre-existing condition that was ratable at 15% permanent partial disability to the left knee at that time. (Id., p. 30) Following the February 19, 2011 accident and injury, Dr. Dugan provided two more operative procedures and, finally, removed the hardware left behind in the 2008 surgery. Then, Dr. Gurba did a total knee replacement followed by two revisions which left the claimant with an additional 60% permanent partial disability to the left knee as a direct, proximate and prevailing factor of the accident occurring on February 19, 2011. (Id., p. 31) Dr. Stuckmeyer found the claimant had a significant abnormal gait and abnormal biomechanics placed on the right knee which was consistent with medial meniscal pathology and he felt an additional arthroscopic evaluation was warranted. Assuming no treatment is provided then, as a natural flow and consequence of the accident occurring on February 19, 2011, he has sustained a 15% permanent partial disability to the right knee. (Id., p. 32) With respect to the complaints of the left hip he felt that, also, occurred as a natural flow and consequence of the abnormal biomechanics and limp for which he assessed a 10% permanent partial disability to the left hip. Relative to the complaints of the low back, he reiterated that, once again, the problem was developed as a natural flow and consequence of the abnormal gait and compensatory biomechanics. He noted the MRI revealed a herniation at L4-5, and a small protrusion at L3-4. (Id., p. 64) He recommended pain management and rated an additional 10% permanent partial disability to the lumbar spine. (Id., p. 33)

Dr. Stuckmeyer offered restrictions of no prolonged standing or walking greater than tolerated, no repetitive bending, twisting, or lifting, no repetitive traversing of steps greater than needed for activities of daily living, no driving of commercial vehicles since he was on chronic narcotic medication, and no working around hazardous equipment or heights for similar reasons. He also felt that he should be allowed to utilize a cane at any workplace and, due to the multiple issues stemming from the accident, he would need to be allowed frequent bouts of recumbency throughout the day. He explained that “greater than tolerated” means exactly that as the claimant has lots of reasons to have difficulty with prolonged standing, prolonged walking because of his back, his hip and his knees and he should do no more of these activities than he can tolerate. (Id., p. 34) He concluded that the prevailing cause of all of these conditions and all the restrictions was the accident of February 19, 2011. He had recommended a vocational assessment and stated that if it indicated Mr. Hunt was permanently and totally disabled, that in his opinion, the cause of the permanent total disability was the workplace accident of February 19, 2011 in isolation.

Subsequently, Dr. Stuckmeyer did review the narrative report of Michael Dreiling, a vocational consultant, and restated the same opinion that Mr. Hunt is permanently and totally disabled as a result of the February 19, 2011 accident in isolation. (Id., pp. 35, 36) During cross-examination he testified that Mr. Hunt did not have any restrictions with regard to his lower extremity prior to the accident which is the subject of this claim and, in fact, on May 26, 2009 Dr. Dugan noted the Employee had come in for a follow-up examination of the left knee and he was asymptomatic at that point. (Id., pp.74-75) He also testified at that time that all restrictions which he had outlined stemmed from the February 19, 2011 workplace accident. (Id., p. 79)

Danny Gurba M.D. testified he is an orthopedic surgeon and has been board-certified since 1987. He testified that he examined Scott Hunt at the request of Mr. Bloskey on April 5, 2012 at which time he was asked to provide opinions as to causation and whether the injury and need for treatment was related to the claimed work injury. (Gurba depo., pp. 4-7) He testified about obtaining a history from the patient following the 2011 accident, his findings upon examination, the previous surgeries by Dr. Dugan, that the Employee had a deformity as a result of a previous injury in 2008. He opined that at that time “although this patient did have a previous deformity in his proximal tibia from his previous tibial plateau fracture, it would appear that he was functioning well until his work-related injury. The work injury I believe was responsible for his lateral meniscal tear and the subsequent lateral meniscectomy has left his abnormal lateral tibial plateau unprotected and I believe is most likely responsible for his current pain. For this reason, I believe that the work injury in February of 2011 is the prevailing factor for the patients current situation”. (Id., Exhibit 2, p.3, ¶ 7) Thereafter, he testified the only option for this man was a knee replacement which was done on May 22, 2012. The Employee started developing an audible popping sensation which was painful so, ultimately, he did another secondary surgery on September 28, 2012 to arthroscopically remove scar tissue that is attached to the quad tendon and causes the patellar clunk. (Id., pp. 22, 23) He continued to see him several times thereafter because he continued to have pain but now it was in a totally different way which he described as a very severe catching-type pain. Accordingly, on March 26, 2013 a final procedure was performed on the left knee where he resurfaced the patella and a plastic button was put on it. At that time Dr. Gurba testified he wanted to look at the polyethylene and concluded there was some side-to-side instability. (Id., pp. 26, 27) He could never, however, identify any other pathology. Subsequently, Mr. Hunt complained of the development of pain in the left hip and the right knee, however, again, he was never able to identify any pathology although he did give a cortisone injection in the right knee. (Id., pp. 28, 29) He felt Mr. Hunt had reached maximum medical improvement on November 22, 2013 and he provided permanent restrictions of sedentary work only, alternate sitting and standing as needed for pain control, no kneeling, squatting, climbing, crawling, and no aerial work or ladder work. He did not recall whether driving was ever discussed but he noted that sometimes Mr. Hunt’s mother would accompany him to his appointments. (Id., pp. 30-31) He rated the impairment of the lower extremity at 75% and primarily based on the AMA’s guide for impairment following total knee

replacement because he felt this was a poor result. (Id., p. 37) He concluded his direct examination by apportioning 50% of that 75% or one-half to the 2008 fracture. (Id., p. 38) He candidly admitted he did not know how to provide a Missouri rating or to provide an apportionment. (Id., pp. 39, 48)

On cross-examination he said he was not testifying as a vocational expert and that in cases of extreme disability where people were employed, it did require that someone be willing to hire that person. More importantly, he noted that Dr. Dugan had, apparently, done three surgeries, as had he, and Mr. Hunt wasn't a whole lot better at the end than he was in the beginning. (Id., 41, 44) He agreed the Employee worked very hard in his recuperation and that whatever his symptoms are or whatever he complained of, it was certainly not from lack of trying to get better. (Id., p. 46) He agreed Mr. Hunt is going to need more medical care because he is so young and the chance of the component loosening or the polyethylene wearing out was real. Exhibit 4 attached to the transcript of Dr. Gurba's deposition references future medical costs of \$30,000-\$50,000. He also admitted there is even a possibility that he could require a knee replacement more than once which would double that cost. (Id., p. 51) At the time of his release he continued to provide medication refills to the last one provided in August 2014 at which time he referred Mr. Hunt to his primary care physician for further pain management. (Id., p.52) During cross-examination by the attorney for the Second Injury Fund, Dr. Gurba again said he was unaware of any symptoms Mr. Hunt experienced following his 2008 injury after his release in 2009 and he had no medical records to suggest anything to the contrary. (Id., p. 58) Finally, he admitted in response to an inquiry about lying down for an extended period of time, "Well, if that's what he subjectively thinks he needs, then I suppose that's the case..." (Id., p. 63) Further, he admitted that although this man had been through six surgeries following subjective complaints that every time he has gone through this there was, in fact, something wrong and something had to be fixed. (Id., p. 67)

Dr. Bernard Abrams testified that he is a medical doctor in the states of Missouri and Kansas and restricts his practice to neurology with an emphasis on pain management and disability evaluation. He explained that neurology is the subspecialty of medicine which deals with the diagnosis and nonsurgical treatment of diseases and injuries of the brain, the spinal cord, the nerves and the muscles and any investing tissues which could give rise to pain. (Abrams depo., pp. 3, 4) He met Scott Hunt on August 5, 2015 to do an examination and evaluation at the request of his attorney. The purpose was to evaluate him and try to come up with a diagnosis; and secondly, to come up with a treatment plan, if possible. He said that, finally, he was to evaluate any permanent partial disability that came as a result of the industrial accident of February 19, 2011. (Id., p. 5) His report was offered into evidence which contains all the elements of his examination and the conclusions rendered. He then went on to testify that at the time of the examination Mr. Hunt had severe left leg pain, severe left knee pain, severe left hip pain and low back pain as well as right knee pain. An examination looking to determine if the Employee had reflex sympathetic dystrophy revealed that was not the accurate diagnosis. (Id., pp. 7, 8) He

reviewed each of the prescription medications taken by Mr. Hunt and the purpose for which they were given. He said the Employee favors his left leg which means he is trying to get weight off of it. (Id., pp. 9, 10) The history obtained from the Employee included the accident in 2008 in Mexico following which Dr. Dugan provided surgery and, except for a brief episode of pain in 2009, he was completely pain free. Following that episode he had no limitations or restrictions of any kind. (Id., p. 10) He testified the Employee's mother drove him to the examination because Mr. Hunt no longer drives, following which he explained how the accident occurred and how the claimant went through several surgeries with Dr. Dugan and Dr. Gurba, including a total left knee replacement followed by a revision with the patella button and, additionally, changing the size of the spacer. During this time he developed severe hip pain and, subsequently, severe pain in his low back. Then, when he was getting up out of bed one day and put weight on the left knee, it locked causing him to twist his right knee which now bothers him as well. (Id., pp. 11, 12) Physical examination revealed that the Employee walked with a walker and had an antalgic gait which meant he was trying to avoid pain. It was a positive finding that his measurements revealed there was swelling of the left lower extremity. He had full range of motion of his left knee associated with crackling and pain. His right knee was crepitant and painful also. The left hip was tender with a positive Patrick sign and the inability to completely externally rotate the hip. He sat and stood with his body tilted to the right with his left hip approximately 2 inches higher than the right with paravertebral spasm in the paraspinal muscles which causes a convex scoliosis. Most reflexes were sluggish and he really had a diminished cold sensation on the left. He concluded the examination was consistent with the complaints made by the Employee. (Id., pp. 13-16) He explained the Employee was hypostatic in the left leg from the mid-thigh to the foot and that meant that he had diminished sensation. He was able to determine that because he used a pin on him and the Employee said he didn't feel it as much, however, he did a more objective test by spraying him with ethyl chloride. The reason that is done is one of the aspects of complex regional pain syndrome is what is known as cold allodynia, which means a painful response to a normally non-painful stimulus and by using anesthetic spray, he goes through various stages and in the first stage it's painful. The reason it's painful is because, to most people, it is so cold but this Employee had no response whatsoever on the left side whereas on the right he felt it to be intensely cold which is a very striking finding. (Id., pp. 18, 19)

Like all of the other witnesses, Dr. Abrams testified that there was no indication Mr. Hunt had any impediment to obtaining employment following the incident in 2008. (Id., p. 20) Based on his review of records and transcripts that have been provided to him and taking into consideration his findings on physical examination, he concluded this man's diagnosis is known as centralization of pain. He explained that when you bombard the spinal cord consistently with pain impulses that after a while the spinal cord itself and higher senses change and that's what is known as centralization of pain. This is an accepted diagnosis in the DSM-IV and the DSM-V and is actually listed as chronic pain syndrome secondary to physical and psychological factors. (Id., pp. 22, 24) He testified the prevailing cause of this condition was the accident of February 19, 2011 and that the pain in the right knee, left hip, and low back can be imputed to that same

accident because of a marked antalgic gait and also because of an episode in which he injured his right knee because of the instability of the left knee. (Id., pp. 24, 25) When asked about treatment recommendations he allowed as how this began as a mechanical injury to the left knee and has now spread to a generalized pain syndrome with centralization and both physical predominately and psychological factors. He felt the depression and anxiety demands psychiatric treatment as centralized pain syndrome could only be mitigated by a spinal cord stimulator with the outcome by no means certain. Although the claimant was taking antidepressants, they were not his choice and he would change those. (Id., pp. 25, 26) With respect to restrictions, he testified this man obviously cannot stand for any period of time, walk at all, kneel, stoop or bend. In addition, he has to lie down frequently. (Id., p. 27) He concluded with reasonable medical certainty the prevailing cause of the condition was the accident of February 19, 2011 and that Mr. Hunt is permanently and totally disabled. He further testified that while a spinal cord stimulator may ameliorate some of his pain and improve the quality of his life, it is not certain that it would be efficacious and, if efficacious, not certain by any means that it would return him to a state where he could obtain and hold remunerative occupation. (Id., pp. 28, 29)

Jennifer Texierra was called as a witness by counsel for the employer. She testified she is a vocational consultant hired by the Employer/Insurer for the purpose of doing job placement. She testified that she had done job placement in other cases and, in particular, she testified she had worked with attorney Ron Edelman in a successful job placement. She did not pursue the job placement in this case as she said the Employee's attorney wanted her to provide information she could not provide.

Ron Edelman, attorney, was called as a rebuttal witness by the attorney for Mr. Hunt. He was provided with a summary of the testimony of Ms. Texierra relative to his experience with her. Mr. Edelman refuted her testimony and testified the "job placement" of which she spoke consisted of placing his client in a job as a parking lot attendant in downtown Kansas City, Missouri; that the job lasted approximately three hours because it required he move construction barriers that far exceeded his lifting and bending restrictions. He never heard from her again.

VOCATIONAL EVIDENCE

Michael J Dreiling testified that he is a vocational rehabilitation consultant and he explained what that meant. He interviewed Scott Hunt on July 22, 2014 for the purpose of doing a vocational assessment in order to evaluate the impact that medical injuries had had on his vocational capacity to work in the open labor market. (Dreiling depo., pp. 3-4) He testified the Employee's mother drove him to the interview because he has difficulty with driving. He brought a reclining type chair to the interview so he could recline because of the significant pain issues he was dealing with. (Id., p. 7) He reviewed medical reports and highlighted medical restrictions the doctors had provided for the patient. He noted Dr. Gurba indicated on July 8, 2014: "returned to work: restrictions-permanent; sedentary work only; alternate sitting/standing as needed for

pain control; no kneeling, squatting, climbing, crawling; no aerial/ladder work.” He said that Dr. Stuckmeyer on May 18, 2014 documented limitations as follows: “In summary, Mr. Hunt indeed represents a complicated orthopedic evaluation, and quite honestly, a sad situation resulting from a workplace prank. Then, as a direct, proximate and prevailing factor of the accident occurring on February 19, 2011, Mr. Hunt has undergone multiple operative procedures and at the time of this evaluation in regard to the left knee, he continues to have ongoing significant problems and I would assess an overall 75% disability to the left knee feeling that he has a poor postoperative result. This would equate to a 60% permanent partial disability as a direct, proximate, and prevailing factor of the accident occurring on February 19, 2011. He warranted the following restrictions:

1. No prolonged standing or walking greater than tolerated.
2. No repetitive bending, twisting, or lifting.
3. No repetitive traversing of steps greater than needed for activities of daily living.
4. No driving of commercial vehicles since he is on chronic narcotic medication.
5. No working around hazardous equipment or at heights for similar reasons.

He should be allowed utilization of a cane at the workplace and will need to be allowed to obtain frequent bouts of recumbency throughout the day.” (Id., pp. 8-10)

After asking about all the relevant areas, he prepared a report and developed what is known as a vocational profile and, based on that vocational profile, formulated an opinion that Mr. Hunt could not return to any of his past relevant work which he has performed in labor market. Further, he offered the opinion Mr. Hunt is now essentially realistically unemployable in the open labor market. He felt that no employer in the normal course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his condition and, therefore, he did not believe he would be capable of performing substantial, gainful employment at any level in the open labor market. His reason for reaching these conclusions was the Employee’s need to alternate between sitting and standing, along with the need to have frequent bouts of recumbency throughout the day as they are going to impact and prevent him from working in the labor market. (Id., pp. 21-24) He explained that even though the Employee may have done some sedentary work in the past, he did not believe that with the requirement that he alternate or change positions and lay down during the workday that he’d be able to do even sedentary work and he is, therefore, permanently and totally disabled. (Id., pp.25, 26) On cross examination he explained, further, that since sedentary work requires employees sit in a chair for extended periods of time and because the Employee has to alternate positions and cannot sit for any length in a regular chair, it would, therefore, exclude sedentary work. (Id., p. 35)

Terry Cordray testified that he is a vocational rehabilitation counselor hired by Mr. Bloskey to perform a vocational assessment with respect to Scott Hunt. He testified that he followed the standard and accepted protocols, evaluating Mr. Hunt's education and work background, his work skills, in combination with his physical restrictions to determine whether he was employable and to give an opinion whether any employer would hire him given the consequences, and the physical restrictions of his injury of February 19, 2011. (Cordray depo., pp. 3-5) He obtained information from the claimant and reviewed medical records, did some testing and developed a vocational profile. He noted the restrictions of Dr. Gurba which limited the Employee to sedentary work, noting he needs to alternate between sitting and standing as needed, and no kneeling, squatting, crawling, climbing and no ladder work. He was of the opinion that based on those restrictions, he could not perform his previous work at Hendrick Cadillac in which he was standing frequently and would not have the opportunity to alternate between sitting and standing. He did feel he had the capability of returning to his previous sedentary work as an insurance claims adjuster, sedentary work as a salesperson over the telephone for Sprint Business Services, or sedentary work at FreightQuote selling and estimating shipping costs. He noted also there are other jobs that existed in the Metropolitan market such as bill collector, telemarketer and cashier. (Id., pp. 9-14) He testified Dr. Stuckmeyer provided similar restrictions and reported no prolonged standing or walking greater than tolerated, so that would place him in sedentary work also. He also included no repetitive bending, lifting or twisting and no traversing steps greater than needed and no driving commercial vehicles. Based on those restrictions he felt he could return to his previous jobs at FreightQuote, Sprint Business Services, APS Technology, and Insurance Claims Services that would allow him to stand as needed. He added that Dr. Stuckmeyer did provide the additional restriction which recommends that Mr. Hunt would warrant the ability to obtain frequent bouts of recumbency throughout the day or, in other words, frequently would have the need to lie down. When Mr. Cordray included that restriction, he felt Mr. Hunt was precluded from all jobs in the labor market as employers will not allow Mr. Hunt or any other employee to have frequent bouts of lying down throughout the day. (Id., pp. 14-15, 42) He testified the interview took an hour and the testing took another hour so the entire process was a little over two hours. He explained the claimant told him that his mother does housework and there is no yard work since he lives in a town home. (Id., p. 18) There are stairs in his residence and he utilizes them one time a day to go up and down to the bedroom. (Id., p. 19) He testified that the Employee was of above-average intelligence and was a person that could have easily participated in vocational rehabilitation retraining for entry-level clerical jobs. (Id., p. 20) During cross examination he testified that he had reviewed his report and there was nothing he would like to amend or change. (Id., p. 27) He testified that it was his understanding that on the day of the accident Mr. Hunt was not working with any limitations or restrictions and he did not find that he would have a problem prior to that date getting a job because of any prior injuries. (Id., pp. 36, 57, 58) He acknowledged that he did not discuss the employee's ability or inability to sleep but acknowledged that if a person has chronic fatigue, then they may lie down at some point during the day if they're constantly having sleep issues. (Id., p. 38) He had suggested the Employee could have completed some training programs and

said that he would not have to attend classes because so many are provided online. In other words, if he has limitations and restrictions and he can't go to a college to take his classes, he could do it at home. He then acknowledged that if the Employee can't leave his house to go to school, it would be equally difficult to leave his house to go to work. (Id., pp. 42, 43) He further acknowledged that the sedentary type of work he had recommended is boilerplate language that is generally put in all of his reports when an injured worker has restrictions and may be in the sedentary category. (Id., pp. 46, 47)

RULINGS OF LAW

Based on substantial competent evidence, the stipulations of the parties and the application of the Worker's Compensation law, I make the following rulings of law.

1. WAS THE ACCIDENT OF FEBRUARY 19, 2011 THE PREVAILING CAUSE OF THE EMPLOYEE'S INJURIES AND NEED FOR MEDICAL CARE.

The uncontradicted testimony of the Employee is that he sustained an accident in Mexico in 2008 in which he sustained a fracture of the left lower leg. Dr. Dugan operated and fixed the meniscus in one surgery and a couple of months later did a second operation in which he added a small plate. By his follow-up appointment in 2009 he was symptom-free. Thereafter, to the date of this accident he was symptom-free and needed no further medical care. He lived his life without restriction or limitation. The incident on February 19, 2011 changed all of that. He immediately developed pain and swelling. For the next several years, he went through several rounds of physical therapy, prescription medication and at least six surgical procedures. He continues to take medication for pain relief.

Section 287.020.3,RSMo provides in part:

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. "The prevailing factor" is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.

All of the doctors who testified in this case, Drs. Stuckmeyer, Gurba and Abrams, agreed that following the accident and medical care received by this Employee in 2008 and, at least by 2009, the Employee appeared to be symptom-free and was not in need of medical care until he had a completely new and distinct accident on February 19, 2011 which accident is admitted by the Employer. This accident caused injuries which necessitated the subsequent medical care provided by Drs. Dugan, Gurba, a psychiatrist, Dr. Donley, and his primary care physician, Dr. Konduri (Gannavaram). (Stuckmeyer depo., p. 27,35,36; Gurba depo. Ex. 2, p.3, ¶7; Abrams depo., pp. 24, 25)

In other words, the Employee, and all other witnesses acknowledge through uncontradicted testimony that it was the February 19, 2011 accident that is the prevailing cause of the injuries sustained by Mr. Hunt which required the medical care provided thereafter. The general rule is that competent substantial and undisputed evidence of a witness who has not been impeached may not arbitrarily be disregarded. (*Copeland v. Thorsen Stout, Inc.*, 204 S.W. 3rd 737,743 (Mo. App. S. D. 2006); *Gordon v. City of Ellisville*, 268 S.W. 3rd 454 E.D 2008)

In *Pile v. Lake Regional Health Sys.*, 321 S.W. 3rd 463 (Mo. App. 2010), the court made clear that the application of Section 287.020.3(2)(b) involves a two-step analysis. The analysis is to "determine whether the hazard or risk is related or unrelated to the employment". (Id. at p. 467) The court explained that "only if the hazard or risk is unrelated to the employment does the second step of the analysis apply. In that event, it is necessary to determine whether the claimant is equally exposed to this hazard or risk in normal, non-employment life. (Id.) Here the Employee's injuries clearly stem from a hazard or risk directly related to his employment. I do not believe that Mr. Hunt would have been exposed to the prank played upon him by co-workers in a non-work-related setting. I believe the Employee has proven the Employee's work activities provide the nexus between the Employee's work and the claimed injuries.

Therefore, I find the accident of February 19, 2011 was the prevailing factor in causing the Employee's injuries and need for medical care.

2. WHETHER THE EMPLOYEE WILL REQUIRE FUTURE MEDICAL CARE AT THE EXPENSE OF THE EMPLOYER AND ITS INSURANCE COMPANY.

Scott Hunt testified about the medical care received since the February 19, 2011 accident and that after several attempts at physical therapy, at least six surgeries and utilization of several medications, Dr. Gurba referred him to his primary care physician for additional pain management. He testified that Dr. Konduri (Gannavaram), his primary care physician, has since continued to prescribe medication of several different kinds for his pain management. He also testified his doctors have told him he will require additional medical care.

Dr. Gurba confirmed that in August, 2014 he filled one last prescription and then referred Mr. Hunt to his primary care physician for further pain management (Gurba depo., p.52) and that, eventually, it is very likely he'll need the current knee replacement be redone at a cost of \$30,000-\$50,000. He agreed there is a possibility of more than one replacement. (Id., p. 52)

Dr. Stuckmeyer echoed the opinion of Dr. Gurba. (Stuckmeyer depo., pp.18,31)

Finally, Dr. Abrams testified that he recommended additional care for pain management utilizing psychiatric treatment and a spinal cord stimulator, as well as anti-depressant medications. (Abrams depo., pp.25,26)

I find the uncontradicted evidence of the Employee, as well as all medical experts who testified in this case, is that Scott Hunt is going to require substantial future medical care as a result of the accident sustained on February 19, 2011 and, therefore, I award future medical care to be provided to the Employee by the Employer and its insurance carrier for so long as it is required to cure and relieve him of the effects of these injuries.

3. WHAT IS THE NATURE AND EXTENT OF DISABILITY

The Employee alleges he is permanently and totally disabled and the evidence supports that contention.

The Employee testified that, except for a couple of weeks in July, 2012 when the Employer tried to provide accommodated duty, he has been unable to perform any but the most minimal tasks. He continues to have pain and swelling in the left lower extremity, has developed pain in his left hip and low back, and due to the left leg "locking up" one morning, he sustained further injury to his right leg. He has been through six operative procedures, done several rounds of physical therapy, and continues to take medication including narcotics and anti-inflammatories. He seldom leaves his home and no longer drives a car due to pain. He further testified that family members do most of his housework. Pain and discomfort prevent him from getting a full night's sleep and, therefore, he has to lie down or nap during the day. He admitted he has sent out over 40 resumes to prospective employers even though he does not believe he could tell a prospective employer in good faith that he could show up on a daily basis to do any work. He was recently awarded Social Security disability from July 12, 2012.

Dr. James Stuckmeyer, a board-certified orthopedic surgeon who is familiar with similar cases, gave significant restrictions based on his findings after an orthopedic examination. He said the Employee should do no prolonged standing or walking greater than tolerated, no repetitive bending, twisting or lifting, no repetitive traversing of steps greater than needed for activities of daily living, no driving commercial vehicles, nor should he work around hazardous equipment or heights. He also testified Mr. Hunt should be allowed to utilize a cane at any workplace which would also allow him several periods of recumbency during the workday. He concluded that Mr. Hunt is permanently and totally disabled. (Stuckmeyer depo., pp. 34-36) Dr. Stuckmeyer rated the Employee's disability to the left lower extremity for this accident at 75% with 15% pre-existing. He also noted the Employee has additional disability in the low back, left hip, and right leg.

Dr. Gurba rated the Employee's disability to the left lower extremity. (Gurba depo., pp. 22, 23, 26-29) He gave permanent restrictions of sedentary work only with alternate sitting and standing as needed for pain control, no kneeling, squatting, climbing, crawling and no aerial work or ladder work. He did not recall discussing driving but noted the Employee's mother did accompany him to his appointments. (Id., p. 30-31) Dr. Gurba also did acknowledge the Employee is in significant pain and if the Employee thinks he needs to lie down to obtain relief, that he should do so. (Id., p. 63)

Vocational experts Michael Dreiling and Terry Cordray testified and gave slightly different opinions as well as the same opinion. Each testified that given the Employee's education, training, work experience and the restrictions placed upon him by the doctors, he would fall into the category of less than sedentary employment (Dreiling depo., p. 35) or sedentary employment (Cordray depo., pp.9,14).

Mr. Dreiling testified that given his vocational profile, he could not return to any of his past relevant work which he performed in the labor market and that he was essentially and

realistically unemployable in the open labor market at this time. Further, he testified no employer in the normal course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ this individual in his condition and, therefore, he did not believe he could perform substantial gainful employment at any level in the open labor market. He said his reasoning was based on the restrictions given by all the doctors and the required periods of recumbency which Mr. Hunt required during the day. (Dreiling depo., pp. 21-24) Mr. Cordray agreed that if the requirement of periods of recumbency during the day is considered, Scott Hunt is permanently and totally disabled and it would not be expected that an employer would hire him to do work. (Cordray depo., pp.14,15,42)

The Employee did take issue with parts of Mr. Cordray's report, even though that report, ultimately, concluded he is unemployable and, therefore, permanently and totally disabled. He denied Mr. Cordray's comment the interview and testing process took in excess of two hours. The Employee produced phone records that clearly showed the entire process could not have taken more than one hour. At the time of his deposition Mr. Cordray was asked if there were any amendments or changes that he wanted to make to his report on two occasions and he declined both times. His credibility is, therefore, called into question.

I find the claimant is a credible witness and I find the claimant is permanently and totally disabled. Total disability means the inability to return to any substantial or normal employment. *Lawrence v. Joplin R-VIII School District*, 834 S.W. 2d 789,792 (Mo. App. 1993); *Brown v. Treasurer of Missouri*, 795 S.W. 2d. 479, 483 (Mo. App. 1990); *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W. 2d 919,922. An employee is not required, however, to be continually inactive or inert to be totally disabled. *Brown, supra.*,483. 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. *Lewis v. Kansas University Medical Center* 356 S.W.3d 796, 800 Mo. App.2011); *Molder v. Missouri Treasurer*, 342 S.W. 3rd 406,411 (Mo. App. 2011). I find that no employer in the normal course of business would be reasonably expected to hire Mr. Hunt to do work.

In addition to the Employee's uncontradicted testimony, both Dr. Stuckmeyer and Dr. Gurba placed significant restrictions on this Employee as a result of injuries sustained on February 19, 2011. Moreover, both vocational experts opined that given his age, education and training, work experience and all of his restrictions, no employer would be expected to hire him.

The phrase "inability to return to any employment" has been interpreted as "the inability of the employee to perform the usual duties of employment under consideration in the manner that such duties are customarily performed by the average person engage in such employment". *Kowalski, supra*, 922.

The claimant must establish a causal connection between the accident and the claimed injuries. *Thorsen v. Sachs Elec. Co.*, 52 S.W.3rd 616,618 (Mo. App.. 2001). An employee has the burden to establish permanent and total disability by introducing evidence to prove her (his) claim. *Carkeek v. Treasurer of State-Custodian of Second Injury Fund*, 352 S. W. 3rd 604,608 (Mo. App. 2011) citing *Clark v. Hart Automotive*, 274 S. W.612,616 (Mo . App. 2009)

I find the claimant sustained his burden of proof, clearly and convincingly through all of the evidence presented, that the prevailing cause of his injuries is the accident of February 19, 2011 as the injuries sustained leave him with restrictions, limitations and the need for constant monitoring of his medical condition so that he can only be found to be permanently and totally disabled.

4. WHAT IS THE SECOND INJURY FUND LIABILITY, IF ANY.

Section 287.220 RSMo. creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability when there has been previous disability". As a preliminary matter, the employee must show that he suffers from a "pre-existing permanent partial disability, whether from a compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed... (Id.)

Missouri courts have articulated the following test for determining whether a pre-existing disability constitutes a "hindrance or obstacle to employment".

The proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past, it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S. W.3d 629, 637 (Mo. App. 2007)

The Employee testified without contradiction that none of his old injuries to his head and neck nor his previous right knee injury as well as the 2008 left leg injury had left him with any limitations or restrictions and never constituted a hindrance in obtaining employment. This sentiment was echoed by Dr. Stuckmeyer. (Stuckmeyer depo., pp. 27, 74, 75) He also said that if that condition in 2008 would've been rated, it constituted a 15% permanent partial disability to the knee. (Id., p. 30) Dr. Gurba confirmed that he was unaware of any symptoms Mr. Hunt experienced following his 2008 injury and final release in 2009 and he had no medical records to suggest anything to the contrary. (Gurba depo., p. 58) Dr. Abrams, the last medical expert to evaluate the Employee, testified that there was no indication Mr. Hunt had any impediment to obtaining employment following the incident in 2008. (Abrams depo., p. 20) Finally, both vocational experts testified the Employee did not have any problems prior to February 19, 2011 that would cause a difficulty or hindrance to obtaining or retaining employment. (Cordray depo., pp.36, 57, 58; Dreiling depo., p.38)

Based on all the evidence, it does not appear the Employee's pre-existing condition was serious enough to constitute a hindrance or obstacle to employment for purposes of Section 287.220 RSMo. Therefore, since the evidence does not prove the pre-existing condition constituted a hindrance or obstacle to employment or reemployment, it is not necessary to address the issue of whether the current permanent and total disability was caused by a combination of the pre-existing condition and the disability from the last accident or whether the permanent total disability was caused by the February 19, 2011 accident in isolation pursuant to RSMo.287.220.1 because if the Employee is permanently and totally disabled due to the last

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injury considered in isolation, the Employer, and not the Second Injury Fund, is responsible for the entire amount of compensation. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W. 3rd 240, 248 (Mo.App.2003)

Therefore, I find there is no Second Injury Fund liability.

CONCLUSION

Therefore, I find the Employer is responsible for temporary total disability at the rate of \$596.49 per week for 129.17 weeks followed by permanent total disability compensation at \$596.49 per week commencing August 18, 2013 and continuing for the remainder of the Employee's life.

I find Claimant's attorney, James Martin, is entitled to attorney's fees in the amount of 25% of sums received.

Made by: _____

Mark Siedlik
Administrative Law Judge
Division of Workers' Compensation