

**FINAL AWARD ALLOWING COMPENSATION**  
(Affirming Award and Decision of Administrative Law Judge  
by Supplemental Opinion)

Injury No.: 06-088342

Employee: James Kellerman  
Employer: Plaza Motors  
Insurer: Zurich American Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Denied)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge (ALJ) 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 ALJ dated October 2, 2012, as supplemented herein.

We issue this supplemental opinion solely to address two findings of fact contested by employee. Specifically, employee argues that on page 5 of the Award, the ALJ erred in her summary of Dr. Hinden's records when she found that "[employee] was told he needed back surgery, but he chose conservative treatment instead." We find, as employee argues, that the record is devoid of any medical notes indicating that employee had been told he needed back surgery and elected to pursue conservative treatment.

Employee also argues that the ALJ erred in listing Dr. Hinden as a doctor of osteopathic medicine (D.O.), when Dr. Hinden is actually a doctor of chiropractic medicine (D.C.). We agree with employee, and find that the ALJ incorrectly listed Dr. Hinden as a D.O. Dr. Hinden is, in fact, a D.C.

We find that the aforementioned corrections do not affect the ALJ's ultimate conclusions in this case, which we find are supported by competent and substantial evidence. Therefore, the Commission affirms the award and decision of the ALJ, as supplemented herein.

The award and decision of Administrative Law Judge Suzette Carlisle, issued October 2, 2012, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

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

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2005 unless otherwise indicated.

Employee: James Kellerman

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

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of March 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: James Kellerman Injury No.: 06-088342  
Dependents: N/A Before the  
Employer: Plaza Motors **Division of Workers'**  
**Compensation**  
Additional Party: Second Injury Fund (Denied) Department of Labor and Industrial  
Relations of Missouri  
Insurer: Zurich American Insurance Company Jefferson City, Missouri  
Hearing Date: June 18, 2012 Checked by: SC

### 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: August 22, 2006
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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: Claimant injured his cervical spine when he pulled on a bolt and fell to the floor.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Cervical spine
14. Nature and extent of any permanent disability: 40% of the body, referable to the lumbar spine
15. Compensation paid to-date for temporary disability: \$24,441.08
15. Value necessary medical aid paid to date by employer/insurer? \$79,097.50

Employee: James Kellerman

Injury No.: 06-088342

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: Sufficient for the rates listed in number 19 below.
- 19. Weekly compensation rate: \$718.87/\$376.55
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	\$0
160 weeks of permanent partial disability from Employer	\$60,248.00

22. Second Injury Fund liability: Denied

**TOTAL: \$60,248.00**

23. Future requirements awarded: As outlined in this award

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

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

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	James Kellerman	Injury No.: 06-088342
Dependents:	N/A	Before the
Employer:	Plaza Motors	<b>Division of Workers' Compensation</b>
Additional Party:	Second Injury Fund (Denied)	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Insurer:	Zurich American Insurance Company	Checked by: SC

### STATEMENT OF THE CASE

The parties appeared at the St. Louis Division of Workers' Compensation ("DWC") before the undersigned administrative law judge on June 18, 2012 for a hearing for a final award at the request of James Kellerman ("Claimant") to determine the liability of Plaza Motors. ("Employer"), Zurich American Insurance Co. ("Insurer"), and the Second Injury Fund ("SIF") for permanent total disability ("PTD") benefits. Attorney Kevin Wayman represented Claimant. Attorney Jared Cone represented the Employer and Insurer, and Assistant Attorney General Maria Daugherty represented SIF. The court reporter was Lori Sanders.

Venue is proper and jurisdiction lies with the DWC. The record closed after presentation of the evidence on June 18, 2012.

### STIPULATIONS

The parties stipulated that on or about August 22, 2006:

1. Claimant was employed by Employer and sustained an accident that arose out of and in the course of employment in St. Louis County;<sup>1</sup>
2. Employer and Claimant operated under the Missouri Workers' Compensation Law<sup>2</sup>;
3. Employer's liability was fully insured;
4. Employer had notice of the injury;
5. A Claim for Compensation was timely filed;
6. Claimant's average weekly wage was sufficient for rates of \$718.87 for temporary total disability (TTD) and permanent total disability (PTD) and \$376.55 for permanent partial disability (PPD); and
7. Employer paid TTD benefits totaling \$24,441.08 and medical expenses totaling \$79,097.50.

<sup>1</sup> All references to the Employer also refer to the Insurer.

<sup>2</sup> All statutory references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

## ISSUES

The parties have identified seven issues for disposition:

1. Has Claimant reached maximum medical improvement (“MMI”)? Yes
2. If so, what is the nature and extent of Employer’s liability for PPD or PTD benefits, if any? 40% PPD of the cervical spine
3. What is the nature and extent of SIF liability for PPD or PTD, if any? None
4. Is Employer liable for past medical expenses totaling \$5,447.25? No
5. Is Employer liable for future medical treatment for Claimant’s cervical spine? Yes

## EXHIBITS

Claimant offered Exhibits A through Q, which were admitted without objection.<sup>3</sup> Employer offered Exhibits 1 through 6 which were admitted without objection.<sup>4</sup> SIF offered no exhibits. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights in the exhibits they were made prior to becoming part of this record and were not made by the undersigned administrative law judge.

## FINDINGS OF FACT

All evidence was reviewed but only evidence which supports this award is summarized below.

At the time of the hearing Claimant was a 53 year old graduate from Webster High School in 1977. He received automotive training at South County Technical School. Claimant uses a computer to shop online on Craig’s List and to date on line. Claimant maintains his personal checking account. He reads newspapers and magazines.

After high school he worked as an auto mechanic until 2006. He completed on-the-job training with General Motors. Prior to working for Employer, Claimant worked for various dealers including Chevrolet, Aufferberg, Boulevard, and Mercedes Benz. While at Mercedes Benz, he received three weeks of initial training and yearly training on the job.

### *Preexisting disabilities*

In 1986 Claimant injured his eye. In 1989 Claimant strained his low back at Boulevard Motors. He missed work for eight days.

In 1990 Claimant injured his left index finger, and does not recall missing work prior to August 2006 for his neck or low back. He did not remember a low back injury in 1992, but Division records show he settled the case for 7.5% PPD of the body.

Division records show Claimant received a settlement for 5% PPD of the low back for an injury that occurred July 6, 1992.

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<sup>3</sup> Employer’s objection to Exhibit Q was withdrawn.

<sup>4</sup> Exhibit 5 was admitted for the limited purposes of pages 10 and 11.

Claimant received occasional chiropractic services from **Linnel Hinden, D.O.**, as needed from 1993 to 2006. Claimant treated from February 11, 1993 to February 24, 1993 for neck and upper back complaints, which started two weeks earlier, after he was hit from behind during a bar fight. Dr. Hinden manipulated T3-4 and C6-C7. Claimant returned on June 25, 1993 with left shoulder and neck pain, and received manipulation at T3-4, C6-7, T11-12, and L5-S1.

Dr. Hinden treated Claimant off and on for his low back, neck, and both shoulders through August 2, 2006 when he reported right neck pain and left arm pain with movement, which started July 31, 2006. Dr. Hinden took Claimant off work. The last visit occurred on August 7, 2006. Claimant was told he needed back surgery, but he chose conservative treatment instead.

In 2001 Claimant developed a hernia while working for Employer, but does not recall how it happened. Division records show he settled the case for 9% PPD of the body. Before August 22, 2006, Claimant's injuries did not affect his work performance or his ability to work overtime.

Claimant worked for Employer as a mechanic for ten years leading up to 2006. He provided customer service, trained other mechanics as a team leader, and performed auto mechanic work. As a team leader, Claimant ensured mechanics completed work, he talked to customers, and ordered parts if necessary, and used a computer to assign work. Claimant lifted 70-pound tires, and 50-pound batteries. He worked overtime and was required to stand, crawl, sit, lie down, kneel, squat, climb, and reach overhead on a regular basis.

### *The work accident*

On August 22, 2006, Claimant fell and injured his left side while using a breaker bar. He felt left sided pain and numbness. Claimant finished his shift. Later in the day, the pain increased.

Claimant has not worked since surgery and has not looked for work due to pain. He believed his spouse divorced him because of his neck problems. His ex-wife presented him with a letter from the Insurer asking questions about Claimant's treatment. He lost his home. Claimant was aware surveillance tapes were made in 2011.<sup>5</sup> All these factors affected his ability to interact with people.

While treating for his neck, Claimant developed low back pain that radiated into his right leg. Occasionally, Claimant continues to have low back pain.

Current complaints include constant neck pain. His left arm is weak and numb. He avoids lifting with his left hand because he may drop it. His neck and left arm are worse than they were before surgery. Claimant has very slight pain in his low back. Claimant rests more often when fishing. Claimant can drive with discomfort. Activity aggravates Claimant's neck, left arm, and shoulder. To relieve pain, he sits, lies down, or takes a hot shower. His neck and left arm are worse than his low back.

Medication includes hydrocodone, gabapentin, sleeping pills, and medication for depression.

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<sup>5</sup> Claimant testified the trailer in the video was owned by Claimant's friend, and his son helped him hook the trailer to his car. Claimant has a smaller trailer.

On a typical day, Claimant wakes at six a.m., drinks coffee, takes medication, eats, lets the dog out and walks. He cuts a portion of the grass, does laundry and returns to his chair for most of the day. He can cook, shop, clean and wash dishes, but it is difficult. He breaks every 20 minutes for pain. Claimant is distrustful and paranoid because of the medical treatment he received. He lies down from one to three hours.

Claimant received unemployment compensation benefits for a period of time. Claimant has received Social Security Disability since about 2007.

*Medical evidence – primary injury*

On August 25, 2006, **Sharon Godar, M.D.**, prescribed medication and physical therapy, for pain on the left side of Claimant's neck and arm, and numbness on his small and ring fingers; however, symptoms increased. Dr. Godar diagnosed cervical/thoracic strain with radiculopathy. Claimant denied prior major neck problems. An October 2006 MRI revealed mild disc protrusion at C5-6 and degenerative joint disease over three to four disc spaces, and disc fragments. X-rays revealed a spur at C5-6.

Dr. Mirkin prescribed more physical therapy. An MRI showed C5-6 disc protrusion to the left with foraminal encroachment. Dr. Mirkin diagnosed preexisting cervical spondylosis, asymptomatic until the work accident. Dr. Mirkin did not review the chiropractic records for treatment prior to the work accident. Dr. Mirkin recommended a fusion at C5-6, and related the injury to the work accident.

However, Claimant informed the Insurer he wanted to find his own doctor, and chose Dr. Kennedy. The Insurer agreed to send Claimant to Dr. Kennedy.

In November 2006, Claimant treated with **Dr. Kennedy**, a neurosurgeon, for increased pain on the left side of his neck and arm, and swelling.

Examination revealed 50% decreased range of motion of the cervical spine, biceps weakness, an absent biceps reflex on the left, and scattered sensory loss in the thumb and index finger and middle finger on the left side. A CT myelogram in December 2006 revealed spinal stenosis at C5-6 with compression of the nerve root on the left.

Based on this information, Dr. Kennedy diagnosed a C5-6 disc protrusion, spondylosis, and stenosis, opined the August 2006 work accident caused the protrusion, and recommended surgery.

Drs. Kennedy and Raskas performed a C5-6 cervical fusion with instrumentation on December 20, 2006, kept Claimant off work until June 13, 2007. A Functional Capacity Evaluation performed on June 6, 2007 placed Claimant in the medium work demand level. Testing showed claimant could occasionally lift 40 pounds floor to waist and waist to shoulder, and 30 pounds overhead. Claimant had unrestricted ability to sit, stand, walk, reach forward frequently, with occasional climbing, forward bending, stooping, and overhead reaching, crouching, kneeling, crawling, and lifting up to 100 pounds.

On June 13, 2007, Dr. Kennedy restricted lifting to 40 pounds floor to waist, and 20 pounds overhead, concluded Claimant had achieved MMI, and rated 15% PPD of the cervical spine.

After Dr. Kennedy released Claimant he treated on his own with Dr. Fischer, his primary care physician and Dr. Ahmad for pain management.

In August 2007, Claimant returned to work but continued to have problems with overhead work, so Dr. Kennedy added another restriction; minimal overhead work. Also, he noted Claimant may need pain medication and injections in the future. A CT scan dated November 7, 2007 revealed mild bulges at C4-5 and C6-7.

In December 2007 Employer terminated Claimant's position. Employer's training jobs required the performance of mechanical work. He was not offered the shop foreman position, which also required lifting.

**Dr. Alan Londe** performed trigger point injections in March 2008 and May 2008. In July and August 2008, **Dr. James Coyle** unsuccessfully treated Claimant with physical therapy. CT myelogram results revealed spondylosis, but no pseudoarthrosis or disc herniation at C4-5 or C5-7. Claimant reported improvement after surgery for up to eight months, then increased pain and numbness with activity in the index and longer fingers on the left.

In August 2008, Claimant received cervical injections from **Dr. Nabil Ahmad**, a pain management specialist, for continuing pain in the left side of his neck, and arm. Dr. Ahmad diagnosed possible pseudoarthrosis at C5-6, C4-5 and C6-7 disc herniation<sup>6</sup>, chronic neck pain and possible neuropathic right arm pain. Dr. Ahmad diagnosed S1 nerve root compression. Injections lasted three days, and he refused to get additional injections.

Dr. Ahmad did not believe Claimant could return to work as an auto mechanic or any activity that required lifting, pushing, and pulling. On March 20, 2009, Dr. Ahmad restricted lifting to 20 pounds occasionally and 10 pounds frequently, four hours to stand, walk, and sit during an eight-hour day with normal breaks and periodic changing from sitting, standing, and walking every 30 minutes, and to lie down as needed, and occasional bending and climbing stairs, but no twisting, crouching, or climbing ladders. Dr. Ahmad predicted Claimant would miss more than three days per month due to pain and medical treatment. He considered Claimant's cervical and lumbar spine.

### *Expert medical evidence*

**David T. Volarich, M.D.**, provided an independent medical examination ("IME"), examined Claimant on January 9, 2008, found he had achieved MMI, and rated 50% PPD of the cervical spine for the C5-6 herniation, which he attributed to the August 22, 2006 work accident.

For preexisting disabilities, Dr. Volarich found no disability for the right herniorrhaphy and lumbar strain. Claimant reported no hindrance to his ability to work leading up to August 22, 2006.

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<sup>6</sup> Dr. Ahmad diagnosed lumbar facet arthropathy and L5-S1 neuroforaminal stenosis, however, Dr. Volarich did not relate Claimant's lumbar conditions to the August 2006 work accident.

Dr. Volarich recommended medication and physical therapy to control pain, pain management, steroid injections, nerve root blocks, trigger point injections, and a TENS unit.

On June 4, 2009, Dr. Volarich reevaluated Claimant, and found decreased range of motion, and added more restrictions: Avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks, no weight over 20 pounds occasionally, no weight overhead or away from the body or long distance or uneven terrain, change positions every 45 minutes.

On July 28, 2010, Dr. Volarich provided a third report after reviewing vocational records, an IME by Dr. DeGrange, and the 1998 MRI.

Dr. Volarich diagnosed degenerative changes to Claimant's back, unrelated to the August 22, 2006 work accident. He related the back complaints to a degenerative disc disease shown on the 1998 MRI. On August 23, 2010, Dr. Volarich opined the low back syndrome began in the summer of 2009, 2 ½ years after the work injury. Furthermore, Claimant received no treatment for the low back after the 2006 work accident. Dr. Volarich rated 20% PPD of the lumbar spine for the low back syndrome which began in the summer of 2009.

Dr. Volarich concluded Claimant's chiropractic treatment for his neck prior to the August 2006 accident did not change his causation opinion. After the accident, Claimant developed new symptoms to his left arm. Furthermore, Dr. Volarich concluded any hit to the head in a bar fight resulted in a contusion at most because Claimant waited several weeks to seek treatment, and only received occasional treatment between 1993 and 2006.

Dr. Volarich reviewed the surveillance DVD but it did not change his opinion, noting Claimant did not push, pull, or handle heavy items, and did not use undue stress or force. However, Dr. Volarich did not find Claimant to be PTD at any time.

**Donald DeGrange, M.D.**, a board certified orthopedic spine surgeon, performed an independent medical examination ("IME") at Employer's request on February 23, 2010. Objective findings did not support Claimant's level of pain and ability to function. Dr. DeGrange diagnosed post anterior discectomy at C5-6 and multi-level degenerative disc disease of the cervical spine.

Initially, Dr. DeGrange agreed with Dr. Kennedy's restrictions and treatment as reasonable for a cervical fusion related to his work activities in August 2006. (40-pound weight limit floor to waist, 20 pounds overhead, and refrain from prolonged work at or above shoulder level). He found no basis for preexisting cervical spine disability, although he found degenerative disc disease.

Dr. DeGrange changed his causation opinion after he reviewed thirteen years of neck treatment, including treatment two weeks before the accident. Also, he considered the mechanism of injury and a bar room fight fifteen years earlier.

Dr. DeGrange concluded Claimant's medical condition at the time he saw him, was not medically causally related to the August 2006 work accident.<sup>7</sup> Also, based on the video, Dr. DeGrange did not impose work restrictions because he found no causal relationship between Claimant's work restrictions and the work accident.

However, Dr. DeGrange recommended Claimant avoid very heavy work based on his age, years as a mechanic, disc bulges, fusion; prolonged work at or above shoulder level, and forceful pushing/pulling. He concluded Claimant had reached MMI and recommended no additional medical treatment for the work injury.

Dr. DeGrange concluded the DVD showed full activity with no neck restrictions. Further, it would take strength to attach the trailer to the SUV<sup>8</sup>, and he was able to work on the ground.

Based on a second examination on May 8, 2012, and new information, Dr. DeGrange revised his rating and attributed 25% PPD of the 15% disability to the 2006 work accident, and 75% PPD to the preexisting conditions, and did not impose restrictions.

### *Expert vocational opinion*

On September 2, 2009, **Mr. Timothy Lalk**, a vocational rehabilitation counselor, interviewed Claimant, wrote an opinion and addendum at the request of Claimant's attorney. Claimant reported the need to lie down most of the day at least once or twice a week to relieve low back problems. Claimant reported he lies down for up to four hours to relieve neck pain. He takes medication to control symptoms. Claimant has no side effects from medication.

Mr. Lalk administered the Wide Range Achievement Test Revision 3 ("WRAT3") and Reading Comprehension tests, and Claimant scored fourth grade in math and reading, and ninth grade in reading comprehension.

Mr. Lalk concluded Claimant could not successfully pursue training at the post-secondary level because Claimant was not a good candidate for training for sedentary work as he lacked the academic skills needed to learn through reading manuals and answering written tests. Also, sedentary positions require emphasis on verbal and mathematical skills.

Based on restrictions imposed by Dr. Volarich and Dr. Ahmad, Mr. Lalk concluded Claimant could not return to work as an auto mechanic, and could not compete, secure and or maintain employment in the open labor market. Furthermore, if hired, Mr. Lalk predicted Claimant would not meet the expectations for even sedentary work due to his symptoms and need to rest, which are consistent with Dr. Volarich's restrictions.

Mr. Lalk opined Claimant's neck complaints were enough to keep him from returning to work. Mr. Lalk did not consider Claimant's low back problems, hearing loss, or any complaints besides

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<sup>7</sup> Dr. DeGrange testified he changed his opinion regarding Claimant's PPD and work restrictions from the August 2006 accident. However, he did not recall changing his opinion about whether surgery was required for the work accident.

<sup>8</sup> Dr. DeGrange presumed Claimant attached the trailer to the vehicle, although Claimant denied it, and it was not clear from the DVD who attached it.

his neck. However, he concluded both neck and low back symptoms need to improve to function at or near sedentary level. He concluded Claimant could not rest as needed during the day on jobs where he has experience.

Mr. Lalk disagreed with Ms. Blaine's opinion that Claimant could work light level because he was not able to stand and walk for at least six hours per day with limited breaks. The jobs identified by Ms. Blaine do not permit Claimant to lie down and rest as needed.

Mr. Lalk further opined Claimant's low back complaints would prevent him from maintaining employment. For Claimant to perform light duty, both the neck and low back would need to improve. Accommodations were required to allow flexibility for him to move as needed. Mr. Lalk did not expect Claimant could work and duplicate his activity at home.

In January 2012, Mr. Lalk provided a supplemental report after he reviewed additional records and a surveillance DVD, however, Mr. Lalk's opinion did not change.

**Ms. June Blaine**, a rehabilitation counselor, interviewed Claimant on March 22, 2010, and testified on behalf of Employer. Ms. Blaine administered the WRAT4, and Claimant scored 4.3 in reading, 6.0 in sentence comprehension, and 5.6 in math.

Ms. Blaine found inconsistency between the DVD and Claimant's inability to perform overhead work or use his right shoulder for any activity.

Based on restrictions from Dr. Volarich, Ms. Blaine concluded Claimant could work the following light duty demand jobs: Car parts delivery, automotive counter sales and other customer service positions, service writer and an estimator. According to Ms. Blaine, restrictions imposed by Drs. Kennedy and DeGrange expanded the work pool to include auto parts sales and delivery, store manager, and service agent.

Ms. Blaine further concluded Dr. Volarich's restrictions included the back, but he did not find Claimant to be PTD, and did not recommend Claimant rest in a "recumbent position."

However, based on Dr. Ahmad's opinion that Claimant should lie down as needed, Ms. Blaine predicted Claimant would miss time from work and be unable to perform based on a combination of problems with his neck and low back.

### **ADDITIONAL FINDINGS OF FACT and RULINGS OF LAW**

After careful consideration of the entire record, based upon the above testimony, the competent and substantial evidence presented, and the applicable law of the State of Missouri, I make the following findings:

#### ***1. Claimant has achieved MMI***

The parties did not stipulate whether Claimant has achieved MMI. MMI is reached when the medical condition has reached the point where further progress is not expected. *Cardwell v.*

*Treasurer of State of Missouri*, (Mo. App. 2008). The Court acknowledged that “maximum medical improvement” is not a phrase used in the Missouri Workers’ Compensation Law. Nevertheless, many cases used maximum medical improvement as the standard for determination of the accrual of permanent partial disability benefits. (*Citations omitted*).

Here, Dr. Kennedy, the treating physician, released claimant at MMI on June 13, 2007, with restrictions. Claimant returned in August 2007 due to neck pain with extension, but Dr. Kennedy did not change his MMI opinion. Dr. Kennedy performed x-rays which showed solid fusion but added minimal overhead work to address pain with extension. Claimant’s MMI status was confirmed during IMEs in 2008 by Dr. Volarich and in 2010 by Dr. DeGrange. No additional surgery has been performed or recommended. Based upon this credible evidence, I find Claimant achieved MMI on June 13, 2007.

## **2. Employer is not liable for PTD benefits**

Claimant asserts he is entitled to PTD benefits from Employer due to the 2006 work accident. Employer contends Claimant is not PTD, but if he is, SIF is liable. SIF contends Claimant can work, but denies liability because no physician has certified PPD or PTD. Also, if Claimant is PTD it is due to either the last injury alone or subsequent deterioration of his low back.

Section 287.020.7 RSMo. defines “**total disability**” as the inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident. Any employment means any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition. *Kowalski v. M-G Metals and Sales, Inc.* 631 S.W.2d 919, 922 (Mo. App. 1982) (*Citations omitted*).

The test for permanent total disability in Missouri is a claimant's ability to compete in the open labor market. The central question is whether any employer in the usual course of business could reasonably be expected to employ claimant in his present physical condition. *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995).

I find Claimant is not generally credible due to inconsistencies between his testimony at the hearing, medical evidence, and the surveillance DVD.

At the hearing, Claimant testified he had no residual problems from neck and low back problems sustained before the August 22, 2006 work accident. Also, Claimant gave Dr. Volarich a history of chiropractic treatment for his low back “for many years,” that resolved with no hindrance to employment, additional medical treatment, or missed days from work before the work accident. Claimant did not report his treatment and missed time from work the same month as the accident. Claimant did not tell Dr. DeGrange about the hit on the back of the head or his thirteen-year span of chiropractic treatment for neck pain.

August 2006 was the most recent treatment for Claimant’s neck which began in 1993 and continued sporadically until early August 2006, less than three weeks before the work accident. On August 2, 2006, Claimant treated with Dr. Hinden for neck complaints and Dr. Hinden took

him off work for a week. Also, Claimant did not tell Dr. Volarich about the August 2006 neck complaints and treatment or two low back settlements (totaling 12.5%) or groin settlement (9%).

I find the opinions of Dr. Volarich and Ms. Blaine are more credible than the opinion of Mr. Lalk. Dr. Volarich and Ms. Blaine found Claimant is not PTD. Despite repeat questions, Dr. Volarich's opinion did not change. Based on Dr. Volarich's restrictions, Ms. Blaine concluded Claimant could deliver car parts and work in automotive counter sales and other customer service positions, as a service writer, and as an estimator. She explained the duties and testified they were within Dr. Volarich's restrictions. Applying restrictions imposed by Drs. Kennedy and DeGrange expanded Claimant's work pool to include auto parts sales, delivery, store manager, and service agent.

On the other hand, Mr. Lalk concluded Claimant could not successfully pursue training at the post-secondary level because Claimant lacked the academic skills needed to learn through reading manuals and answering written tests. However, Ms. Blaine concluded Claimant's level of education did not match his test results. I find Mr. Lalk's opinion is not credible. Claimant scored ninth grade on the Adult Basic Learning test administered by Mr. Lalk. Also, Claimant successfully completed numerous training courses throughout his thirty-year career as a mechanic, sometimes more than one course per year. The record contains no evidence the training was all "hands on training."

Mr. Lalk predicted Claimant would not meet the expectations for even sedentary work Ms. Blaine identified because he cannot stand and walk at least six hour a day with limited breaks, and his need to lie down and rest. Mr. Lalk did not predict Claimant could work and duplicate his limited activity at home. However, Ms. Blaine noted Dr. Volarich did not require Claimant to lie down in order to rest. Furthermore, Dr. Volarich's restrictions only limited fixed standing or sitting for more than 45 minutes, he did not prohibit standing and sitting. Ms. Blaine noted Dr. Volarich's restrictions include the lumbar spine.

On the DVD I observed Claimant kneel off and on for more than 10 minutes, freely raise his arms overhead, stoop, squat, sit on the ground, and bend over. Ms. Blaine noted Claimant's use of his right arm in the DVD was inconsistent with his report that "any activity" caused problems.<sup>9</sup>

Mr. Lalk gave contradictory opinions about the cause of Claimant's PTD status. Mr. Lalk testified he only considered Claimant's neck problems, yet he concluded both the neck and low back symptoms needed to improve before Claimant could function at or near the sedentary level. Mr. Lalk relied heavily on Claimant's reported symptoms to form his opinions.

During the hearing, Claimant had poor recall about prior back and neck injuries, settlements, and chiropractic treatment. He denied receiving neck treatment several weeks before the work accident, until he read the medical record on cross examination. He could not recall the last time he hitched his trailer to his vehicle. On the DVD I observed Claimant walk out of sight toward a trailer, I saw the trailer shift, and Claimant reappeared and moved a floor jack on wheels away from under the vehicle.

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<sup>9</sup> However, Ms. Blaine noted Claimant's right arm activities were within the work restrictions.

Based on credible evidence by Dr. Volarich and Ms. Blaine, I find Claimant did not prove employers in the usual course of business would not reasonably be expected to employ him in his present physical condition. I find Claimant is not PTD due to the work accident.

2(a) ***Employer is liable for PPD benefits***

A permanent partial award is intended to cover claimant's permanent limitations due to a work-related injury and any restrictions his limitations may impose on employment opportunities. ***Phelps v. Jeff Wolk Construction Co.***, 803 S.W.2d 641,646 (Mo.App. 1991).<sup>10</sup> With respect to the degree of permanent partial disability, a determination of the specific amount or percentage of disability is within the special province of the finder of fact. ***Banner Iron Works v. Mordis***, 663 S.W.2d 770, 773 (Mo.App. 1983).

Dr. Volarich rated 50% PPD of the cervical spine with restrictions, and Dr. Kennedy rated 15% PPD of the cervical spine with restrictions, which he increased. Dr. DeGrange rated 3.75% PPD of the cervical spine, with no restrictions. Dr. Ahmad imposed restrictions but did not provide a rating. Also, Drs. Kennedy and Ahmad concluded Claimant could no longer work as a mechanic.

Claimant testified he has constant neck pain, and his left arm is weak and numb. He avoids lifting items with his left hand because he may drop them, and his neck and left arm are worse than they were before surgery. However, during evaluation, Dr. DeGrange noted Claimant's objective findings did not support his reported limitations.

Based upon credible testimony by Drs. Volarich, Kennedy, Ahmad, and DeGrange, I find Claimant sustained 40% PPD of the cervical spine from the August 22, 2006 work accident.

3. ***The SIF claim is denied***

SIF contends Claimant had no injuries or conditions before the 2006 work accident that were a hindrance or obstacle to his employment or reemployment.

Once a determination is made that a claimant is not PTD, the inquiry turns to what degree, if any, is an individual permanently partially disabled for purposes of SIF liability. ***Leutzinger v. Treasurer of the State of Missouri***, 895 S.W.2d 591, 593 (Mo. App. 1995). Section 287.220.1 RSMo. provides: SIF liability is triggered in all cases of PPD where there has been previous disability that created a hindrance or obstacle to employment or re-employment, and the primary injury along with the preexisting disability(s) reach a threshold of 50 weeks (12.5%) for a body as a whole injury or 15% of a major extremity. The combination of the primary and the preexisting conditions must produce additional disability greater than the last injury standing alone.

Here, Drs. Kennedy and Volarich did not find measurable preexisting disability, and DeGrange rated 11% PPD, which is below the threshold. Dr. Volarich amended his opinion to add low back disability, but attributed it to a problem that developed in 2009. Also, Claimant

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<sup>10</sup> Several cases herein were overruled by ***Hampton v. Big Boy Steel Erection***, 121 S.W.3d 220 (Mo banc 2003) on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton*** in this award.

testified that prior to the 2006 accident, he worked overtime and had no hindrance to his employment, despite receiving periodic treatment for his low back and cervical spine. For these reasons, I find Claimant did not prove SIF liability, therefore, the SIF claim is denied.

#### 4. *Employer is not liable for past medical expenses totaling*

Claimant asserts Employer owes past medical expenses totaling \$5,447.25<sup>11</sup>. The alleged charges are contained in various exhibits, including A, C, E, F, J, L, and P.<sup>12</sup> Employer denies liability based on Claimant's less than complete medical history and the surveillance DVD.

The Missouri Supreme Court found in *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W. 105 (Mo. Banc 1989) once an employee testifies that his visits to the medical providers were the product of his injury and identifies the bills, which relate to the professional services rendered as shown by the medical records in evidence, a factual basis exists for the award of the bills. Once Claimant made such a showing, the burden shifts to his employer to challenge the reasonableness or fairness of the bills or to show that the medical expenses incurred were not related to the injury in question. *Id.*

Claimant testified he currently pays his medical bills through Medicare. Mr. Kellerman testified he told the Insurer he was going to select his own doctor to perform surgery. He chose Dr. Kennedy and Employer consented.

Claimant seeks reimbursement for services provided by the following providers totaling \$5,447.25:

1. Dr. Alan Londe - \$220.00(1-16-06 to 5-19-08)
2. Mr. R. Peter Mirkin - \$265.00 (10-25-06 to 2-27-08)
3. Dr. James Coyle - \$383.00 (7-7-08 to 8-5-08)
4. DesPeres Physical Therapy - \$2,195.00 (7-9-08 to 8-4-08)
5. Dr. Nabil Ahmad - \$914.00 – (7-21-09 to 2-23-12)
6. Dr.Nabil Ahmad - \$1,955.25 (7-21-09 to 2-23-2012)
7. Prescriptions from Walgreens – 2006 to present (Undetermined)

However, Claimant did not testify the medical treatment was related to the work accident, nor did he identify the bills related to the medical records in evidence. Therefore, I find Claimant did not meet his burden to show Employer is liable for the bills.

#### 5. *Employer is liable for future medical treatment*

Claimant asserts Employer is liable for future medical care for his cervical spine. Employer contends they are not liable based on Claimant's less than complete medical history and the surveillance DVD.

In cases involving the award of future medical benefits, the medical care must flow from the accident in order for the employer to be held responsible. *Landers v. Chrysler Corp.*, 963

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<sup>11</sup> It should be noted the medical expenses listed above do not total \$5,447.25, and do not include the Walgreens prescriptions.

<sup>12</sup> Exhibit P contains Walgreens prescription payments from 2006 to the present, with no yearly or grand totals listed.

S.W.2d 275, 283 (Mo. App. 1997). For an award of temporary disability and future medical aid, proof of cause of injury is sufficiently made on reasonable probability, while proof of a permanent injury requires reasonable certainty. *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo. App. 1995).

Here, Dr. Kennedy opined Claimant may need ongoing injections and medication from a pain specialist for his cervical spine if problems persist. Dr. Volarich recommended medication, physical therapy, pain management, steroid injections, nerve root blocks, trigger point injections, and a TENS unit. Claimant testified Dr. Ahmad currently provides treatment for his cervical spine problems. Based on credible evidence by Drs. Kennedy and Volarich, I find Employer liable for future medical treatment to cure and relieve the effects of Claimant's cervical spine injury, with treatment to be directed by the Employer.

### CONCLUSION

1. Claimant has achieved maximum medical improvement.
2. Employer is liable for permanent partial disability benefits.
3. The Second Injury Fund case is denied.
4. Employer is not liable for past medical expenses.
5. Employer is liable for future medical expenses as outlined in this award.

Made by: \_\_\_\_\_

Suzette Carlisle  
*Administrative Law Judge*  
*Division of Workers' Compensation*