

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

Injury No.: 01-039389

Employee: Charles Kelson  
Employer: Admiral Limousine Service, Ltd.  
Insurer: St. Paul Insurance Company of Illinois  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: February 27, 2001  
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Pursuant to section 286.090 RSMo, subsequent to reviewing the evidence and considering the entire record, the Commission modifies the award and decision of the administrative law judge dated October 12, 2005. The award and decision of Administrative Law Judge Edwin J. Kohner, is attached and incorporated by this reference.

The administrative law judge awarded the employee the following permanent disability: (1) 100 weeks of permanent partial disability from employer; (2) permanent total disability from Second Injury Fund: 100 weekly differential (\$52.41) payable by Second Injury Fund for weeks beginning November 24, 2004, and, thereafter, \$366.67 for employee's lifetime.

The employee timely filed an Application for Review with the Commission alleging the administrative law judge's award was erroneous as to the beginning date for the payment of permanent total disability benefits from the Second Injury Fund; in lieu of a beginning date of November 24, 2004, the beginning date for permanent total disability benefits from the Second Injury Fund should be June 16, 2001.

The Commission agrees with the contention set forth by the employee in his Application for Review, and, consequently, modifies the award and decision of the administrative law judge by concluding that permanent total disability benefits from the Second Injury Fund are payable beginning June 16, 2001, for 100 weeks at the weekly rate of \$52.41, and, thereafter, \$366.67 weekly for employee's lifetime.

The findings of fact and stipulations of the parties were accurately recounted in the award issued by the administrative law judge and will be summarized below.

The pertinent facts are as follows: employee slipped and fell at work on February 27, 2001; he landed on his back and left hip; and following this injury he noted problems in his low back, head, neck and left hip.

Dr. Mirkin was the employer's selected treating physician. Dr. Mirkin noted that employee was referred to him exclusively for back complaints and Dr. Mirkin prescribed a conservative course of treatment.

Following conservative treatment with Dr. Mirkin, employee was released at maximum medical improvement on June 15, 2001. At that time, Dr. Mirkin noted employee had persistent hip pain but the low back had improved. It was the opinion of Dr. Mirkin that the persistent hip pain was secondary to employee's pre-existing condition.

The administrative law judge awarded employee 25% permanent partial disability to the body as a whole and specifically found employee's left hip treatment, subsequent to the work related accident, was not medically causally related to the work accident.

Furthermore, the administrative law judge found that the medical treatment and lost time benefits associated with the left hip were not medically causally related to the work accident.

Accordingly, the Commission concludes that the competent and substantial evidence indicates employee reached maximum medical improvement from his work related injury on June 15, 2001, when he was released by Dr. Mirkin.

As a result, permanent total disability benefits from the Second Injury Fund are payable beginning June 16, 2001, for 100 weeks at the weekly rate of \$52.41, and, thereafter, \$366.67 weekly for employee's lifetime. All remaining findings of fact and conclusions of law are affirmed.

The award and decision of Administrative Law Judge Edwin J. Kohner, issued October 12, 2005, as modified, is attached and incorporated by 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 5<sup>th</sup> day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee:	Charles Kelson	Injury No.: 01-039389
Dependents:	N/A	Before the <b>Division of Workers'</b>
Employer:	Admiral Limousine Service, Ltd.	<b>Compensation</b> Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	Second Injury Fund	
Insurer:	St. Paul Insurance Company of Illinois	
Hearing Date:	August 26, 2005	Checked by: EJK

**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 27, 2001
5. State location where accident occurred or occupational disease was contracted: St. Louis 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:  
The employee slipped and fell on a moist surface on the employer's premises.
12. Did accident or occupational disease cause death? No      Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back, head, neck, and left hip
14. Nature and extent of any permanent disability: 25% permanent partial disability to the body as a whole
15. Compensation paid to-date for temporary disability: \$156.96
16. Value necessary medical aid paid to date by employer/insurer? \$2,650.86

Employee:                      Charles Kelson                      Injury No.: 01-039389

17. Value necessary medical aid not furnished by employer/insurer? \$38,797.69
18. Employee's average weekly wages: \$550.00
19. Weekly compensation rate: \$366.67/\$314.26
20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:
  - 3/7 weeks of temporary total disability (or temporary partial disability)      \$ -156.96
  - 100 weeks of permanent partial disability from Employer      \$31,426.00
22. Second Injury Fund liability: Yes
  - Permanent total disability benefits from Second Injury Fund:
    - 100 weekly differential (\$52.41) payable by SIF for weeks beginning  
November 24, 2004, and, thereafter, \$366.67 for Claimant's lifetime      Not Determinable

TOTAL:      Not Determinable
23. Future requirements awarded: As above

Said payments to begin as of November 24, 2004, 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: David J. Jerome, Esq.

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

Employee: Charles Kelson Injury No.: 01-039389

Dependents: N/A Before the  
**Division of Workers'**

Employer: Admiral Limousine Service, Ltd. **Compensation**  
Department of Labor and Industrial

Additional Party: Second Injury Fund Relations of Missouri  
Jefferson City, Missouri

Insurer: St. Paul Insurance Company of Illinois

Hearing Date: August 26, 2005 Checked by: EJK

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, a commercial driver, fell on a wet surface on the employer's premises and suffered an aggravation to preexisting disorders. The issues for determination are (1) Medical causation, (2) Liability for past medical expenses, (3) Temporary disability, (4) Permanent disability, and (5) Second Injury Fund liability. The evidence compels an award for the claimant for permanent disability benefits.

At the hearing, the claimant testified in person and offered depositions of David T. Volarich, D.O., and Timothy Lalk, a vocational rehabilitation counselor, voluminous medical records, prior workers' compensation settlements, and a medical bills summary with attached bills. The defense offered a deposition of Joseph Williams, M.D., a medical report from Peter Mirkin, M.D., and a vocational rehabilitation report and testimony from Donna K. Abram, another vocational rehabilitation counselor.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### **SUMMARY OF FACTS**

On February 27, 2001, while walking through the employer's garage near the wash area, this fifty-five year old claimant slipped on standing water and his feet came out from under him. The claimant fell backwards, landed on his back and left hip, and struck his head on the rear wheel of a nearby vehicle. The claimant testified that he originally noted problems in his low back, head, neck and left hip. The claimant testified that he was no longer able to walk on his left hip without a great deal of pain.

The claimant originally denied any need for medical care and hoped that the symptoms would pass. However, as time went on, the claimant's pain became worse. On March 6, 2001, the claimant went to his family doctor, Dr. Jerome Williams and reported pain in his head, neck, left knee, left hip and low back. Dr. Williams prescribed pain medication and referred the claimant to Dr. Whiteside, the claimant's longstanding hip surgeon. On March 16, 2001, Dr. Whiteside examined the claimant and released him to return to work with restrictions, "Limited duty - minimal lifting, walking distance and climbing. To be scheduled for revision left total hip replacement."

The claimant took those work restrictions to his employer who advised that the employer had no such light duty. The claimant also advised his employer of the need for further medical care. Eventually, the employer referred the claimant to Dr. Mirkin, who examined the claimant on April 2, 2001, for low back pain and bilateral hip pain. Dr. Mirkin noted that the patient was referred to him exclusively for treatment of the low back. Following a physical examination, Dr. Mirkin prescribed conservative treatment consisting of physical therapy. Dr. Mirkin

released the claimant to return to work without restrictions for his back but observed that the hip surgeon would not allow the claimant to return to work due to the hip condition. Dr. Mirkin recommended that the claimant observe the hip surgeon's work restrictions. Dr. Mirkin released the claimant from treatment on June 15, 2001, and reported that the claimant had persistent hip pain but that the back had improved. Dr. Mirkin reported that the claimant had 90% range of motion and continued to have pain with passive rotation of both hips. He opined that the persistent hip pain was secondary to the severe pre-existing spine disease and hip disease. On August 24, 2001, Dr. Mirkin opined that the claimant had sustained a strain and mild aggravation of this underlying condition. The claimant testified that while treating with Dr. Mirkin, he had requested treatment for his left hip and that Dr. Mirkin advised him that he was only authorized to treat his back. The claimant also testified that he had asked his employer for treatment on his left hip, but his employer never authorize any such treatment. The employer never sent him to any other doctors for further treatment or evaluation of the hip problems.

The claimant testified that after his office visit with Dr. Whiteside on March 16, 2001, Dr. Whiteside scheduled him to undergo left hip surgery. The claimant testified that he did not have surgery in 2001 due to personal and religious issues regarding blood transfusions. On December 4, 2003, Dr. Whiteside performed the left hip surgery. The claimant last saw Dr. Whiteside on January 15, 2004, when Dr. Whiteside recommended that the claimant follow up in one year, unless he had a worsening of his pain. The claimant has never had additional right hip surgery. He testified that Dr. Whiteside never advised him that it is needed at any specific time in the future, but only recommended such treatment if the pain should warrant.

The claimant continues to take Celebrex and Cyclobenzoprene to control the hip and low back pain. He testified that before the work injury, he took Celebrex for arthritis in his hips.

The claimant has daily pain in his left hip that rated a five out of ten. He testified that when the pain increases, it could be as high as eight out of ten. The claimant testified that his pain increases with extensive walking or standing. The claimant maintained that he could walk one block and stand thirty minutes without having increased pain. The claimant testified that he can safely carry fifteen to twenty pounds but would have problems lifting heavier objects. He testified that he continues to use a cane for stability when walking in open or unfamiliar areas. The claimant testified that if he tries to get around in a new environment or uneven surfaces, his left hip wants to give out. He testified that his left hip is as strong as it was before the work injury and that uneven surfaces cause a great deal of pain in that hip.

The claimant testified that he continues to have low back pain. He identified the low back pain separate from the hip, located in the middle of his back right at the belt line. The claimant testified that the pain is always present, but is worse in the morning when he attempts to get out of bed. The claimant also testified that he had pain that is in the base of his neck, which causes problems with turning his head from side to side. He noted that the pain causes problems going down his right arm.

The claimant testified that since this injury, he is only able to sleep two to three hours per night and wakes up due to pain in his hips, back and neck. He has also testified that in the morning he has problems getting out of bed, and often stays in bed about two times per week because he cannot get out of bed due to low back and hip pain. He testified that he never had this problem prior to this accident. The claimant testified that his wife works full time so he is home alone. He testified that he is able to drive and can do some minimal grocery shopping, but nothing extensive. He tries to help with some of the housework, but only does so on a limited and light basis. He testified that whenever he tries to perform these activities he has to lie down two times per day for up to two hours due to low back and left hip pain. The claimant testified that he never had this problem, and never had to lie down before this accident.

The claimant testified that he has not been able to return to work in any full time capacity since this work injury. He noted that he worked as a "casual driver" for Central States Bus Line and Vandalia Bus Line. He described a "casual drive" as being a single day/event driver. He testified that he would work for these facilities for single excursions, with many of them only lasting a couple of hours during the day. He testified that he worked for Central States on eight jobs, and for Vandalia bus lines for eight to twelve jobs. The claimant testified that he had to take these jobs because the bills were adding up and he had no income otherwise. The claimant testified that when he did these jobs, he noted significantly increased low back, left hip and neck pain. At times, he was unable to complete these jobs and had to stop on multiple occasions during the excursion. He testified that the

passengers would complain due to the multiple stops that he had to make in order to get out of the bus to stretch. The claimant testified that in August 2001, he could no longer perform these work tasks due to increasing hip and low back pain. He testified that these jobs were sporadic and not full-time positions. He testified that the choice of whether to accept a "casual driver" job was based in part on whether he could physically complete the work activities. The claimant testified that he often had to turn down jobs due to his low back and hip pain. The claimant testified that in May 2002 he began receiving social security disability benefits. He testified that he received this on the first filing and has not worked anywhere since that time.

#### Preexisting Conditions

In 1973, the claimant sustained a left tibia fracture in a motor vehicle accident and required a closed reduction surgery. The claimant testified that he missed several months from work, and continues to have problems with his left leg. He testified that the ankle continues to want to buckle and that he has problems walking up and down steps as well as walking long distances. The claimant testified that these problems continued up until the 2001 accident.

In 1983, the claimant sustained a tendon rupture to his left little finger while playing basketball. The claimant testified that he continues to have pain and aching in that left hand all the way up until the 2001 accident.

In 1984, the claimant injured his right shoulder in an altercation, received conservative care and cortisone injections for this condition, and continues to have right shoulder pain going down his right arm.

In December 1987, the claimant was involved in a work related motor vehicle accident when his bus was rear-ended by a tractor-trailer. The claimant underwent an MRI, which showed abnormalities throughout his neck. He settled his workers' compensation claim based on a twenty percent permanent partial disability of the cervical spine.

The claimant testified that he began having problems with his hips in the 1980's and ultimately received a diagnosis of severe osteoarthritis in both hips. In May 1990, Dr. Whiteside performed a left total hip replacement. In December 1990, Dr. Whiteside performed a right total hip replacement. The claimant testified that he continued to follow up with Dr. Whiteside each year to verify the status of the hip replacements. The claimant received Social Security Disability for three years before returning to work as a driver.

In August 1994, February 1996, and May 1997, the claimant was involved in motor vehicle accidents while driving a bus. He sustained injuries to his low back, hips and right arm. In November 1999, the claimant suffered low back injuries loading luggage on to a bus and slipping on grease. The claimant testified that for the year leading up to the injury in February 2001, he continued to have stiffness and aching in his low back. He also noted stiffness and swelling in his neck, which he thought was a pinched nerve. The claimant testified that he had problems that continued to go down his right arm. The claimant testified that he suffered from aching hips leading up to the accident of February 27, 2001. Although he took Celebrex and used a cane or a walker, he was able to return to work full duty and work a forty hour workweek.

The claimant testified that in November 1999, Dr. Whiteside discussed surgery but did not indicate that surgery was to be scheduled or that it was imminent. Dr. Whiteside instructed the claimant was going to return to his office one year to discuss revision surgery for the hip replacements. The next medical record from Dr. Whiteside was dated March 16, 2001. The claimant testified that he did not return to Dr. Whiteside in November 2000, because his hip pain did not warrant the need for a follow up at that time. The claimant testified that he did not feel that he needed any form of treatment or surgery to either of his hips until after the February 27, 2001, accident. The claimant testified that between November 1991 and August 2000, when he saw his family doctor, Dr. Jerome Williams, he did not receive any treatment from any other physicians. The claimant testified that he did not receive any x-rays in 2000 of either of his hips.

From 1969 to 1973, the claimant worked as an orderly or a surgical technician. Since 1979, this fifty-five year old claimant worked as a commercial driver with either limousines or buses. He testified that he could not return to these positions, because his last training was over thirty years ago.

Dr. Volarich

Dr. Volarich examined the claimant on April 17, 2002 and November 24, 2004. After the initial evaluation on April 17, 2002, Dr. Volarich concluded that the work injury had aggravated the underlying condition in his cervical and lumbar spine, and caused contusions to both knees. Dr. Volarich also opined that the work injury aggravated the left hip syndrome and caused a worsening and greater displacement of the greater trochanteric fracture.

Dr. Volarich opined that the work injury worsened the left hip on an objective level. He testified that in reviewing the hip x-rays, he saw a difference in the condition before the accident, when compared with x-rays taken after the accident. He testified that the claimant had a non-displaced fracture of the greater trochanter of the left hip. He testified that after the injury, the fracture became displaced. See Dr. Volarich deposition, page 14. Dr. Volarich described the difference to mean that one of the major fragments of the fractured bone moved away from its normal anatomical position. He testified that if the fragments had remained in an anatomical position, the fracture would merely need to be immobilized. However, due to the fracture becoming displaced, the treatment that is typically prescribed is a surgical repair. See Dr. Volarich deposition, page 15. Following the initial visit of April 17, 2002, Dr. Volarich recommended further treatment, including a repeat of the hip joint replacement.

After the claimant's December 16, 2003, left hip surgery, Dr. Volarich examined the claimant on November 24, 2004. He repeated the same diagnosis from the initial evaluation, but noted that the left hip had now been surgically redone. He testified that the claimant had 25-30% loss of motion in both of his hips, and that he had his worst pain with external rotation of this hip. Dr. Volarich also opined that the claimant had decreased range of motion of the lumbar spine that included a twenty percent loss of extension, 60% loss of right lateral flexion, and twenty percent loss of left lateral flexion. Dr. Volarich concluded:

Mr. Kelson is unable to engage in any substantial gainful activity nor can he be expected to perform in an ongoing work capacity in the future. It is my opinion that he cannot be reasonably expected to perform in any ongoing basis eight hours per day, five days per week throughout the work year. It is also my opinion that he is unable to continue in his line of employment that he has held as a driver for Gem Transportation, nor can he be expected to work on a full time basis in a similar job. See Dr. Volarich deposition, pages 35, 36.

He opined that based on his medical assessment alone, the claimant is permanently and totally disabled and unable to return to work in the open labor market as a result of the injury of February 27, 2001 in combination with his preexisting medical conditions. Dr. Volarich noted that the claimant was 54 years old which was approaching advanced age; had an education that was limited to graduation from high school and some training as a surgical assistant; had been unable to return to work since August 12, 2001; and had received Social Security Disability.

Dr. Volarich opined that the claimant had a twenty-five percent permanent partial disability to the cervical spine due to the preexisting C-5 radiculopathy and degenerative disc disease and degenerative joint disease. See Dr. Volarich deposition, pages 33, 34. He opined that the claimant had a twenty-five percent permanent partial disability to the low back due to chronic lumbar syndrome, degenerative disc disease, and degenerative joint disease with bulging from L-2 to S-1. See Dr. Volarich deposition, pages 33, 34. Dr. Volarich opined that the claimant had a sixty-five percent permanent partial disability of the left hip and fifty percent permanent partial disability of the right hip that predated the date of accident. See Dr. Volarich deposition, pages 33, 34. Finally, Dr. Volarich concluded that the claimant had a fifteen percent permanent partial disability of the left ankle due to the tibia fracture and ongoing pain and instability in the leg. See Dr. Volarich deposition, pages 33, 34.

Dr. Mirkin

Dr. Mirkin last examined the claimant on June 15, 2001, for his low back, but referenced the claimant's persistent hip pain. See Exhibit 1. On the last visit, Dr. Mirkin concluded the claimant had ninety percent range of motion of the lumbar spine and allowed him to return to work without restrictions. Dr. Mirkin concluded that the claimant had no disability to his low back but did not address or rate any other body part. See Exhibit 1.

Dr. Joseph Williams

Dr. Joseph Williams examined the claimant on July 23, 2001, and testified that he reviewed x-rays from 1999 and March 2000. He opined that the x-rays revealed a fracture of the greater trochanter in 1999. He couldn't identify an injury relating to the fall of February 27, 2001. He opined that a fracture was present in 1999 and that it was still present in 2001. Additionally, Dr. Williams opined that the hip replacements showed severe wear of the polyethylene on both hips.

Dr. Williams testified that between March 2000, and February 2001, the claimant had not received any ongoing treatment for his hips. Additionally, Dr. Williams testified that following the visit in November 1999, surgery was not scheduled nor was there any mention that it would need to be scheduled in the near future. See Dr. Williams deposition, page 13. Dr. Williams based his opinion in part upon x-rays in November 1999 and March 2000. See Dr. Williams deposition, pages 18-19. He testified that he relied on a March 2000 x-ray to support his conclusions. See Dr. Williams deposition, page 19. He also reviewed x-rays taken in February 2003.

At the time of the July 23, 2001, evaluation, Dr. Williams opined that the claimant walked with a very mild limp. He concluded that the claimant would definitely require a revision of both hips. However, he concluded that the 2001 accident did not cause or contribute to the need for bilateral hip revisions. He opined that these were old changes that had been progressive. He opined stated that he saw no acute changes on the recent x-rays. Dr. Williams was unaware of the outcome the December 2003 hip surgery and has not examined the claimant since the surgery. Dr. Williams did not address work restrictions.

Timothy Lalk

Timothy Lalk, a vocational rehabilitation counselor, met with the claimant on March 18, 2005, and testified that the claimant's symptoms were similar to those reported to Dr. Volarich. Mr. Lalk testified that based upon Dr. Volarich's restrictions and the claimant's description of his symptoms and limitations, the claimant was unable to secure and maintain employment in the open labor market. Mr. Lalk testified that the doctors had given him restrictions that restricted him to less than sedentary levels of physical exertion. Mr. Lalk testified that during the interview, the claimant advised him of his limited ability to stand, walk, or sit and that he needed to change positions in order to control his pain. The claimant also reported that he experiences mornings in which he is unable to get out of bed and must remain in bed for extended periods. Mr. Lalk concluded that an employer would be able to tolerate the claimant's inability to come in to work on a regular basis due to the exacerbation of his symptoms.

Mr. Lalk opined that the claimant was unemployable in the open labor market due to the last work injury in combination with his preexisting disabilities. He also opined that he could not even recommend any vocational rehabilitation assistance for the claimant unless the claimant was better able to control his pain and improve his level of activity. Mr. Lalk concluded that the claimant would have to at least be able to function at a sedentary level throughout a full workday and on a daily basis.

Donna Abrams

Donna Abrams, another vocational rehabilitation counselor, did not do any testing nor did she actually meet with the claimant. She testified that this placed her at a slight disadvantage in being able to verify transferable job skills. After reviewing the medical records and performing a transferable skills and abilities analysis, she opined that the claimant was employable in the open labor market. However, she concluded that if the claimant did not believe that he was employable, it would prevent his ability to return to gainful employment. Ms. Abrams did not perform a labor market survey but identified "occupational classifications" which she opined the claimant could perform.

Ms. Abrams did not agree with Dr. Volarich's conclusion that the claimant was medically unable to return in the open labor market, because she considered that to be a legal conclusion instead of a medical conclusion. She testified that she disregarded Dr. Volarich's statement that he did not believe that the claimant could work eight

hours per day on a regular basis, because it was a legal opinion beyond the purview of Dr. Volarich's opinions. Ms. Abrams testified that Dr. Volarich is the only doctor who identified all of the physical restrictions and limitations regarding the multiple injuries both before and after the work injury and that she relied on his work restrictions and limitations.

Ms. Abrams also testified that she took issue with Dr. Volarich's indication that the claimant was fifty-five years old and therefore of an advanced age. She testified that her review of the documentation revealed that the claimant was actually only fifty years old. She testified that an age of fifty-five years might impact the claimant's ability to obtain reemployment in the open labor market since he would be considered of advanced age.

In reviewing the occupational categories identified by Ms. Abrams, many involved the continued driving of vehicles. Ms. Abrams identified chauffeur, car rental deliver, courier, shuttle driver or van bus driver. Ms. Abrams testified that she did not see any types of restrictions that would curtail the claimant's ability to sit for long periods in a vehicle. Ms. Abrams also identified many categories involving the medical field including surgical technician, blood donor unit assistant, denture maker assistant, blood/plasma lab assistant, and medical lab assistant. Ms. Abrams testified that the claimant had not received any training for any medical fields since the early 1970's.

Ms. Abrams testified that she was not aware of any employer that would allow an employee to stop work and lie down for two hours whenever the employee suffered from increased pain. She testified that some may allow a person to take a few hours break, but was not aware of any that would allow the person to actually lie down.

### **MEDICAL CAUSATION**

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

The claimant testified that he suffered pain to his neck, low back, and hips when he fell on a wet surface on the employer's premises. Dr. Volarich testified that the claimant suffered permanent partial disability from the accident, whereas Dr. Mirkin opined that the claimant suffered no permanent disability to his back from the accident. The defense produced no evidence that the claimant suffered no permanent disability to his neck from the accident. The evidence is unchallenged that the claimant suffered compensable disability to his neck from the accident. The claimant prevails on this issue based on the weight of the evidence.

### **LIABILITY FOR PAST MEDICAL EXPENSES**

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo.

banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. *Id.* at 111, 112.

At the hearing, the claimant testified that he had requested medical treatment for his left hip from Dr. Mirkin as well as directly from the employer. The claimant testified that Dr. Mirkin refused to treat his left hip, and the employer did not authorize any additional physicians to examine or treat his hip. The claimant testified that he received medical and surgical care from Dr. Jerome Williams and Dr. Whiteside for ongoing problems associated with his left hip. This treatment included the eventual hip surgery on December 4, 2003. The claimant presented the following medical bills totaling \$38,797.69 relating to his hip surgery:

Dr. Jerome Williams	\$ 952.00	
Missouri Bone & Joint (Dr. Anwar and Dr. Whiteside)		\$14,605.00
SSM Rehabilitation	\$ 747.00	
Barnes Jewish Hospital	\$22,082.19	
ProRehab		<u>\$ 411.50</u>
Total		\$38,797.69

The question is whether the February 27, 2001, accident was a substantial factor causing the claimant's hip surgery in December 2003. The claimant testified that when he fell on February 27, 2001, he landed on his low back and left hip. He testified that when he attempted to stand, he had left hip pain and difficulty walking on his left leg. Dr. Jerome Williams' medical records show that the claimant identified left hip pain following the accident and that his left hip felt worse to the point that he had missed work. Dr. Williams noted that the claimant continued to have pain in the left hip at the end ranges of motion. Dr. Williams referred the claimant to Dr. Leo Whiteside for further consideration of surgery of the left hip.

Dr. Whiteside's records reveal that the claimant had moderate thigh and lateral pain of the left hip, but no pain within his right hip. Dr. Whiteside opined that the left femur was showing a severe fracture of the left greater trochanter and recommended a left hip revision.

Dr. Volarich testified that he examined the x-rays from 1999 and compared them with the March 2001 x-rays. Dr. Volarich testified that before the work injury, there was a non-displaced fracture but that following the injury the fracture became displaced. Dr. Volarich opined that if this were merely a non-displaced fracture, surgery might not have been needed. However, due to the displaced nature of the fracture, surgery was now required on the left side.

The defense relies on Dr. Joseph Williams' opinion to deny liability for the left hip. Dr. Williams opined that the February 27, 2001, accident did not cause the need for the 2004 left hip replacement. See Dr. Williams deposition, page 9. Instead, Dr. Williams opined that the need for the left hip replacement was due to: (1) the severe wear of the polyethylene plastic on both hips from the original 1990 replacements and (2) severe osteolysis. See Dr. Williams deposition, pages 8, 9. He defined osteolysis as a "disappearing bone disorder." He testified that this disease is caused by the deterioration of the polyethylene/plastic hip replacement, which is "eaten up" by scavenger cells. See Dr. Williams deposition, page 9. Dr. Williams testified he was familiar with the type of hip replacements used in 1990 by Dr. Whiteside. Dr. Williams opined that the life expectancy of the original 1990 hip replacements were ten years. See Dr. Williams deposition, page 10. Dr. Whiteside's medical records before the accident also support Dr. Joseph Williams' conclusions. Dr. Whiteside's records reveal bilateral hip pain from 1995 through November 1999. See Exhibit E. On November 24, 1999, Dr. Whiteside reported "a fall on November 15 onto back and left side." See Exhibit E. On that visit, Dr. Whiteside found osteolysis of the left acetabulum femur and that the claimant "will need revision, see one year to discuss time." See Exhibit E.

Dr. Joseph Williams has been a practicing orthopedic surgeon since 1978, specializing in the treatment of hips, knees and shoulders. See Dr. Williams deposition, page 4. He has performed one hundred to two hundred hip replacements/year for the last twenty-seven years. See Dr. Williams deposition, page 5. In addition, he is the President of the St. Louis

Arthroscopic Association since 1990, a member of the board on the Osteoporosis Foundation, and past member of the board of directors for the Eastern Missouri Chapter of the Arthritis Foundation. See Dr. Williams deposition, page 5. Dr. Volarich, a radiographic specialist, based his opinion on the claimant's hip pain after the accident and his review of x-rays. Dr. Williams' credentials as an orthopedic surgeon originally retained by the claimant seem to be superior to those of Dr. Volarich. While the accident may have been a triggering factor causing the surgical requirement, the more reasonable explanation is that the surgical requirement was a preexisting condition and that the accident was not a substantial factor causing the surgical requirement. Since the accident was not a substantial factor causing the surgical requirement, the claim for past medical expenses is denied.

### TEMPORARY DISABILITY

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000, sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

Temporary total disability awards are designed to cover the employee's healing period, and they are owed until the claimant can find employment or the condition has reached the point of maximum medical progress. When further medical progress is not expected, a temporary award is not warranted. Any further benefits should be based on the employee's stabilized condition upon a finding of permanent partial or total disability. Shaw v. Scott, 49 S.W.3d 720, 728 (Mo.App. W.D. 2001).

The claimant testified that he received work restrictions from Dr. Whiteside relative to his left hip on March 16, 2001. Dr. Mirkin released him to return to work full duty based on the claimant's back condition, but deferred to a hip doctor regarding his left hip injury. Dr. Mirkin released the claimant from medical care on June 15, 2001. In addition, the claimant underwent surgery to his left hip on December 4, 2003. The doctor apparently released him from his care on January 15, 2004, advising the claimant to follow up in one year's time. As noted above, the claimant's hip condition was a preexisting condition and not a compensable injury.

The claimant received \$156.96 in temporary total disability benefits. The defense is awarded a credit for these benefits paid.

### PERMANENT DISABILITY

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the

burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Dr. Volarich opined that the claimant suffered a thirty percent permanent partial disability to his left hip and a twenty percent permanent partial disability to his right hip, his neck, and low back from aggravation of preexisting conditions by the accident at work. See Dr. Volarich deposition, pages 31, 32. He opined that the claimant also suffered a ten percent permanent partial disability to the claimant's right knee from a contusion or strain injury causing some stiffness and knee pain. See Dr. Volarich deposition, page 33. He also opined that the claimant suffered from preexisting permanent partial disabilities of: twenty-five percent to the claimant's cervical spine and lumbosacral spine due to degenerative disc disease and degenerative joint disease, sixty-five percent of the left hip and fifty percent of the right hip, and fifteen percent of the left ankle from a tibia fracture requiring conservative care. See Dr. Volarich deposition, pages 33, 34. Dr. Mirkin examined the claimant and found no permanent disability to the claimant's back from the accident.

Although Dr. Volarich and Timothy Lalk opined the claimant was unemployable in the open labor market and permanently totally disabled, none of the forensic evidence supports a finding that the claimant's total disability resulted solely from the work related accident. Given the variety of evidence on the entire record, the claimant suffered a twenty-five percent permanent partial disability to the body as a whole from the work-related accident from the aggravation of preexisting conditions.

### **SECOND INJURY FUND**

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).

2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by

the statute:

The proper focus of the inquiry as to the nature of the prior disability 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. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

The standard for determining whether Claimant was permanently and totally disabled is whether the person is able to compete on the open job market, and the key test to be answered is whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. Joulzhouser v. Central Carrier Corp., 936 S.W.2d 908, 912 (Mo.App. S.D. 1997).

As discussed above, the claimant suffered a twenty-five percent permanent partial disability from the work-related accident. The claimant also had extensive preexisting permanent partial disabilities to his neck, low back, and both hips. The substantial question is the claimant's overall disability after the accident.

Timothy Lalk, a vocational rehabilitation counselor, met with the claimant on March 18, 2005, and testified that based upon Dr. Volarich's restrictions and the claimant's description of his symptoms and limitations, the claimant was unable to secure and maintain employment in the open labor market. Mr. Lalk testified that the doctors had given him restrictions that restricted him to less than sedentary levels of physical exertion. Mr. Lalk concluded that an employer would not tolerate the claimant's inability to come in to work on a regular basis due to the exacerbation of his symptoms. Mr. Lalk opined that the claimant was unemployable in the open labor market due to the last work injury in combination with his preexisting disabilities. He also opined that he could not even recommend any vocational rehabilitation assistance for the claimant unless the claimant was better able to control his pain and improve his level of activity. Mr. Lalk concluded that the claimant would have to at least be able to function at a sedentary level throughout a full workday and on a daily basis.

Donna Abrams, another vocational rehabilitation counselor, did not do any testing nor did she actually meet with the claimant, which placed her at a slight disadvantage in being able to verify transferable job skills. After reviewing the medical records and performing a transferable skills and abilities analysis, she opined that the claimant was employable in the open labor market. However, she concluded that if the claimant did not believe that he was employable, it would prevent his ability to return to gainful employment. Ms. Abrams testified that Dr. Volarich is the only doctor who identified all of the physical restrictions and limitations regarding the multiple injuries both before and after the work injury and that she relied on his work restrictions and limitations.

Ms. Abrams identified "occupational classifications" which she opined the claimant could perform. Many of the occupational categories involved the continued driving of vehicles. Ms. Abrams identified chauffeur, car rental delivery, courier, shuttle driver, or van bus driver. Ms. Abrams testified that she did not see any types of restrictions that would curtail the claimant's ability to sit for long periods in a vehicle. Ms. Abrams also identified many categories involving the medical field including surgical technician, blood donor unit assistant, denture maker assistant, blood/plasma lab assistant, and medical lab assistant. The claimant has a certificate as a surgical assistant, cardiovascular technician and one-half year of college but has not received any training for any medical fields since the early 1970's. Ms. Abrams testified that she was not aware of any employer that would allow a person to stop work and lie down for two hours whenever they were having increased pain. She testified that some may allow a person to take a few hours break, but was not aware of any that would allow the person to actually lie down.

The claimant testified that he has used the cane to ambulate since 1997 or 1998 during which time he was gainfully employed. He has had a Missouri handicap-parking sticker since 1990 and has had a valid Missouri commercial driver's license since 1978 with no restrictions. After the February 27, 2001, accident, the claimant worked as a commercial driver until August 12, 2001, at Centralia State Charters and Vandalia Bus Lines. He uses a lawn mower and a gas-powered trimmer at his home. He currently walks door-to-door to preach as a Jehovah's Witness, drives to various homes to preach, and attends church meetings once a week. He testified he drove himself to a multitude of medical appointments since the February 27, 2001, accident.

Each party expressed weaknesses in the opposing party's vocational expert opinions. The defense pointed out that Mr. Lalk placed great value on the claimant's subjective complaints of pain. The claimant pointed out that Ms. Abrams' suggestions that the claimant can be employable as a driver seems unlikely given the combination of the claimant's preexisting and work related disabilities together with his unsuccessful return to driving after the accident. The suggestions that he could perform various medical positions seems unlikely without vocational rehabilitation and unrealistic given the claimant's inability to stand for long periods and lack of training since the early 1970's. Ms. Abrams chastised Dr. Volarich for his assumption that the claimant's age was fifty-five years of age, rather than fifty years that she assumed. She testified that the difference was very significant. The claimant testified that he was fifty-five years of age and many medical records showing the claimant's date of birth support that finding.

The record suggests that the claimant had severe preexisting permanent partial disabilities before the accident with severe degenerative conditions in his neck, low back, and both hips. His ability to work was aided by using a cane to ambulate and a handicap-parking sticker. The claimant attempted to return to work after the accident and worked part time until August 12, 2001. Given the claimant's age of fifty-five years, his past relevant past work history as a commercial driver, his high school education, and Dr. Volarich's restrictions and limitations, Mr. Lalk's findings appear to be more credible and consistent with the record. Ms. Abrams' suggestion that starting a new career at age fifty-five reduces the claimant's employability appears to be consistent with the evidence. Based on the evidence as a whole, the claimant is awarded permanent total disability benefits from the Second Injury Fund. The claimant's forensic expert, Dr. Volarich, testified that the claimant reached maximum medical improvement from the accident on November 24, 2004. See Dr. Volarich deposition, page 31.

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

EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
*Patricia "Pat" Secrest*  
*Director*  
*Division of Workers' Compensation*