

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

Injury No.: 02-122484

Employee: Mark Lancaster  
Employer: United Parcel Service  
Insurer: Liberty Mutual Insurance Group  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged November 6, 2002  
Place and County of Accident: Alleged St. Louis County

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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 9, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued May 9, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Dependents: n/a

Employer: United Parcel Service

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Hearing Date: February 2, 2006

Before the  
**Division of Workers'  
Compensation**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Checked by: KMH/tr

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
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: November 6, 2002
5. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
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 was lifting a box and fell onto his right side.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: groin, right hip, low back
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: 3710.40
16. Value necessary medical aid paid to date by employer/insurer? \$6079.14

Employee: Injury No.: 02-122484

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: Maximum
19. Weekly compensation rate: 649.32/340.12
20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: NONE
22. Second Injury Fund liability: No

TOTAL:

-0-

23. Future requirements awarded: None

Said payments to begin immediately 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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

Employee: Mark Lancaster

Injury No.: 02-122484

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: United Parcel Service

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Checked by: KMH/tr

Three claims were tried together, Injury Numbers 02-122484, 02-125282 and 03-126470. Pursuant to 8 C.S.R. 20-3.050(1)(2) and (3), all claims were tried together in one proceeding and one transcript will be generated but 3 separate awards will be issued. The claims and facts are so inextricably intertwined that resolution of one necessarily involves resolution of the others. The earliest Injury Number, 02-122484, will be designated the master proceeding and the evidence and transcript will reside in that file.

The hearing in these matters was held February 2, 2006. Mark Lancaster (Claimant) was represented by attorney Mark Haywood. United Parcel Service (Employer) and its insurer, Liberty Mutual, were represented by attorney Maureen Cary.

The issues in the first claim, 02-122484 were medical causation, liability for past medical expenses of \$32,140.85, temporary total disability and permanent partial disability.

The issues in the second claim, 02-125828, were medical causation and the nature and extent of permanent partial

disability.

The issues in the third claim, 03-126470 were accident, medical causation, liability for past medical expenses in the amount of \$32, 140.85, temporary total disability and permanent partial disability.

### **STIPULATIONS**

For the first claim, injury number 02-122484, the parties stipulated to the following:

1. Claimant alleges that on November 6, 2002, he sustained an injury by accident while in the course and scope of his employment.
2. On that date, Claimant was an employee of Employer. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.
3. Employer's liability was fully insured by Liberty Mutual Insurance Group.
4. Claimant's average weekly was sufficient to entitle him to the maximum rates for TTD and PPD, which are \$649.32 and \$340.12 respectively.
5. Employer has paid \$3710.40 to date in TTD and \$6079.14 in medical benefits.
6. Employer had notice of the injury and Claimant's claim was timely filed.

### **FINDINGS OF FACT**

Based on the competent and substantial evidence, I find:

1. Claimant is a 47-year-old man who currently works as a car salesman.
2. Claimant worked for Employer for nearly 29 years as a package car driver until his termination in June 2005. His job involves home and commercial delivery of packages of all different weights. On any given day, Claimant made 100-150 stops to deliver packages.
3. Claimant alleges on November 6, 2002, he was retrieving a 70-pound box from the top storage shelf and fell backwards injuring his right hip, right groin, back and shoulder.
4. Claimant's first treatment for this injury was November 11, 2002 with Dr. Cynthia Byler. Dr. Byler's records reflect a history from Claimant not of a fall, but of injuring himself at work getting a package up from shoulder level. According to records, Claimant got the package down to the step and when moving it off the step, he experienced sharp pain in the groin. He complained to Dr. Byler of pain when flexing his right hip. Dr. Byler noted Claimant had a slight limp and diagnosed a right groin strain. Dr. Byler ordered medications, physical therapy and light duty.
5. On November 20, 2002, Claimant was involved in a motor vehicle accident while working. He testified the accident occurred because he had to lift his leg to change from the gas to the brake pedal. He had to lift his leg due to pain in the hip from his last injury. Claimant testified he injured his head, shoulder and neck as a result of this accident.
6. Claimant first saw Dr. Byler for this vehicle incident on December 2, 2002 (Exhibit 6). She diagnosed cervical, thoracic and right shoulder sprain, and she felt Claimant could continue working. Claimant was already working light duty as a restriction due to the prior injury.
7. Dr. Byler's December 2, 2002 report also addressed Claimant's November 6, 2002 injury. She noted Claimant felt his right hip was better, he still had a little bit of soreness, no limp and had minimal tenderness.
8. Claimant next saw Dr. Byler 12/13/02 (Exhibit 6). Her records indicate Claimant said his neck and thoracic area were doing well and he had some pain in his right shoulder. Dr. Byler released Claimant to return to full duties.
9. At that visit, Dr. Byler also examined Claimant's groin and noted he had no limp and was able to squat and return to standing with no difficulty. Her exam produced no objective findings and she reiterated her diagnosis of right groin strain as a result of Claimant's November 6, 2002 injury.
10. Claimant sought no further treatment related to his November 22, 2002 motor vehicle accident and continued to work

full duty.

11. Claimant sought no treatment for his groin injury of November 6, 2002, until June 2003. He then again presented to Dr. Byler (Exhibit 7) with complaints of anterior right groin pain, which he said had been constant since his last visit in December 2002. He also complained of pain upon going up steps and said he couldn't sleep on his back because it "pulls". Dr. Byler examined Claimant and found he appeared to be uncomfortable, he hesitated with ambulation, and resisted flexion of his right hip was extremely painful. He had no pain in his left hip.
12. Due to continued groin complaints, Dr. Byler referred Claimant to Dr. Bennett. Dr. Bennett performed exploratory surgery in June 2003 but did not find a hernia. (Exhibit 8)
13. Claimant continued to treat with Dr. Byler who notes on August 6, 2003 (Exhibit 7) that Claimant was limping again and complained that he always has a limp. He advised Dr. Byler that he remembered an injury 2-3 years ago where he was treated for right hip problems.
14. Claimant saw Dr. Bennett again August 7, 2003 (Exhibit 8). Dr. Bennett noted considerable problems with the thigh/groin crease and opined Claimant's problem was more arthritic than soft tissue.
15. Employer sent Claimant to Dr. Nogalski in August 2003. Claimant completed the initial patient questionnaire (Exhibit 2) stating he injured his right hip November 2002. He did not make mention of his prior hip injury and treatment in 2001 or 1990. Claimant complained of right hip pain, which Dr. Nogalski noted Claimant also had in 2001. Dr. Nogalski found Claimant's hip motion was decreased and ordered x-rays, which showed right hip joint space narrowing and osteophytes. Dr. Nogalski diagnosed symptomatic degenerative joint disease of the right hip. He opined this was idiopathic and was not substantially related to Claimant's work. Dr. Nogalski also told Claimant he should consider hip replacement surgery.
16. In November 2003, Dr. Bennett again saw claimant and reiterated his belief that Claimant's pain was generated by a bad hip joint. (Exhibit 8)
17. On December 10, 2003, Claimant alleges he slipped and fell getting into his delivery truck. He testified he injured his knee, right hip and back. There were no witnesses to this alleged accident.
18. Claimant saw Dr. Byler that day and complained of pain in his right shoulder, right hips, right knee and low back. Dr. Byler's record of this visit (Exhibit 7) indicates Claimant told her his right hip is always sore because of his arthritis. He advised Dr. Byler he was seeing Dr. Albanna, but did not mention why. Dr. Albanna is a neurosurgeon. Dr. Byler examined Claimant, found no objective signs of injury, and released Claimant to full duty. She diagnosed right low back pain, right knee pain, chronic right hip pain and altered mood.
19. Claimant again saw Dr. Byler for hip complaints January 16, 2004 (Exhibit 7). He complained of right hip pain, which was "10 times worse" since his December 10, 2003 fall. Dr. Byler's records indicate Claimant told her he needed a hip replacement due to pre-existing degenerative disease. He complained that he walked with a limp, had difficulty sitting, had pain when lying on his back and had to use a pillow under his thighs to relieve the discomfort from his hip.
20. Claimant next treated for his hip with his own doctor, Dr. Richard Rende, in July 2004. At his initial visit of July 15, 2004, Claimant completed a patient questionnaire. He noted his reason for seeing the doctor was "right hip groin". Claimant did not list any prior right hip problems or treatment on this form. Dr. Rende's notes from that visit (Exhibit 1) indicate Claimant had a long history of right hip pain, which had gotten more severe over the last year. Claimant told Dr. Rende the prior hernia surgery did not relieve his pain. Dr. Rende notes he advised Claimant his arthritis is very severe and he would eventually require a hip replacement.
21. Dr. Rende ordered x-rays, which showed advanced degenerative osteoarthritis right hip.
22. Dr. Rende performed a right hip replacement in September 2004. His pre and post-operative diagnoses were severe right hip arthritis. (Exhibit 1) The pathology report indicates there was erosion and pitting of the articular cartilage with thickening of cartilage at the junction of the femoral head and neck.
23. Claimant was released to return to work in March 2005.
24. Claimant continued to work full duty through his termination in June 2005. Claimant initially agreed at trial that his termination was not related to the three injuries at issue. He later testified he felt his termination did have something to do with these injuries.
25. Diane Wheeler, Labor Management Supervisor for UPS, testified at trial Claimant filed a union grievance regarding his termination. Following a hearing regarding the grievance, Claimant's termination was upheld.

## MEDICAL HISTORY

Claimant has a history of problems with his right hip dating back to 1987. Records from Cave Springs Physical Therapy (Exhibit 5) indicate while treating claimant for low back pain in 1987, the therapist found bilaterally tight piriformis muscles. Dr. Lehman's records (Exhibit 3) reveal treatment for right hip complaints in 1990. At that time, Dr. Lehman found Claimant had popping and significant pain in the hip. He ordered an arthrogram and in January 1991 diagnosed mild degenerative arthritis in the right hip. Claimant returned to Dr. Lehman June 11, 1991 for complaints of deep tenderness in the hip. An MRI was ordered at that time which was within normal limits and Claimant was released from care.

Claimant had an injury May 14, 1996 with no treatment. The Division of Workers' Compensation Report of Injury lists the condition as "inflammation, hips".

Dr. Levy's June 23, 2005 (Exhibit B of Claimant's Exhibit A) report notes Claimant gave a history of a 1999 injury when he was pulling a two-wheeler and fell injuring his back and right hip. He was treated conservatively but "it remained painful".

Claimant again injured his right hip March 7, 2001. He received physical therapy from Healthsouth (Exhibit 5). On the patient registration form, Claimant listed an injury to his right hip and said he felt his hip gave out on the date of injury. He complained "when he turns the hip the wrong way, his right hip feels as if it has snapped in half". He continued to have sharp pain and decreased range of motion in the hip and said he felt as if the hip slips. These therapy notes also indicate Claimant denied having any problems with his hip before this 2001 injury.

Claimant treated with Dr. Nogalski for the March 2001 hip injury. Dr. Nogalski diagnosed piriformis syndrome. In his deposition he explained this is a condition of tendonitis around the hip. Treatment records continue to reveal Claimant's complaints of deep soreness in the hip and clicking or popping in the right hip.

In May 2002, Claimant was deposed regarding this 2001 hip injury. He testified he continued to have a sensation of his hip giving out, strength and limping problems, and difficulty sleeping due to throbbing pain in his right hip. He also testified he continued to limp on a daily basis and continued to have popping in his right hip. These complaints continued through his 2002 hip injury.

Claimant's 2001 hip injury claim was settled July 2002 for 15% PPD of the right hip.

Claimant had a prior injury to his head and neck. On October 28, 1997, Claimant was involved in another work related motor vehicle accident. He was treated for head and neck complaints and that case proceeded to trial. At that trial, Claimant testified he had daily headaches and neck complaints. Claimant was awarded 10% PPD to his body as a whole referable to his neck and headaches. His neck complaints continued through his November 20, 2002 injury.

Employer took Claimant's deposition February 12, 2003 regarding another work injury from March 2002. At his deposition, Claimant testified he had no injuries since March 2002 other than "a small rear-ender" and he had no injuries from that accident.

## RULINGS OF LAW

Claimant has a long history of right hip treatment and complaints dating back to 1987. His medical records are replete with significant right hip complaints before his 2002 and 2003 accidents. Claimant's own deposition testimony taken six months before his November 6, 2002 accident was that he had severe complaints in his right hip and was still taking anti-inflammatory medication.

Throughout Claimant's trial testimony, he continually provided caveats regarding his previous injuries to the same part of the body. There are numerous inconsistencies between Claimant's deposition testimony, his trial testimony and his medical records. Claimant stood impeached with his deposition testimony on numerous occasions and was neither direct nor forthright in his trial testimony. Claimant was not forthcoming with his own medical expert, Dr. Levy, and had to return to see him a number of times in order to provide the entire relevant history.

Claimant's testimony was not credible. It was incomplete and selective.

The aggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct causal link between job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*,

80 S.W.3d 524 (Mo.App.W.D. 2002). The worsening of a pre-existing condition is a change in pathology. *Id. at* 529. Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991).

Claimant relies on the opinion of Dr. Levy to establish causation between his November 6, 2002 injury, his December 10, 2003 injury and his hip replacement. Dr. Levy's June 23, 2005 report addressed Claimant's November 6, 2002 and December 10, 2003 injuries. In that report, Dr. Levy lists a 1999 right hip injury with conservative treatment. Claimant told Dr. Levy his hip complaints from that injury continued through November 2002. Dr. Levy had examined Claimant April 2003 regarding his 2001 hip injury, but he made no mention of the 2001 hip injury and PPD in his 2005 report. He also made no mention of Claimant's 1990 hip treatment. Dr. Levy's April 2003 report made no mention of Claimant's November 2002 injuries allegedly to the same body part. Claimant was evasive with his doctor and failed to fully inform his own doctor regarding his medical history.

Additionally, Dr. Levy did not apportion Claimant's right hip disability between the November 6, 2002 and the December 13, 2003 injury. He did not adequately address causation. He did not discuss whether the hip replacement was medically and causally related to Claimant's injuries at issue or his prior condition.

I find Dr. Levy's opinion fails to establish medical causation.

Regarding Claimant's hernia surgery, Dr. Levy testified he found no disability related to this surgery.

Dr. Levy, Dr. Byler and Dr. Nogalski all agree Claimant had osteoarthritis of the right hip before his November 2002 right hip injury. The question becomes whether Claimant's work injuries of 2002 or 2003 caused a change in this pre-existing condition.

Claimant's treating records show he had significant complaints with his right hip before and through November 2002. As mentioned earlier, Claimant's trial testimony conflicted with his prior deposition testimony. I find the medical records do not show Claimant's work injuries caused a worsening or acceleration of his pre-existing condition.

Dr. Nogalski opined in his August 2003 and his November 2005 reports Claimant's hip condition was degenerative and not substantially related to his work. Dr. Nogalski testified by deposition degenerative disc disease is typically a progressive condition. He explained Claimant's 1991 MRI showed a small subchondral cyst which suggested early osteoarthritis. Treatment records showed Claimant had symptomatic osteoarthritis in 1990. He also explained the April 2001 x-rays of Claimant's hip showed some calcification of the rim of the acetabulum which signifies some degeneration and is highly suggestive of osteoarthritis. While he agreed Claimant's hip replacement was medically necessary, he did not believe the need for surgery was caused by his work injuries.

All of the doctors, including Dr. Levy, agreed Claimant's arthritic condition developed over a period of years.

I find the opinion of Dr. Nogalski more credible on the issue of causation.

It is worth noting the Claimant did not produce an opinion from Dr. Rende, his surgeon. He would have been in the best position to advise of the extent of the degeneration that existed at the time of Claimant's hip replacement.

**CONCLUSION**

Based upon all of the evidence, I find Claimant has not met his burden of proof that his November 6, 2002 injury or his December 10, 2003 injury caused the osteoarthritis in his hip or caused an acceleration of his osteoarthritis in his hip. I find his work was not a substantial factor in causing the need for Claimant's hip replacement and find Employer not liable for

the medical expenses related to the hip surgery. I find no permanent partial disability to Claimant's right hip or back as a result of this injury.

I further find based on the testimony of Claimant's rating doctor Claimant has no disability related to his hernia surgery.

Because Second Injury Fund liability is dependent on Employer's liability and I found no Employer liability, Claimant's Second Injury Fund claim is hereby dismissed.

Date: \_\_\_\_\_

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

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-125282

Employee: Mark Lancaster  
Employer: United Parcel Service  
Insurer: Liberty Mutual Insurance Group

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

Date of Accident: Alleged November 20, 2002

Place and County of Accident: Alleged St. Louis County

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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 9, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued May 9, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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

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

Attest:

\_\_\_\_\_  
Secretary

**AWARD**

Employee: Mark Lancaster

Injury No.: 02-125282

Dependents: n/a

Before the

**Division of Workers'**

**Compensation**

Employer: United Parcel Service

Department of Labor and Industrial

Relations of Missouri

Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Hearing Date: February 2, 2006

Checked by: KMH/tr

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No

- 3. 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
- 6. Date of accident or onset of occupational disease: November 20, 2002
- 7. State location where accident occurred or occupational disease was contracted: St. Louis County
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
- 7. Did employer receive proper notice? Yes
- 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
- 10. 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 was in a motor vehicle accident.
- 12. Did accident or occupational disease cause death? No
- 13. Part(s) of body injured by accident or occupational disease: head, shoulder, neck
- 15. Nature and extent of any permanent disability: None
- 15. Compensation paid to-date for temporary disability: None
- 16. Value necessary medical aid paid to date by employer/insurer? \$366.54

Employee: \_\_\_\_\_ Injury No.: \_\_\_\_\_

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 19. Employee's average weekly wages: Maximum
- 19. Weekly compensation rate: 649.32/340.12
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

21. Amount of compensation payable: \_\_\_\_\_ NONE

22. Second Injury Fund liability: No

TOTAL: -0-

23. Future requirements awarded: None

Said payments to begin immediately 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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

Employee: Mark Lancaster

Injury No.: 02-125282

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: United Parcel Service

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Checked by: KMH/tr

Three claims were tried together, Injury Numbers 02-122484, 02-125282 and 03-126470. Pursuant to 8 C.S.R. 20-3.050(1)(2) and (3), all claims were tried together in one proceeding and one transcript will be generated but 3 separate awards will be issued. The claims and facts are so inextricably intertwined that resolution of one necessarily involves resolution of the others. The earliest Injury Number, 02-122484, will be designated the master proceeding and the evidence and transcript will reside in that file.

The hearing in these matters was held February 2, 2006. Mark Lancaster (Claimant) was represented by attorney Mark Haywood. United Parcel Service (Employer) and its insurer, Liberty Mutual, were represented by attorney Maureen Cary.

The issues in the first claim, 02-122484 were medical causation, liability for past medical expenses of \$32,140.85, temporary total disability and permanent partial disability.

The issues in the second claim, 02-125828, were medical causation and the nature and extent of permanent partial disability.

The issues in the third claim, 03-126470 were accident, medical causation, liability for past medical expenses in the amount of \$32, 140.85, temporary total disability and permanent partial disability.

### **STIPULATIONS**

For the second claim, injury number 02-125828, the parties stipulated to the following:

7. Claimant sustained an injury on November 20, 2002 by accident while working in the course and scope of his employment.
8. On that date, Claimant was an employee of Employer. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.

9. Employer's liability was fully insured by Liberty Mutual Insurance Group.
10. Claimant's average weekly was sufficient to entitle him to the maximum rates for TTD and PPD, which are \$649.32 and \$340.12 respectively.
11. Employer has paid no TTD to date and has paid \$366.54 in medical benefits.
12. Employer had notice of the injury and Claimant's claim was timely filed.

### **FINDINGS OF FACT**

Based on the competent and substantial evidence, I find:

26. Claimant is a 47-year-old man who currently works as a car salesman.
27. Claimant worked for Employer for nearly 29 years as a package car driver until his termination in June 2005. His job involved home and commercial delivery of packages of all different weights. On any given day, Claimant made 100-150 stops to deliver packages.
28. Claimant alleges on November 6, 2002, he was retrieving a 70-pound box from the top storage shelf and fell backwards injuring his right hip, right groin, back and shoulder.
29. Claimant's first treatment for this injury was November 11, 2002 with Dr. Cynthia Byler. Dr. Byler's records reflect a history from Claimant not of a fall, but of injuring himself at work getting a package up from shoulder level. According to records, Claimant got the package down to the step and when moving it off the step, he experienced sharp pain in the groin. He complained to Dr. Byler of pain when flexing his right hip. Dr. Byler noted Claimant had a slight limp and diagnosed a right groin strain. Dr. Byler ordered medications, physical therapy and light duty.
30. On November 20, 2002, Claimant was involved in a motor vehicle accident while working. He testified the accident occurred because he had to lift his leg to change from the gas to the brake pedal. He had to lift his leg due to pain in the hip from his last injury. Claimant testified he injured his head, shoulder and neck as a result of this accident.
31. Claimant first saw Dr. Byler for this vehicle incident on December 2, 2002 (Exhibit 6). She diagnosed cervical, thoracic and right shoulder sprain, and she felt Claimant could continue working. Claimant was already working light duty as a restriction due to the prior injury.
32. Dr. Byler's December 2, 2002 report also addressed Claimant's November 6, 2002 injury. She noted Claimant felt his right hip was better; he still had a little bit of soreness, no limp and had minimal tenderness.
33. Claimant next saw Dr. Byler 12/13/02 (Exhibit 6). Her records indicate Claimant said his neck and thoracic area were doing well and he had some pain in his right shoulder. Dr. Byler released Claimant to return to full duties.
34. At that visit, Dr. Byler also examined Claimant's groin and noted he had no limp and was able to squat and return to standing with no difficulty. Her exam produced no objective findings and she reiterated her diagnosis of right groin strain as a result of Claimant's November 6, 2002 injury.
35. Claimant sought no further treatment related to his November 22, 2002 motor vehicle accident and continued to work full duty.
36. Claimant sought no treatment for his groin injury of November 6, 2002, until June 2003. He then again presented to Dr. Byler (Exhibit 7) with complaints of anterior right groin pain, which he said had been constant since his last visit in December 2002. He also complained of pain upon going up steps and said he couldn't sleep on his back because it "pulls". Dr. Byler examined Claimant and found he appeared to be uncomfortable, he hesitated with ambulation, and resisted flexion of his right hip was extremely painful. He had no pain in his left hip.
37. Due to continued groin complaints, Dr. Byler referred Claimant to Dr. Bennett. Dr. Bennett performed exploratory surgery in June 2003 but did not find a hernia. (Exhibit 8)
38. Claimant continued to treat with Dr. Byler who notes on August 6, 2003 (Exhibit 7) that Claimant was limping again and complained that he always has a limp. He advised Dr. Byler that he remembered an injury 2-3 years ago where he was treated for right hip problems.
39. Claimant saw Dr. Bennett again August 7, 2003 (Exhibit 8). Dr. Bennett noted considerable problems with the

thigh/groin crease and opined Claimant's problem was more arthritic than soft tissue.

40. Claimant was sent to Dr. Nogalski in August 2003. Claimant completed the initial patient questionnaire (Exhibit 2) stating he injured his right hip November 2002. He did not make mention of his prior hip injury and treatment in 2001 or 1990. Claimant complained of right hip pain, which Dr. Nogalski noted Claimant also had in 2001. Dr. Nogalski found Claimant's hip motion was decreased and ordered x-rays, which showed right hip joint space narrowing and osteophytes. Dr. Nogalski diagnosed symptomatic degenerative joint disease of the right hip. He opined this was idiopathic and was not substantially related to Claimant's work. Dr. Nogalski also told Claimant he should consider hip replacement surgery.
41. In November 2003, Dr. Bennett again saw claimant and reiterated his belief that Claimant's pain was generated by a bad hip joint. (Exhibit 8)
42. On December 10, 2003, Claimant alleges he slipped and fell getting into his delivery truck. He testified he injured his knee, right hip and back. There were no witnesses to this alleged accident.
43. Claimant saw Dr. Byler that day and complained of pain in his right shoulder, right hips, right knee and low back. Dr. Byler's record of this visit (Exhibit 7) indicates Claimant told her his right hip is always sore because of his arthritis. He advised Dr. Byler he was seeing Dr. Albanna, but did not mention why. Dr. Albanna is a neurosurgeon. Dr. Byler examined Claimant, found no objective signs of injury, and released Claimant to full duty. She diagnosed right low back pain, right knee pain, chronic right hip pain and altered mood.
44. Claimant again saw Dr. Byler for hip complaints January 16, 2004 (Exhibit 7). He complained of right hip pain, which was "10 times worse" since his December 10, 2003 fall. Dr. Byler's records indicate Claimant told her he needed a hip replacement due to pre-existing degenerative disease. He complained that he walked with a limp, had difficulty sitting, had pain when lying on his back and had to use a pillow under his thighs to relieve the discomfort from his hip.
45. Claimant next treated for his hip with his own doctor, Dr. Richard Rende, in July 2004. At his initial visit of July 15, 2004, Claimant completed a patient questionnaire. He noted his reason for seeing the doctor was "right hip groin". Claimant did not list any prior right hip problems or treatment on this form. Dr. Rende's notes from that visit (Exhibit 1) indicate Claimant had a long history of right hip pain, which had gotten more severe over the last year. Claimant told Dr. Rende the prior hernia surgery did not relieve his pain. Dr. Rende notes he advised Claimant his arthritis is very severe and he would eventually require a hip replacement.
46. Dr. Rende ordered x-rays, which showed advanced degenerative osteoarthritis right hip.
47. Dr. Rende performed a right hip replacement in September 2004. His pre and post-operative diagnoses were severe right hip arthritis. (Exhibit 1) The pathology report indicates there was erosion and pitting of the articular cartilage with thickening of cartilage at the junction of the femoral head and neck.
48. Claimant was released to return to work in March 2005.
49. Claimant continued to work full duty through his termination in June 2005. Claimant initially agreed at trial that his termination was not related to the three injuries at issue. He later testified he felt his termination did have something to do with these injuries.
50. Diane Wheeler, Labor Management Supervisor for UPS, testified at trial Claimant filed a union grievance regarding his termination. Following a hearing regarding the grievance, Claimant's termination was upheld.

## **MEDICAL HISTORY**

Claimant has a history of problems with is right hip dating back to 1987. Records from Cave Springs Physical Therapy (Exhibit 5) indicate while treating claimant for low back pain in 1987, the therapist found bilaterally tight piriformis muscles. Dr. Lehman's records (Exhibit 3) reveal treatment for right hip complaints in 1990. At that time, Dr. Lehman found Claimant had popping and significant pain in the hip. He ordered an arthrogram and in January 1991 diagnosed mild degenerative arthritis in the right hip. Claimant returned to Dr. Lehman June 11, 1991 for complaints of deep tenderness in the hip. An MRI was ordered at that time which was within normal limits and Claimant was released from care.

Claimant had an injury May 14, 1996 with no treatment. The Division of Workers' Compensation Report of Injury lists the condition as "inflammation, hips".

Dr. Levy's June 23, 2005 (Exhibit B of Claimant's Exhibit A) report notes Claimant gave a history of a 1999 injury when he was pulling a two-wheeler and fell injuring his back and right hip. He was treated conservatively but "it remained painful".

Claimant again injured his right hip March 7, 2001. He received physical therapy from Healthsouth (Exhibit 5). On the patient registration form, Claimant listed an injury to his right hip and said he felt his hip gave out on the date of injury. He complained "when he turns the hip the wrong way, his right hip feels as if it has snapped in half". He continued to have sharp pain and decreased range of motion in the hip and said he felt as if the hip slips. These therapy notes also indicate Claimant denied having any problems with his hip before this 2001 injury.

Claimant treated with Dr. Nogalski for the March 2001 hip injury. Dr. Nogalski diagnosed piriformis syndrome. In his deposition he explained this is a condition of tendonitis around the hip. Treatment records continue to reveal Claimant's complaints of deep soreness in the hip and clicking or popping in the right hip.

In May 2002, Claimant was deposed regarding this 2001 hip injury. He testified he continued to have a sensation of his hip giving out, strength and limping problems, and difficulty sleeping due to throbbing pain in his right hip. He also testified he continued to limp on a daily basis and continued to have popping in his right hip. These complaints continued through his 2002 hip injury.

Claimant's 2001 hip injury claim was settled July 2002 for 15% PPD of the right hip.

Claimant had a prior injury to his head and neck. On October 28, 1997, Claimant was involved in another work related motor vehicle accident. He was treated for head and neck complaints and that case proceeded to trial. At that trial, Claimant testified he had daily headaches and neck complaints. Claimant was awarded 10% PPD to his body as a whole referable to his neck and headaches. His neck complaints continued through his November 20, 2002 injury.

Employer took Claimant's deposition February 12, 2003 regarding another work injury from March 2002. At his deposition, Claimant testified he had no injuries since March 2002 other than "a small rear-ender" and he had no injuries from that accident.

## RULINGS OF LAW

Throughout Claimant's trial testimony, he continually provided caveats regarding his previous injuries to the same part of the body. Claimant stood impeached with his deposition testimony and was neither direct nor forthright in his trial testimony. Claimant was not forthcoming with his own medical expert, Dr. Levy, and had to return to see him a number of times in order to provide the entire relevant history.

Claimant's testimony was not credible. It rang incomplete and selective.

"The Claimant bears the burden of proving an accident occurred and it resulted in injury. In addition, a claimant must show a disability resulted from the injury and the extent of such disability." *Hunsperger v. Poole Truck Lines*, 886 S.W.2d 656, 658 (Mo. App. E.D. 1994) (overruled on other grounds) (citations omitted).

I find Claimant failed to prove a permanent disability resulted from this injury for the following reasons:

- Claimant treated for this injury for less than two weeks.
- Claimant had to see his rating doctor a third time to address this injury because he had not advised his doctor of this injury during his prior evaluations.
- Claimant did not advise his rating doctor he had a prior neck injury and headache complaints and had received 10% PPD regarding those conditions.
- At the time of Claimant's trial regarding his prior neck and head injury, Claimant testified he had daily neck pain and headaches.
- During the trial in this case, Claimant testified his neck complaints continued through November 20, 2002.
- No credible medical evidence documents a change in pathology or increase in symptoms since Claimant's 1997 neck and head injury.
- Claimant's rating doctor found normal ranges of motion in the neck, back, and upper extremities with "slight tenderness" and "slight discomfort" in the neck and back.
- Claimant's doctor attributes his 15% PPD rating solely to Claimant November 20, 2002 injury.
- Claimant testified under oath in a deposition on February 13, 2002 that he had no injuries resulting from this motor vehicle accident.

**CONCLUSION**

Based upon all of the evidence, I find Claimant is not entitled to any additional benefits and that his complaints are not medically and causally related to this injury. Because Second Injury Fund liability is dependent on Employer's liability and I found no Employer liability, Claimant's Second Injury Fund claim is hereby dismissed.

Date: \_\_\_\_\_

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

KATHLEEN M. HART  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 03-126470

Employee: Mark Lancaster  
Employer: United Parcel Service  
Insurer: Liberty Mutual Insurance Group  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: Alleged December 10, 2003  
Place and County of Accident: Alleged St. Louis County

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. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 9, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kathleen M. Hart, issued May 9, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 17<sup>th</sup> day of October 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

**AWARD**

Employee: Mark Lancaster

Injury No.: 03-126470

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: United Parcel Service

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Hearing Date: February 2, 2006

Checked by: KMH/tr

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
4. 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
8. Date of accident or onset of occupational disease: December 10, 2003
9. State location where accident occurred or occupational disease was contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
11. 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 slipped and fell getting into his truck.

- 12. Did accident or occupational disease cause death? No
- 13. Part(s) of body injured by accident or occupational disease: right knee, right hip, back
- 16. Nature and extent of any permanent disability: None
- 15. Compensation paid to-date for temporary disability: None
- 16. Value necessary medical aid paid to date by employer/insurer? \$6091.92

Employee: Mark Lancaster

Injury No.: 03-126470

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 20. Employee's average weekly wages: Maximum
- 19. Weekly compensation rate: 662.55/347.05
- 20. Method wages computation: Stipulation

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable: NONE
  
- 22. Second Injury Fund liability: No
  
  
- TOTAL: -0-
  
- 23. Future requirements awarded: None

Said payments to begin immediately 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 N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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

Employee: Mark Lancaster

Injury No.: 03-126470

Dependents: n/a

Before the  
**Division of Workers'  
Compensation**

Employer: United Parcel Service

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance Group

Checked by: KMH/tr

Three claims were tried together, Injury Numbers 02-122484, 02-125282 and 03-126470. Pursuant to 8 C.S.R. 20-3.050(1)(2) and (3), all claims were tried together in one proceeding and one transcript will be generated but 3 separate awards will be issued. The claims and facts are so inextricably intertwined that resolution of one necessarily involves resolution of the others. The earliest Injury Number, 02-122484, will be designated the master proceeding and the evidence and transcript will reside in that file.

The hearing in these matters was held February 2, 2006. Mark Lancaster (Claimant) was represented by attorney Mark Haywood. United Parcel Service (Employer) and its insurer, Liberty Mutual, were represented by attorney Maureen Cary.

The issues in the first claim, 02-122484 were medical causation, liability for past medical expenses of \$32,140.85, temporary total disability and permanent partial disability.

The issues in the second claim, 02-125828, were medical causation and the nature and extent of permanent partial disability.

The issues in the third claim, 03-126470 were accident, medical causation, liability for past medical expenses in the amount of \$32,140.85, temporary total disability and permanent partial disability.

### **STIPULATIONS**

For the third claim, injury number 03-126470, the parties stipulated to the following:

13. Claimant was an employee of Employer on December 10, 2003. Employer and Claimant were operating under the provisions of the Missouri Workers' Compensation Law.
14. Employer's liability was fully insured by Liberty Mutual Insurance Group.
15. Claimant's average weekly was sufficient to entitle him to the maximum rates for TTD and PPD, which are \$662.55 and \$347.05 respectively.
16. Employer has paid no TTD to date and has paid \$6091.92 in medical benefits.
17. Employer had notice of the injury and Claimant's claim was timely filed.

### **FINDINGS OF FACT**

Based on the competent and substantial evidence, I find:

51. Claimant is a 47-year-old man who currently works as a car salesman.
52. Claimant worked for Employer for nearly 29 years as a package car driver until his termination in June 2005. His job involves home and commercial delivery of packages of all different weights. On any given day, Claimant made 100-150 stops to deliver packages.
53. Claimant alleges on November 6, 2002, he was retrieving a 70-pound box from the top storage shelf and fell

backwards injuring his right hip, right groin, back and shoulder.

54. Claimant's first treatment for this injury was November 11, 2002 with Dr. Cynthia Byler. Dr. Byler's records reflect a history from Claimant not of a fall, but of injuring himself at work getting a package up from shoulder level. According to records, Claimant got the package down to the step and when moving it off the step, he experienced sharp pain in the groin. He complained to Dr. Byler of pain when flexing his right hip. Dr. Byler noted Claimant had a slight limp and diagnosed a right groin strain. Dr. Byler ordered medications, physical therapy and light duty.
55. On November 20, 2002, Claimant was involved in a motor vehicle accident while working. He testified the accident occurred because he had to lift his leg to change from the gas to the brake pedal. He had to lift his leg due to pain in the hip from his last injury. Claimant testified he injured his head, shoulder and neck as a result of this accident.
56. Claimant first saw Dr. Byler for this vehicle incident on December 2, 2002 (Exhibit 6). She diagnosed cervical, thoracic and right shoulder sprain, and she felt Claimant could continue working. Claimant was already working light duty as a restriction due to the prior injury.
57. Dr. Byler's December 2, 2002 report also addressed Claimant's November 6, 2002 injury. She noted Claimant felt his right hip was better, he still had a little bit of soreness, no limp and had minimal tenderness.
58. Claimant next saw Dr. Byler 12/13/02 (Exhibit 6). Her records indicate Claimant said his neck and thoracic area were doing well and he had some pain in his right shoulder. Dr. Byler released Claimant to return to full duties.
59. At that visit, Dr. Byler also examined Claimant's groin and noted he had no limp and was able to squat and return to standing with no difficulty. Her exam produced no objective findings and she reiterated her diagnosis of right groin strain as a result of Claimant's November 6, 2002 injury.
60. Claimant sought no further treatment related to November 22, 2002 motor vehicle accident and continued to work full duty.
61. Claimant sought no treatment for his groin injury of November 6, 2002, until June 2003. He then again presented to Dr. Byler (Exhibit 7) with complaints of anterior right groin pain, which he said had been constant since his last visit in December 2002. He also complained of pain upon going up steps and said he couldn't sleep on his back because it "pulls". Dr. Byler examined Claimant and found he appeared to be uncomfortable, he hesitated with ambulation, and resisted flexion of his right hip was extremely painful. He had no pain in his left hip.
62. Due to continued groin complaints, Dr. Byler referred Claimant to Dr. Bennett. Dr. Bennett performed exploratory surgery in June 2003 but did not find a hernia. (Exhibit 8)
63. Claimant continued to treat with Dr. Byler who notes on August 6, 2003 (Exhibit 7) that Claimant was limping again and complained that he always has a limp. He advised Dr. Byler that he remembered an injury 2-3 years ago where he was treated for right hip problems.
64. Claimant saw Dr. Bennett again August 7, 2003 (Exhibit 8). Dr. Bennett noted considerable problems with the thigh/groin crease and opined Claimant's problem was more arthritic than soft tissue.
65. Employer sent Claimant to Dr. Nogalski in August 2003. Claimant completed the initial patient questionnaire (Exhibit 2) stating he injured his right hip November 2002. He did not make mention of his prior hip injury and treatment in 2001 or 1990. Claimant complained of right hip pain, which Dr. Nogalski noted Claimant also had in 2001. Dr. Nogalski found Claimant's hip motion was decreased and ordered x-rays, which showed right hip joint space narrowing and osteophytes. Dr. Nogalski diagnosed symptomatic degenerative joint disease of the right hip. He opined this was idiopathic and was not substantially related to Claimant's work. Dr. Nogalski also told Claimant he should consider hip replacement surgery.
66. In November 2003, Dr. Bennett again saw claimant and reiterated his belief that Claimant's pain was generated by a bad hip joint. (Exhibit 8)
67. On December 10, 2003, Claimant alleges he slipped and fell getting into his delivery truck. He testified he injured his knee, right hip and back. There were no witnesses to this alleged accident.
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69. Claimant again saw Dr. Byler for hip complaints January 16, 2004 (Exhibit 7). He complained of right hip pain,

which was “10 times worse” since his December 10, 2003 fall. Dr. Byler’s records indicate Claimant told her he needed a hip replacement due to pre-existing degenerative disease. He complained that he walked with a limp, had difficulty sitting, had pain when lying on his back and had to use a pillow under his thighs to relieve the discomfort from his hip.

70. Claimant next treated for his hip with his own doctor, Dr. Richard Rende, in July 2004. At his initial visit of July 15, 2004, Claimant completed a patient questionnaire. He noted his reason for seeing the doctor was “right hip groin”. Claimant did not list any prior right hip problems or treatment on this form. Dr. Rende’s notes from that visit (Exhibit 1) indicate Claimant had a long history of right hip pain, which had gotten more severe over the last year. Claimant told Dr. Rende the prior hernia surgery did not relieve his pain. Dr. Rende noted he advised Claimant his arthritis is very severe and he would eventually require a hip replacement.
71. Dr. Rende ordered x-rays, which showed advanced degenerative osteoarthritis right hip.
72. Dr. Rende performed a right hip replacement in September 2004. His pre and post-operative diagnoses were severe right hip arthritis. (Exhibit 1) The pathology report indicates there was erosion and pitting of the articular cartilage with thickening of cartilage at the junction of the femoral head and neck.
73. Claimant was released to return to work in March 2005.
74. Claimant continued to work full duty through his termination in June 2005. Claimant initially agreed at trial that his termination was not related to the three injuries at issue. He later testified he felt his termination did have something to do with these injuries.
75. Diane Wheeler, Labor Management Supervisor for UPS, testified at trial Claimant filed a union grievance regarding his termination. Following a hearing regarding the grievance, Claimant’s termination was upheld.

## **MEDICAL HISTORY**

Claimant has a history of problems with is right hip dating back to 1987. Records from Cave Springs Physical Therapy (Exhibit 5) indicate while treating claimant for low back pain in 1987, the therapist found bilaterally tight piriformis muscles. Dr. Lehman’s records (Exhibit 3) reveal treatment for right hip complaints in 1990. At that time, Dr. Lehman found Claimant had popping and significant pain in the hip. He ordered an arthrogram and in January 1991 diagnosed mild degenerative arthritis in the right hip. Claimant returned to Dr. Lehman June 11, 1991 for complaints of deep tenderness in the hip. An MRI was ordered at that time which was within normal limits and Claimant was released from care.

Claimant had an injury May 14, 1996 with no treatment. The Division of Workers’ Compensation Report of Injury lists the condition as “inflammation, hips”.

Dr. Levy’s June 23, 2005 (Exhibit B of Claimant’s Exhibit A) report notes Claimant gave a history of a 1999 injury when he was pulling a two-wheeler and fell injuring his back and right hip. He was treated conservatively but “it remained painful”.

Claimant again injured his right hip March 7, 2001. He received physical therapy from Healthsouth (Exhibit 5). On the patient registration form, Claimant listed an injury to his right hip and said he felt his hip gave out on the date of injury. He complained “when he turns the hip the wrong way, his right hip feels as if it has snapped in half”. He continued to have sharp pain and decreased range of motion in the hip and said he felt as if the hip slips. These therapy notes also indicate Claimant denied having any problems with his hip before this 2001 injury.

Claimant treated with Dr. Nogalski for the March 2001 hip injury. Dr. Nogalski diagnosed piriformis syndrome. In his deposition he explained this is a condition of tendonitis around the hip. Treatment records continue to reveal Claimant’s complaints of deep soreness in the hip and clicking or popping in the right hip.

In May 2002, Claimant was deposed regarding this 2001 hip injury. He testified he continued to have a sensation of his hip giving out, strength and limping problems, and difficulty sleeping due to throbbing pain in his right hip. He also testified he continued to limp on a daily basis and continued to have popping in his right hip. These complaints continued through his 2002 hip injury.

Claimant’s 2001 hip injury claim was settled July 2002 for 15% PPD of the right hip.

Claimant had a prior injury to his head and neck. On October 28, 1997, Claimant was involved in another work related motor vehicle accident. He was treated for head and neck complaints and that case proceeded to trial. At that trial, Claimant testified he had daily headaches and neck complaints. Claimant was awarded 10% PPD to his body as a whole referable to his neck and headaches. His neck complaints continued through his November 20, 2002 injury.

Employer took Claimant's deposition February 12, 2003 regarding another work injury from March 2002. At his deposition, Claimant testified he had no injuries since March 2002 other than "a small rear-ender" and he had no injuries from that accident.

## **RULINGS OF LAW**

Claimant has a long history of right hip treatment and complaints dating back to 1987. His medical records are replete with significant right hip complaints before his 2002 and 2003 accidents. Claimant's own deposition testimony taken six months before his November 6, 2002 accident was that he had severe complaints in his right hip and was still taking anti-inflammatory medication.

Throughout Claimant's trial testimony, he continually provided caveats regarding his previous injuries to the same part of the body. There are numerous inconsistencies between Claimant's deposition testimony, his trial testimony and his medical records. Claimant stood impeached with his deposition testimony on numerous occasions and was neither direct nor forthright in his trial testimony. Claimant was not forthcoming with his own medical expert, Dr. Levy, and had to return to see him a number of times in order to provide the entire relevant history.

Claimant's testimony was not credible. It was incomplete and selective.

The aggravation of a pre-existing condition is a compensable injury if the claimant establishes a direct casual link between job duties and the aggravated condition. *See Smith v. Climate Engineering*, 939 S.W.2d 429, 433-34 (Mo. App. E.D. 1996). If a claimant can show that the performance of the usual and customary duties led to a breakdown or change in pathology, the injury is compensable. *Bennett v. Columbia Health Care*, 80 S.W.3d 524 (Mo.App.W.D. 2002). The worsening of a pre-existing condition is a change in pathology. *Id. at 529*. Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991).

I find Claimant did have an accident December 10, 2003, but I find he failed to prove his accident caused his need for hip surgery or any permanent partial disability. Claimant relies on the opinion of Dr. Levy to establish causation between his November 6, 2002 injury, his December 10, 2003 injury and his hip replacement. Dr. Levy's June 23, 2005 report addressed Claimant's November 6, 2002 and December 10, 2003 injuries. In that report, Dr. Levy lists a 1999 right hip injury with conservative treatment. Claimant told Dr. Levy his hip complaints from that injury continued through November 2002. Dr. Levy had examined Claimant April 2003 regarding his 2001 hip injury, but he made no mention of the 2001 hip injury and PPD in his 2005 report. He also made no mention of Claimant's 1990 hip treatment. Dr. Levy's April 2003 report made no mention of Claimant's November 2002 injuries allegedly to the same body part. Claimant was evasive with his doctor and failed to fully inform his own doctor regarding his medical history.

Additionally, Dr. Levy did not apportion Claimant's right hip disability between the November 6, 2002 and the December 13, 2003 injury. He did not adequately address causation. He did not discuss whether the hip replacement was medically and causally related to Claimant's injuries at issue or his prior condition.

I find Dr. Levy's opinion fails to establish medical causation.

Regarding Claimant's hernia surgery, Dr. Levy testified he found no disability related to this surgery.

Dr. Levy, Dr. Byler and Dr. Nogalski all agree Claimant had osteoarthritis of the right hip before his November 2002 right hip injury. The question becomes whether Claimant's work injuries of 2002 or 2003 caused a change in this pre-existing condition.

Claimant's treating records show he had significant complaints with his right hip before and through November 2002. As mentioned earlier, Claimant's trial testimony conflicted with his prior deposition testimony. I find the medical records do not show Claimant's work injuries caused a worsening or acceleration of his pre-existing condition.

Dr. Nogalski opined in his August 2003 and his November 2005 reports Claimant's hip condition was degenerative and not substantially related to his work. Dr. Nogalski testified by deposition degenerative disc disease is typically a progressive condition. He explained Claimant's 1991 MRI showed a small subchondral cyst which suggested early osteoarthritis. Treatment records showed Claimant had symptomatic osteoarthritis in 1990. He also explained the April 2001 x-rays of Claimant's hip showed some calcification of the rim of the acetabulum which signifies some degeneration and is highly suggestive of osteoarthritis. While he agreed Claimant's hip replacement was medically necessary, he did not believe the need for surgery was caused by his work injuries.

All of the doctors, including Dr. Levy, agreed Claimant's arthritic condition developed over a period of years.

I find the opinion of Dr. Nogalski more credible on the issue of causation.

It is worth noting the Claimant did not produce an opinion from Dr. Rende, his surgeon. He would have been in the best position to advise of the extent of the degeneration that existed at the time of Claimant's hip replacement.

Injury No: 03-126470

### CONCLUSION

Based upon all of the evidence, I find Claimant has not met his burden of proof that his November 6, 2002 injury or his December 10, 2003 injury caused the osteoarthritis in his hip or caused an acceleration of his osteoarthritis in his hip. I find his work was not a substantial factor in causing the need for Claimant's hip replacement and find Employer not liable for the medical expenses related to the hip surgery. I find Claimant has sustained no permanent partial disability as a result of this injury.

I further find based on the testimony of Claimant's rating doctor Claimant has no disability related to his hernia surgery.

Because Second Injury Fund liability is dependent on Employer's liability and I found no Employer liability, Claimant's Second Injury Fund claim is hereby dismissed.

Date: \_\_\_\_\_

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

KATHLEEN M. HART  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

---

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