

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

Injury No.: 02-049455

Employee: Blaine Lyman
Employer: Allmon Construction, LLC
Insurer: Missouri Employers Mutual Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the November 6, 2009, award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties stipulated that on or about May 24, 2002, employee sustained an accident arising out of and in the course and scope of his employment with employer. The administrative law judge heard this matter to consider: (1) whether the accident of May 24, 2002, caused the injuries and disabilities for which benefits are now claimed; (2) whether employee proved his entitlement to future medical care; (3) whether employee is entitled to temporary total disability benefits; (4) the nature and extent of any permanent disability sustained as a consequence of the accident of May 24, 2002; (5) the nature and extent of any Second Injury Fund liability; and (6) whether employee unreasonably refused treatment offered by the employer/insurer, and if so, whether this renders employee ineligible for temporary total disability benefits for the period of January 25, 2008 through July 25, 2008.

The administrative law judge found that: (1) as a result of the work accident of May 24, 2002, employee sustained a left femoral neck fracture requiring multiple surgeries, development of cataracts and deterioration of vision secondary to hyperbaric oxygen treatments, mechanical low back pain resulting in severe degenerative disk disease of the lumbar spine, and deep vein thrombosis; (2) employer/insurer are liable for future medical care; (3) employee did not unreasonably refuse to submit to medical treatment and thus employee's benefits are not reduced under § 287.140.4 RSMo; (4) employer/insurer are liable for \$101,906.14 in temporary total disability compensation, and \$6,988.39 in temporary partial disability compensation; (5) employer/insurer are liable for \$40,452.77 in permanent partial disability compensation; (6) employee is permanently and totally disabled due to a combination of his preexisting visual disability and his disabilities resulting from the accident of May 24, 2002; and (7) the Second Injury Fund is liable for the difference between permanent total disability compensation and permanent

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partial disability compensation for 122.8 weeks, and thereafter for weekly payments of \$494.69 for employee's lifetime.

Each of the parties to this case filed an Application for Review with the Commission. The Second Injury Fund filed an Application for Review arguing that the employee was rendered permanently and totally disabled due to the last injury alone. The employee filed an Application for Review arguing that, if the Second Injury Fund was successful in its appeal to the Commission, permanent total disability benefits should be assessed against the employer/insurer. Employer/insurer filed an Application for Review arguing the administrative law judge erred: (1) in concluding that hyperbaric oxygen treatments caused employee to develop cataracts and deterioration in eyesight; (2) in finding employer/insurer liable for temporary total disability benefits from January 25, 2008 through July 25, 2008; and (3) in finding that employee did not unreasonably refuse cataract surgery. Employer/insurer concedes that the evidence shows that employee is permanently and totally disabled, but urges that this is solely due to the combination of employee's preexisting disabilities and disability stemming from the work injury. Accordingly, employer/insurer requests this Commission to find the Second Injury Fund liable for permanent total disability payments after December 14, 2004.

Findings of Fact

The findings of fact and stipulations of the parties are set forth in the award of the administrative law judge. We have incorporated those findings¹ to the extent that they are not inconsistent with the modifications set forth in our award. Therefore, we address only those findings of fact pertinent to our modification herein.

Pre-existing Visual Impairment

The administrative law judge appears to have credited the testimony of employee for the most part; we specifically find employee's testimony credible. Employee was born with nystagmus, which makes it difficult for employee to focus and prevents 20/20 vision, even with correction. Employee had surgery to correct crossed eyes when he was five years old. Employee has worn hard contact lenses since age 16. He used the same prescription lenses until his vision began to deteriorate after the primary injury. Employee was unable to get into the military due to poor vision. Other than the military, however, employee's visual impairment did not cause him to lose jobs, miss work, or fail to obtain steady work. Claimant framed houses for employer. Employee's visual condition required him to double-check measurements to make sure he was seeing them correctly, and to take extra care when reading and writing. Before the primary injury, employee was able to drive a car and do most things notwithstanding his poor vision.

Primary Hip Injury

¹ We do note and correct an error in the findings of the administrative law judge. While we agree that Dr. Rolfe A. Becker is more credible with regard to the issue whether hyperbaric oxygen treatments were a causative factor in employee developing cataracts, the administrative law judge's award mistakenly refers to Dr. Becker's reliance on a "Palmquist article." Dr. Becker did not cite or rely on the Palmquist article. Rather, the article was used in cross-examination at the deposition of Dr. Elliot L. Korn.

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On May 24, 2002, employee fell 6 or 8 feet from a ladder, suffering a femoral neck fracture of his left hip. Employee elected to undergo a closed reduction with pinning rather than surgery to implant a prosthetic. Employee suffered a bone infection after the surgery, and subsequently underwent 4 surgeries and 66 hyperbaric oxygen treatments in order to cure the infection. Employee noticed his vision becoming more nearsighted a couple of weeks after beginning the hyperbaric oxygen therapy, and later developed cataracts in both eyes, for which he underwent surgery. Employee stopped driving as a result of his vision deteriorating, and can no longer do things that he was able to do.

Employee went back to work on May 24, 2004, as an electrician's helper. Employee's supervisor had known employee for five to ten years and gave employee the job so employee could try to get back into the workplace again. Employee's duties included running a drill and pulling wires. Employee had no difficulty working at chest height, but could only do so for short periods due to the limited amount of time employee could be on his feet. Employee had great difficulty climbing ladders and getting down on the floor (activities that were frequently required by the work), and was much slower than other employees. Employee sometimes worked two to three days a week because his supervisor only called him for jobs he thought employee could physically perform. Employee's supervisor was worried that employee's disabilities were so great that employee might get injured again so they both agreed to end the arrangement in December 2004. The supervisor testified and specifically cited employee's mobility and eyesight as the deciding factors for ending the employment. Employee likewise cited his deteriorating vision and his hip condition, which made him very slow in performing his tasks and made it painful to walk across a room.

Currently, employee has great difficulty walking and moving around because his right leg is now longer than his left. Employee must use a cane to walk and can only go about 1/8 of a mile before having to rest. Because of the need to use the cane, employee can only carry an object weighing five pounds or less with his one free hand while walking. Employee has increased back pain after the primary injury. Employee has to alternate between sitting and standing every 45 minutes. Employee is unable to stand up fully straight and needs to lie down during the day.

Expert Medical Evidence

On November 23, 2004 and December 13, 2004, Dr. Jeffrey Woodward saw employee for chronic left hip pain. Dr. Woodward opined that the work injury resulted in a permanent partial disability of 15% of the body as a whole. Dr. Woodward acknowledged that claimant will always be at risk for reactivation of the infection in his hip due to the work injury. Dr. Woodward released employee to full-time modified duty, half standing, half sitting, no climbing, no working at heights greater than 4 to 6 feet, and occasional ladder use. Dr. Woodward noted employee had a severely limping gait. Dr. Woodward acknowledged that the type of hip condition suffered by employee following the work injury can change sitting and standing posture and have a direct effect on the back; Dr. Woodward also noted that a patient with such an abnormal left hip joint region as employee will most likely have significant pain. Dr. Woodward opined that, absent employee's visual difficulties, he would be a good candidate for the following positions: construction cost estimator, building systems repair supervisor, answer desk staff in a

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home remodeling facility, security work, cashiering, or counter clerk work. Dr. Woodward opined that employee's visual difficulties negate his ability to perform any of these types of work. Dr. Woodward opined that employee is permanently and totally disabled due to the combination of his limitations stemming from the work injury and employee's visual disability. Notably, Dr. Woodward did not specifically consider or quantify the degree of employee's *preexisting* visual impairment. Rather, Dr. Woodward clearly rendered his opinion of total disability based upon employee's visual condition *at the time* he examined employee.

On December 16, 2005, Dr. P. Brent Koprivica saw employee for an independent medical examination. Dr. Koprivica rated employee's disabilities as follows: 50% permanent partial disability at the 207-week level for the hip injury, 15% permanent partial disability to the body as a whole for mechanical back pain secondary to the hip injury, and 5% permanent partial disability to the body as a whole for deep venous thrombosis (a complication of treatment for the hip injury). Dr. Koprivica noted that employee has the risk of reactivation of the bone infection at any time. Dr. Koprivica assigned the following restrictions: captive sitting/standing intervals of less than 30 minutes; use of a cane; avoidance of uneven surfaces; no crawling, kneeling, squatting, or climbing; ground level work only; no pushing, pulling, twisting, or bending at waist; and no standing for more than 2 to 4 hours per day. Dr. Koprivica opined that employee's altered gait, the result of his shorter left leg, puts wear and tear and limits the flexion of employee's low back, resulting in a severe impact on employee's ability to do any activities that require bending at the waist. Dr. Koprivica opined that employee suffered "profound disability due to visual acuity deficits," which was "of significance" prior to the work injury, while noting he would defer to an eye expert. Dr. Koprivica opined that employee is permanently and totally disabled due to a combination of the preexisting visual condition and the last injury. For reasons more fully explained below, we consider Dr. Koprivica's opinion as to preexisting visual disability and permanent total disability to lack credibility.

Expert Vocational Evidence

Employee, who was 59 years old at the time of hearing, has been a carpenter for most of his working life. His educational history includes two years of college. Employee did not earn a degree and has no certification or formal vocational training. At one point, employee managed a hotel.

On behalf of the employee, Mr. Wilbur Swearingin evaluated employee on May 22, 2006, and April 28, 2009, and ultimately found him unemployable based on the orthopedic limitations caused by the primary injury alone. Mr. Swearingin added that the combination of visual impairment renders employee permanently and totally disabled "without a reasonable doubt." On cross-examination, Mr. Swearingin admitted that his initial report did not specifically state that employee was permanently and totally disabled due to the primary injury alone, and that he revised his opinion after exchanging correspondence with employee's attorney. Mr. Swearingin explained that, in his initial report, he assumed that employee's worsened vision "went together" with the primary injury, and so wanted to clarify his opinion when he was apprised that there was a dispute as to that issue.

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Mr. Swearingin opined that employee would be unable to perform any of the jobs identified by Dr. Woodward due to his physical restrictions from the hip injury alone. Even relatively light unskilled or "common" work would be a problem due to employee's lack of endurance and because employee has to be up and down, and most unskilled jobs are structured so that a worker doesn't have that freedom. Mr. Swearingin noted that employee would be unable to carry anything other than something light in one hand due to his need to use a cane, and that his pain would prevent him from working a consistent and regular work schedule. Mr. Swearingin noted that, although employee had a visual impairment before the primary injury, employee was able to drive and work without difficulty, noting employee's long and steady work history. After reviewing employee's history and the evaluations by Dr. Woodward and Dr. Koprivica, Mr. Swearingin concluded that employee did not have impairments which would have been vocationally disabling sufficient to constitute a hindrance or obstacle to employment prior to May 2002.

On behalf of the employer/insurer, Mr. James England reviewed employee's records and testified on April 15, 2009, that employee is permanently and totally disabled due to the combination of the effects of the work injury and his visual impairment. In Mr. England's opinion, employee's conditions stemming from the hip injury alone should not prevent him from working. Mr. England opined that absent employee's visual difficulties, he would be employable in each of the jobs identified by Dr. Woodward. Mr. England acknowledged that employee's vision deteriorated significantly after the primary injury, and that it was not until after the primary injury that employee became unable to drive. Mr. England admitted that he was unaware whether employee's visual difficulties in reading, recognizing acquaintances, or using the computer arose before the accident, after the accident, or following cataract surgery.

For reasons more fully explained below, we find Mr. Swearingin more credible than Mr. England.

Conclusions of Law

We agree that there is no doubt that employee is permanently and totally disabled. The issue is whether employee is unemployable in the open labor market as a result of the last accident alone or a combination of the last accident and employee's preexisting conditions. Upon careful review of the entire record, we adopt the conclusions of the administrative law judge with the following exception: the Commission determines and concludes that the evidence supports a finding that the last injury alone renders employee permanently and totally disabled.

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid from the fund in "all cases of permanent disability where there has been previous disability." For the Fund to be liable for permanent, total disability benefits, employee must establish that: (1) he suffered from a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Here, there is some evidence supporting the proposition that employee had a preexisting visual disability. However, the employer's liability must first be considered in isolation before determining

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Second Injury Fund liability. *Kizior v. Trans World Airlines*, 5 S.W.3d 195 (Mo. App. 1999), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003). “[I]f claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability.” *Gassen v. Lienbengood*, 134 S.W.3d 75, 79 (Mo. App. 2004).

It is uncontested that the work injury resulted in the following: a fracture to employee’s left hip requiring surgery; a closed reduction and pinning; a subsequent infection that resisted treatment for over two years and required employee to undergo 4 additional surgeries and 66 hyperbaric oxygen therapy treatments; significant chronic hip pain; a disparity in length between employee’s right and left legs; the necessity that employee use a cane to walk; a change in employee’s posture resulting in significant stress and pain in his low back; the risk that his hip infection may recur at any time; the need to lie down during the day; and work restrictions that effectively preclude employment in the occupations in which employee has skill and experience. We find the evidence regarding employee’s attempt to return to work as an electrician’s helper particularly telling: it’s clear that, even if employee had no visual impairment, he would not have lasted long in that job given his slow pace, his inability to perform work anywhere but chest height, his need to frequently sit down, and his inability to climb ladders.

Mr. Swearingin found employee’s disabilities stemming from the work injury alone to be sufficient to render employee permanently and totally disabled. We find Mr. Swearingin’s testimony more credible than that of Mr. England. We are not convinced that Mr. England realistically considered employee’s physical restrictions and limitations stemming from the last injury when he opined as to the various positions for which employee would qualify absent his visual difficulties. We agree with Mr. Swearingin that employee’s need to be up and down throughout the day, his need to use a cane, his need to lie down, and his lack of endurance are conditions preclusive to employment in the positions listed by Mr. Woodward. We are unconcerned with the fact that Mr. Swearingin revised his opinion. Mr. Swearingin adequately explained that he was originally unaware that it was disputed whether the visual deterioration was an effect of the work injury.

We are not convinced by Dr. Koprivica’s opinion that employee is permanently and totally disabled due to a combination of his preexisting vision problems and his disabilities and restrictions stemming from the last injury. Dr. Koprivica forthrightly admitted that he did not “have all the expertise necessary to quantify the [preexisting visual] disability.” Dr. Koprivica noted that he would defer to an eye expert on the question. On cross-examination, Dr. Koprivica acknowledged that he was unaware of any evidence that employee ever missed work before May 24, 2002, due to his visual impairment. We conclude that Dr. Koprivica’s opinion as to preexisting visual disability is of little value in this case.

In sum, while employee’s preexisting visual difficulties most likely play a role in further hindering employee’s prospects for employment, this fact is irrelevant if employee is permanently and totally disabled due to disability stemming from the work injury alone. *APAC Kan., Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. 2007). We are convinced that he is.

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Given the foregoing, we conclude that the Second Injury Fund is not liable for permanent total disability benefits because employee is permanently and totally disabled due to the last injury alone.

Award

We modify the award of the administrative law judge on the issue of Second Injury Fund liability for permanent total disability benefits. The employee is permanently and totally disabled, but it is the employer/insurer, not the Second Injury Fund, that is liable to employee for permanent total disability benefits. In all other respects, we affirm the award.

We direct the employer/insurer to pay to employee a weekly permanent total disability benefit in the amount of \$494.69 beginning November 15, 2008, the day after employee achieved maximum medical improvement. Said permanent total disability benefit payments shall continue for employee's lifetime, or until as modified by law.

The award and decision of Administrative Law Judge L. Timothy Wilson, issued November 6, 2009, is attached hereto and incorporated herein to the extent it is not inconsistent with this decision and award.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fees 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 22nd day of July 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest:

John J. Hickey, Member

Secretary

AWARD

Employee: Blaine Lyman

Injury No. 02-049455

Dependents: N/A

Employer: Allmon Construction, LLC

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

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: August 24, 2009

Checked by: LTW

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: May 24, 2002
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
While performing his work duties, Claimant fell from a ladder approximately 8 feet to the floor.
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: hip, low back, body as a whole
14. Nature and extent of any permanent disability: 40% PPD left lower extremity; 5% PPD body as a whole referable to low back; 5 percent referable to deep venous thrombosis involving the left subclavian and left brachial vein and permanent changes in the venous system\
15. Compensation paid to-date for temporary disability: \$47,276.31
16. Value necessary medical aid paid to date by employer/insurer? \$237,096.46

Employee:

Injury No.

- 17. Value necessary medical aid not furnished by employer/insurer?
- 18. Employee's average weekly wages: \$742.00
- 19. Weekly compensation rate: \$494.69 TTD/PPD; \$329.42 PPD
- 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Future medical care is awarded. (See Award0

206 weeks of temporary total disability	\$101,906.14
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Temporary partial disability	6,988.39
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122.8 weeks of permanent partial disability from Employer	40,452.77
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weeks of disfigurement from Employer

Permanent total disability benefits from Employer beginning, for Claimant's lifetime

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:

122.8 weekly differential \$165.27 payable by SIF
and, thereafter, \$494.69 for Claimant's lifetime

TOTAL:	\$149,347.30
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- 23. Future requirements awarded: See Award

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 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Blaine Lyman

Injury No. 02-049455

Dependents: N/A

Employer: Allmon Construction, LLC

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

Insurer: Missouri Employers Mutual Insurance Company

Hearing Date: August 24, 2009

Checked by: LTW

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on August 24, 2009. The parties were afforded an opportunity to submit briefs or proposed awards, resulting in the record being completed and submitted to the undersigned on or about September 18, 2009.

The employee appeared personally and through his attorney Patrick Platter, Esq. The employer and insurer appeared through their attorney, Patricia Musick, Esq. The Second Injury Fund appeared through its attorney, Susan Colburn, Assistant Attorney General.

The parties entered into a stipulation of facts. The stipulation is as follows:

- (1) On or about May 24, 2002, Allmon Construction, LLC was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Missouri Employers Mutual Insurance Company.
- (2) On the alleged injury date of May 24, 2002, Blaine Lyman was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about May 24, 2002, the employee sustained an accident, which arose out of and in the course and scope of his employment with the employer.
- (4) The contract of employment was made in Missouri. The above-referenced accident occurred in the State of Colorado. The parties agree to venue lying in Springfield (Greene County), Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.

- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the claimed accident the employee's average weekly wage was \$742.00, which is sufficient to allow a compensation rate of \$494.69 for temporary total / permanent total disability compensation, and a compensation rate of \$329.42 for permanent partial disability compensation.
- (8) Temporary disability benefits have been provided to the employee in the amount of \$47,276.31, payable for the periods of May 25, 2002 to May 9, 2004, and November 23, 2004 to December 13, 2004.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$237,096.46 in medical expenses. Further, the employer and insurer have not paid, but will pay the medical expenses incurred for cataract removal surgery incurred through Cokington Eye Center of Overland Park, Kansas.

The sole issues to be resolved by hearing include:

- (1) Whether the claimed accident of May 24, 2002 caused the injuries and disabilities for which benefits are now being claimed?
- (2) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (3) Whether the employee is entitled to temporary disability benefits?
- (4) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, what is the nature and extent of the disability?
- (5) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?
- (6) Whether the employee unreasonably refused cataract surgery offered by the employer and insurer; and, if so, whether the actions of the employee render him ineligible to receive temporary total disability compensation for the period of January 25, 2008 through July 25, 2008?

EVIDENCE PRESENTED

The employee, Blaine Lyman, testified at the hearing in support of his claim. Also, Mr. Lyman presented in person at the hearing of this case two additional witnesses – Ron Schrock and Wilbur Swearingin, CRC. In addition, Mr. Lyman offered for admission the following exhibits:

- Exhibit A.....Complete Medical Report of P. Brent Koprivica, M.D.
- Exhibit B.....Deposition of P. Brent Koprivica, M.D.
- Exhibit C.....Deposition of Rolfe A. Becker, M.D.
- Exhibit D..... Complete Medical Reports of Rolfe A. Becker, M.D.
- Exhibit E..... Deposition of David M. Pierce, OD
- Exhibit F..... Curriculum Vitae of Wilbur Swearingin, CRC
- Exhibit G..... Vocational Evaluation Report of Wilbur Swearingin, CRC
- Exhibit H.....Medical Records from The Medical Center of Aurora
- Exhibit I.....Medical Records from Robert E. Hufft, M.D.
- Exhibit J.....Medical Records from Cox Medical Center
- Exhibit K.....Medical Records from Ferrell-Duncan Clinic
- Exhibit L..... Medical Records from Barnes-Jewish Hospital
- Exhibit M..... Medical Records from Barnes-Jewish Hospital
- Exhibit N..... Medical Records from William Ricci, M.D.
(Washington University Medical School)
- Exhibit O..... Medical Records from David M. Pierce, OD
(Vision Enhancement Clinic)
- Exhibit P..... Medical Records from Fancis C. Jansen, M.D.
(Missouri Eye Institute)
- Exhibit Q.....Medical Records from Robert H. Crawford, M.D.
- Exhibit R..... Medical Records from St. John’s Clinic – Eye Specialists
- Exhibit S..... Deposition of Carmen Munday (ER/IR Corporate Representative)
- Exhibit T.....Objection to Complete Medical Report of Dr. William Ricci
& Alternative Motion for Sanctions
- Exhibit U..... 2004 W-2 Wage and Tax Statement for Blaine Lyman
- Exhibit V..... Treatment / Employment Time Line
- Exhibit W.....Calculation of Past Benefits Due
- Exhibit X.....Deposition (Cross-Examination) of Elliot L. Korn, M.D.

Exhibits A, B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, and X were received and admitted into evidence. Exhibits V and W were admitted as demonstrative exhibits only, and are not admitted for the truth to the matter asserted. Exhibit D was received at the hearing, but the undersigned reserved ruling on its admission. Having now considered arguments of counsel, the objection to the admission of Exhibit D is overruled. Exhibit D is received and admitted into evidence.

The employer and insurer did not present in person any witnesses at the hearing of this case. The employer and insurer, however, offered for admission the following exhibits:

- Exhibit 1..... Complete Medical Report of William Ricci, M.D.

Exhibit 2..... Deposition of Jeffrey Woodward, M.D.
Exhibit 3..... Complete Medical Report of Elliot L. Korn, M.D.
Exhibit 4..... Deposition of James M. England, Jr.
Exhibit 5..... Correspondence Dated January 14, 2008
(from Patricia Musick, Esq. to Becky Dias, Esq.)
Exhibit 6..... Correspondence Dated January 21, 2008
(from Darren J. Morrison, Esq. to Patricia Musick, Esq.)
Exhibit 7..... Correspondence Dated July 25, 2008
(from Patrick Platter, Esq. to Patricia Musick, Esq.)
Exhibit 8..... Correspondence Dated July 29, 2008 (without Signature Page)
(from Patricia Musick, Esq. to Patrick Platter, Esq.)
Exhibit 9..... Deposition of Rolfe A. Becker, M.D.
Exhibit 10..... Correspondence Dated February 19, 2009
(from Patrick Platter, Esq. to Wilbur Swearingin, CRC)

Exhibits 2, 3, 4, 5, 6, 7, 8, and 9 were received and admitted into evidence. Exhibit 1 was received at the hearing, but the undersigned reserved ruling on its admission. Having now considered arguments of counsel, the objection to the admission of Exhibit 1 is overruled. Exhibit 1 is received and admitted into evidence.

The Second Injury Fund did not present any witnesses or offer any additional exhibits at the hearing of this case.

In addition, the parties identified several documents filed with the Division of Workers' Compensation, which were made part of a single exhibit identified as the Legal File. The undersigned took official notice of the documents contained in the Legal File, which include:

- Notice of Hearing
- Request for Hearing-Final Award
- Minute Entry Dated July 30, 2008 by Hon. Robert House, ALJ
- Order Granting Motion for Leave to Withdraw (for David Childers, Esq.)
- Motion for Leave to Withdraw (by David Childers for Employer/Insurer)
- Order Granting Motion for Leave to Withdraw (for Darren Morrison, Esq.)
- Motion to Withdraw (by Darren Morrison for Employee)
- Amended Answer of Employer/Insurer to Claim for Compensation
(Dated July 28, 2008)
- Answer of Employer/Insurer to Claim for Compensation (Dated April 23, 2007)
- Answer of Second Injury Fund to Claim for Compensation (Dated March 2, 2005)
- Answer of Employer/Insurer to Claim for Compensation (Dated April 23, 2007)
- Claim for Compensation (Dated Jan. 28, 2005)
- Report of Injury

All exhibits appear as the exhibits were received and admitted into evidence at the evidentiary hearing. There has been no alteration (including highlighting or underscoring) of any exhibit by the undersigned judge.

DISCUSSION

Personal Background of Employee

The employee Blaine Lyman is 59 years of age, having been born on June 19, 1950. Mr. Lyman is married and resides in Seymour, Missouri with his wife and four of his nine children.

Mr. Lyman graduated from Escalante High School in Escalante, Utah in 1968. He attended Southern Utah State College for two years, but did not earn any degrees or certifications. Mr. Lyman's employment history is varied, and includes labor or blue collar oriented work. The employment history primarily involves work as a carpenter. Additionally, Mr. Lyman has worked as a hotel manager. Subsequent to the claimed accident, and in light of certain accommodations afforded to him, Mr. Lyman worked for a brief period for Ron Schrock (Ron's Electrical) as an electrician's helper.

In addition, Mr. Lyman does not have any occupational licenses or certifications. He has no skill or formal education in regards to using computers. And he does not have any background in word processing or in computer software programs. Further, Mr. Lyman does not have a driver's license, as he was unable to renew his driver's license due to poor vision. He has no history of military service. (Mr. Lyman was unable to get into the military because of problems with his eye sight, and was classified as 4F.)

Mr. Lyman testified that he suffers from physical problems which prevent him from engaging in employment. Notably, according to Mr. Lyman, he can sit comfortably as long as about 45 minutes. He cannot stand as long as he did before the accident, namely less than one hour. He avoids placing weight upon his left leg due to pain. He cannot completely straighten his left hip. He walks with a cane (since Spring 2005), and can only walk with a cane for about 1/8 of a mile.; and without a cane he can only walk a few steps.

In addition, Mr. Lyman suffers from severe visual impairment, which includes a preexisting and congenital eye condition involving Nystagmus and Strabismus. For example, he cannot see credit card bills. However, he notes that he can read large print books.

Employment & Accident

In or around 1994, Mr. Lyman secured employment with the employer Allmon Construction, LLC, working as a carpenter. In this employment, Mr. Lyman built timber frame houses, which involved cutting timber and framing the homes for residential construction. Most construction jobs occurred in southwest Missouri, although some homes involved construction out of state. Mr. Lyman worked for this employer off and on from 1994 through October 2002.

On or about May 24, 2002, while working for Allmon Construction in Colorado, Mr. Lyman suffered an accident. In describing this accident, Mr. Lyman noted that he climbed a fiberglass ladder in order to retrieve a six-foot floor level. He climbed 8 to 10 feet, took the level and then began to step down from the ladder. As Mr. Lyman took a step down on the ladder, the ladder slipped on wet surface, causing Mr. Lyman to fall approximately 8 feet to the floor, landing on his left side and injuring his left hip. Mr. Lyman experienced immediate pain, and "hurt all over."

Mr. Lyman, through the assistance of a co-worker, presented to HealthOne Centennial Medical Plaza for treatment. The attending physician diagnosed Mr. Lyman as having suffered a left femoral neck fracture of the left hip, and initiated first-aid type treatment. Upon placing Mr. Lyman in stable condition, the attending physician transferred Mr. Lyman by ambulance to Medical Center of Aurora for consultation with Lawrence N. Varner, DO, who is an orthopedic surgeon, and for admission into the hospital.

Dr. Varner recommended that Mr. Lyman undergo a prosthetic hip replacement, premised on his belief that the displaced femoral neck fracture indicated a high incidence of avascular necrosis and non-union. Mr. Lyman, however, refused this surgery, indicating that he wanted as little metal in his body as possible and did not want to have hip prosthesis placement. Thereafter, with surgical consent modified, on May 25, 2002, Dr. Varner proceeded with surgical repair involving a closed reduction and pinning of the left hip using a Synthes Conversion hip screw system. This included a 145-degree angle side plate and 120 ml length nail with six bone screws with an end locking barrel compression screw.

Mr. Lyman received post-operative care and remained in the hospital until receiving a discharge on May 28, 2002. He then traveled home by air transportation to Southwest Missouri for further medical treatment with Robert Hufft, M.D., who is an orthopedic surgeon and recommended that Mr. Lyman travel to Springfield by air transportation.

Dr. Hufft assumed responsibility as the primary attending orthopedic surgeon. He performed three more surgeries to the left hip. He performed those surgeries on October 16, 2002, January 20, 2003, and January 27, 2003.

Dr. Hufft removed the left hip nail on October 16, 2002. Approximately 10 to 14 days following this procedure, Mr. Lyman began to experience a low-grade fever, approximately 100-102 degrees. Initially, in noting that there was no erythema or drainage, and not believing that the fever was caused by a wound infection, Dr. Hufft elected not to treat the fever with an antibiotic.

Medical Treatment for Infection

On November 1, 2002, however, Mr. Lyman experienced some spontaneous drainage, resulting in him contacting Dr. Hufft's office and being instructed to meet Dr. Hufft's partner (William Wester, M.D.) in the emergency room. Thereafter, on the same date, Dr. Wester evaluated Mr. Lyman and recommended that Mr. Lyman be admitted into the hospital and undergo an irrigation and debridement procedure. Mr. Lyman declined the surgery, believing that the surgery would cause a progression of the infection. After counseling with Mr. Lyman and dressing the wound, Dr. Wester allowed Mr. Lyman to leave the hospital and provided Mr. Lyman with a prescription for Keflex.

On November 5, 2002 Mr. Lyman presented to Dr. Hufft for examination in Dr. Hufft's office. At the time of this visit, Dr. Hufft noted that the upper half of his wound was "somewhat widened and has two or three areas of breakdown and drainage." Yet, in assessing Mr. Lyman's condition, Dr. Hufft concluded that the condition involved superficial infection, and that the wound had opened itself up and was draining adequately. Noting that Mr. Lyman was "definitely getting better by all objective signs," Dr. Hufft increased the Keflex, but allowed Mr. Lyman to

continue to treat conservatively at home, and to follow up in two days. Two days later Mr. Lyman returned to see Dr. Hufft and was noted to be feeling "very good" and that the swelling in Mr. Lyman's left thigh was going down and the drainage was diminishing.

Dr. Hufft continued to provide follow-up treatment. Notably, the infection never completely healed and Dr. Hufft expressed concern that Mr. Lyman was continuing to experience purulent drainage, and that Mr. Lyman may need to undergo a debridement procedure.

Eventually, in light of continuing intermittent episodes of moderated drainage from the wound, on January 14, 2003, Dr. Hufft elected to treat the infection more aggressively. He referred Mr. Lyman for an infectious disease consultation that day and decided to keep Mr. Lyman in the hospital. The infection persisted, resulting in Dr. Hufft performing an incision drainage and debridement of the left wound on January 20, 2003. He also took cultures from the left hip, and lastly, performed a curettement of the left femoral head and neck canal. On January 27, 2003 Dr. Hufft performed an additional debridement of the open left hip wound.

On January 31, 2003 Mr. Lyman began treating with Stephen Daugherty, M.D., who is an infectious disease specialist. Dr. Stephen Daugherty frequently saw Mr. Lyman from January 31, 2003 to September 22, 2003. He oversaw the use of antibiotic therapy, which included a PICC line for long-term IV access. In April 2003 Dr. Daugherty diagnosed Mr. Lyman with (1) Osteomyelitis of the left femur with draining sinus tract, and (2) Deep venous thromboses of the left central venous system.

On April 15, 2003, Dr. Daugherty expressed concern that, while they were treating Mr. Lyman on the assumption that the condition is "simply a osteomyelitis, possibly chronic with a draining sinus tract," the condition causing the continuing drainage may involve avascular necrosis of the femoral head. In light of this concern, Dr. Daugherty referred Mr. Lyman to Larry Chase, M.D. for evaluation and possible hyperbaric oxygen therapy. Thereafter, Dr. Chase evaluated Mr. Lyman and recommended that Mr. Lyman undergo hyperbaric oxygen therapy.

Subsequently, the employer and insurer referred Mr. Lyman to John Davidson, M.D. for a second opinion. Dr. Davidson concurred with Dr. Chase, and recommended that Mr. Lyman undergo hyperbaric oxygen therapy for treatment of the infection.

On or about June 18, 2003, and continuing through September 2003, Mr. Lyman underwent hyperbaric oxygen therapy, which included 60 or more sessions. On September 22, 2003 Dr. Daugherty noted that Mr. Lyman had progressed while on hyperbaric oxygen treatments and while receiving antibiotic therapy. However, the treatment did not remove the infection; and Dr. Daugherty recommended that Mr. Lyman receive additional input from other physicians, including a specialist or specialist in St. Louis, Missouri.

Thereafter, William Ricci, M.D., who is an orthopedic surgeon affiliated with Barnes-Jewish Medical Center of St. Louis assumed responsibility as the primary orthopedic surgeon. Dr. Ricci's initial treatment plan contemplated stopping antibiotics two weeks before follow up surgery. He would then perform an irrigation and debridement of the previous surgical sight, obtain bone cultures, and then perform a second irrigation and debridement about 3-5 days later, and to then fill in the defect with calcium sulfate impregnated with antibiotic.

Dr. Ricci performed the first of these two surgeries on November 17, 2003. This surgery consisted of an irrigation and debridement of the left proximal femur and associated muscle and skin tissue around the femur. Dr. Ricci also excised sinus tracts, which involved removing any necrotic or damaged tissue in the muscle and other soft tissues around the bone, debriding the damaged bone itself, and then irrigating these regions with saline and antibiotic solutions in order to clean out active infection. Stated simply, Dr. Ricci scraped and cut infected bone from the femur in the hopes that it would not grow onto healthier bone on the femur.

Dr. Ricci performed the second planned surgery on November 20, 2003. This surgery included an incision and drainage of the femur, but also included the placement of antibiotic beads into the area of the left hip for more direct antibiotic treatment. This antibiotic injection therapy is described as advanced medical treatment for infectious disease that is difficult to cure.

Dr. Ricci discharged Mr. Lyman from Barnes-Jewish Hospital on November 22, 2003, and provided follow-up care. The treatment provided by Dr. Ricci resolved the ongoing infection in the left femur. On or about April 27, 2004, Dr. Ricci diagnosed Mr. Lyman with resolved osteomyelitis, left proximal femur and mild to moderate arthrosis of the left hip. Additionally, Dr. Ricci determined that Mr. Lyman had reached maximum medical improvement relative to the left hip, and released him to return to work full duty.

On or about May 11, 2004, Dr. Ricci opined that Mr. Lyman had sustained a permanent partial impairment of 15 percent, referable to the left hip. Notably, in releasing Mr. Lyman to return to work, and in rendering an opinion of permanent partial impairment, Dr. Ricci did not provide Mr. Lyman with any permanent restrictions.

Also, while treating with Dr. Ricci, Mr. Lyman treated with J. William Campbell, M.D., who is a physician practicing in the specialty of infectious disease. In June 2004 Dr. Campbell noted that Mr. Lyman no longer presented with infection and was doing well. However, Dr. Campbell noted that "osteomyelitis can be notoriously recalcitrant to cure" and that Mr. Lyman is at risk for reactivation of the infection. In this context, Dr. Campbell propounded the following comments:

Reactivation of the infections has been witnessed even decades after presumed effective therapy. ... In addition, previously infected joints/bones are at increased risk for new infections due to the damage that they have sustained from the previous trauma and infection. Therefore, Mr. Lyman is at increased risk for new infections in the future.

On or about June 22, 2004, Mr. Lyman presented to Dr. Hufft for evaluation and treatment. At the time of this visit, Dr. Hufft determined that Mr. Lyman was at maximum medical improvement and released Mr. Lyman from his care. In releasing Mr. Lyman from his care, Dr. Hufft opined that Mr. Lyman had sustained a permanent partial impairment of 15 percent to the body as a whole. Additionally, Dr. Hufft did not place any restrictions on Mr. Lyman.

Further, while Dr. Hufft did not believe additional testing was indicated, he noted that Mr. Lyman would need additional treatment consisting of antibiotics on a “prophylactic basis, per his other treating physicians.” And he noted that Mr. Lyman was at risk of suffering problems in the future, which is a common risk factor for treated osteomyelitis. In this context, Dr. Hufft propounded the following comment:

That would be primarily because of the potential of anticipated problems in the future, e.g., osteoarthritis, even now some element of aseptic necrosis and collapse of his femoral head, and recurrent infection, although none appears to be present now but that can be the story of treated osteomyelitis.

On or about November 23, 2004, Mr. Lyman presented to Jeffrey Woodward, M.D., who is a physician practicing in the specialty of physical medicine and rehabilitation. At the time of this examination, Mr. Lyman presented with chronic left hip pain and visual acuity loss. And, in light of his examination, Dr. Woodward prescribed certain medical treatment, including use of a home TENS unit, and placed certain restrictions on Mr. Lyman.

On or about December 17, 2004 Dr. Woodward opined that, effective December 15, 2004, Mr. Lyman reached maximum medical improvement. Dr. Woodward further opined that Mr. Lyman could return to work full time with modified work duties, to include permanent restrictions of half-time sitting, half-time standing, no climbing scaffolds, no working at height above 4-6 feet, and occasional ladder use only. Additionally, in his deposition, Dr. Woodward indicated that Mr. Lyman should not crawl; he should not kneel; he should not squat; and he should limit bending to the knee.

In addition, Dr. Woodward made note of Dr. Ricci’s opinion of permanent partial impairment, but did not render a specific impairment rating. (In his deposition, Dr. Woodward states that he does not disagree with the rating issued by Dr. Ricci.) Dr. Woodward further noted that the cause of the visual disturbance was uncertain. In this context, Dr. Woodward propounded in his report of December 17, 2004, the following comments:

Patient had medical issues regarding work-relatedness of vision problems, which he and doctor related to Bextra. Patient had substantial preexisting visual acuity abnormality as well. However, patient was concerned about any visual problems from oral pain medication use. I indicated to the patient that my review of all nonsteroidal anti-inflammatories and narcotic pain medications included incidental reports of visual disturbance with use of uncertain causation.

On February 8, 2005, Dr. Ricci recommended that Mr. Lyman see a pain medicine specialist for treatment of chronic pain. Additionally, in light of “a significant risk of re-activation of infection in association with a hip replacement”, Dr. Ricci indicated that he “would only recommend a hip replacement if there was absolutely no other option available and he was severely hampered by this pain...”

Subsequent Work

On or about May 21, 2004, Mr. Lyman obtained employment with Ron Schrock, who is an electrician and operates an electrical contracting business under the name Ron’s Electrical.

Notably, Mr. Schrock knew Mr. Lyman and assisted in helping Mr. Lyman in obtaining employment with him as a general laborer by affording Mr. Lyman with certain accommodations. In this employment Mr. Lyman assisted other electricians as an electrician helper, which involved operating power tools, running electrical wires, and performing various other tasks related to electrical wiring work in residential construction.

As an employee of Ron Schrock, Mr. Lyman worked 2 to 3 days a week. Mr. Lyman's work schedule depended on the availability of work he could do. Mr. Schrock noted that Mr. Lyman was not able to work at the same speed as other helpers, and Mr. Lyman could not work on certain projects that were not suitable for his physical limitations. Mr. Schrock further noted that Mr. Lyman exhibited physical disabilities, and he often worked with Mr. Lyman, as he was afraid that Mr. Lyman could not physically do the work required of an electrician helper.

Eventually, on or about December 6, 2004, Mr. Lyman quit his employment with Ron Schrock. According to both Mr. Lyman and Mr. Schrock, the termination involved a mutual agreement because of Mr. Lyman's health concerns, relating to his lack of mobility and diminishing eye sight.

Development of Cataracts

As a child Mr. Lyman suffered with a congenital eye condition involving Nystagmus and Strabismus. The examining physicians identified and discussed the nature of these conditions. According to the physicians, Nystagmus is a medical condition associated with "jerky movement" of the eyes. The eyes do not stay straight in place, but can jump side to side. Strabismus is a medical condition associated with abnormal muscle eye function. According to Mr. Lyman, as a child he suffered with severely crossed eyes, which resulted in him undergoing corrective surgery at age five.

Notably, even with corrective surgery and use of corrected lenses (eye glasses and/or contact lens) Mr. Lyman experienced as a child poor vision (myopia), which did not allow for complete restoration of eye sight. Mr. Lyman wore glasses until age 16. He was then fitted with contact lenses. As early as June 19, 1997, Mr. Lyman presented with a best corrected eye vision of 20/70 in each eye. He kept the same contact lens prescription from the time he was 16, until after suffering the work-related injury of May 24, 2002.

Mr. Lyman's poor vision prevented him from performing certain activities prior to May 24, 2002, and rendered him unable to qualify for military service. Yet, Mr. Lyman could do many things and was able to work. In order to read and perform eye-hand coordination activities, he adjusted to the impaired vision by getting closer to items. Additionally, prior to May 24, 2002, he managed to pass the vision test associated with having a driver's license, and obtained a driver's license, although he presented with a vision that is considered insufficient to obtain a driver's license. Elliot L. Korn, M.D., who is an ophthalmologist that the employer and insurer secured for the purpose of performing an independent medical examination, noted that a corrected vision of 20/40 is generally considered the minimal vision necessary for an individual to pass and obtain a driver's license from a DMV office. Although Dr. Korn acknowledged that, at times examiners will permit a person to pass the test and obtain a driver's license with a 20/50 or 20/60 vision.

In April 2003 Mr. Lyman presented to David M. Pierce, OD for purpose of securing a prescription for contact lens. At the time of this visit, Mr. Lyman underwent an eye examination, which allowed Dr. Pierce to provide Mr. Lyman with a "best corrected visual acuity" of 20/70 for both the right and left eyes. And Mr. Lyman's myopia was noted to be -7.00 in each eye. According to Dr. Pierce, this initial examination allowed him to fit Mr. Lyman with "contacts that were successful both in fit and visual acuity."

In addition, Dr. Pierce noted that, at the time of the April 2003 examination, Mr. Lyman did not suffer from cataracts. (The medical evidence indicates that cataracts involve a medical condition in the eyes, which causes cloudiness of vision, and can produce glare and cause the individual to experience difficulty seeing to read and drive, and to do activity that requires vision.)

Subsequent to undergoing hyperbaric oxygen treatment sessions, however, Mr. Lyman began to experience deterioration in his eye sight. In light of this deterioration in eye sight, Mr. Lyman returned to see Dr. Pierce on July 28, 2004. At the time of this examination, Dr. Pierce noted that Mr. Lyman presented with increased myopia, which had changed from -7.00 to -10.75 in each eye; and Mr. Lyman had developed nuclear sclerotic cataracts. (According to the physicians, cataracts or age-related nuclear cataracts is a medical condition involving the opacification of the natural lens system – "a general clouding of the lens system.") Notably, at the time of this visit, Dr. Pierce expressed concern that the hyperbaric oxygen treatment or the high doses of antibiotics had caused Mr. Lyman to develop the cataracts and that Mr. Lyman will need to undergo cataract surgery.

Mr. Lyman's eye sight continued to deteriorate, and hindered his ability to work and perform various activities, including driving a motor vehicle. In September 2004 Dr. Pierce determined that, even with corrected acuities, Mr. Lyman's vision no longer allowed him to qualify for a driver's license. Further, and based on his review of medical literature, Dr. Pierce causally related the loss of vision and development of "extreme myopia and cataract formation" to the dosage and duration of use by Mr. Lyman of the medication Bextra. Dr. Pierce further warned that, "if Mr. Lyman were to stay on this medication he would develop significant cataract development increased myopia and possible legal blindness."

Thereafter, the employer and insurer referred Mr. Lyman to Elliot L. Korn, M.D., who is an ophthalmologist, for an examination and evaluation. In light of his examination and evaluation of Mr. Lyman, Dr. Korn opined that Mr. Lyman presented with bilateral cataracts, posterior vitreous detachments in both eyes, and ptosis in both eyelids. Additionally, Dr. Korn noted that Mr. Lyman demonstrated a corrected vision with contact lens of 20/200 in both eyes, as compared to a vision of 20/70 in 1997 at its best.

Notably, in examining the cause of the cataracts and worsening of the myopia, Dr. Korn, in pertinent part, propounded the following comments:

To summarize, I feel that Mr. Lyman's cataracts is possibly consistent with his age, congenital esotropia and surgery, and congenital nystagmus. Although these may not be complete factors, his injury in which he had acute inflammation and

infection of his hip, which may cause to continue more inflammatory changes in the body, causing possibly a more rapid progressive in the lens.

I cannot be certain of any of this, because I have many patients who have not had any infections or problems, which have had developed cataracts much more quickly. I have performed cataract surgery on 17 years old people, who have had no other medical problems. Basically, it is my opinion that the cataract formation is not related to the Bextra or Hyperbaric oxygen therapy.

In light of Dr. Korn's evaluation and opinion, the employer and insurer denied liability associated with the development of cataracts and increased loss of vision, and declined to provide Mr. Lyman with medical care for treatment of the cataracts and visions loss. Mr. Lyman did not obtain medical care for treatment of and removal of the cataracts in the calendar years 2004, 2005, 2006, or 2007.

On or about March 24, 2007, the employer and insurer sought and obtained a supplemental examination and evaluation of Mr. Lyman by Dr. Korn. At the time of this examination, Dr. Korn noted that Mr. Lyman's corrected vision was 20/300 in both eyes. Additionally, Dr. Korn noted that Mr. Lyman presented with bilateral amblyopia secondary to nystagmus, mild cataracts and mild ptosis.

On or about November 17, 2007, Mr. Lyman presented to Rolfe A. Becker, M.D., who is a physician practicing in the specialty of ophthalmology and is affiliated with Cokingtin Eye Center, for an examination and evaluation. In light of his examination and evaluation of Mr. Lyman, Dr. Becker recommended that Mr. Lyman undergo surgical cataract removal. Additionally, in recommending this surgery, Dr. Becker expressed hope that Mr. Lyman would experience improvement in his vision, and possibly achieve his pre-injury vision of 20/70 in both eyes. However, without the surgery, Dr. Becker expressed concern that the cataracts would cause Mr. Lyman's vision to continue to deteriorate.

In addressing the cause of the cataracts and the likelihood of success associated with the recommended surgery, Dr. Becker propounded the following opinion:

On examination, Mr. Lyman had best corrected distant vision of 20/100 in each eye and near vision of Jaeger 10-12. He wears contact lenses with a high myopic correction. The other findings of significance include nystagmus and dense nuclear cataracts. Intraocular tension was normal (16 OD, 17 OS), as was muscle balance and confrontation fields. The fundi appeared intact.

Mr. Lyman described his vision change as progressively decreasing after his hyperbaric treatments. He states he was advised that his vision could get blurry, but would recover. It did not improve and, in fact, deteriorated. There was no specific comment about his vision after the use of Bextra.

The literature on hyperbaric treatment stated that a myopic shift can take place, but usually returns to pre-treatment level. However, in some cases, cataract

changes occur and progress. Mr. Lyman's cataracts, which are dense nuclear opacities or age-related type, are consistent with those described in the literature.

The literature is sparse regarding Bextra. It includes as adverse reactions, blurred vision and cataract, but only in less than 0.2% of cases. While I have inquired from the manufacturer for more detail, none has been forthcoming.

It is my medical opinion that Mr. Lyman has developed age-related nuclear cataracts consistent with the type described following hyperbaric treatment. I do not think Bextra has played a role in his visual disturbance.

Mr. Lyman's vision history suggested abnormal findings from birth, including reduced vision and nystagmus. With removal of the cataracts, which I strongly recommend, he should return to pre-cataract status, probably in the range of 20/60 to 20/70.

In a supplemental report dated January 14, 2008, Dr. Becker propounded the following opinion:

Mr. Lyman has pre-injury conditions which accounted for his poor vision (20/70 in each eye). These include nystagmus and strabismus. Cataracts were not present. It is still my medical opinion that the hyperbaric treatments caused lens changes which have progressed with reduced vision.

Since my December 7, 2007 report, I did receive a response from the manufacturer of Bextra. They gave reference to literature ... that states conjunctivitis and blurred vision are the two main ocular adverse effects of this medicine but usually self resolve. In studies done ... several adverse events could occur in 0.1-1.9% of patients. In my medical opinion, Bextra did not have any adverse effect causing Mr. Lyman's visual disturbance.

On or about January 14, 2008 the employer and insurer, by counsel, authorized Mr. Lyman to undergo treatment with Dr. Becker for removal of the cataracts. Thereafter, Mr. Lyman, by counsel, responded to the employer and insurer's letter authorizing treatment with Dr. Becker, stating that he was prepared to undergo the surgery, but "only when he receives his back TTD and an agreement of the payment of TTD until he has reached maximum medical improvement.

Subsequently, the employer and insurer took the position that the employee was unreasonably refusing medical care for treatment of the cataracts. Eventually, following discussion between counsel, and determining that Dr. Becker does not perform this surgery, the parties agreed to have Mr. Lyman undergo the cataract removal surgeries with Christopher S. Banning, M.D. who is a physician practicing in the specialty of ophthalmology and is affiliated with Cokingtin Eye Center and a colleague of Dr. Becker. (In agreeing to authorize this surgery, the employer and insurer continued to deny medical causation, and noted that it would be raised as an issue at a final hearing.)

In September 2008, Mr. Lyman presented to Dr. Banning for evaluation and consideration of surgery. At the time of this initial evaluation by Dr. Banning, Mr. Lyman's best vision was noted to be 20/200 in both eyes with eye pressures of 11 and 12. Pupil motility testing was unremarkable. Mr. Lyman had slow horizontal pendular nystagmus of both eyes. There was moderate upper lid ptosis of both eyes. There was moderate blepharitis of both eyes. The corneas were clear with extremely deep anterior chambers. Dr. Banning found dense nuclear sclerotic cataracts. The peripheral retinas appeared intact. Dr. Banning mentioned to Mr. Lyman that the congenital nystagmus with high myopia would cause a limited best corrected vision and increase a risk for retinal detachment.

On or about October 1, 2008, and October 14, 2008, Mr. Lyman underwent surgery for removal of the cataracts, with the surgeries performed by Dr. Banning. Subsequently, on or about November 14, 2008 Dr. Banning released Mr. Lyman from his care.

In a supplemental report dated December 30, 2008, and in response to questions propounded to him from Mr. Lyman's attorney following the surgeries involving removal of the cataracts, Dr. Becker propounded the following comments:

Question #1: The visual acuity following surgery for cataract removal in both eyes was 20/100 in each eye. Mr. Lyman was last seen on November 14, 2008 with these visions. Since it has been a short while for him to readjust to seeing after cataract surgery, there may be some improvement with time, but that would take weeks to months before I can answer that question.

Question #2: There was no unusual or new significant finding following cataract surgery that had not been discussed or reported prior to surgery.

Question #3: It is my opinion that Mr. Lyman has a stable situation with regard to his vision. As you know, he had poor vision prior to any cataract disturbance and he should return to a similar vision status and pattern as he adapts to his new situation. The prognosis is stable without any anticipation of a progressive or new problem or any specific deterioration. Obviously, with his genetic history of nystagmus and poor vision, there can be some deterioration with time and age and therefore, one has to be cautious to say that he will have no trouble, but at the same time, based upon post operative findings, I have nothing significant to report.

Question #4: With regard to hyperbaric oxygen and the development of cataracts, it is still my opinion that the hyperbaric oxygen therapy contributed to the development and progression of the cataracts which was initially reported and discussed.

Carmen Munday testified as a representative of the insurer. One significant purpose of the testimony concerned the issue of whether the insurer had offered medical treatment to Mr. Lyman, which he refused. Ms. Munday admitted that there were no agreements between Allmon Construction and Missouri Employers Mutual so that Allmon delegated its right to select medical providers to Missouri Employers Mutual.

Ms. Munday admitted that Dr. William Campbell had recommended to Missouri Employers Mutual that it refer Mr. Lyman to a rheumatologist. Dr. Woodward also recommended a referral to a rheumatologist for the same reason. The purpose of the referral would be to determine whether the use of Bextra or the hyperbaric oxygen caused the development of cataracts. Missouri Employers Mutual only looked to Ferrell Duncan Clinic in Springfield to determine if rheumatologists were available and then it dropped the search. In addition, Ms. Munday admitted that Dr. William Ricci had recommended that Mr. Lyman see a pain management specialist. And Munday admitted that the employer and insurer did not follow up upon the request.

In addition, Ms. Munday acknowledged that the employer and insurer did not offer to pay for cataract removal in the calendar years 2004, 2005, 2006, or 2007. Then, in January 2008, according to Ms. Munday, the insurer, through legal counsel, offered to send Mr. Lyman to Dr. Christopher Banning for cataract surgery. However, Ms. Munday did not have any personal knowledge of a specific referral to Dr. Banning in January 2008. And Ms. Munday acknowledged that, in July 2008, the insurer was unsure whether Dr. Banning would perform the recommended surgery for Mr. Lyman in context of the case involving workers' compensation.

P. Brent Koprivica, M.D., who is a physician with certification in the specialties of emergency medicine and preventive medicine in the subspecialty of occupational medicine, testified by deposition in behalf of the employee. Dr. Koprivica performed an independent medical examination of the employee on December 16, 2005. At the time of this examination, Dr. Koprivica took a history from Mr. Lyman, reviewed various medical records, and performed a physical examination of him. In light of his examination and evaluation of Mr. Lyman, Dr. Koprivica opined that, on May 24, 2002, Mr. Lyman sustained a work-related injury involving a fall off a ladder, which resulted in him suffering a left femoral neck fracture. Further, in noting that the injury involved treatment in the nature of an open reduction and internal fixation, which resulted in Mr. Lyman developing osteomyelitis with possible avascular necrosis of the femoral head, Dr. Koprivica opined that the injury caused Mr. Lyman to suffer intractable left hip pain, which impacted him severely.

In addition, Dr. Koprivica opined that, as a consequence of this May 24, 2002 injury, Mr. Lyman developed deep vein thrombosis, which complicated post-surgical treatment. And Dr. Koprivica opined that the injury to Mr. Lyman's left hip caused him to suffer mechanical back pain, resulting in him suffering severe degenerative disk disease of the lumbar spine at the level of L5-S1. In explaining this latter opinion, Dr. Koprivica propounded the following comment:

I felt that the development of the back pain followed as a direct and natural consequence of the direct injuries he had sustained to the left hip and the altered gait and weight bearing that arose because of that permanent injury.

In discussing his physical examination of Mr. Lyman during the taking of his deposition, Dr. Koprivica propounded in pertinent part, the following testimony:

Q. What did you find upon physical examination?

A. He was very unsteady because of the problems with not being able to symmetrically weight bear. He could not lie supine because of the left hip pain.

Although I could not do supine straight leg raising, I felt that Waddell's test were appropriate. I didn't believe he was exaggerating. I thought it was on a structural basis that he presented. He had severe atrophy of the left leg compared to the right. The definition of severe atrophy, again in the guides, is if there is a 3-centimeter or greater difference from one leg to the other.

In this case, he had 3 centimeters of difference in the thigh area with the right leg being bigger than the left. The left is the one he's not using, so that's going to lead to the atrophy.

Q. And that's obvious an objective finding?

A. That's correct. He had a healed scar in the area of the left hip where he had internal fixation and then had the surgical drainage procedures. He had a severe relative deficit of motion of the left hip compared to the right. If you look, his forward flexion was to 145 degrees on the right, but only 48 degrees on the left.

Again, if we do that relative percentage loss, where you take 145 minus 48 and divide it by 145, we're above the 60 percent range. And then I have the relative number in my report, but he has loss of motion in the left hip.

Neurologically, I thought he was intact. So I didn't believe any of the deficits in the left lower extremity were related to spinal pathology producing a neurological deficit; I thought it was mechanical from problems with the hip. He couldn't squat. He couldn't toe or heel ambulate. There was no evidence of any pathology higher up in the spine. That's the Babinski Clonus testing, looking to see if there's any compression on the spinal cord or brain lesion that's causing the deficit. There was no evidence of that.

In addressing the question of future medical care, Dr. Koprivica opined that "it is medically likely that [Mr. Lyman] will eventually require a total hip arthroplasty." And Dr. Koprivica notes that the May 24, 2002 injury resulted in Mr. Lyman suffering an infection to the bone, which Dr. Koprivica notes in his deposition testimony, is considered a "lifetime infection" and presents a concern about recurrence of infection, even if presently under control.

According to Dr. Koprivica, as a consequence of the May 24, 2002 accident, Mr. Lyman is governed by permanent restrictions, "posturally to a severe degree." The permanent restrictions imposed on Mr. Lyman by Dr. Koprivica are as follows:

- Captive sitting intervals should be limited on a sustained basis to less than 30 minutes.
- Standing should be limited to less than 30 minutes at any one interval.
- Mr. Lyman will need to use a cane in order to ambulate.
- Mr. Lyman should avoid activities on uneven surfaces.

- Mr. Lyman is restricted to ground level activities.
- Cumulatively, Mr. Lyman is restricted to between two and four hours on his feet as a maximum.
- Mr. Lyman is restricted entirely from crawling, kneeling, squatting or climbing.
- Mr. Lyman should avoid bending at the waist, pushing, pulling or twisting for safety reasons.

In rendering an assessment of permanent disability attributable to the May 24, 2002 accident, Dr. Koprivica opined that Mr. Lyman was at maximum medical improvement, and had sustained the following permanent partial disabilities:

- Mr. Lyman sustained a permanent partial disability of 50 percent to the left lower extremity, referable to the hip at the 207-week level.
- Mr. Lyman sustained a permanent partial disability of 15 percent to the body as a whole, referable to the low back.
- Mr. Lyman sustained a permanent partial disability of 5 percent to the body as a whole, referable to the deep venous thrombosis involving the left subclavian and left brachial vein and the permanent changes in the venous system.

Finally, Dr. Koprivica opined that, prior to the May 24, 2002 accident, Mr. Lyman presented with a “profound disability due to visual acuity deficits.” In considering whether the May 24, 2002 injury contributed to Mr. Lyman’s overall visual disability, Dr. Koprivica indicated that he would defer to an appropriate expert. However, in considering Mr. Lyman’s visual disability along with the restrictions causally related to the May 24, 2002 accident, Dr. Koprivica opined that “it is unrealistic to expect an ordinary employer to employ [Mr. Lyman]. In this regard, Dr. Koprivica recommended that Mr. Lyman obtain a formal vocational evaluation.

Notably, on April 12, 2008, following his receipt and review of Dr. Becker’s medical report dated December 7, 2007, Dr. Koprivica amended his prior medical opinion, opining that Mr. Lyman needs eye surgery in order to address the level of his visual acuity, and that this condition renders Mr. Lyman temporarily and totally disabled. In rendering this opinion, Dr. Koprivica accepts the opinion of Dr. Becker that the use of hyperbaric oxygen is the likely substantial factor in the progression of the cataracts.

Wilbur Swearingen, CRC, who is a vocational consultant, testified in behalf of the employee through the submission of his vocational report. Mr. Swearingen performed a vocational evaluation of the employee on May 22, 2006. At the time of this evaluation, Mr. Swearingen took a history from Mr. Lyman, reviewed various medical records, performed a vocational profile using the Dictionary of Occupational Titles, and performed a vocational assessment. In performing this evaluation, Mr. Swearingen identified four factors to determine whether Mr. Lyman could be placed in the open labor market. These factors are as follows:

- Consideration of Mr. Lyman's past work
- Consideration of whether Mr. Lyman had any transferrable skills
- Consideration of whether Mr. Lyman had the ability to be educated and retrained
- Consideration of whether Mr. Lyman could work in "common jobs" (entry level employment).

In his consideration of these factors, Mr. Swearingin opined that Mr. Lyman could not return to his past work based upon restrictions set forth by either Dr. Koprivica or Dr. Woodward. Further, Mr. Swearingin opined that Mr. Lyman did not have transferrable skills, and Mr. Lyman was not eligible for retraining or similar education due to his physical pain disorders, his limitations from such, and his poor vision. Additionally, Mr. Swearingin noted that Mr. Lyman was not eligible to work in common jobs, as most of these jobs require light or medium exertion as defined by The Dictionary of Occupational Titles, which require considerable standing and walking. Very few are sedentary positions and Mr. Lyman does not sit well; and he would not have the freedom to alternate between sitting and standing in such sedentary positions.

In light of the foregoing, Mr. Swearingin opined that it was unlikely that an employer would consider hiring Mr. Lyman based upon his work restrictions, poor vision, inability to drive, limited education, and history of manual work. Thusly, Mr. Swearingin opined that Mr. Lyman was permanently and totally disabled as a consequence of the incident of May 24, 2002, considered in isolation. (Yet, in rendering this opinion, Mr. Swearingin premises his opinion on Mr. Lyman's poor vision, which he attributes to the May 24, 2002 accident, apparently without consideration of the preexisting condition's contribution to the poor vision.) In rendering this opinion, Mr. Swearingin notes that Mr. Lyman would be unable to perform any of the following work as defined by the United States Department of Labor, which included the following functions: climbing, balancing, stooping, crouching, crawling; near and far acuity, depth perception, accommodation and color vision; work in extreme weather, extreme cold, wet and humid conditions; work with vibrations from equipment or supplies; high exposed places; and explosives or toxic and caustic chemicals.

James England, VRC, who is a vocational consultant, testified by deposition in behalf of the employer and insurer. Mr. England performed a vocational evaluation of Mr. Lyman based on his review of various records and deposition testimonies, including Mr. Lyman and Dr. Woodward, but without personally interviewing him or personally observing him. In light of his evaluation, Mr. England opined that Mr. Lyman was not unemployable as a consequence of the May 24, 2002 injury, considered in isolation.

In explaining his opinion, Mr. England noted that Mr. Lyman's hip problems "certainly restrict his overall employability, but do not cause him to be unemployable. In this regard, Mr. England noted that, absent Mr. Lyman's visual difficulties, Mr. Lyman would be a "good candidate" for the use of his skill and knowledge as a construction cost estimator, building systems repair supervisor, or employee at an answer desk in a home remodeling facility. He would also be a candidate for a variety of entry-level service positions such as security work, cashiering, and counter clerk work, absent the degree of visual problems.

However, according to Mr. England, if he considered the disabilities and limitations caused by Mr. Lyman's visual impairment, in combination with the disabilities and limitations attributable to the May 24, 2002 injury, he was of the opinion that Mr. Lyman was unemployable in the open and competitive labor market.

On cross-examination Mr. England acknowledged that Mr. Lyman performed heavy work before the primary injury. And Mr. Lyman could see well enough to work, to drive, and to complete certain college work before suffering the May 24, 2002 injury. Additionally, Mr. England acknowledged that Mr. Lyman suffered deterioration in his vision after the May 24, 2002 injury, and that the deteriorated vision never returned to the pre-injury baseline. Further, Mr. England acknowledged that Mr. Lyman's visual problems, as they presently exist, are a major impediment to his ability to work.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident occurring on May 24, 2002, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on May 24, 2002, which is substantive in nature, and not procedural, governs the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

The fundamental purpose of The Workers' Compensation Law for the State of Missouri is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted and is intended to extend its benefits to the largest possible class. Any question as to the right of an employee to compensation must be resolved in favor of the injured employee. *Cherry v. Powdered Coatings*, 897 S.W. 2d 664 (Mo. App., E.D. 1995); *Wolfgeher v. Wagner Cartage Services, Inc.*, 646 S.W.2d 781, 783 (Mo. Banc 1983). Yet, a liberal construction cannot be applied in order to excuse an element lacking in the claim. *Johnson v. City of Kirksville*, 855 S.W.2d 396 (Mo. App., W.D. 1993).

The party claiming benefits under The Workers' Compensation Law for the State of Missouri bears the burden of proving all material elements of his or her claim. *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995), citing *Meilves v. Morris*, 442 S.W.2d 335, 339 (Mo. 1968); *Bruflat v. Mister Guy, Inc.* 933 S.W.2d 829, 835 (Mo. App. W.D. 1996); and *Decker v. Square D Co.* 974 S.W.2d 667, 670 (Mo. App. W.D. 1998). Where several events, only one being compensable, contribute to the alleged disability, it is the claimant's burden to prove the nature and extent of disability attributable to the job-related injury.

Yet, the claimant need not establish the elements of the case on the basis of absolute certainty. It is sufficient if the claimant shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation claimant has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All

doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I.
Nature of Injury & Medical Causation

The evidence is supportive of a finding, and I find and conclude that on or about May 24, 2002, while working in Colorado constructing timber frames homes for Allmon Construction, Mr. Lyman sustained an injury by accident, which arose out of and in the course of his employment. The accident occurred as Mr. Lyman climbed a fiberglass ladder in order to retrieve a six-foot floor level. He climbed 8 to 10 feet, took the level and then began to step down from the ladder. As Mr. Lyman took a step down on the ladder, the ladder slipped on wet surface, causing Mr. Lyman to fall approximately 8 feet to the floor, landing on his left side and suffering injuries to his body, including his left hip. Mr. Lyman experienced immediate pain, and “hurt all over.”

Mr. Lyman sought and obtained immediate medical treatment, resulting in him being diagnosed with a left femoral neck fracture, and undergoing a surgical procedure involving a closed reduction and pinning of the left hip. Notably, the treating surgeon recommended that Mr. Lyman undergo a prosthetic hip replacement, premised on his belief that the displaced femoral neck fracture indicated a high incidence of avascular necrosis and non-union. Mr. Lyman, however, declined to have this surgery, indicating that he wanted as little metal in his body as possible and did not want to have hip prosthesis placement.) Mr. Lyman received post-operative care and remained in the hospital until receiving a discharge on May 28, 2002. He then traveled home by air transportation to Southwest Missouri for further medical treatment with Robert Hufft, M.D., who is an orthopedic surgeon.

Dr. Hufft assumed responsibility as the primary attending orthopedic surgeon. He performed three more surgeries to the left hip, which occurred on October 16, 2002, January 20, 2003, and January 27, 2003. During the course of this treatment, however, Mr. Lyman suffered a wound infection and developed osteomyelitis with potential avascular necrosis of the femoral head, causing Mr. Lyman to experience significant post-surgical treatment complications, which required Mr. Lyman to undergo hyperbaric treatment and the use of prescription medication that included Bextra.

Notably, the parties do not dispute that, on May 24, 2002, Mr. Lyman sustained an accident arising out of and in the course of his employment with Allmon Construction, and that this accident caused Mr. Lyman to sustain an injury to his left hip. The parties, however, dispute the nature and extent of injuries suffered by Mr. Lyman. The parties offer competing and differing medical opinion.

Primarily, the parties dispute whether the hyperbaric treatment and use of Bextra caused Mr. Lyman to develop cataracts, and to suffer deterioration in his vision. In context of this issue, it is noted that, as a child, Mr. Lyman suffered with a congenital eye condition involving Nystagmus and Strabismus, causing him to present with severely crossed eyes and to undergo corrective surgery at age five. Yet, even with corrective surgery and use of corrected lenses (eye

glasses and/or contact lens) Mr. Lyman experienced as a child poor vision (myopia), which did not allow for complete restoration of eye sight, and rendered him unable to qualify for military service.

Notwithstanding, Mr. Lyman could do many things and was able to work. In order to read and perform eye-hand coordination activities, he adjusted to the impaired vision by getting closer to items. Additionally, he managed to obtain a driver's license, and obtained a driver's license prior to sustaining the injury on May 24, 2002. However, subsequent to undergoing the hyperbaric treatment and taking Bextra, Mr. Lyman developed cataracts and experienced significant and progressive deterioration in his eyesight.

After consideration and review of the evidence, I find and conclude that hyperbaric treatment caused Mr. Lyman to develop cataracts and to suffer deterioration in his eyesight. In resolving this issue, having had an opportunity to observe Mr. Lyman at trial and to consider his testimony, I find Mr. Lyman credible and accept as true his testimony. Further, I resolve the differences in medical opinion in favor of Dr. Becker, who is a physician practicing in the specialty of ophthalmology, and who I find credible, reliable and worthy of belief. Dr. Becker provides explanation for his opinion, wherein he causally relates the development of cataracts to the hyperbaric treatment received by Mr. Lyman, which is causally related to the left hip injury subsequent development and treatment of osteomyelitis.

Several factors support this determination. First, before initiating the hyperbaric oxygen therapy treatment in June 2003, Mr. Lyman obtained a vision examination with an optometrist (Dr. Pierce), who found his vision to be 20/70, and did not find the presence of cataracts. Secondly, there is plausible biological explanation for hyperbaric oxygen therapy to cause cataracts, as stated in the Palmquist article cited by Dr. Becker. Thirdly, there is a close temporal relationship between the use of hyperbaric oxygen therapy and onset of myopia. And Mr. Lyman received sufficient oxygen therapy to explain why his vision deteriorated the way that it did, at least according to Dr. Becker and the literature he cited. Additionally, even Dr. Korn could not provide another explanation to consider why Mr. Lyman's visual acuity worsened at the time it did.

Finally, after consideration and review of the evidence, I find and conclude that the accident of May 24, 2002 caused Mr. Lyman to sustain an injury to his low back, which is in the nature of mechanical low back pain, and deep vein thrombosis. In rendering this determination I find Dr. Koprivica credible, reliable and worthy of belief, and accept as true his opinion that the May 24, 2002 accident caused Mr. Lyman to sustain additional injury in the nature of deep vein thrombosis and mechanical low back pain, resulting in him suffering severe degenerative disk disease of the lumbar spine at the level of L5-S1, and deep vein thrombosis.

Accordingly, I find and conclude that, as a consequence of the May 24, 2002 accident, Mr. Lyman sustained the following injuries:

- left femoral neck fracture, which necessitated receipt of multiple surgeries;
- development of cataracts and deterioration in vision;

- mechanical low back pain, resulting in severe degenerative disk disease of the lumbar spine; and
- deep vein thrombosis.

II. Future Medical Care

The evidence is supportive of a finding, and I find and conclude that, as a consequence of the accident of May 24, 2002, the employee, Blaine Lyman, has sustained injuries that will require future medical care in order to cure and relieve the employee from the effects of the injuries. In speaking to this issue, Dr. Koprivica opined that “it is medically likely that [Mr. Lyman] will eventually require a total hip arthroplasty.” And Dr. Koprivica notes that the May 24, 2002 injury resulted in Mr. Lyman suffering an infection to the bone, which is considered by Dr. Koprivica to be a “lifetime infection” and presents a concern about recurrence of infection, even if presently under control.

Notably, Dr. Campbell who is a physician practicing in the specialty of infectious disease, and who treated Mr. Lyman for the osteomyelitis, noted that, while Mr. Lyman no longer presented with infection and was doing well, “osteomyelitis can be notoriously recalcitrant to cure” and that Mr. Lyman is at risk for reactivation of the infection. In this context, Dr. Campbell propounded the following comments:

Reactivation of the infections has been witnessed even decades after presumed effective therapy. ... In addition, previously infected joints/bones are at increased risk for new infections due to the damage that they have sustained from the previous trauma and infection. Therefore, Mr. Lyman is at increased risk for new infections in the future.

I find Drs. Koprivica and Campbell credible and find no basis to disregard or reject their testimony. Accordingly, I accept as true their testimony concerning the nature of the injuries suffered by Mr. Lyman, and the risk of Mr. Lyman incurring additional medical care as a consequence of the May 24, 2002 accident.

Therefore, future medical care shall remain open. The employer and insurer are ordered to provide the employee, Blaine Lyman, with such additional medical care as may be deemed reasonable, necessary, and causally related to the accident of May 24, 2002.

III Refusal of Cataract Surgery

The employer and insurer, relying on Section 287.140.4, RSMo, argue that the employee refused to undergo cataract surgery offered by the employer and insurer, and his refusal disqualifies him from being eligible for receipt of temporary total disability compensation for the period he refused such treatment. Section 287.140.4, RSMo states,

No compensation shall be payable for the disability of an employee, if and in so

far as the same may be caused, continued or aggravated by any unreasonable refusal to submit to any medical or surgical treatment or operation, the risk of which is, in the opinion of the commission, inconsiderable in view of the seriousness of the injury.

This is an affirmative defense and the burden of proof rests upon the employer. *Berry v. Moorman Manufacturing Company*, 675 S.W.2d 131 (Mo. App. W.D. 1984).

There are several reasons to conclude that Mr. Lyman did not unreasonably refuse to submit to medical treatment. First, even the insurer's examining physician, Dr. Korn, testified that the decision to undergo cataract surgery is an individual choice for the patient. And, according to Dr. Korn, the decision to have cataract surgery must be based on the patient's perception of his ability to see and to do the things that he wants to do, insofar as there are complications to cataract surgery, including lost of the eye or eye sight, His testimony, plus the information sheet from Cokington Eye Center, reflects that the decision by Mr. Lyman to defer cataract surgery was reasonable. See, for example, *Jacobs v. Ryder System/Complete Auto Transit*, 789 S.W.2d 233 (Mo. App. E.D. 1990); *Berry v. Mormon Manufacturing Company*, *Supra*.

In addition, the employer and insurer denied liability and refused to offer cataract removal surgery for Mr. Lyman from 2004 to 2008. In this regard, Ms. Munday acknowledged that the employer and insurer did not offer to pay for cataract removal in the calendar years 2004, 2005, 2006, or 2007. Then, in January 2008, according to Ms. Munday, the insurer, through legal counsel, offered to send Mr. Lyman to Dr. Christopher Banning for cataract surgery. However, Ms. Munday did not have any personal knowledge of a specific referral to Dr. Banning in January 2008. And Ms. Munday acknowledged that, in July 2008, the insurer was unsure whether Dr. Banning would perform the recommended surgery for Mr. Lyman in context of the case involving workers' compensation. Although ostensibly offering the treatment in January 2008, the initial offer was illusory because the surgeon purportedly available to perform the surgery would not accept a Worker's Compensation referral. It was only discovered, when Ms. Munday was deposed, that the original eye surgeon contemplated by the insurer to perform the cataract surgery, would not accept a Worker's Compensation referral.

Accordingly, after consideration and review of the evidence, I find and conclude that Mr. Lyman did not unreasonably refuse to submit to medical treatment, and the benefits owed to Mr. Lyman shall not be reduced under Section 287.140.4, RSMo.

IV. Temporary Total Disability Compensation

The parties stipulated to the employer and insurer having provided Mr. Lyman with temporary total disability compensation in the amount of \$47,276.31, payable for the periods of May 25, 2002 to May 9, 2004, and November 23, 2004 to December 13, 2004. Yet, the employee seeks additional temporary disability compensation, claiming entitlement to temporary partial disability compensation for the period he worked for Ron Schrock (May 21, 2004 to December 6, 2004), and temporary total disability compensation for the period of December 6, 2004 to

November 14, 2008, less credit to the employer and insurer for temporary disability compensation paid by the employer and insurer during this claimed period.

The evidence is supportive of a finding, and I find and conclude that, following the extensive treatment provided to him, including surgery for cataract removal, Mr. Lyman reached maximum medical improvement on November 14, 2008 when Dr. Banning (colleague of Dr. Becker) released Mr. Lyman from his care. I further find and conclude that, the accident of May 24, 2002 caused Mr. Lyman to be temporarily and totally disabled during the period of May 25, 2002 to November 14, 2008; although Mr. Lyman obtained employment and worked for Ron Shrock during the period of May 21, 2004 to December 6, 2004. (The employment with Ron Schrock involved special accommodations being provided to Mr. Lyman, which allowed Mr. Lyman to work and earn \$6,156.23 as a helper for Ron Schrock.)

Accordingly, in light of the foregoing, I find and conclude that the employee Blaine Lyman is entitled to additional temporary total disability compensation in the amount of \$101,906.14, which represents 206 weeks, payable for the periods of May 9, 2004 through May 20, 2004, and December 14, 2004 through November 14, 2008. (During this 206 weeks period Mr. Lyman did not work and earn any income, did not receive any unemployment compensation, and did not receive any temporary total disability compensation.) And I find and conclude that the employee Blaine Lyman is entitled to temporary partial disability compensation in the amount of \$6,988.39, payable for the period of May 21, 2004 through December 6, 2004. (This temporary partial disability compensation includes a credit owed to the employer and insurer in the amount of \$918.71, which represents the temporary total disability compensation paid by the employer and insurer to the employee for the period of November 23, 2004 through December 6, 2004; and it includes a reduction of \$6,156.23 in income earned by the employee during the period of May 21, 2004 through December 6, 2004.) The calculation is as follows:

Temporary Total Disability Compensation Owed

May 9, 2004 through May 20, 2004 = 1 4/7 weeks
December 14, 2004 through November 14, 2008 = 204 3/7 weeks
1 4/7 weeks + 204 3/7 weeks = 206 weeks x \$494.69 (comp. rate) = \$101,906.14

Temporary Partial Disability Compensation Owed

Employee worked from May 21, 2004 through December 6, 2004 = 28 3/7 weeks
28 3/7 weeks of TTD for this period = \$14,063.33
Employees earnings for this period = \$6,156.23

ER/I paid TTD during Nov. 23, 2004 through Dec. 6, 2004 = 1 6/7 weeks
1 6/7 weeks of TTD = \$918.71

TTD (28 3/7 weeks).....	\$ 14,063.33
Earnings Reduction	- 6,156.23
Subtotal:.....	\$ 7,907.10

Employer Credit for TTD paid by ER/I (1 6/7 weeks) - 918.71
Total PPD Owed\$ 6,988.39

Therefore, the employer and insurer are ordered to pay to the employee, Blaine Lyman, \$101,906.14 in temporary total disability compensation. And the employer and insurer are ordered to pay to the employee, Blaine Lyman, \$6,988.39 in temporary partial disability compensation.

V.
Nature & Extent of Permanent Disability

The accident of May 24, 2002, and the injuries caused by this accident, causes Mr. Lyman to be governed by permanent restrictions and limitations. Having considered the various restrictions imposed by the several physicians, I find and conclude that, as a consequence of the May 24, 2002 accident, Mr. Lyman is governed by the permanent restrictions imposed on him by Dr. Koprivica. These restrictions are as follows:

- Captive sitting intervals should be limited on a sustained basis to less than 30 minutes.
- Standing should be limited to less than 30 minutes at any one interval.
- Mr. Lyman will need to use a cane in order to ambulate.
- Mr. Lyman should avoid activities on uneven surfaces.
- Mr. Lyman is restricted to ground level activities.
- Cumulatively, Mr. Lyman is restricted to between two and four hours on his feet as a maximum.
- Mr. Lyman is restricted entirely from crawling, kneeling, squatting or climbing.
- Mr. Lyman should avoid bending at the waist, pushing, pulling or twisting for safety reasons.

In light of the foregoing, and after consideration and review of the evidence, I find and conclude that, as a consequence of the May 24, 2002 accident, the employee Blaine Lyman suffered a significant injury and sustained permanent disability in the amounts and as follows:

- Mr. Lyman sustained a permanent partial disability of 40 percent to the left lower extremity, referable to the hip at the 207-week level (82.8 weeks).
- Mr. Lyman sustained a permanent partial disability of 5 percent to the body as a whole, referable to the low back (20 weeks).

- Mr. Lyman sustained a permanent partial disability of 5 percent to the body as a whole, referable to the deep venous thrombosis involving the left subclavian and left brachial vein and the permanent changes in the venous system (20 weeks).

Further, I find and conclude that the May 24, 2002 accident caused Mr. Lyman to suffer certain deterioration in his eyesight, deteriorating temporarily to a best vision of 20/200 in both eyes. However, following surgery and removal of the cataracts in October 2008, Mr. Lyman experienced significant improvement in his vision, improving to 20/100 shortly after the surgery. Additionally, in December 2008 Dr. Becker indicated that Mr. Lyman may experience some additional improvement in his vision with time. Similarly, in December 2008 Dr. Becker noted that, Mr. Lyman had poor vision prior to any cataract disturbance, and he should return to a similar vision status and pattern as he adapts to his new situation. Thus, Dr. Becker opines, the prognosis for Mr. Lyman's vision is stable without any anticipation of a progressive or new problem or any specific deterioration.

Notably, the parties do not offer any expert opinion of disability referable to Mr. Lyman's vision, as it existed subsequent to December 2008. Accordingly, while the accident of May 24, 2002, may have caused Mr. Lyman to sustain certain permanent disability beyond the disability he suffered prior to the accident, a finding of such disability would be speculative, and I make no such finding.

Finally, after consideration and review of the evidence, including vocational expert opinion of both Mr. Swearingin and Mr. England, I find and conclude that the restrictions caused by the accident of May 24, 2002, considered alone, do not render Mr. Lyman unemployable in the open and competitive labor market. The vision problems experienced by Mr. Lyman, which prevent him from driving an automobile and performing certain activities, and are included in the consideration of the vocational experts opining that Mr. Lyman is unemployable in the open and competitive labor market, includes consideration of his preexisting congenital condition causing poor vision.

Therefore, the employer and insurer are ordered to pay to the employee Blaine Lyman permanent partial disability compensation the amount of \$40,452.77, which represents 122.8 weeks of permanent partial disability compensation, payable at the applicable permanent partial disability compensation rate of \$329.42 per week.

VI. Second Injury Fund

The accident of May 24, 2002, considered alone, does not render the employee permanently and totally disabled. Yet, prior to the accident of May 24, 2002, Mr. Lyman suffered from a preexisting congenital condition involving nystagmus and strabismus, which caused Mr. Lyman to suffer poor vision (best correction at 20/70 in each eye). This medical condition caused Mr. Lyman to suffer certain permanent disability, and presented him with hindrances and obstacles to employment or potential employment, particularly with activities requiring good vision. Notably, the poor eyesight prevented Mr. Lyman from serving in the military and engaging in employment with the United States Armed Services.

The disability caused by the accident of May 24, 2002 combines with the preexisting industrial disability to cause Mr. Lyman to be governed by additional restrictions and limitations. The restrictions resulting from the accident of May 24, 2002, together with the preexisting disability, considered as a whole, render Mr. Lyman permanently and totally disabled. Notably, all of the vocational experts appear to agree that, with consideration of Mr. Lyman's poor vision and all the restrictions imposed on Mr. Lyman, he is unemployable in the open and competitive labor market.

Accordingly, after consideration and review of the evidence I find and conclude that, as a consequence of the accident May 24, 2002, in combination with the preexisting industrial disability, Mr. Lyman is permanently and totally disabled. Therefore, the Second Injury Fund is ordered to pay to the employee, Blaine Lyman, the sum of \$494.69 per week for the employee's lifetime. The payment of permanent total disability compensation by the Second Injury Fund is effective as of November 14, 2008 (when Mr. Lyman reached maximum medical improvement), and shall take into consideration 122.8 weeks of permanent partial disability, which is attributable to the employer and insurer. Accordingly, the Second Injury Fund shall pay the difference between permanent total disability compensation and permanent partial disability compensation (\$165.27) for 122.8 weeks, and thereafter the payment of \$494.69 per week, for life.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be paid is hereby approved, and shall be a lien against the proceeds until paid. Interest as provided by law is applicable.

Made by: /s/ L. Timothy Wilson
L. Timothy Wilson
Administrative Law Judge
Division of Workers' Compensation
(signed November 2, 2009)

This award is dated and attested to this 6th day of November, 2009.

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation