

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

Injury No.: 03-109407

Employee: Elbert McDaniel
Employer: General Motors Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

Date of Accident: July 8, 2003

Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006. The award and decision of Administrative Law Judge Kevin Dinwiddie, issued September 22, 2006, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 7th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Elbert McDaniel

Injury No. 03-109407

Dependents: N/A
Employer: General Motors Corporation
Additional Party: State Treasurer, as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: June 20, 2006; finally submitted August 21, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: KD/Isn

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? accident
4. Date of accident or onset of occupational disease: 7/8/03
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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:
Employee suffered a trip and fall on angle iron and injured his low back
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 10% permanent partial disability of the body as a whole, referable to the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? None
18. Employee's average weekly wages: maximum rate
19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

40 weeks of permanent partial disability from Employer at \$347.05 per week \$13,882.00

22. Second Injury Fund liability: claim as against the Second Injury Fund denied. See Award.

TOTAL: \$13,882.00

23. Future requirements awarded: Future medical care found in favor of employer. See Award.

Said payments to begin as of date of this Award 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:

Ray A. Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elbert McDaniel

Injury No: 03-109407

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: General Motors Corporation

Additional Party State Treasurer, as Custodian of the Second Injury Fund

Insurer: Self-Insured

Checked by: KD/Isn

The claimant, Mr. Elbert McDaniel; the employer, General Motors Corporation, self-insured; and the State Treasurer, as custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into various stipulations and agreements as to the issues and evidence to be submitted in this claim for compensation. The parties agreed to a joint hearing in the matter with a companion claim, Injury Number 04-069472.

The parties identified the following as the issues to be resolved at hearing in Injury Number 03-109407:

Injury by occupational disease;

Notice;
Medical causation;
Future medical care;
Permanent partial disability, and
Liability of the Second Injury Fund.

Mr. Elbert McDaniel appeared at hearing and testified on his own behalf. The claimant also submitted the deposition testimony of Robert Poetz, D.O. The employer and insurer submitted the deposition testimony of Bernard C. Randolph, Jr., M.D. The State Treasurer, as Custodian of the Second injury Fund, declined to call any witnesses on its behalf.

EXHIBITS

The hearsay objection of the Second Injury Fund has been sustained as to the opinion expressed by Dr. Morrow within his report, as contained in Claimant's Exhibit K, as to nature and extent of permanent partial disability. Subject to the aforementioned ruling, the following exhibits are in evidence:

Claimant's Exhibits

- A. Deposition of Robert Poetz, D.O., taken on 1/30/06
- B. Certified medical records of Barnes-Jewish Hospital
- C. Certified medical records of Barnes West County Hospital

- D. Certified medical records of Christian Hospital Northeast-Northwest
- E. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit signed on 4/3/04
- F. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit dated 11/7/03
- F-1. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit signed on 5/27/04
- G. Medical records of Adam LaBore, M.D.
- H. Reports of Robert P. Poetz, D.O., dated 10/13/04; 10/26/04; 9/12/05
- I. Medical records of Robert A. Shively, M.D.
- J. Certified medical records of Saint Joseph Hospital West
- K. Certified records of the Division of Workers' Compensation, dated 12/06/04
- L. Certified medical records of Melvin Butler, M.D.

Employer and Insurer's Exhibits

- 1. Deposition of Bernard C. Randolph, Jr., M.D., taken on 3/20/06
- 2. General Motors Physical History Form
- 3. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit dated 2/1/05

Second Injury Fund Exhibits

None offered.

SUMMARY OF WITNESS TESTIMONY

The parties at hearing stipulated to the employment history of the claimant, Mr. Elbert McDaniel, prior to his employment with General Motors Corporation in March of 1985. The parties acknowledge that the claimant is a

high school graduate, and that prior to his employment at G.M. he worked a variety of jobs as a porter; a physical instructor; a van driver; and as a carpenter for McCarthy Brothers.

Mr. McDaniel relates that his duties varied from menial, such as working on locks or doors, to more involved construction of partitions and platforms. Claimant relates that his work often involved heavy lifting of construction lumber, angle iron, dry wall, scaffolding, bags of concrete weighing as much as 80 to 90 pounds, and tanks weighing as much as 60 to 80 pounds. Claimant recalls that he was constantly being called upon to patch concrete, and recalls that he would also do roof work that would require him to carry 40 to 50 pounds of tar up as many as three to four stories.

Mr. McDaniel recalls that he attended courses at Forest Park Community College from time to time; that changes to his work schedule were disruptive to his education; and that he attended as many as 1 ½ to 2 years of college but did not earn a degree. Mr. McDaniel recalls that for a year he attended courses in Ministry at Leal University, but did not attain a degree.

Mr. McDaniel acknowledges a history of right shoulder, bilateral knee, and prostate complaint beginning in the 1990s. Claimant recalls suffering a work injury to his right rotator cuff in 1995, with a reinjury in 1996. Claimant recalls that he did not have a surgery, and was able to continue working as a carpenter, noting that his shoulder injury resulted in a loss of strength that affected his ability to lift on occasion.

Mr. McDaniel recalls that his prostate problem did not affect him at his work, but notes that after his back injury he was obliged to go to the bathroom as many as six times a day.

Mr. McDaniel recalls suffering from excruciating knee pain after a motor vehicle accident occurring on the way to work in 1997 or 1998. Mr. McDaniel mentioned the motor vehicle accident in response to a question from his counsel as to when low back complaints first began, but claimant did not provide a history of back treatment thereafter, and testified only as to knee complaints to his family physician, Dr. Butler, after that particular accident. Mr. McDaniel does not recall missing any time from work after his motor vehicle accident, and notes that he was able to continue working as a carpenter with knee pain from time to time. Claimant also recalls suffering a medial meniscus tear to his right knee that was repaired in 1969 or 1970. Mr. McDaniel relates that he had no problems with his knee after that repair, noting that he began to suffer from knee pain in varying degrees in the 1990s. Mr. McDaniel does not recall a specific incident as to his knees, noting that over the 18 years of employment with General Motors as a carpenter, he was obliged to perform tasks that required that he bend, stoop, crawl, and lift.

Mr. McDaniel recalls that on 7/8/03 he was working with another carpenter, building platforms during a plant shutdown. Claimant recalls tripping over some angle iron that had been bolted to the floor, and falling while wearing his tool pouch and with tools in hand. Mr. McDaniel recalls suffering "excruciating pain" in his low back, and acknowledges that he continued to work that day, and continued to work thereafter, without seeking medical attention, supposing that he would recover from the event. Mr. McDaniel recalls that he did not report the injury or seek treatment for about six weeks thereafter, and that he began treating at the plant dispensary while he continued to work. Claimant recalls being referred by his family physician, Dr. Butler, to Dr. Shively, who treated the claimant for knee complaints, and subsequently referred claimant to Dr. Fotopoulos for treatment as to low back complaints. Claimant relates that he continued working while under the care of Dr. Fotopoulos, and recalls attending physical therapy at Christian Hospital Northeast-Northwest. Claimant recalls that in November of 2004 his treatment was switched from Dr. Fotopoulos to Dr. LaBore. Mr. McDaniel recalls receiving injections to his low back, as many as 4 or 5 since 2003, and most recently receiving an injection in December of 2005. Mr. McDaniel reports temporary relief of his low back pain for two weeks or so.

Claimant relates that his last day of work at General Motors was on 10/04/04. Mr. McDaniel recalls that he was on sick leave at one point; that he attempted to return to work; but that his pain complaints in his knees and back, and complaints as to his right shoulder from time to time, caused him to seek retirement with 20 years of service. Mr. McDaniel relates that chronic back pain throughout the day caused him to come off of the job.

The claimant denied a history of back complaint prior to the trip and fall on angle iron on 7/8/03. Mr. McDaniel acknowledged his handwriting on the Plant History Form, Employer and Insurer's Exhibit Number 2, dated 2/18/03, and agrees that in answer to number 58 he acknowledged that he had back pain from time to time. It is further worthy of note that at number 5 on the form, claimant answered "no" to the question "Are you able to do any work assignments that you may be given?", and wrote in behind that question, "Knee & Back problems at Times".

FINDINGS OF FACT AND RULINGS OF LAW

NOTICE

The parties stipulated to an injury by accident arising out of and in the course of employment occurring on 7/8/03. In addition to a single event trauma on 7/8/03, the claimant as a further ground for recovery claims to have suffered an injury by occupational disease.

Although the written reports of Dr. Poetz fail to make any mention of causal relationship between repetitive traumas occurring at work and the degenerative condition of the claimant's back, the issue as to causal connection was raised during redirect examination of Dr. Poetz in his deposition, Claimant's Exhibit A, beginning on page 54. No seven-day rule objection to this testimony was made at deposition. In the matter of a repetitive trauma claim, the notice provisions of Section 287.420 RSMo. do not necessarily apply, and the logic of the notice requirement does not apply until at least the claimant has reason, based on expert medical diagnosis, that the cause of the condition complained of is work related. Kintz v. Schnucks Markets, Inc., 889 S.W.2d 121 (Mo. E.D. 1994). The Court later determined that the notice provisions of Section 287.420 RSMo simply do not apply to claims of occupational disease. Endicott v. Display Technologies, Inc., 77 S.W.3d 612, 616 (Mo. Banc 2002).

With respect to notice as it applies to the traumatic slip and fall suffered by Mr. McDaniel on or about 7/8/03, the testimony of Mr. McDaniel persuades that despite suffering from "excruciating pain" on the date in issue, he failed to provide actual notice of the injury within the time provided by statute, nor did he seek medical attention for the six weeks following the event. The notice statute, where applicable, forgives such failure to provide notice if the employer is not prejudiced by the failure to receive a timely notice. The claimant has the burden to show that despite the failure to provide the statutory notice, the employer still had the opportunity to investigate the claim of injury and to minimize the injury by providing treatment.

The employer stipulated to injury by accident arising out of and in the course of employment. Such stipulation, given the testimony of Mr. McDaniel as to the circumstances surrounding his trip and fall on angle iron at work, mitigates severely against a finding that the employer was unable to conduct a timely investigation as to the whether the accident occurred. Further, there is nothing in the expert medical testimony to suggest that the delay in giving notice deprived the employer of the opportunity to provide medical attention to minimize the disability. To the contrary, the testimony of both Drs. Poetz and Randolph suggest that the claimant suffered a lumbar strain and/or contusion as a result of his work injury on 7/8/03. There is nothing in evidence to suggest that the failure to give timely notice precluded the employer from providing medical attention that would have minimized the disability suffered by Mr. McDaniel as a consequence of the soft tissue injury suffered to his low back. The issue as to notice is found in favor of the employee.

MEDICAL CAUSATION/OCCUPATIONAL DISEASE

Dr. Poetz believes that the degenerative condition found in the claimant's back is the result of repetitive traumas, and that wear and tear on the back over the years as a carpenter at G.M. played a substantial part in the development of the condition (Claimant's Exhibit A, at p. 63). To the contrary, Dr. Randolph believes the claimant to be suffering from preexisting lumbar degenerative disease and from degenerative spinal stenosis; does not believe the conditions to be work related; and does not believe the accident on 7/8/03 substantially aggravated the degenerative condition in the spine (Employer and Insurer's Exhibit No. 1, at pp. 7-8). Dr. Randolph further believes that the limitations that he would place on the claimant's activity with regard to the low back are related to the degenerative disk disease.

A complicating factor in the analysis as to causation with respect to the claimant's back complaints is the insistence of Mr. McDaniel at hearing that he had no back complaints prior to his trip and fall on 7/8/03. The record as a whole simply does not support, and in fact directly contradicts the assertion that Mr. McDaniel had no pain complaints prior to 7/8/03. For example, contained within Claimant's Exhibit E is a report as to an x-ray of the lumbar spine and of the right hip dated 12/13/02, indicating findings of degenerative disc disease at L2-L5. Further, both Drs. Poetz and Randolph provide a rating of disability for degenerative disc disease of the lumbar spine as it preexisted the injury by accident on 7/8/03.

The testimony of Dr. Randolph as to medical causal relationship between the degenerative condition of the claimant's low back and his work at General Motors is found more persuasive than that of Dr. Poetz. The issue as to occupational disease is found in favor of the employer and insurer. Claimant has failed to persuade that he suffered an injury by occupational disease involving the low back.

PERMANENT PARTIAL DISABILITY

The expert medical testimony persuades that the claimant suffered a traumatic trip and fall on 7/8/03 that brought about further permanent disability that added to a preexisting and disabling condition in the low back. The testimony of Mr. McDaniel, in conjunction with the expert medical opinion of Drs. Poetz and Randolph, persuades that as a result of his work injury on 7/8/03, Mr. McDaniel suffered a back strain that resulted in a permanent partial disability equivalent to 10% of the body as a whole, over and above any disability that preexisted relating to a degenerative condition of the low back. The total amount due from the employer and insurer, for 40 weeks of disability at the stipulated maximum weekly rate of \$347.05, is \$13,882.00.

FUTURE MEDICAL CARE

Dr. Poetz opined as to the need for future medical care related to knee complaints that are the subject of the companion claim heard in combination with the low back claim. As for the low back, Dr. Poetz indicated the possible need for lumbar myelogram in the future, and possible treatment, such as surgery if necessary. Dr. Randolph, to the contrary, found the claimant to be at maximum medical improvement, and believed that the back strain, while disabling, did not exacerbate the progressive and degenerative condition in the low back.

The testimony of Dr. Poetz fails to persuade that the back strain suffered by Mr. McDaniel on 7/8/03 resulted in the need for ongoing care to cure and relieve of the effects of the trip and fall suffered at work on 7/8/03. The testimony of Dr. Randolph, to the effect that Mr. McDaniel was at maximum medical improvement and in need of no further treatment relative to a back strain, is found more persuasive. The issue as to future medical care is found in favor of the employer and insurer.

LIABILITY OF THE SECOND INJURY FUND

There is nothing in the evidence to support the conclusion that Mr. McDaniel was rendered unemployable on the open labor market as a result of the combination of his back injury on 7/8/03 and any conditions preexisting that injury that were permanently and partially disabling. Further, to invoke entitlement to an award of permanent partial disability for the combination of disabling conditions, Mr. McDaniel is obliged to reach the statutory threshold of 50 weeks of disability for a body as a whole injury, which would be a minimum a 12.5% permanent partial disability of the body as a whole, Subsection 1 of Section 287.220 RSMo. Inasmuch as permanent disability relating to the work injury has failed to reach the threshold for Second Injury Fund liability, the claim as against the Second Injury Fund must be denied.

This award is subject to a lien in favor of Ray A. Gerritzen, Attorney at Law, in the amount of 25% thereof for necessary legal services rendered.

This award is subject to interest as provided by law.

Date: September 22, 2006

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation

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

Injury No.: 04-069472

Employee: Elbert McDaniel
Employer: General Motors Corporation
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: July 2004
Place and County of Accident: St. Charles County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 22, 2006, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kevin Dinwiddie, issued September 22, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 7th day of May 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Dependents: N/A
Employer: General Motors Corporation
Additional Party: State Treasurer, as Custodian of the Second Injury Fund
Insurer: Self-Insured
Hearing Date: June 20, 2006; finally submitted August 21, 2006

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and
Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: KD/Isn

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: alleged July of 2004
5. State location where accident occurred or occupational disease was contracted: alleged in St. Charles County, MO
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? N/A
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes, self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See Award
12. Did accident or occupational disease cause death? Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? See Award
18. Employee's average weekly wages: maximum rates
19. Weekly compensation rate: \$662.55/\$347.05
20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable:

The claims as against the employer and insurer and as against the State Treasurer, as Custodian of the Second Injury Fund must be denied. See award.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Elbert McDaniel

Injury No: 04-069472

Before the
**DIVISION OF WORKERS'
COMPENSATION**

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

Dependents: N/A

Employer: General Motors Corporation

Additional Party State Treasurer, as Custodian of the Second Injury Fund

Insurer: Self-Insured

Checked by: KD/Isn

The claimant, Mr. Elbert McDaniel; the employer, General Motors Corporation, self-insured; and the State Treasurer, as custodian of the Second Injury Fund, appeared at hearing by and through their counsel and entered into various stipulations and agreements as to the issues and evidence to be submitted in this claim for compensation. The parties agreed to a joint hearing in the matter with a companion claim, Injury Number 03-109407.

The parties identified the following as the issues to be resolved at hearing in Injury Number 04-069472:

Injury by accident arising out of and in the course of employment;
Injury by occupational disease;
Notice;
Medical causation;

Future medical care;
Temporary total disability;
Permanent disability; and
Liability of the Second Injury Fund.

Mr. Elbert McDaniel appeared at hearing and testified on his own behalf. The claimant also submitted the deposition testimony of Robert Poetz, D.O. The employer and insurer submitted the deposition testimony of Bernard C. Randolph, Jr., M.D. The State Treasurer, as Custodian of the Second injury Fund, declined to call any witnesses on its behalf.

EXHIBITS

The hearsay objection of the Second Injury Fund has been sustained as to the opinion expressed by Dr. Morrow within his report, as contained in Claimant's Exhibit K, as to nature and extent of permanent partial disability. Subject to the aforementioned ruling, the following exhibits are in evidence:

Claimant's Exhibits

- M. Deposition of Robert Poetz, D.O., taken on 1/30/06
- N. Certified medical records of Barnes-Jewish Hospital
- O. Certified medical records of Barnes West County Hospital
- P. Certified medical records of Christian Hospital Northeast-Northwest
- Q. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit signed on 4/3/04
- R. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit dated 11/7/03
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- U. Medical records of Robert A. Shively, M.D.
- V. Certified medical records of Saint Joseph Hospital West
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- X. Certified medical records of Melvin Butler, M.D.

Employer and Insurer's Exhibits

- 1. Deposition of Bernard C. Randolph, Jr., M.D., taken on 3/20/06
- 2. General Motors Physical History Form
- 3. Certified medical records of Orthopaedic Surgery, Division of Washington University Medical School, by affidavit dated 2/1/05

Second Injury Fund Exhibits

None offered.

SUMMARY OF WITNESS TESTIMONY

The parties at hearing stipulated to the employment history of the claimant, Mr. Elbert McDaniel, prior to his employment with General Motors Corporation in March of 1985. The parties acknowledge that the claimant is a high school graduate, and that prior to his employment at G.M. he worked a variety of jobs as a porter; a physical instructor; a van driver; and as a carpenter for McCarthy Brothers.

Mr. McDaniel relates that his duties varied from menial, such as working on locks or doors, to more involved construction of partitions and platforms. Claimant relates that his work often involved heavy lifting of construction lumber, angle iron, dry wall, scaffolding, bags of concrete weighing as much as 80 to 90 pounds, and tanks weighing as much as 60 to 80 pounds. Claimant recalls that he was constantly being called upon to patch concrete, and recalls that he would also do roof work that would require him to carry 40 to 50 pounds of tar up as many as three to four stories.

Mr. McDaniel recalls that he attended courses at Forest Park Community College from time to time; that changes to his work schedule were disruptive to his education; and that he attended as many as 1 ½ to 2 years of college but did not earn a degree. Mr. McDaniel recalls that for a year he attended courses in Ministry at Leal University, but did not attain a degree.

Mr. McDaniel acknowledges a history of right shoulder, bilateral knee, and prostate complaint beginning in the 1990s. Claimant recalls suffering a work injury to his right rotator cuff in 1995, with a reinjury in 1996. Claimant recalls that he did not have a surgery, and was able to continue working as a carpenter, noting that his shoulder injury resulted in a loss of strength that affected his ability to lift on occasion.

Mr. McDaniel recalls that his prostate problem did not affect him at his work, but notes that after his back injury he was obliged to go to the bathroom as many as six times a day.

Mr. McDaniel recalls suffering from excruciating knee pain after a motor vehicle accident occurring on the way to work in 1997 or 1998. Mr. McDaniel mentioned the motor vehicle accident in response to a question from his counsel as to when low back complaints first began, but claimant did not provide a history of back treatment thereafter, and testified only as to knee complaints to his family physician, Dr. Butler, after that particular accident. Mr. McDaniel does not recall missing any time from work after his motor vehicle accident, and notes that he was able to continue working as a carpenter with knee pain from time to time. Claimant also recalls suffering a medial meniscus tear to his right knee that was repaired in 1969 or 1970. Mr. McDaniel relates that he had no problems with his knee after that repair, noting that he began to suffer from knee pain in varying degrees in the 1990s. Mr. McDaniel does not recall a specific incident as to his knees, noting that over the 18 years of employment with General Motors as a carpenter, he was obliged to perform tasks that required that he bend, stoop, crawl, and lift.

Mr. McDaniel recalls that on 7/8/03 he was working with another carpenter, building platforms during a plant shutdown. Claimant recalls tripping over some angle iron that had been bolted to the floor, and falling while wearing his tool pouch and with tools in hand. Mr. McDaniel recalls suffering "excruciating pain" in his low back, and acknowledges that he continued to work that day, and continued to work thereafter, without seeking medical attention, supposing that he would recover from the event. Mr. McDaniel recalls that he did not report the injury or seek treatment for about six weeks thereafter, and that he began treating at the plant dispensary while he continued to work. Claimant recalls being referred by his family physician, Dr. Butler, to Dr. Shively, who treated the claimant for knee complaints, and subsequently referred claimant to Dr. Fotopoulos for treatment as to low back complaints. Claimant relates that he continued working while under the care of Dr. Fotopoulos, and recalls attending physical therapy at Christian Hospital Northeast-Northwest. Claimant recalls that in November of 2004 his treatment was switched from Dr. Fotopoulos to Dr. LaBore. Mr. McDaniel recalls receiving injections to his low back, as many as 4 or 5 since 2003, and most recently receiving an injection in December of 2005. Mr. McDaniel reports temporary relief of his low back pain for two weeks or so.

Claimant relates that his last day of work at General Motors was on 10/04/04. Mr. McDaniel recalls that he was on sick leave at one point; that he attempted to return to work; but that his pain complaints in his knees and back, and complaints as to his right shoulder from time to time, caused him to seek retirement with 20 years of service. Mr. McDaniel relates that chronic back pain throughout the day caused him to come off of the job.

The claimant denied a history of back complaint prior to the trip and fall on angle iron on 7/8/03. Mr. McDaniel acknowledged his handwriting on the Plant History Form, Employer and Insurer's Exhibit Number 2, dated 2/18/03, and agrees that in answer to number 58 he acknowledged that he had back pain from time to time. It is further worthy of note that at number 5 on the form, claimant answered "no" to the question "Are you able to do any work assignments that you may be given?", and wrote in behind that question, "Knee & Back problems at Times".

FINDINGS OF FACT AND RULINGS OF LAW

INJURY BY ACCIDENT ARISING OUT OF AND IN THE

COURSE OF EMPLOYMENT/MEDICAL

CAUSATION/OCCUPATIONAL DISEASE

Mr. McDaniel testified that there was no one specific incident at work that caused him to make a complaint as to his knees. Further, there is nothing in the various medical records to support the conclusion that the claimant suffered a specific traumatic event in July of 2004 or on any other particular date at work that could be interpreted as a discrete injury by accident to his knees. Claimant testified to a history of having worked as a carpenter at G.M for over 18 years, bending, stooping, crawling, and lifting on a regular basis up until his last day of work for G.M. on or about 10/04/04.

The expert medical testimony in the matter, in conjunction with claimant's history of evaluation and treatment of knee complaint, persuades that Mr. McDaniel suffers from an osteoarthritic condition that is present in both of his knees. On 8/15/01 x-ray of both knees was interpreted as follows:

"Standing frontal view of both knees demonstrate moderate to marked degenerative change within both knees. It is most pronounced within the medial femoral tibial joint space on the left and slightly worse within the lateral femorotibial joint space on the right. No acute fracture or dislocation is identified" (Medical records of Washington University Medical School, Claimant's Exhibit E). As early as 10/18/00, an x-ray of the right knee was interpreted as showing "Severe three compartment osteoarthritis of the right knee with osteocartilaginous bodies in the posterior aspect of the joint"

(Medical records of Barnes-Jewish Hospital, Claimant's Exhibit B).

The letter of Dr. Shively to Dr. Butler dated 8/15/01 (See Claimant's Exhibit E) notes, in part, as follows: "I saw Mr. McDaniel in the office today. He is a 57 year-old gentleman who complaining of both knees and his left heel. He had difficulty for a number of years. He had an open right medical meniscectomy in the late 70s. He did ok until about 1 year ago, when he had gradual onset of bilateral knee pain, worsening over time..." Dr. Shively went on to note that he found Mr. McDaniel to have severe osteoarthritis, and speculated that ultimately the claimant would need a bilateral total knee replacement.

In May of 2003 Dr. Shively treated knee complaints with intrarticular steroid injections. In May of 2004, Dr. Shively had further occasion to evaluate the claimant's knee complaints. X-ray taken on 5/20/04 was interpreted as follows:

Right knee: there is severe tricompartmental osteoarthritis of the right knee with near bone-on-bone appearance in the medial compartment. There is exuberant osteophytosis in the patellofemoral compartment, also with near bone-on-bone appearance in lateral projection. A 1 cm ossified fragment projecting posterior to the right knee may represent a loose body, but is unchanged from the prior study. There is no fracture. There is no dislocation. There is no effusion.

Left knee: There is severe tricompartmental osteoarthritis of the left knee, worst in the lateral compartment. There is no effusion. There is no fracture or dislocation.

Impression: Stable bilateral severe tricompartmental osteoarthritis.

The earliest record of x-ray finding in the knee is by reference of Dr. Morrow to an x-ray taken of the right knee as a part of his disability evaluation dated 1/21/97 (See Claimant's Exhibit K). Dr. Morrow noted, in part, that the x-rays revealed "very thin medial joint space getting close to bone on bone..."

Both Drs. Poetz and Randolph agree that the claimant suffers from osteoarthritis that had been present for some time. Dr. Poetz further believes that the wearing thin of medial cartilage in the knees is work related (Claimant's Exhibit A, at page 15). To the contrary, Dr. Randolph opined with respect to the knees as follows:

With regard to Mr. McDaniel's knee complaints, he has severe osteoarthritis of the knees. In my opinion, these conditions are related to constitutional and hereditary factors and that work activities have not substantially aggravated or caused

these conditions. It should be also noted that he has a history of a surgery to the right knee in the 1960s which was for a cartilage injury. And this has also contributed to the development of osteoarthritis of the right knee. (Employer and Insurer's Exhibit No 1, at page. 8)

Dr. Randolph further noted that the claimant provided him with a history of slip and fall in July of 2004 that Dr. Randolph was unable to verify through his review of the record. Note that at trial Mr. McDaniel offered no testimony with respect to a fall in July of 2004 affecting his knees, and further specifically disavowed a history of trauma to his knees as the result of a specific event.

The claimant has the burden of proving all the essential elements of the claim for compensation. It is noted that the proof as to medical causation need not be by absolute certainty, but rather by a reasonable probability. "Probable" means founded on reason and experience which inclines the mind to believe but leaves room for doubt. Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo.App. 1986).

"Medical causation, not within the common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause". Brundige v. Boehringer Ingelheim, 812 S.W. 2d 200, 202 (Mo.App. 1991); McGrath v. Satellite Sprinkler Systems, Inc., 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). The ultimate importance of expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Choate v. Lily Tulip, Inc., 809 S.W. 2d 102, 105 (Mo.App.1991).

Medical causation as to a progressive degenerative condition of the lower extremities cannot be considered uncomplicated. The commission may not substitute an administrative law judge's personal opinion on the question of medical causation for the uncontradicted testimony of a qualified medical expert. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo banc 1994), citing Merriman v. Ben Gutman Truck Service, Inc., 392 S.W.2d 292, 297 (Mo. 1965).

"A medical expert's opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence." (citations omitted) Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App. 1990).

Drs. Poetz and Randolph disagree as to a medical causal relationship between the degenerative condition suffered by the claimant in his knees and his work as a carpenter at General Motors. Claimant has the burden to prove not only a medical causal relationship, but must also prove that work was "a substantial factor in the cause of the resulting medical condition or disability", Subsection 2 of Section 287.020 RSMo.

The testimony of Dr. Randolph is found more persuasive than that of Dr. Poetz as it relates to the medical causal relationship between the claimant's degenerative and progressive knee condition and his work at General Motors. Further, there is no evidence to support the conclusion that the claimant suffered some traumatic event on or about 7/04 that would have resulted in a new injury or exacerbation of the degenerative condition of the knees at the time.

The issues as to medical causation, occupational injury, and injury by accident arising out of and in the course of employment are found in favor of the employer and insurer. The claim for compensation as against the employer and insurer is denied.

A finding in favor of the employer and insurer as to medical causation, occupational disease, and injury by accident arising out of and in the course of employment renders moot the issues as to notice, future medical care, temporary total disability, and permanent disability.

LIABILITY OF THE SECOND INJURY FUND

Second Injury Fund liability is premised on a finding or stipulation as to a compensable work injury under the act, Section 287.220 RSMo. Inasmuch as the claimant has failed to prove that he has suffered a compensable work injury, the claim as against the Second Injury Fund must be denied.

Date: September 22, 2006

Made by: /s/ KEVIN DINWIDDIE
KEVIN DINWIDDIE
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ PATRICIA "PAT" SECREST
PATRICIA "PAT" SECREST
Director
Division of Workers' Compensation