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

Injury No.: 01-004755

Employee: Alice McPherson

Employer: New Prime, Inc.

Insurer: Self-Insured

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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 8, 2010. The award and decision of Administrative Law Judge L. Timothy Wilson, issued December 8, 2010, 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 9th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Alice McPherson Injury No. 01-004755

Dependents: N/A

Employer: New Prime, Inc.

Insurer: N/A (Self-insured Employer)

Additional Party: N/A

Hearing Date: October 6, 2010 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: January 22, 2001

5. State location where accident occurred or occupational disease was contracted: Maryville, Illinois (The contract of employment between the employee and employer was made in 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: As a B-seat driver, Employee was sleeping unrestrained in the bunk of a low 2' tall sleeper berth. While Employee was situated in the sleeper berth and sleeping, the other team driver caused the brakes to be sharply applied, resulting in Employee being thrown out of the sleeper berth and to strike her head and chest against the Quallcom partition.

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: Lumbar spine, cervical spine, head, upper extremities, lower extremities, and body as a whole.

14. Nature and extent of any permanent disability: 10% BAW

15. Compensation paid to-date for temporary disability: $17,758.14

16. Value necessary medical aid paid to date by employer/insurer? $15,896.91

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $450.89

19. Weekly compensation rate: $300.59 for TTD & PPD/PTD

20. Method wages computation: Adjudication

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: N/A

85 2/7 weeks of temporary total disability (or temporary partial disability):	$25,636.03
• TTD paid by ER	$17,758.14
• Unpaid TTD owed to EE	$ 7,877.89

NOTE: EE was temporarily and totally disabled for the period of January 23, 2001, to September 12, 2002 (85 2/7 weeks). ER has paid to EE temporary total disability compensation in the amount of $17,758.14. Accordingly, EE is entitled to $7,877.89 in additional temporary total disability compensation.

40 weeks of permanent partial disability compensation from Employer:	$12,023.60

Weeks of disfigurement from Employer: None

22. Second Injury Fund liability: N/A

TOTAL: $19,901.49

23. Future requirements awarded: None

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Pitts Law Office, P.C.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Alice McPherson Injury No. 01-004755

Dependents: N/A

Employer: New Prime, Inc.

Insurer: N/A (Self-insured Employer)

Additional Party: N/A

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on October 6, 2010. The evidentiary record remained open for 30 days, resulting in the record being closed on November 5, 2010.[1] Further, 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 November 5, 2010.

The employee appeared personally and through her attorney Jonathan Pitts, Esq. The employer appeared through its attorney, Kevin Fitzgerald, Esq.

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

(1) On or about January 22, 2001, New Prime, Inc. was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully self-insured.

(2) On the alleged injury date of January 22, 2001, Alice McPherson was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.

(3) On or about January 22, 2001, the employee sustained an accident, which arose out of and in the course of her employment with the employer.

(4) The above-referenced accident occurred in or near Maryville, Illinois. However, the contract of employment between the employee and employer was made in Missouri. The parties agree to venue lying in Greene County, Missouri. Venue is proper.

[1] Subsequent to the hearing, the employer filed a Motion to File Additional Evidence, which resulted in the undersigned holding a conference call with the parties by and through their legal counsel. After consideration of arguments of counsel, and for good cause shown, the undersigned sustained the Motion to File Additional Evidence, and ordered the evidentiary record be reopened and to remain open for 30 days, effective from the date of hearing. This order is included in and made part of the Legal File.

(5) The employee notified the employer of her 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) Temporary disability benefits have been provided to the employee in the amount of $17,758.14, payable for the period of January 23, 2001 through September 14, 2002, payable at the rate of $206.49 per week.

(8) The employer has provided medical treatment to the employee, having paid $15,896.91 in medical expenses.

(9) The employee reached maximum medical improvement on September 14, 2002.

(10) The attorney fee being sought is 25 percent.

The sole issues to be resolved by hearing include:

(1) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee from the effects of the injuries?

(2) What is the applicable compensation rate?

(3) Whether the claimant is entitled to additional temporary disability benefits? (The employee contends there is an underpayment of temporary total disability compensation. The employee is seeking additional temporary total disability compensation, contending that the employer paid the temporary total disability at a rate less than the applicable compensation rate.)

(4) Whether the employee has sustained any permanent disability as a consequence of` the accident of January 22, 2001; and, if so, what is the nature and extent of the disability?

EVIDENCE PRESENTED

The employee, Alice McPherson, testified at the hearing in support of her claim. Also, Ms. McPherson offered for admission the following exhibits:

Exhibit A..... Report of Injury
Exhibit B..... Claim for Compensation
Exhibit C..... Employee’s W-2 (2001)
Exhibit D.....Notice of Commencement / Termination of Compensation

Exhibit E ... Deposition of Robert E. Paul, M.D. (Inclusive of IME Report, CV, & Functional Ability Statement from Dr. Paul, and Social Security Decision)
Exhibit F .....Notice of Intent to Rely Upon Medical Report of Dr. Paul
Exhibit G.....Medical Records
Exhibit H.....Department of Transportation – Medical Examiner Certificate

The exhibits were received and admitted into evidence. The employer objected to the admission of Exhibit E relative to Dr. Paul's opinion that the employee is unemployable on grounds that Dr. Paul is not competent to render such an opinion. This objection has now been considered and the objection is overruled.

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

Exhibit 1.....Average Weekly Wage Calculation
Exhibit 2..... CV of Ted Lennard, M.D.
Exhibit 3.....Medical Report of Ted Lennard, M.D.
Exhibit 4..... Deposition of Ted Lennard, M.D.
Exhibit 5..... Employer's Post-hearing Submission of Additional Evidence (Inclusive of Employer/Insurer's Offer of Settlement Statement for Bonus And Settlement Statement for Settlement / Compensation Payment)

The exhibits were received and admitted into evidence.

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 administrative or judicial notice of the documents contained in the Legal File, which include:

- Cover Letter Dated October 26, 2010
- Order (Reopening of Evidentiary Record)
- Employer's Motion to File Additional Evidence (with Cover Letter)
- Notice of Hearing
- Request for Hearing-Final Award
- Notice of Commencement of Compensation Payments
- Answer of Employer to Claim for Compensation
- Claim for Compensation
- 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

The employee, Alice McPherson, is 60 years of age, having born on June 18, 1950. Ms. McPherson is divorced; she has five children, one of whom is deceased.

Ms. McPherson attended high school through the tenth grade, but did not graduate from high school. However, she obtained a GED certificate, and then later enrolled in college and obtained a Bachelor Degree in Industrial Technology. Ms. McPherson's employment history is varied and includes working as an over-the-road truck driver, working in construction, working as a cook, and working in a nursing home.

Employment

On or about January 17, 2001, Ms. McPherson obtained employment with the employer, New Prime, Inc., to work as an over-the-road driver. In this employment, Ms. McPherson agreed to work as a team driver (B-seat driver), partnering with another company driver. In entering into this employment agreement the parties did not agree to a specific salary amount. Rather, the parties agreed to an income based on mileage per trip. In this context, Ms. McPherson indicated that while her earnings were to be based on mileage, the employer guaranteed to her a minimum of $500 per week.

In addition, in consideration of Ms. McPherson agreeing to work for the employer as an over-the-road driver, the employer agreed to pay a signing bonus of $1,500 to Ms. McPherson; the signing bonus was payable in three installments of $500, beginning on the first day of work, with the second and third installment payable each 30 days thereafter. The second and third installments of the signing bonus were conditioned on Ms. McPherson continuing to be engaged in employment with the employer. In light of Ms. McPherson working for the company for only one week, the employer did not pay the second and third installments of the signing bonus.

Accident

On or about January 22, 2001, Ms. McPherson sustained an accident, which arose out of and in the course of her employment. Notably, on this date, Ms. McPherson and her team driver had already dropped their first load, and the two drivers had been dispatched to New York to deliver their second load. At the time of the accident, Ms. McPherson's team driver was driving the tractor-trailer on I-70 in Illinois, east of St. Louis, and Ms. McPherson was sleeping unrestrained in the bunk of the cab[2], which is a low 2' tall sleeper berth. This team driver caused the brakes to be sharply applied, resulting in Ms. McPherson being thrown out of the sleeper berth and to strike her head and chest against the Quallcom partition. Ms. McPherson awoke with her head resting between the seat and partition.

Ms. McPherson experienced immediate pain and discomfort. According to Ms. McPherson, within 15 minutes of the incident, she began to feel weak; she felt nauseated in her stomach; and her head, back and neck began to hurt. Further, according to Ms. McPherson, she began to cough up blood. In light of these concerns, Ms. McPherson informed the team driver she needed to go to the hospital. He proceeded to the nearest hospital.

Medical Treatment

Shortly after the accident, Ms. McPherson presented to the emergency room of Anderson Hospital in Maryville, Illinois, with multiple complaints, including head trauma, neck pain and low back pain. Additionally, she was noted to present with pain in the front and back of the head, and discomfort and nauseous feeling in the left side of her abdomen. The attending physician

[2] Although the employer had directed her to use seat restraints while in the sleeper berth, the team driver, who was training Ms. McPherson and was recognized as the lead driver, told Ms. McPherson to not use the restraints.

ordered diagnostic studies, which included x-rays of the cervical, thoracic and lumbar spine and left shoulder. The x-rays were negative.

In light of his examination and findings, the attending physician diagnosed Ms. McPherson with multiple contusions, and gave Ms. McPherson a shot of Demerol and Vistaril. Additionally, the attending physician took Ms. McPherson off work until January 26, 2001. Ms. McPherson received a release and discharge from the hospital without an overnight admission.

Subsequent to being released from the hospital, Ms. McPherson returned to the truck, and the two drivers drove to New York. Upon arriving in Brooklyn, New York, and while making a stop Ms. McPherson secured a taxi and proceeded to a local pharmacy, and obtained the prescription medication prescribed by the attending emergency room physician in Illinois. Upon obtaining the prescription medication, Ms. McPherson returned to the truck and completed the scheduled trip to the upstate New York.

Ms. McPherson noted that her mom lived in Springfield, Massachusetts; in light of the proximity of her mom to the delivery site in New York, and in light of her presenting medical condition, Ms. McPherson was taken to a bus station and traveled by bus to Springfield, Massachusetts.

On January 26, 2001, Ms. McPherson presented to Barry Magnes, M.D. at Occupational Health & Rehabilitation, for examination and evaluation. Dr. Magnes recommended that Ms. McPherson remain off work for another 5 to 6 days, use pain medications, and follow-up with him on February 1, 2001.

Subsequently, Ms. McPherson presented to Bernard T. Price, M.D., who is a physician with MVA Center for Rehabilitation, in Springfield, Massachusetts. Dr. Price examined Ms. McPherson for complaints relating to the work injury. Dr. Price diagnosed Ms. McPherson with multiple conditions relating to the work injury. This diagnosis included the following conditions:

1. Posttraumatic headache
2. Back strain to the cervical spine
3. Back strain to the thoracic spine
4. Back strain to the lumbar spine
5. Bilateral sacroiliac and piriformis sprain
6. Bilateral hip pain
7. Bilateral knee and pretibial contusions, left greater than right
8. Bilateral ankle sprains
9. Left shoulder contusion and upper arm contusion
10. Bilateral chest wall and breast contusions, left greater than right
11. Abdominal wall contusion and suprapubic tenderness
12. Hematuria (blood in the urine)
13. Bilateral elbow, forearm and wrist contusions
14. Bilateral upper extremity sensory neuropathies

In light of his examination and findings, Dr. Price prescribed Celebrex, Flexeril and Percocet, provided work restrictions, and recommended physical therapy.

During the period of February, March and April of 2001 Ms. McPherson underwent a course of physical therapy, which included moist heat, electrical stimulation and interferential current as well as manual techniques and therapeutic exercises. Additionally, in April 2001 Ms. McPherson presented to Byron Hartunian, M.D., upon referral by Dr. Price, for evaluation of her left lower extremity. In light of his examination, Dr. Hartunian diagnosed Ms. McPherson with a trochanteric bursitis and left knee contusion, strain and internal derangement. He recommended continued conservative care and possible surgery if symptoms continued unabated.

Ms. McPherson continued to treat with Dr. Price and Dr. Hartunian. Dr. Price continued to keep Ms. McPherson off work.

In May 2001 Dr. Hartunian administered an injection in the area of Ms. McPherson's left lower extremity for treatment of her left trochanteric bursitis. And on June 6, 2001, Dr. Hartunian administered a second injection, and released Ms. McPherson from his care. Yet, Ms. McPherson continued to treat with Dr. Price, who continued to keep Ms. McPherson off work.

On September 6, 2001, Dr. Price discharged Ms. McPherson from his care. However, he recommended that Ms. McPherson remain off work until October 6, 2001. In August or September 2001, Ms. McPherson returned to her home town of Greenwood, Mississippi. Upon her relocation to Greenwood, Mississippi, Ms. McPherson initiated care with Olujoke Brimah, M.D.

In January 2002 Dr. Brimah ordered a diagnostic study in the nature of an MRI of the lumbar spine, cervical spine, and left knee. This study revealed the following:

- Lumbar Spine. The MRI showed evidence of bulging discs from L3 through S1. At L5-S1, the disc bulge caused mild narrowing of the left neural foramina. The L4-L5 disc bulge caused minimal narrowing of both neural foramina.

- Cervical Spine. The MRI showed evidence of a posterior bulging disc at C5-C6 and C6-C7 with no neural forminal encroachment.

- Left Knee. The MRI of the left knee was negative.

On July 19, 2002, Ms. McPherson presented to R. Bruce Newell, M.D., who is an orthopedic surgeon with Greenwood Orthopedic Clinic, for an examination and evaluation, in light of continuing complaints of pain in her head, neck, back, hip and arms. Dr. Newell diagnosed Ms. McPherson as having multiple joint pain secondary to myositis and chronic strain. He released her from his care without initiating any specific treatment, with directions to return on an as needed basis.

On September 12, 2002, Ms. McPherson returned to see Dr. Newell for a final examination and rating at the request of the employer. In light of his examination of Ms. McPherson and his review of her records from other providers following the motor vehicle accident, Dr. Newell opined that Ms. McPherson was at maximum medical improvement as of this visit of September 12, 2002. Dr. Newell further opined that the work injury of January 22,

2001, caused Ms. McPherson to sustain a permanent partial impairment of 3 percent to the body as a whole.

Thereafter, Ms. McPherson treated with Todd Besselievre, M.D. for complaints of chronic low back pain, neck and shoulder pain. Dr. Besselievre prescribed medication, including Lorcet and Skelaxin, and scheduled her for a lumbar epidural steroid injection and trigger point injections. The first epidural injection occurred on November 11, 2002. The second injection occurred on December 6, 2002.

In January 2003 Dr. Besselievre postponed the scheduled third lumbar epidural injection, electing instead to inject the cervical spine. Apparently, Ms. McPherson was reporting that she had experienced some relief to the lumbar spine with the two injections, and on this day she was reporting that the cervical spine was hurting the most.

On March 11, 2004, Ms. McPherson presented to Fred Sandifer, M.D. for an examination and evaluation, upon referral. In light of his exam, Dr. Sandifer propounded the following comments:

> This patient has chronic discomfort of the entire body with any form of active or passive movement. Clinically there is no gross abnormalities. She is walking with a cane in the right hand. She has discomfort with range of motion of the neck and back and complains of pain when moving the lower extremities. Neurological examination appears to be intact. MRI of the cervical and lumbar spine are reported as negative. Multiple x-rays are also negative.

Based on this examination Dr. Sandifer diagnosed Ms. McPherson with chronic cervical lumbar strain secondary to accident three years ago. Additionally, Dr. Sandifer referred Ms. McPherson to a physical therapist for neck and back rehabilitation. And he prescribed Skelaxin in addition to Celebrex.

On May 27, 2004, Ms. McPherson returned to Dr. Sandifer, continuing to present with similar complaints, but which Dr. Sandifer described as migratory in nature, with Ms. McPherson now complaining of pain in the thoracic spine. Dr. Sandifier indicates that at the time of this visit, he reviewed all of her records and MRIs, which he identifies as being negative. Dr. Sandifier determined that he had nothing more to offer Ms. McPherson and referred her to a neurosurgeon.

In July 2004 Ms. McPherson underwent a repeat MRI of the cervical spine, which showed bulging of C5-C6 and C6-C7 with narrowing of the C5-C6 neural foramina on the right. Additionally, an MRI of the lumbar spine showed some spinal stenosis at multiple levels, most notably at T11-T12, L2-L3 and L3-L4. The L3-L4 was identified to be the most severe.

On October 4, 2004, Ms. McPherson presented to Ahmed S. Abdel Aziz, M.D., who is the director of the Greenwood Pain Clinic. Dr. Aziz diagnosed Ms. McPherson with chronic degenerative disc disease; chronic neck and low back pain; and chronic myofascial pain. Further, Dr. Aziz determined that because of the chronic pain syndrome and the chronicity of her symptoms, which had affected her quality of life, Dr. Aziz elected to change the medication

regiment; he initiated narcotic medication treatment to include use of the Duragesic (Fentanyl) Patch. (Dr. Paul notes that "Duragesic (Fentanyl) is a strong narcotic medication that is applied in a transdermal fashion.")

Dr. Aziz continued to provide pain management treatment. In December 2004 Dr. Aziz added methadone, and later Topamax, to her treatment regimen. (Dr. Paul notes that "Topamax is an antiepilectic medicine that has pain-modifying characteristics.") The medical records indicate that Dr. Aziz continued to provide treatment, including trigger point injections and prescriptions for narcotic medications through October 12, 2005. Although Dr. Aziz did not release Ms. McPherson from treatment on October 12, 2005, the undersigned could not readily discern from the records whether Dr. Aziz continued to provide treatment beyond the October 12, 2005, treatment date.

In or around April 2007 Ms. McPherson underwent an additional MRI of the brain, MRI of the lumbar spine, and an MRI of the thoracic spine. The MRI of the brain showed no evidence of abnormality. The radiologist reading the MRI of the lumbar spine concluded that the MRI showed the following:

1. Multilevel central arthropathy contributing varying amounts of lateral recess and central narrowing.

2. Small central right-ward disk herniation at L5-S1 with bilateral neural foraminal narrowing this level secondary to facet joint arthropathy.

3. Small right neural foraminal disk herniation at L4-L5.

The radiologist reading the MRI of the thoracic spine concluded that the MRI showed evidence of lower thoracic facet joint arthropathy without spinal canal compromise.

The medical records admitted into evidence do not identify or reference Ms. McPherson receiving medical treatment subsequent to the April 2007 diagnostic study.

Prior Medical Conditions / Injuries

The evidence indicates that prior to the work injury Ms. McPherson sought and obtained medical care for several conditions:

Back and Shoulder: In 1988 Ms. McPherson was diagnosed with a back strain and received medical care for this condition. Apparently, there was no precipitating cause for the pain and swelling that was present. And in 1989 Ms. McPherson was continuing to receive treatment for this condition involving back pain, which the attending physician described as "persistent" and pain believed to be musculoskeletal in nature.

In addition, in 1998 Ms. McPherson was involved in an automobile accident, which necessitated an emergency room visit and follow-up treatment. This treatment, including diagnostic studies, revealed degenerative disc disease of the lumbar spine, with no post-traumatic findings. Dr. Lennard testified that by definition, degenerative disc disease would not get better, but, if anything, degenerates over time.

Rheumatoid Condition: In January 1989 Ms. McPherson underwent testing and was diagnosed as having a rheumatoid factor. According to Dr. Paul, a person with a rheumatoid factor is predisposed to having rheumatoid arthritis, as opposed to having rheumatoid arthritis. It is not clear whether Ms. McPherson underwent any additional testing to determine whether she has rheumatoid arthritis; she has not been diagnosed with rheumatoid arthritis.

Independent Medical Examinations

Robert E. Paul, M.D., who is a physician practicing in the specialty of occupational and environmental medicine, testified by deposition on behalf of the employee. Dr. Paul performed an independent medical examination of Ms. McPherson on October 27, 2006. At the time of this examination, Dr. Paul took a history from Ms. McPherson, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. McPherson, Dr. Paul opined that that the accident of January 22, 2001, which involved Ms. McPherson being thrown out of the sleeper berth and to strike her head and chest against the Quallcom partition, caused Ms. McPherson to sustain an injury to her lumbar spine, thoracic spine, cervical spine and left shoulder.

Further, Dr. Paul opined that as a consequence of the January 22, 2001, work injury, Ms. McPherson sustain the following impairments:

- Lumbar Spine: 16 percent to the BAW
- Thoracic Spine: 10 percent to the BAW
- Cervical Spine: 18 percent to the BAW
- Left Upper Extremity: 16 percent to the left upper extremity at the 232-week level

Additionally, Dr. Paul opined that relative to this injury Ms. McPherson is governed by permanent restrictions, which include:

- Stand and/or Walk: Ms. McPherson may continuously stand and/or walk for 15 minutes; she may stand and/or walk a total of 2 hours in an 8 hour work day.

- Sit: Ms. McPherson may continuously sit for 30 minutes; she may sit a total of 3 hours in an 8 hour work day.

- Alternate Sit, Stand, and Walk: Ms. McPherson is required to have the option to change position to relieve her pain, with a frequency of every 15 minutes.

- Lift and Carry: Ms. McPherson is limited to lifting and carrying occasionally less than 5 pounds up to 2.5 hours during an 8 hour work day.

- Physical Demands: Ms. McPherson is governed by the following physical demands:

    - She is never to climb ladders, poles, scaffolding, and stairs.
    - She is never to engage in balancing on narrow, slippery, moving surfaces.
    - She is never to stoop or bend at waist, full use of lower extremities.

  - She is never to kneel – bend her legs to rest on knees.
  - She is never to crouch – bending downward, forward, legs and spine.
  - She is never to crawl – moving on hands and knees.
  - She is limited to reaching occasionally up to 2.5 hours.
  - She is limited to handling (seizing, holding, gripping, turning) occasionally up to 2.5 hours.
  - She is limited to fingering (picking, pinching, work with fingers) occasionally up to 2.5 hours.
  - She is limited to feeling (perceiving size, shape, temp., by touch) occasionally up to 2.5 hours.

- Environments: Ms. McPherson is never to engage in activity in environments involving exposure to weather; extreme cold; extreme heat; wet and/or humid conditions; atmospheric conditions; moving mechanical parts; electrical shock; high exposed places; radiation; explosives; toxic / caustic conditions; and hazards.

- Other Factors: Ms. McPherson requires use of narcotic pain medication; and she needs to lie down during the day in order to relieve pain.

In light of these of these restrictions, Dr. Paul opines that Ms. McPherson is permanently and totally disabled as a consequence of the January 22, 2001, accident, considered alone; Ms. McPherson is unemployable in the open and competitive labor market. Notably, in rendering this opinion, Dr. Paul notes that prior to the work injury Ms. McPherson was functional and held truck jobs since 1994, but after the injury has been totally unable to work.

Ted Lennard, M.D., who is a physician practicing in the specialty of physical medicine, and who is affiliated with Springfield Neurological & Spine Institute, testified by deposition on behalf of the employer. Dr. Lennard performed an independent medical examination of Ms. McPherson on June 16, 2008. At the time of this examination, Dr. Lennard took a history from Ms. McPherson, reviewed various medical records, and performed a physical examination of her. In light of his examination and evaluation of Ms. McPherson, Dr. Lennard opined that Ms. McPherson suffers from cervical and lumbar degenerative changes, myofascial pain – spine and extremities, and depression. Dr. Lennard further opines that the depression is not related to the work injury. And Dr. Lennard notes that in 1989 Ms. McPherson underwent a rheumatoid factor test and was diagnosed with a rheumatoid condition.

On cross-examination, Dr. Lennard acknowledged that in 2004 Ms. McPherson was diagnosed with fibromyalgia. However, Dr. Lennard disagrees with this diagnosis for Ms. McPherson.

In considering Ms. McPherson's disability, Dr. Lennard opined that a portion but not all of her presenting complaints are attributable to the work injury of January 22, 2001. In this regard, Dr. Lennard opined that Ms. McPherson presents with a permanent partial disability of 15 percent to the body as a whole; 10 percent to the body as a whole is attributable to the work injury and the remaining 5 percent to the body as a whole is attributable to the non work related degenerative changes. Notably, in discussing the nature of degenerative disk disease and the

treatment provided by Dr. Aziz, Dr. Lennard testified that treatment he provided "secondary to degenerative disc disease" is different from treatment "secondary to a motor vehicle accident."

Also, in light of his examination of Ms. McPherson, and in noting that the objective findings did not match Ms. McPherson's complaints, Dr. Lennard questioned the validity of her complaints. In this regard, Dr. Lennard propounded the following testimony:

> Q. And there were some – were there concerns that you had in how she presented in this particular case? Did you have questions regarding whether she was being straightforward with you all the way through?
> A. Well, I think as my last portion of my report on page 7 indicates, there's some indicators of the validity of many of her complaints based on many of the psychometric scales in parts of her exam.
>
> Q. What do you mean by that, Doctor?
> A. Well, there are several key elements in her exam including all the psychometric scale results along with the fact that she said that she's getting worse rather than getting better along with a history of depression. And her skin pinch tenderness was concerning in her ability to get better.
>
> Q. You're saying her objective – the objective findings did not match up with her complaints?
> A. Yes.

Finally, Dr. Lennard opined that Ms. McPherson does not require any additional medical care for treatment of the work injury. Although Dr. Lennard recommends that McPherson see her family doctor for treatment of her depression, he does not consider the depression and the treatment for this condition to be causally related to the work injury.

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 date of January 22, 2001, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on January 22, 2001, which is substantive in nature, and not procedural, governs substantively the adjudication of these two cases. 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.
Compensation Rate

In the present case, Ms. McPherson was employed by New Prime, Inc. as B-seat driver. In entering into this employment agreement the parties did not agree to a specific salary amount. She was not paid a salary and did not earn an hourly wage. Rather, the parties agreed to an income based on output (mileage per trip). Although Ms. McPherson indicated that while her earnings were to be based on mileage, the employer guaranteed to her a minimum of $500 per week; I do not accept this testimony as true and do not find as a fact that the employer guaranteed a minimum compensation of $500 per week.

In addition, in consideration of Ms. McPherson agreeing to work for the employer as an over-the-road driver, the employer agreed to pay a signing bonus of $1,500 to Ms. McPherson; the signing bonus was payable in three installments of $500, beginning on the first day of work, with the second and third installment payable each 30 days thereafter. The second and third installments were conditioned on continuing employment.

Further, at the time of the accident Ms. McPherson had worked for the employer for less than one week. For this week of work Ms. McPherson received a gross wage of $253.90, premised on her output (miles driven) during this week. Additionally, Ms. McPherson received a signing bonus payment of $500. The employer did not pay to Ms. McPherson the second and third installments, insofar as she worked for the employer only one week.

In addition, the evidence indicates that New Prime, Inc. employed 102 B-seat drivers in 1990, and for this calendar year the annual income received by these 102 drivers averaged $16,106.00, which would provide an average weekly wage of $309.73. Additional evidence indicates that from a random sampling of B-seat drivers, for the period of January 1, 2001 to June 31, 2001, the B-seat drivers earned an average weekly wage of $450.89. The parties did not

provide evidence of the of income earned by the employer's B-seat drivers for the 2000 calendar year, or for the 13 week period preceding the work injury.

The provisions of Section 287.250, RSMo govern the determination of the applicable compensation rate. Section 287.250, RSMo, in pertinent part, states:

> 1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly wage earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:
>
> * * *
>
> (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two;
>
> (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages by the day, hour, or output per day actually worked by the employee that such employee earned in the employ of the employer in the last thirteen consecutive calendar weeks immediately preceding the week in which the employee was injured….
>
> (5) If the employee has been employed less than the two calendar weeks immediately preceding the injury, the employee's weekly wage shall be considered to be equivalent to the average weekly wage prevailing in the same or similar employment at the time of the injury, except if the employer has agreed to a certain hourly wage, then the hourly wage agreed upon multiplied by the number of weekly hours scheduled shall be the employee's average weekly wage;
>
> (6) If the hourly wage has not been fixed or cannot be ascertained, or the employee earned no wage, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees of the employer or any other employer;
>
> * * *
>
> 3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.
>
> 4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the

> division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determined such employee's average weekly wage.

After consideration and review of the evidence, I find and conclude that the adjudication of this issue must be made in light of Section 287.250.4, RSMo. Ms. McPherson did not work more than two calendar weeks. And although the parties provided evidence of similarly situated employees, this evidence relates to earnings occurring in 1990 (more than a year prior to the work injury) and to earnings occurring six months after the work injury. The parties did not offer any evidence of the earnings of similarly situated employees for the year preceding the work injury.

Accordingly, I find and conclude that the exceptional facts presented in this case support usage of Section 287.250.4, RSMo, and that the wages earned by the B-seat drivers for the period of January 2001 to June 2001 provide a fair determination of the employee's average weekly wage. This evidence provides an average weekly wage of $450.89. Therefore, I find and conclude that the applicable compensation rate is $300.59, which is applicable to both temporary total disability compensation and permanent disability compensation.

II.
Temporary Total Disability Compensation

The evidence is supportive of a finding, and I find and conclude that the work injury of January 22, 2001, caused Ms. McPherson to be temporarily and totally disabled for the period of January 23, 2001, to September 12, 2002 (85 2/7 weeks). In rendering this decision I find and conclude that Ms. McPherson reached maximum medical improvement on September 12, 2002. (On this date Ms. McPherson returned to see Dr. Newell for a final examination and rating, and at the time of this examination Dr. Newell released Ms. McPherson from medical treatment and opined that she had reached maximum medical improvement.)

Accordingly, Ms. McPherson is entitled to $25,636.03 in temporary total disability compensation, payable for the period of January 23, 2001, to September 12, 2002 (85 2/7 weeks), and payable at the applicable compensation rate of $300.59 per week. ($300.59 x 85 2/7 weeks = $25,636.03.) Further, the employer paid to Ms. McPherson temporary total disability compensation in the amount of $17,758.14. Therefore, in light of this underpayment of temporary total disability compensation, the employer is ordered to pay to Ms. McPherson the additional sum of $7,877.89, which represents payment of temporary total disability compensation for the period of January 23, 2001, to September 12, 2002.

III.
Permanent Disability Compensation

The parties offer differing and competing medical opinions relative to the nature and extent of the injury and disability caused by the accident of January 22, 2001. The employee relies principally upon the medical opinion of Dr. Paul; while the employer relies principally

upon the medical opinion of Dr. Lennard. I resolve this difference in medical opinion in favor of Dr. Lennard, who I find credible, reliable and worthy of belief.

After consideration and review of the evidence, I find and conclude that the January 22, 2001, accident caused Ms. McPherson to sustain an injury to her lumbar and cervical spine, which resulted in her suffering degenerative changes to the spine and to suffer myofascial pain, referable to her spine and extremities. Although the work injury caused Ms. McPherson to sustain initially additional injuries to her head and body as a whole, these injuries were transitory and not of a permanent nature.

In considering the nature and extent of the disability resulting from the work injury, I find and conclude that Ms. McPherson is overstating the severity of this injury, and I do not find her testimony to be credible and persuasive. Further, prior to this work injury Ms. McPherson suffered from spine pain and degenerative disk disease, which was symptomatic and required intermittent medical care and treatment. Additionally, she has a rheumatoid factor, and there is evidence of her suffering deterioration in her back prior to the work injury of January 22, 2001.

In addition, Ms. McPherson suffers from depression, which is not related to the work injury of January 22, 2001. This depression, of course, may explain or partially explain her subjective presentation of complaints, which are not consistent with the objective findings. Notwithstanding, I do not find Ms. McPherson credible and do not accept as true her complaints of pain and presenting symptomology relative to the nature and severity of the work injury or her medical conditions.

Moreover, I find and conclude that Ms. McPherson is not governed by the permanent restrictions imposed by Dr. Paul. At most, she is governed by the restrictions imposed by Dr. Lennard, which is limited only to her not lifting more than 40 pounds. And these restrictions do not relate solely to the work injury of January 22, 2001.

Accordingly, I find and conclude that the work injury of January 22, 2001, caused Ms. McPherson to sustain a permanent partial disability of 10 percent to the body as a whole, referable to the lumbar and cervical spine (40 weeks). Further, this work injury, considered alone, does not render Ms. McPherson unemployable in the open and competitive labor market. Therefore, the employer is ordered to pay to the employee, Alice McPherson, the sum of $12,023.60, which represents 40 weeks of permanent partial disability compensation payable at the applicable compensation rate of $300.59 per week.

IV.
Future Medical Care

The parties offer differing and competing medical opinions relative to whether Ms. McPherson should be awarded additional or future medical care. The employee relies principally upon the medical opinion of Dr. Paul; while the employer relies principally upon the medical opinion of Dr. Lennard. Again, I resolve the difference in medical opinion in favor of Dr. Lennard.

Dr. Lennard opined that Ms. McPherson does not require any additional medical care for treatment of the work injury. Although Dr. Lennard recommends that McPherson see her family doctor for treatment of her depression, he does not consider the depression and the treatment for this condition to be causally related to the work injury.

After consideration and review of the evidence, I find and conclude that the employer and insurer provided Ms. McPherson with reasonable and necessary medical treatment; and she does not require any additional or future medical care in order to cure and relieve her from the effects of the accident of January 22, 2001. The employee's request for future medical care is denied.

V.
Safety Penalty

The employer seeks a safety penalty reduction of 15 percent under Section 287.120.5, RSMo, contending that Ms. McPherson violated the employer's safety rule and policy in failing to wear her seat belt.

The evidence presented in this case indicates that the team driver, who was training Ms. McPherson and was recognized as the lead driver, told Ms. McPherson to not use the restraints. Ms. McPherson complied with this directive, and did not fasten her seat beat while situated in the sleeper berth of the cabin. In light of the foregoing, I find and conclude that the employee is not in violation of Section 287.120.5, RSMo, and the employer is not entitled to a safety penalty reduction. This issue is resolved in favor of the employee.

The award is subject to modifications as provided by law.

An attorney's fee of 25 percent of the benefits ordered to be provided 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 December 3, 2010)

This award is dated and attested to this 8th day of December, 2010.

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