

FINAL AWARD ALLOWING COMPENSATION  
(Based on Remand Hearing Subsequent to Temporary Award  
Issued by the Labor and Industrial Relations Commission)

Injury No.: 93-173447

Employee: James H. Metts  
Employer: Fantasy Bus Limousine Service  
Insurer: None  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: September 18, 1993  
Place and County of Accident: Jefferson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review subsequent to a remand hearing ordered by the Commission in a temporary award issued on September 2, 2004. The issue on remand was for the Division of Workers' Compensation (Division) to take additional evidence concerning all medical bills claimed, allowing the Commission to ascertain the validity of all the medical bills claimed, whether or not the employee is legally subject to liability for the medical bills claimed and consequently, the resultant liability of the Second Injury Fund.

Subsequent to the issuance of the temporary award, the Second Injury Fund perfected an appeal to the Missouri Court of Appeals, Eastern District, claiming the Commission erred in finding Second Injury Fund liability for medical expenses due to this workers' compensation injury. The Commission received the mandate from the Missouri Court of Appeals, Eastern District, dated June 23, 2005, in which, the temporary award issued by the Commission was affirmed.

Consequently, the Division scheduled the remand hearing February 23, 2006, in which all parties participated and upon conclusion of the hearing, the transcript has been forwarded to the Commission for its review and issuance of its final order.

Issue: Liability of Second Injury Fund for Medical Bills

At the remand hearing, employee testified as to certain visits, treatment and services rendered from various physicians and health care providers, on account of his injury. Employee further testified that the bills he received were the results of these various visits, treatments and services rendered. The treating medical records and/or medical records pertaining to the services rendered for these several visits were all submitted into evidence accompanying the various bills. The employee identified all of the medical bills as being related to and the product of his work related injury. The medical bills were shown to relate to the professional services rendered by various exhibits submitted into evidence in behalf of employee.

When an employee testifies that his visits, treatment and services rendered at hospitals, health care providers and various doctors were the product of a work-related accident, and the employee further states that the medical bills received were the results of these visits, treatment and services rendered, and when such testimony accompanies the bills, which the employee identifies as being related to and the product of his injury, and when the bills relate to professional services rendered as shown by the medical records in evidence, a sufficient factual basis exists for the Commission to award compensation. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. banc 1989).

The employer may challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. *Martin v. Mid-America Farm Lines, Inc., supra*.

If the employee remains personally liable for any of the medical bills, the employee is entitled to recover them as fees and charges pursuant to section 287.140 RSMo. However, if the employer establishes by a preponderance of the evidence that the health care providers allowed write offs and reductions for their own purposes and the employee is not legally subject to further liability, the employee is not entitled to any windfall recovery. *Farmer-Cummings v. Personnel Pool of Platt County*, 110 S.W.3d 818 (Mo. banc 2003).

At the remand hearing, the following medical bills were submitted into evidence in behalf of the employee; employee stated that said bills received were attributable to his accident and were related to visits to various health care providers, physicians and or entities providing treatment on account of his injury; and the bills related to the professional services rendered:

<u>Exhibit</u>	<u>Amount</u>
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B. Logan Chiropractic	\$100.00
D. Deaconess West MRI	\$893.00
E. St. Mary's Hospital	\$4,936.93
F. St. Louis Rehab Inst.	\$1,172.00
G. Dr. Bailey	\$10,315.00
H. St. Anthony's	\$180.00
	\$26,342.50
	\$2,301.00
	\$1,380.00
I. South County Anesthesiology	\$700.00
	\$645.00
	\$1,155.00
J. South County Radiology	\$551.00
	\$47.00
K. Dr. Mirkin	<u>\$17,536.00</u>
TOTAL	\$68,254.43

The employee testified that to the best of his knowledge these outstanding medical bills were valid; had not been written off; and he was subject to payment to these various health care providers for the amounts itemized.

Pursuant to *Martin, supra*, the employee satisfied his burden of proof, and produced documentation detailing his past medical expenses and testified to the relationship of said expenses to his compensable work place injury.

Based on the record, the Second Injury Fund did not produce evidence challenging the reasonableness or fairness of the medical bills or show that the medical expenses incurred were not related to the injury in question. Furthermore, there is no competent and substantial evidence in the record on which the Commission could base a finding that the employee is not legally subject to further liability; i.e., that these medical bills were written off, or were reduced by the health care providers.

Consequently, the Commission awards employee the claimed medical expenses in the total amount of \$68,254.43. The temporary award of the Commission dated September 2, 2004, is attached and incorporated by reference.

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

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

Given at Jefferson City, State of Missouri, this 23<sup>rd</sup> day of March 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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TEMPORARY AWARD  
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 93-173447

Employee: James Metts

Employer: Fantasy Bus Limousine

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

Date of Accident: September 18, 1993

Place and County of Accident: Jefferson 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 (ALJ), as modified, 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 December 31, 2003, as modified. The award and decision of Administrative Law Judge Leslie E. H. Brown, is attached and incorporated by this reference.

The Commission affirms the award of the ALJ insofar as the compensability of the injury and the liability of the Second Injury Fund (Fund) has been established under the law. However, we find that there is insufficient evidence to establish the liability of the Fund and/or Employee for the medical charges.

The Commission would evaluate the testimony of Dr. Musich to establish the liability of the Fund for the charges of St. Anthony's Medical Center in the amount of \$26,342.50. The ALJ was of the opinion that the substantial weight of the medical evidence did not establish that the work injury was a substantial factor in Employee's low back complaints and treatment subsequent to March 14, 1994. We disagree.

The Commission adopts the expert opinion of Dr. Musich that Employee continued to experience low back pain

and radicular symptoms after his first surgery. These complaints continued and led to the second surgical intervention in 1999. Dr. Musich found the charges of St. Anthony's Medical Center, South County Radiologists, Inc., South County Anesthesiology and Dr. Peter Mirkin to be reasonable and necessary to cure and relieve and necessitates as a sequela of the 1993 injury. We adopt the opinion of Dr. Musich in this regard. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879 (Mo. App. 2001); *Palmer v. Kansas City Football Club*, 621 S.W.2d 350 (Mo. App. 1981).

The Commission finds that Employee's complaints to Dr. Mirkin verify his testimony that he experienced low back pain with radiating pain down his legs for many years prior to the medical consultations of 1999. We find Employee credible. *Shaw v. Scott*, 49 S.W.3d 720 (Mo. App. 2001).

The Commission finds the evidence insufficient to determine responsibility for all the medical charges in question. The Fund is quoted in the award as relying on *Mann v. Varney Construction*, 23 S.W.3d 231 (Mo. App. E.D. 2000), for the proposition that Fund liability for medical expenses does not extend to the full amount of the bills but, rather, is limited only to the amount of the Medicare lien. This is only true if the payment made by Medicare has extinguished all other liability for payment of the bill. To the extent that any additional sum could be owed by Employee the Fund would have additional liability.

The Commission remands this case to the Division of Workers' Compensation to take additional evidence concerning the medical bills. Such evidence shall include: 1) the total amount of all bills claimed; 2) the amount of payments made by Medicaid or other providers and whether such amount must be repaid by Employee; and, 3) the amount due and owing which is the responsibility of Employee.

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 2<sup>nd</sup> day of September 2004.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
Ken Jacob, Chairman

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Ken Legan, Member

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

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Secretary

**AWARD**

Employee: James Metts

Injury No. 93-173447

Dependents:

Employer: Fantasy Bus Limousine

Additional Party: State Treasurer, as custodian of Second Injury Fund

Insurer: ----

Hearing Date: July 24, 2003 (finally submitted 8/25/03)

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

Checked by: LEHB/bfb

**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: September 18, 1993
5. State location where accident occurred or occupational disease was contracted: Jefferson 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? ----
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? None
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Employee's injury arose out of and in the course of performing his work duties for Fantasy Bus  
Limousine Service
12. Did accident or occupational disease cause death? No Date of death? ----
13. Part(s) of body injured by accident or occupational disease: low back
14. Nature and extent of any permanent disability: ----
15. Compensation paid to-date for temporary disability: ----
16. Value necessary medical aid paid to date by employer/insurer? \$0.00
17. Value necessary medical aid not furnished by employer/insurer? See Award
18. Employee's average weekly wages: ----
19. Weekly compensation rate: ----
20. Method wages computation: ----

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: . . . . . \$6,339.18

---weeks of temporary total disability (or temporary partial disability)

--- weeks of permanent partial disability from Employer

--- weeks of disfigurement from Employer

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

22. Second Injury Fund liability: Yes  No  Open (Uninsured employer/medical bills) \$6,339.18

weeks of permanent partial disability from Second Injury Fund

Uninsured medical/death benefits

Permanent total disability benefits from Second Injury Fund: weekly differential ( ) payable by SIF for weeks beginning and, thereafter, for Claimant's lifetime

TOTAL: \$6,339.18

23. Future requirements awarded: None

Said payments to begin as of the 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:

James Guirl, Attorney for Claimant

### FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Metts

Injury No: 93-173447

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

Dependents:

Employer: Fantasy Bus Limousine

Additional Party State Treasurer, as custodian of Second Injury Fund

Insurer: ----

Checked by: LEHB/bfb

This is a hearing in Injury No. 93-173447. The claimant, James Metts, appeared in person and by counsel, Attorney

Jim Guirl. The alleged employer, Fantasy Bus Bus Limousine Service, appeared by and through counsel, Attorney Eugene Coon. The Second Injury Fund appeared through Assistant Attorney General Laura Wagener.

There is a Medical Fee Dispute matter filed in this case.

The parties entered into stipulations, and agreements as to the complex issues and evidence to be presented in this hearing.

**STIPULATIONS:**

- On or about September 18, 1993: a. an incident occurred in Jefferson County, Missouri.  
b. A Claim for Compensation was filed within the time prescribed by law. c. No medical aid has been provided.

**ISSUES:**

1. Whether or not there was an employee/employer relationship
2. Whether or not there was an accident arising out of and in the course of the claimant's employment
3. Liability of past medical expenses (reasonableness and necessity)

**EXHIBITS:**

The following exhibits were admitted into evidence:

Claimant's Exhibits:

- No. A: Report of Injury
- No. B: Certified medical records of Logan College Chiropractic Health Center, and bill
- No. C: Certified medical records of Mid-America Orthopedic Surgery, Inc., and bill
- No. D: Certified medical record consisting of a report of an MRI performed on 11/08/93, and bill
- No. E: Certified medical records from St. Mary's Health Center, and bill
- No. F: Certified medical records from St. Louis Rehabilitation Institute, Inc., and bill
- No. G: Certified medical records of Dr. Gregory J. Bailey, M.D., and bill
- No. H: Certified medical records of St. Anthony's Medical Center, and bill
- No. I: Bill from South County Anesthesia
- No. J: Bill from South County Radiologist
- No. K: Certified medical records of Tesson Heights Orthopedics/Dr. R. Mirkin, M.D.
- No. L: Dr. Thomas F. Musich, M.D. June 28, 1999 evaluation report
- No. M: Dr. Thomas F. Musich, M.D. August 30, 1999 supplemental report
- No. N: Dr. Thomas F. Musich, M.D. August 14, 2001 evaluation report
- No. O: Dr. Thomas F. Musich, M.D. October 10, 2001 supplemental report
- No. P: Fantasy Bus Bus & Limousine Service income statement
- No. Q: Copy of the US Corporation Income Tax return filed by Fantasy Bus bus Service, Inc., for the calendar year 1993
- No. R: Copy of a Subpoena Duces Tecum that was served on Ms. Taylor

Employer Exhibits:

The employer offered no exhibits.

Second Injury Fund Exhibits:

Exhibit Roman Numeral I: Certified copy of the Division of Employment Security record

Official Notice:

Exhibit No. AA: Medical fee dispute application

**James Herbert Metts, the claimant**, testified that he is 42 years old, born on August 9, 1960. My educational background is a GED in 1977 or 1978, the claimant said, and I have no post high school education. Discussing his work history from the time he graduated from high school up to the time immediately before he worked at Fantasy Bus Bus &

Limousine, Metts stated that he was a mechanic, and drove and ran tow trucks for impound yards. I first applied for employment with Fantasy Bus Limousine & Bus Service around the end of 1992 or the beginning of 1993 after a friend told me there was a position open, he said. I went in and filled out an application for a driver position, Metts stated. He agreed that he had commercial driver's license. When I first filled out my application I spoke with Mike Nelson at Fantasy Bus & Limousine (Fantasy Bus) about what my job requirements were going to be, Metts stated. Nelson and I discussed my salary and what I would be actually doing as far as driving and helping maintain the buses, the claimant said. I believe my rate of pay when I was hired was like \$10.00 an hour and a weekly paycheck, Metts stated.

I eventually started to work as a driver for Fantasy Bus, I believe, the beginning of February or March of 1993, the claimant testified. The nature of Fantasy Bus's business was providing limousine service and bus service for hire, he said. Fantasy Bus's vehicles that were operated for hire were two large bus limousines and then one six-passenger car stretch limousine, the claimant stated. Describing the large buses, Metts said it was like a Greyhound type bus with a restroom; I believe it held 28 to 32 passengers, he said. Metts agreed that he drove the bus for Fantasy Bus as well as their other vehicles. My duties on a daily basis for Fantasy Bus were helping to maintain the buses, driving the buses, and picking up and delivering fares, Metts said. The claimant was asked, at the time he first started working for Fantasy Bus, how many people were working with this organization. I believe it was eight, Metts answered. He identified a document marked as Claimant's Exhibit P as a document listing some names and payments to them of people that worked at Fantasy Bus at the time he worked there. The people beside myself were Tom Fortson, Tammy Morgan, Steve Gonzales, Mike Miller, Marsha Lawson, Tamera Gonzales, and Michelle Lewandowski, the claimant stated. To the best of my knowledge, Metts said, these people, like myself, were drivers and servers working on the bus for Fantasy Bus and were employed by Fantasy Bus at the time I was injured while working for Fantasy Bus on September 18, 1993. Additional people that I was aware of who also worked for Fantasy Bus, Metts said, were Mike Nelson, the manager overseeing it all, and Ginger Taylor.

Metts was queried as to how he performed work for the company. We received a phone call and I would be told what my fares would be if I was going out on an actual trip, but I'd come in on a pretty much daily basis and maintain and work on buses, the claimant said. It is correct that I worked different times of the day, Metts added. The claimant was questioned if he worked steadily everyday from the time he started his employment with Fantasy Bus until the time he was injured at Fantasy Bus. I wasn't on a regular daily schedule, but, yes, I worked everyday, Metts said. The claimant was asked, from the time he was hired at Fantasy Bus up to the time he was injured, who directed what he did as far as driving the buses. Mainly Mike Nelson, but also Ginger Taylor, Metts responded. Explaining how Nelson or Taylor would advise him what he had to do, Metts stated that he would receive a trip tic that would tell him his destination, what time he had to pick somebody up, and the directions as to what they wanted to do and where they wanted to go. Metts was asked if Fantasy Bus had a right to discharge him or did he have a contract of employment with them. I had no contract; they could discharge me at any time, Metts answered. From the time I started my employment with Fantasy Bus up to the time I was injured, taxes were withheld from my check, Metts said, as well as the other normal withholdings were made on his check by Fantasy Bus such as social security and FICA. The claimant was asked during the time he was hired by Fantasy Bus up to the time he was injured was he able to go out and get his own jobs using Fantasy Bus limousine or buses. Oh, no, Metts answered. He was asked if he could keep a payment using Fantasy Bus's equipment, and Metts answered - no. Every day, Metts agreed, he came in and was either operating Fantasy Bus's equipment on Fantasy Bus's behalf or was fixing, maintaining, or repairing their equipment.

Metts testified about what happened on September 18, 1993. I came into work about 9:00 or 10:00 in the morning, he said. Discussing his schedule for that day, Metts stated that he believed he was to pick up some people and go down to Herman to the wine country. I was going to be operating one of the larger buses that day, he said. To prepare for the trip, Metts said, I started the bus up, cleaned it up, made sure it was fueled up, and I was to make sure the propane tanks were on there to operate the generator that provided electricity for the inside of the bus. Explaining how he sustained the injury, Metts stated that he was loading one of the propane tanks and the hinge was broken on one of the heavy doors that come up on the side of the bus which made it really difficult in opening the door and then taking the propane tank, bending over and putting it up underneath the bus and hooking it up to the generator when he felt his back pop. Metts was asked how much did a full propane tank weigh. I'd say 50 pounds or a little more, the claimant answered.

Metts stated that he finished his shift that day and complete his trip successfully. As the day went on, though, I had more pain, Metts said, I could feel it going down my back and down my right leg.

The claimant agreed that he was scheduled to work the next day, which was a Saturday, and he did come in to work for Fantasy Bus that day. My job on Saturday was to take another fare out, he said. I did not seek medical care that day because I had to work that day, Metts stated. The pain was there but it wasn't as intense as it got to be, he said. Metts agreed that he worked the next day as well, which would have been Sunday.

I did not tell anyone at Fantasy Bus about the September 18, 1993 incident and my injury until a couple of days later, Metts said. I spoke to Mike Nelson that following Monday or Tuesday, somewhere I guess around the 20<sup>th</sup> or 21<sup>st</sup>, he said. I told Nelson what happened as far as loading the propane tanks, and that I'd hurt my back and couldn't come in to work, Metts testified. He stated that he did not recall what Nelson had said about the fact that he had been injured. I did not request that Fantasy Bus send me to a doctor or provide medical care, and did not make Nelson aware that I needed to seek medical care at the time I first spoke to Nelson, the claimant said. After this conversation with Nelson, I did not go in to work that day, a Monday I believe, the claimant stated, and I did not seek medical care. The next time I had contact with Fantasy Bus about either working or not coming into work was later on that week, I believe, Metts said, and I spoke with Nelson again letting him know that my back pain was extensive and that I couldn't work, couldn't do anything. Nelson did not offer to provide me medical care or tell me to go seek medical care anywhere, the claimant said. I told him at that time that I was going to go to a doctor, Metts stated, and Nelson responded that they didn't have any insurance.

The claimant stated that he sought medical care at Logan Chiropractic, and identified Claimant's Exhibit No. B as the medical records of Logan College from when he first sought treatment on or about October 1, 1993. Metts agreed that he treated at Logan Chiropractic for a little over two and a half weeks, or through the 18th. The treatment they provided was called manipulation, the claimant said. The pain problems in my back and right leg got worse, Metts said. He agreed that he was eventually referred to another physician at Mid America Orthopedic Surgery. I was seen at Mid America about two times, the claimant said, they started manipulations again and took x-rays of my back. Metts agreed that he had an MRI at Deaconess West the first week in November 1993, and that he eventually came under the care of Dr. Bailey, an orthopedic surgeon, on November 15, 1993 regarding his back injury. Dr. Bailey gave his opinion as to what he thought was wrong with my back, that my disc in L-4 L-5 had exploded, Metts said, and the doctor suggested microsurgery. Metts agreed that the surgery was performed in December of 1993; I believe it was at St. Mary's Hospital, he said. The claimant agreed that he continued to treat with Dr. Bailey after the surgery was performed, and that Dr. Bailey eventually released him from his care about June of 1995.

After I was released by Dr. Bailey in 1995 I continued to have problems with my back and pain going my legs, and I had to go back and have a second surgery with Dr. Bailey, the claimant testified. The second surgery was another microsurgery at the same level, L4, 5, Metts stated, and was performed, I believe, at St. Mary's also. Dr. Bailey explained that what went wrong with the first surgery that required the second surgery was that when the disc exploded, pieces of disc were floating around in there and it pinched off a nerve and shut down a nerve down my leg, Metts testified. I continued to treat with Dr. Bailey after the second surgery, the claimant said, and the doctor once again released me some time in 1995.

I still had constant pain down the right leg at the time Dr. Bailey released me, Metts said, and I ended up going to a Dr. Peter Mirkin, who was suggested to me by a friend, for my back problems. I first saw Dr. Mirkin in November of 1999 and he took some more x-rays and MRI scans, and told me that the disc had exploded at L4, 5 and there was nothing left to repair, the claimant said. Dr. Mirkin's recommendation for treatment at that time was a complete fusion, Metts said, and this surgery was performed at St. Anthony's the day after Thanksgiving, I believe. Metts was asked if this surgery was successful. Yes, the claimant answered, though I still have pain, but, yes, it was successful. Metts agreed that Dr. Mirkin continued to treat him for some time, eventually releasing him in the spring of 2000. At the time Dr. Mirkin released me I was still having problems referable to my back, but I have not sought any further medical care, Metts stated.

The claimant agreed that he had reviewed the records and bills referable to his care marked as Claimant's Exhibits B through K, and agreed that he calculated the medical bills to total \$73,383.23. These bills have not been paid by me or any other source that I am aware of, Metts said, and I am still getting notices for all of these bills. Fantasy Bus Bus & Limousine has never offered to pay any of these outstanding medical bills, the claimant said.

I have never had any injuries to my low back or back prior to the injury I sustained while working at Fantasy Bus, Metts testified.

On cross examination by the alleged employer, Metts agreed that he worked the day of the alleged injury, a Friday. I worked an excess of probably eight hours that day because I had a long trip that day, the claimant said. Metts agreed that he worked the following day, which was a Saturday, stating the he believed he had two fares that day, so he would again have worked in excess of eight hours. He agreed that he also worked the next day, which he believed was a Sunday, and stated that he believed this was a shorter day, probably five hours or so. Metts stated that when he had testified that prior to the accident he generally worked everyday, he meant five to six days a week. The number of hours each day I worked, like I said, would depend on the fare, or the job for that day, but on average, eight hours a day, the claimant said. Metts agreed that he was paid \$10.00 an hour, but further stated that he did not know how much money he was paid for the month of September, 1993. The claimant was shown the document marked as Claimant's Exhibit P, and agreed that the document reflected what he had earned for the month of September, 1993; he agreed that according to the document he was paid

\$450.00 for that month, which at \$10.00 an hour meant he worked a total of 45 hours that month.

Metts was queried if he had ever received a W-2 from Fantasy Bus at any time during his employment. I have no idea; don't know; I don't recall at this time, Metts answered. The claimant agreed that he had testified on direct that he had had withholdings from his pay, and stated that it was the normal taxes, but he did not know the actual amount withheld. He was asked, other than the normal taxes what else was withheld, if anything. I don't know, the claimant answered.

During cross examination by the alleged employer, Metts was asked who did he see of the people he said were working for Fantasy Bus on the day that he said the incident occurred. I don't recall at this time which ones worked with me that day, the claimant answered. When asked if he recalled how many people worked with him that day, Metts stated that there would have been one that would have went with him as a server. Metts testified that he saw other people driving other buses or the limo for Fantasy Bus that day; I don't recall who else went out but the other buses went out on a trip that day, I believe, he said. Metts was asked if there was any place where the people that worked for Fantasy Bus could gather and meet. Where the buses were parked at, the claimant responded, just in a parking lot.

Metts stated, during cross examination by the alleged employer, that he had never filed a workman's compensation claim besides this one. He was asked who he had worked for prior to Fantasy Bus, and he answered - Southside Towing, City of St. Louis where I drove a tow truck, and Northwest Towing. Metts agreed that he was in an automobile accident prior to working for Fantasy Bus, but stated that he did not recall the date. He stated that he did not recall the exact date he worked for City of St. Louis, but that it was for less than a year. Metts was handed documents described as a copy of a Claim for Compensation that was filed with the Division of Workers' Compensation along with the Stipulation for Compromise Settlement.<sup>[1]</sup> Metts stated that he did not believe it was his signature on the document on line 20, but agreed that the document reflected his social security number on line 5. Metts agreed that line 11 on the document claimed that the parts of the body that were injured were back, neck, legs and body. When queried if it was his testimony at the hearing that this injury never occurred and this claim was never filed by him, Metts responded that he did not recall it, no. He was queried if he remembered ever being represented by Attorney Thomas Gregory. Not that I recall, the claimant responded. He agreed that he lived at the address reflected in the document, and that he had lived there at or around April 1, 1987. Metts stated that he did not know if it was his signature on the third page of the document; I can't tell if that's my signature, Metts said. The claimant agreed that on page 2 of the exhibit indicated that this settlement is based upon an approximate disability of ten percent of the back. Metts was again asked if it was his testimony that he had never received medical treatment for his back prior to September of 1993, and the claimant responded - not that I recall, no. He stated that he did not recall receiving any money for a Workers' Compensation case.

During cross examination by the alleged employer, Metts agreed that the trip tic that he testified about on direct examination contained the information that would tell him where he was to pick up passengers, the approximate number of passengers, and where he was taking those passengers, and did not provide any other information. When queried that it did not provide the route that he was to take to get to the destination, Metts answered that sometimes it would include directions. Metts agreed that when he drove the bus he was responsible for the bus or for any of the vehicles that he drove. He was asked if either Nelson or Taylor would be on the bus with him when he was operating it, and Metts responded - sometimes. Metts agreed that he did not have any information as to when the eight people he said worked for Fantasy Bus in September of 1993 actually worked, and admitted that he didn't have any information as to how often any of those people worked. When queried didn't all of those people have other jobs, Metts stated that he didn't know. He was queried wasn't it true that he was not required to take a fare if he didn't want to. Well, it was part of my job, Metts answered. He agreed that he only got paid if he worked. The claimant agreed that if he didn't want to work he could decline a trip; when asked if this was also true for the other people he said worked for Fantasy Bus, Metts responded that he had no knowledge of that. Metts agreed that he had a number to be able to contact Nelson if he needed to get ahold of him.

On cross examination by the Second Injury Fund, Metts agreed that he had testified on direct that he began working for Fantasy Bus in late 1992 or early 1993. Metts agreed that the days and number of hours he worked changed from week to week, but he did not recall any weeks where he didn't work at all for Fantasy Bus. He stated that he did not recall the minimum number of hours he worked in any week doing the time he worked for Fantasy Bus. Metts agreed that he had the option to turn down a shift if he wanted to, but, he added, it didn't make the bosses happy as they were responsible to find somebody else to drive. The claimant was asked if he had ever turned down a shift he was asked to take before September of 1993. Not that I recall, no, Metts answered. He stated that he was not provided any sort of medical insurance through Fantasy Bus. I was not provided any other sort of benefits at all other than my paycheck, Metts said, and I did not have any set vacation time or sick time. He was asked how would he go about it if he had to take off work. I would call in and tell them, mostly speaking to Mike Nelson, Metts said, but I don't recall taking off any time prior to September, 1993. The claimant stated that the range of pay he made per week was \$300 to \$500.00; I also made tips on top of that, Metts said. Metts stated that he did not know how often the other people he had mentioned were working for Fantasy Bus actually

worked. When asked if he knew if the other people had set work schedules, Metts answered that that would depend on whether they were driving or working on the bus when they would receive their schedules. Metts then admitted that he just knew who was going with him on his trip. It would be on my trip tic who would be my server and stuff, Metts said, and I did not know about the other people that were working and how they got their schedules. Metts stated that he had no knowledge of whether the other people were able to turn down shifts or not. When asked if he knew how the other people were paid, Metts answered that he knew that some of the servers were also paid on an hourly basis too and also made tips. He stated that he did not know if any of the other people had full-time jobs other than working for Fantasy Bus Bus.

During cross examination by the Second Injury Fund, Metts stated he did not recall ever having had a W-2, but he was sure he did as he filed taxes for the year. Metts stated that he did not have with him at the hearing a copy of a W-2 or taxes.

Metts was asked if he had to wear a uniform when he worked for Fantasy Bus Bus. I had to where a nice shirt and tie, he answered, which I provided myself. Metts was asked if he knew the business structure of Fantasy Bus, whether it was a corporation or a sole proprietorship. I believe it was a corporation, he answered. Metts agreed that he believed the owner of Fantasy Bus was Ginger Taylor, and that Mike Nelson was a person in authority, a manager. Metts stated that he did not know any other officers of the corporation. The only people I knew in a managerial role at Fantasy Bus were Ginger Taylor and Mike Nelson, the claimant said. Metts agreed that Fantasy Bus was located next to another business owned by Ginger Taylor, Taylor Packaging. I did not do any work for Taylor Packaging, Metts stated.

Metts agreed, during cross examination by the Second Injury Fund, that after working the Saturday and Sunday after the alleged injury he never returned to work at Fantasy Bus. He stated that he was never specifically told by anyone that he was terminated by Fantasy Bus, the relationship pretty much just ended with him calling in. I don't recall if I had any shifts scheduled at the time I stopped working, Metts said. The claimant agreed that he had stated on direct examination he had a commercial drivers license, and stated that he had this license before he started working for Fantasy Bus. I continued to maintain this license after I left Fantasy Bus, Metts said.

On redirect examination, Metts stated that he was not working for anybody else at the same time he was working for Fantasy Bus. The claimant was asked, besides the shirt and tie he had to wear, did he have to bring any tools or anything else to his job to work for Fantasy Bus. Yeah, Metts answered, if I needed tools and they weren't there, I had to provide my own. When queried that Fantasy Bus had tools provided for him there, the claimant answered that there were some. Metts stated, during cross examination by the Second Injury Fund, that his own tools he sometimes provided to do the work at Fantasy Bus were just normal hand tools, mechanic tools; Metts stated that he had had those tools prior to coming to work for Fantasy Bus.

**Michael Thomas Nelson** testified on behalf of the employer. Nelson stated that to his knowledge, Fantasy Bus was a corporation. In September 1993, Nelson agreed, he was the general manager of Fantasy Bus. Nelson stated that he was familiar with James Metts, the claimant. Metts drove a vehicle for Fantasy Bus, Nelson stated. I first met Metts right before he drove because I had a pre-meeting with each person and told them about the independent contractor status, that we didn't take out taxes, and that we liked them to dress nice; basic things like that, Nelson said. I also had to show them the bus and how to operate the bus; there were a lot of different generators and things like that on the bus that they had to understand how to do, Nelson said. He stated that he recalled having this conversation with Metts. I recall what I told Metts about the job of driving a bus, Nelson said. Metts' experience was pretty slim with a bus, so I had to take him through the bus and show him how to operate that particular unit, Nelson testified, and then I also went over with him how we hire -- which would be not as an employee but as an independent contractor. I told him that I would call him and he could take jobs as he pleased; I had several guys that I could do that with, Nelson testified. Agreeing that he had explained to Metts how he would be paid, Nelson stated that it was \$10.00 an hour plus tips from the customers. Nelson was asked if Metts had any type of work schedule, and he answered - no. Metts was not required to report to work on particular days of the week, Nelson said, and agreed that Metts was basically on an as-needed/as-called basis. Nelson stated that Metts was free to decline work, and if he declined work he would not have been punished or reprimanded in any way. Metts was not provided any type of uniform or clothing, Nelson said. Metts' job was primarily to drive a bus, Nelson said. He was asked if Metts was required to maintain buses, and Nelson answered - no. People who worked for Fantasy Bus were not required to work any particular day, they were able to work when they wanted to; if they refused to work at any given time there would no punishment or reprimand, Nelson said.

It was noted that Metts had testified he was injured on September 18, 1993 and that a few days later he told Nelson about it. When asked if he recalled that conversation, Nelson responded - No, I do not.

Nelson stated that he did not recall that Metts quit driving for Fantasy Bus. Metts was never terminated by Fantasy

Bus, Nelson said, and to my knowledge was never told to not return to work. If Metts had been available to work he would have been used if needed, Nelson said. Nelson stated that as far as he knew, Metts never returned to work for Fantasy Bus Bus after September of 1993.

Nelson was asked if any type of withholding was done from the checks that Metts received, and he answered - no. Nelson agreed that if Metts had worked ten hours in a month he was paid a hundred dollars. It was noted that Metts had testified the normal shift he worked would have been approximately eight hours; I don't think so, Nelson responded. The minimum booking was four hours in the evening, and normally people did four and sometimes stretched it to five; a wedding, the minimum booking is two hours, Nelson testified. Metts did not work everyday, Nelson said. In September of 1993 Metts probably worked two days, he stated. Nelson agreed that two days a week would be pretty consistent with what Metts had worked prior to that. Nelson agreed the total payments that Metts would have received from Fantasy Bus Bus would be the \$3602.70 (as reflected on Claimant's Exhibit No. P), which would equate to roughly 360 hours. Nelson stated that he did not recall when Metts first did any work for Fantasy Bus Bus, but agreed that he believed Metts was working by March of 1993. It was noted that there were other names listed on Claimant's Exhibit No. P besides Metts, and Nelson was asked if any of the other people listed worked regularly or had regular schedules with Fantasy Bus; Nelson answered - no. Nelson testified that the people listed in Claimant's Exhibit No. P came to work in their own vehicles. Explaining how the people would know to come to work for Fantasy Bus Bus, Nelson testified that he would get a trip and he'd just start at the top of the list and call people and see if they wanted to take the job or not. If somebody didn't want to work I would go to the next name, he said. Names from Claimant's Exhibit No. P were noted - John Jones, Mike Miller, Marsha Larson, Tamera Gonzalez and M. Lewandowsky; Nelson agreed that none of these people worked in September of 1993. Nelson was asked how many vehicles were normally used at any one time for Fantasy Bus Bus, and he responded - normally one at a time. Usually we would try to have two people when the vehicle required was a bus in order to operate it and to accommodate the passengers, Nelson said, and if the vehicle was a limousine we would have one.

Nelson stated that he was familiar with the bus that Metts said he was driving the day he claimed to have been injured, September 18, 1993. Nelson said that the bus does have propane tanks. Describing the size of a propane tank, Nelson testified that it is huge - four or five feet long, and about two to three feet in diameter. He was asked how the propane tank was filled. You would go to a gas station and they would take a hose and bring it into the tank and fill it up, Nelson answered. When asked if he was able to remove the propane tank, Nelson responded - well, it would be possible but you would have to unbolt it; I mean, technically, no. Nelson stated that he did not remove the tank to fill it. He stated that that tank was not replaced on September 18, 1993, and, to his knowledge, was never replaced.

On cross examination by the claimant, Nelson testified that he had experience in accounting and bookkeeping from running businesses, and agreed that this required accounting and bookkeeping. Discussing his experience, Nelson stated that he owned hair and tanning salons and operated the books for them. I did not operate the books for Fantasy Bus and Limo in the calendar year 1993, he said. Nelson was asked who produced the document marked as Claimant's Exhibit No. P. I believe Ginger Taylor, Nelson responded; he stated that he did not enter the income information on this document. Nelson agreed that some people listed on Claimant's Exhibit No. P - Tom Fortson, Tammy Morgan, Steve Gonzalez, Ray Dornsef, Jim Metts - all of them worked in the month of September, 1993. He agreed that the other people listed on the document - Mike Miller, Marsha Lawson, Tamara Gonzalez, M. Lewandowsky and John Jones - all also worked at some time in the calendar year of 1993 for Fantasy Bus. Nelson agreed that he was a 50 percent shareholder in the Fantasy Bus and Limousine Company and was aware of where the money was going and was paid out each month. Referring to Claimant's Exhibit No. P, it was noted that it reflected at the top of the document: Labor - \$2,000.00. Nelson stated that he believed this \$2000.00 in September, 1993 was his pay. He agreed that the \$21,100.00 figure on the document in the year to date section was his pay as well.

Nelson stated, during cross examination by the claimant, that he did not recall if Metts ever declined work at any time when he was working for Fantasy Bus. He stated that he would not disagree with Metts' testimony that he never declined work during his employment with Fantasy Bus. Nelson denied that he had testified that Metts' job included not only driving the vehicle but also cleaning and doing basic maintenance on this vehicle both prior to and after the trips. Normally, I was doing this, Nelson stated. As the driver of the vehicle they could fuel sometimes, though I normally did, Nelson testified, and they were supposed to pick up basic trash after the trip. The actual cleaning was my job, Nelson stated. Nelson agreed that it would be rare that all three of his vehicles would be out at one time, and admitted that this was because usually one of them was broken down. We were a new business and booking all three of them all the time was very difficult, Nelson said. He was asked if he had brought with him any documentation to the hearing that supported his statement Metts did not have any withholding out of his paychecks, and Nelson answered - not that I'm aware of. Nelson stated that he did not recall if he signed off on the tax returns.

During cross examination by the claimant, Nelson stated he did not know the last date that Metts had worked in

September, 1993. He stated that he could not say how many days Metts worked in September, 1993. He was asked why didn't Metts return to work at Fantasy Bus, and Nelson said that he did not know. When queried that he never talked to Metts, Nelson responded that he did not recall, he didn't have a memory of it as it was ten years ago. Nelson was queried if he was stating that Metts was not hurt on September 18, 1993. I wouldn't know, Nelson responded. He admitted that he had no information to dispute the fact that Metts did sustain an injury on September 18, 1993. Nelson stated that he was aware of which bus Metts was alleging he had injured himself on September 18, 1993; in previous testimony Metts had said it was the white bus, Nelson added. The other bus was black, he said. Nelson was asked how the propane tank was put into the bus. It was put in between the two doors, it had steel straps around it, and it was secured to the bottom of the floor with bolts, he stated. Nelson was asked if the propane tank was put in with a forklift, or a crane, or did a person put it in. I'm not sure, Nelson answered, but I think we used about four guys to lift it in. Nelson stated that he did not know how much the propane tank weighed empty. It weighed a lot when it was full, but I don't know how much, he said.

On cross examination by the Second Injury Fund, Nelson agreed that the people who drove and served for Fantasy Bus Bus worked varying hours from time to time, and some weeks they did not work at all. Nelson was asked if he was responsible for the tax documentation for Fantasy Bus Bus, and he answered - No. He was queried as to how was he aware that no taxes were being taken out of these various individuals' checks. Because when we started the company we discussed how these people would be paid and how we would run the company, Nelson explained. He was queried if the other individuals besides Metts that were listed on Claimant's Exhibit P had full-time jobs. I know that almost all of them did, if not all of them; I think Marcy was a full-time student and the other people all had full-time jobs, Nelson answered. Nelson explained that he was aware that these people had full-time jobs because he had to work around their jobs in order to get them to work with him sometimes. I also drove with these people and sat and talked to them; I pretty much can tell you which job each one of them had, Nelson stated. He was asked if he had ever requested Metts to perform any sort of maintenance on buses that would require hand tools, and Nelson answered - no. None of my other drivers were required to do any sort of maintenance of the buses using hand tools, he said.

Nelson was asked, during cross examination by the Second Injury Fund, how he had come to know about Metts' back injury. I received a thing in the mail saying we were being sued or whatever that paper said, and that Metts had a bad back, Nelson answered. Nelson stated that he did not believe Metts ever personally requested any medical treatment for his back from him, but he really wouldn't remember that. Agreeing that he had said he was a 50 percent shareholder in Fantasy Bus Bus. Nelson stated that Ginger Taylor held the other shares. The officers of the corporation were me and Ginger Taylor; I believe we listed me as the President, Nelson testified.

On further cross examination by the claimant, when queried wasn't it true that he was not able to state whether taxes were withheld from any of the checks of the people listed in Claimant's Exhibit No. P, Nelson responded that he handed the people their checks and there weren't deductions. Nelson was queried if it was possible the big propane tank on the white bus was broken and that portable tanks had to be used in September of 1993 when Metts injured himself. A broken tank; no, not possible, Nelson responded.

**Ginger Ann Taylor** testified on behalf of the employer. Taylor stated that Fantasy Bus Bus Service Inc. was a Missouri corporation of which she was a shareholder. Fantasy Bus began in the bus and limousine business in about 1991 or 1992, Taylor said. Prior to this, neither I or Mike Nelson had been involved in that type of business, she said. Taylor agreed that Fantasy Bus used people to drive the buses and people to be waiters on the buses. Explaining how these people were paid, Taylor stated that it was hourly, per trip. These people did not have any type of regular scheduled hours, she said, they worked only if there was a trip to be done and if they wanted to work. Taylor stated that the people could refuse to work and not be reprimanded or punished in any way for refusing to work. She agreed that the people were free to come and go as they pleased, basically, as far as when they wanted to work. Fantasy Bus treated these people as independent contractors, she said. Taylor stated that she knew what a W-2 was as she had had experience from managing and running companies before. She stated that in these prior companies she had been involved with she provided these employees with workers' compensation insurance, and if people refused to work they would get fired.

The decision to treat the people of Fantasy Bus as independent contractors was based upon information that we received from other bus and limousine companies we talked with at the inception of the business, Taylor testified, including the person from whom one of the buses was purchased. She agreed that she was told that they were treated as independent contractors and paid on an hourly, as they worked, basis. Taylor stated that she also sought the advice of an insurance agent and an accountant, and based upon the information she received she believed that this was an appropriate way to compensate these people.

At the end of a year the company issued the people a 1099, Taylor stated. She explained that a 1099 is issued to any person that you pay over 600 hours in a calendar year that is not a taxable employee, a person to whom you paid money and

you did not withhold any taxes or other items from. This person would not be an employee, she said. The document you send to an employee is a W-2 form, Taylor said. [\[2\]](#)

Taylor reviewed a document marked as Claimant's Exhibit Q; she stated that she had seen the document before and that her signature was on the first page. The last two pages of the document, Taylor said, were copies of the check stubs for Mike Nelson's pay for the four weeks in September of 1993. Mike Nelson was paid \$500.00 a week, and less taxes, his net was \$421.79, Taylor said. There was no one else with Fantasy Bus Bus that had withholdings of that nature done, she said.

Taylor reviewed Claimant's Exhibit No. P and was directed to the names starting with Tom Fortson down to M. Lewandowsky; she stated that none of these people had withholdings from their pay; if these people worked ten hours, they would receive for \$10.00 an hour a check for a hundred dollars. Taylor was asked to explain what "taxes – payroll" below the Lewandowsky name meant on the document. Taxes withhold from Mike Nelson's paycheck, she answered. Taylor explained that the line below that – FUTA – meant Federal Unemployment Tax something; that was based upon on Mike Nelson's compensation, she explained. Taylor stated that near the top of the document, the first line after Total Revenue entitled "Labor", was referring to Mike Nelson. This document marked as Claimant's Exhibit No. P was prepared at or about the time that it reflected, September 30, 1993, Taylor agreed, and to her knowledge was a fair and accurate representation of the income expenses of the business as of that point in time. The compensation received by Metts in the month of September, 1993 was \$450.00, she said, and his total compensation through September 30, 1993 was \$3,602.70. To my knowledge Metts was never paid anything after September of 1993, Taylor stated. Taylor agreed that the document marked as Claimant's Exhibit No. Q was produced by her upon a request for documents made back in 1994, and at the same time she produced the document marked as Claimant's Exhibit No. P. Taylor stated that the document marked as Claimant's Exhibit No. P was prepared by her accountant.

Taylor testified that Fantasy Bus cease operations some time in 1994 or 1995. I don't remember the exact date, she said. When asked if she knew where the records of Fantasy Bus were kept, Taylor responded that she believed she took the records of Fantasy Bus to her house. Taylor stated that she had not looked for these records until within the last year and she was not able to locate them.

On cross examination by the claimant, Taylor was asked if there were other companies in which she was a shareholder, member, or principal. A company called Taylor Packaging Corporation for 23 years, Taylor answered, and I am the President of the company. She stated that she doubted if she still had her financial records dating back from 1993 for Taylor Packaging. According to my accountant, Taylor stated, we are told to keep the records for seven years and then get rid of them. It would have been my intent to follow the same practice for my documents in the company where I was a 50 percent shareholder and vice president, Fantasy Bus Bus and Limousine, Taylor agreed.

Taylor admitted, during cross examination by the claimant, that she had no documentation to provide that day at the hearing that withholding was or was not taken out of Metts' payments. She stated that the current status of Fantasy Bus Bus and Limousine was that it is no longer in operation; it's been dissolved. Taylor was asked if she had filed bankruptcy on behalf of that organization, and Taylor answered – no. My position at Fantasy Bus was just as an owner, she said. Taylor admitted that when she filed the documentation with the State as to her incorporation status, she was listed, she thought, as the vice president. The tax returned marked as Claimant's Exhibit No. Q was noted, and Taylor was queried if she was ever paid anything from Fantasy Bus. No, Taylor answered. She explained that she was not getting paid because the business was not making money. Nelson was getting paid because he was running the organization, Taylor stated, that was his only job.

During cross examination by the claimant, Taylor was asked if she had made statements in setting up the people that were working for her as independent contractors - Tom Fortson, Tammy Morgan, Steve Gonzalez, Ray Dornsef, John Jones, Jim Metts, Mike Miller, Marsha Lawson, Tamara Gonzalez, and M. Lewandowsky; did she have any of them sign an employment agreement of any sort. No, Taylor answered. She was asked if she had ever had them sign any sort of paper or documentation stating that they understood that they were independent contractors. I don't remember if we had them sign anything, Taylor answered.

Taylor testified that she was not aware of any problems with the propane tank on the white bus in the month of September, 1993, and was not aware of any repairs having to be made to the propane tank in the calendar year 1993. Taylor was queried if she was aware of any of the day-to-day operations of any of the buses. I was not involved in the day-to-day operations of the buses, she answered.

On cross examination by the Second Injury Fund, Taylor was asked if she had provided to the people listed on Claimant's Exhibit No. P - Tom Fortson to M. Lewandowsky – any benefits to them other than their pay, such as medical, or

sick leave, or vacation leave. No, Taylor answered. She agreed that this is something she does for the employees of Taylor Packaging. Taylor stated that she was personally aware that some of the people on Claimant's Exhibit No. P, from Tom Fortson to M. Lewandowsky, had other full-time jobs because they told her.

ISSUE: Whether or not there was an employee/employer relationship

At issue in this case is whether or not there was an employee/employer relationship between the claimant, Metts, and the company Fantasy Bus Bus and Limousine on or about September 18, 1993. Section 287.020. 1 RSMo defines "employee" as "...every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations." An "employer" is defined in 287.030.1 (1) RSMo as "Every person, partnership, association, corporation, limited liability partnership or company.....and every other person.....using the service of another for pay....".

In its Memorandum of Law the Second Injury Fund notes that Section 287.220.5 states, in part:

If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer, or in the case of death of an employee in the employ of an uninsured employer, funds from the second injury fund may be withdrawn to cover fair, reasonable, and necessary expenses in the manner required in sections 287.240 and 287.241. In defense of claims arising under this subsection, the treasurer of the state of Missouri, as custodian of the second injury fund, shall have the same defenses to such claims as would the uninsured employer.

The Second Injury Fund notes that case law has defined the differences between an employee under the statute and an independent contractor, who would not be considered an employee under the statute. Reviewing some cases on the issue:

"In making this determination, the 'facts of each case control whether the claimant is an independent contractor or an employee.' *Gaston v. J.H. Ware Trucking Inc.*, 849 S.W.2d 70, 73 (Mo. App. W.D. 1993). However, some general guidelines exist; an indicia of 'employee' status is typically evidenced by the employer's 'right to control' the means by which the job is completed. *Ceradsky v. Mid-Am. Dairymen, Inc.*, 583 S.W.2d 193, 197 (Mo. App. W.D. 1979). In contrast, an independent contractor is one who works 'according to his own methods, without being subject to the control of his employer, except as to the result of his work.' *Miller v. Hirschbach Motor Lines, Inc.*, 714 S.W.2d 652, 656 (Mo. App. S.D. 1986)." *Phillips v. Par Elec. Contrs.*, 92 S.W.3d 278, 282 (Mo.App. W.D. 2002).

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"The facts of each case control whether the claimant is an independent contractor or an employee. (*Miller*, 714 S.W.2d) at 656. Generally, in an employer - employee relationship, the employer reserves the right to control or actually controls the means and details associated with completing the job. *Ceradsky v. Mid-Am. Dairymen, Inc.*, 583 S.W.2d 193, 197 (Mo. App. 1979), *Hirschbach*, 714 S.W.2d at 656. \$ =R An independent contractor, on the other hand,

'is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer, except as to the result of his work.' *Hirschbach*, 714 S.W.2d at 656." *Gaston v. J.H. Ware Trucking, Inc.*, 849 S.W.2d 70, 73-74 (Mo.App. W.D. 1993).

The *Phillips* Court noted:

"In analyzing which category an individual falls into under "the right to control" analysis, courts have developed various multi-pronged tests. One such test (relied on by the Commission in this case), which utilizes many of the factors commonly considered in the "right to control" analysis, is the following:

(1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right to discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished equipment, (7) the extent to which the work is the regular business of the employer, and (8) the employment contract." *Phillips*, 92 S.W.3d at 282.

In this case, both the claimant and Mike Nelson (a 50% shareholder and the general manager of Fantasy Bus) testified that when Metts began with Fantasy Bus, Nelson discussed with Metts how to operate the bus, and that Metts' salary would be \$10.00 an hour. Witnesses for the employer, Nelson and Ginger Taylor (the other shareholder for Fantasy Bus) both testified that Metts and the other people Fantasy Bus used to drive buses and to be waiters on the buses did not have any type of work schedule and were not required to report to work on particular days of the week, and would not be punished if they refused to work at any given time. Metts was basically on an as-needed/as-called basis, Nelson testified, I told him that I would call him and he could take jobs as he pleased. Nelson testified that he would get a trip and he'd just start at the top of the list and call people and see if they wanted to take the job or not; and if somebody didn't want to work he would go to the next name. Metts agreed that he had the option to turn down a shift if he wanted to, but, he added, it didn't make the bosses happy as they were responsible to find somebody else to drive. The claimant stated that he had never turned down a shift he was asked to take before September of 1993; Nelson testified that he would not disagree with Metts that he had never declined work during the time he was with Fantasy Bus. The claimant agreed that he would receive a phone call and would be told what his fares would be if he was going out on an actual trip, but added that he'd come in on a pretty much daily basis and maintain and work on buses; Metts further stated that he had worked two more days after the September 18, 1993 injury. Metts, however, was shown an Income Statement from Fantasy Bus (Claimant's Exhibit No P) and he admitted that it reflected he had earned \$450.00 for the month of September, 1993 which at \$10.00 an hour meant he had worked a total of 45 hours that month. The people who were drivers and servers for Fantasy Bus were discussed by both the claimant and Nelson: a. Metts identified people listed on the Income Statement document marked as Claimant's Exhibit P as people that worked at Fantasy Bus as drivers, like himself, and as servers at the time he worked there - Tom Fortson, Tammy Morgan, Steve Gonzales, Mike Miller, Marsha Lawson, Tamara Gonzales, and Michelle Lewandowski. B. Nelson also reviewed the Income Statement and noted the listed people he would call to drive and serve for Fantasy Bus. Nelson stated that the people listed on Claimant's Exhibit No. P - Tom Fortson, Tammy Morgan, Steve Gonzalez, Ray Dornsef, Jim Metts - all of these people worked in the month of September, 1993; the other people listed on the document - Mike Miller, Marsha Lawson, Tamara Gonzalez, M. Lewandowsky and John Jones - all also worked at some time in the calendar year of 1993 for Fantasy Bus and Limo, Nelson said. Nelson agreed that the people who drove and served for Fantasy Bus worked varying hours from time to time, and some weeks they did not work at all. Considering the Income Statement (Claimant's Exhibit No. P) in light of the testimonies, the Income Statement reflects the following salaries for the month of September, 1993: Tom Fortson - \$222.50, Tammy Morgan - \$417.50, Steve Gonzales - \$190.00, Ray Dornsef - \$100.00, John Jones - \$0.00, Jim Metts - \$450.00, Mike Miller - \$0.00, Marsha Lawson - \$0.00, Tamara Gonzales - \$0.00, and Michelle Lewandowski - \$0.00. The Income Statement reflected similar variances in year to date salary amounts for the listed people (i.e. Tom Fortson - \$222.00, Steve Gonzales - \$1489.50, Jim Metts - \$3602.70, M. Lewandowski - \$1486.50). It is found that these facts in this case - i.e. the variations in salary amounts for people described by both the claimant and the general manager as performing the same jobs - does not clearly demonstrate an exercise of control or a right to control work schedules.

Considering other facts in the case on the issue of control, the testimonies were in dispute as to whether or not taxes were withheld from the claimant's pay. Metts testified that after he filled out an application for a driver position at Fantasy Bus, he spoke with Mike Nelson at Fantasy Bus about what his job requirements were going to be. Nelson and I discussed my salary and what I would be actually doing as far as driving and helping maintain the buses, the claimant said. I believe my rate of pay when I was hired was like \$10.00 an hour with a weekly paycheck, Metts stated. Metts testified that from the time he started his employment with Fantasy Bus up to the time he was injured, taxes were withheld from his check as well as the other normal withholdings such as social security and FICA. The claimant admitted, though, that he did not know the actual amount of the taxes withheld from his check. When queried if he had ever received a W-2 form from Fantasy Bus at any time during his employment, Metts responded that he had no idea; he did not know; he did not recall at that time. Metts later stated that he did not recall ever having had a W-2, but he was sure he did as he filed taxes for the year. The claimant stated that he did not have with him at the hearing a copy of a W-2 form or his taxes. Taylor testified that their decision to treat the people of Fantasy Bus as independent contractors was based upon information they received from other bus and limousine companies they talked with at the inception of the business, as well as from the person from whom one of the buses was purchased, as well as from an insurance agent and from an accountant. Taylor admitted that she did not have any of the people she said were working for her as independent contractors sign an employment agreement of any sort, and said that she did not remember if she had had them sign any sort of paper stating that they understood that they were independent contractors. Taylor stated that she knew what a W-2 form was from prior experience with managing and running companies, and that in these prior companies she had been involved with she provided the employees with workers' compensation insurance and if people refused to work they would get fired. Taylor indicated that the people listed in Claimant's Exhibit No. P, starting with Tom Fortson down to M. Lewandowsky, were the independent contractors Fantasy Bus used to drive buses or serve on buses; she stated that none of these people had withholdings from their pay, and that if these people worked ten hours they would receive for \$10.00 an hour a check for a hundred dollars. At the end of a year Fantasy Bus issued these people a 1099, Taylor stated. She explained that a 1099 is issued to any person that you pay over

600 hours in a calendar year that is not a taxable employee, a person to whom you paid money and you did not withhold any taxes or other items from. This person would not be an employee, Taylor said, and further stated that the document you send to an employee is a W-2 form. Taylor admitted that she had no documentation to provide at the hearing that withholding was or was not taken out of Metts' payments. Discussing the Income Statement document (Claimant's Exhibit No. P), Taylor stated that the document was prepared by her accountant and was prepared at or about the time that it reflected, September 30, 1993; Taylor explain that "taxes – payroll" below the Lewandowsky name on the document meant taxes withhold from Mike Nelson's paycheck, and that the line below that – Futa, which meant Federal Unemployment Tax something - was based on Mike Nelson's compensation, and that the first line after Total Revenue entitled "Labor" near the top of the document was referring to Mike Nelson. Taylor testified that she was not getting paid because the business was not making money. Nelson was getting paid because he was running the organization, Taylor stated, that was his only job. Nelson testified that he had a pre-meeting with each person before they drove for Fantasy Bus and he told them about the independent contractor status, that we didn't take out taxes, and that he showed them how to operate the bus and told them that we liked them to dress nice, basic things like that. Nelson stated that he recalled having this conversation with Metts; henoted that Metts' experience was pretty slim with a bus, so he had to take Metts through the bus and show him how to operate the unit. I also went over with him how we hire, Nelson testified, which would be not as an employee but as an independent contractor. Nelson said that he had explained to Metts how he would be paid, that it was \$10.00 an hour plus tips from the customers. Nelson stated that as no type of withholding was done from the checks that Metts received, if Metts had worked ten hours in a month he was paid a hundred dollars. Nelson stated that he was not responsible for the tax documentation for Fantasy Bus Bus, but he was aware that no taxes were being taken out of these individuals' checks because when they started the company they discussed how these people would be paid and how we would run the company. When challenged on cross examination by the claimant, wasn't it true that he was not able to state whether taxes were withheld from any of the checks of the people listed in Claimant's Exhibit No. P, Nelson responded that he handed the people their checks and there weren't deductions. Nelson admitted that he was not aware of bringing any documentation to the hearing to support his testimony that Metts did not have any withholding out of his paychecks. Considering the Income Statement and the tax return (Claimant's Exhibit No. Q), identified by Taylor as a copy of the company's tax return, and in light of the testimonies, it is found that these documents support Taylor's and Nelson's testimonies, in particular that only the company officer Nelson devoted 100% of his time to the company and was compensated for his service, and indicated that no other salaries were paid but rather "contract labor" was paid with no withholdings and was noted with "other deductions" (line 26 on form 1120, and noted on a separate sheet setting out "Line 26 – Other Deductions"). It is found that these facts do not demonstrate a method of payment such that the claimant or the other drivers/servers were paid as employees of Fantasy Bus. See, also, Phillips where the Court noted that the alleged employer did not deduct taxes for its employees as one factor that did "not conclusively demonstrate a 'right to control' that would ultimately determine whether the truck driver was an 'employee'" Id. at 283.

"This court has held when the evidence does not clearly demonstrate the employer's actual or right to control, the "relative nature of the work test" determines employment status for purposes of workers' compensation. *Ceradsky*, 583 S.W.2d at 199.

'Where by the very nature of the work relationship or other circumstance . . . control is not conspicuous, the right to direct the detail of the work becomes only one indicium of control among others and the inquiry turns to the economic and functional relationship between the nature of the work and the operation of the business served. The inquiry, moreover, tends away from technical common law definitions to the public purpose of the scheme for workmen's compensation.'

*Id.* at 198-99. The purpose of workers' compensation is to make industry bear the burden of compensating employees for injuries arising out of the scope and course of employment. *West v. Posten Constr. Co.*, 804 S.W.2d 743, 746 (Mo. banc 1991)." *Gaston*, 849 S.W.2d at 74.

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"The factors to consider under the nature of the work test include: the character of the claimant's work or business - how skilled it is, how much of a separate calling or enterprise it is, to what extent it may be expected to carry its own accident burden and so on - and its relation to the employer's business, that is, how much it is continuous or intermittent, and whether the duration is sufficient to amount to the hiring of continuing services as distinguished from contracting for the completion of a particular job. *Ceradsky*, 583 S.W.2d at 199." *Id.*

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“The factors to consider in determining whether or not the requisite right to control exists are.....In cases when these factors do not clearly determine the issue, Missouri's courts have applied the ‘relative nature of the work’ test. This test, recognized in *Ceradsky v. Mid-America Dairymen, Inc.*, 583 S.W.2d 193 (Mo. App. 1979), shifts the focus from the right to control to the economic and functional relationship between the nature of the work and a business' operation. It considers how much skill that a claimant's work requires, how much of a separate calling or enterprise it is, and to what extent the job might be expected to carry its own accident burden. It also focuses on the relation of the job to the employer's business and determines whether the job being performed is continuous or intermittent and whether its duration amounts to the hiring of continuous services rather than a contract for the completion of a particular job. *Phillips*, 92 S.W.3d at 283; *Turner*, 952 S.W.2d at 358-59.” *Leach v. Bd. Of Police Comm'rs of Kan. City*, 118 S.W.3d 646 (Mo.App. W.D. 2003).

In this case, there is no dispute in the evidence that the nature of the business of Fantasy Bus Bus & Limousine Company was a bus and limousine service, i.e. Taylor testified that Fantasy Bus began in the bus and limousine business in about 1991 or 1992; the claimant testified that the nature of Fantasy Bus's business was providing limousine and bus service for hire; and the income tax return for Fantasy Bus noted in Schedule K that the business activity was "Bus/Limo Service" and that the product or service was "Service". There is no dispute in the evidence that Fantasy Bus owned three vehicles for hire, i.e. the claimant testified that Fantasy Bus's vehicles that were operated for hire were two large bus limousines with restrooms and held 28 to 32 people and one six-passenger car stretch limousine; the corporation income tax return Depreciation and Amortization document at Part V Section A indicated property used more than 50% in the qualified business were two buses and one limousine; in his testimony Nelson stated that it would be rare that all three of his vehicles would be out for hire at the same time because usually one of them was broken down. There is no dispute that Fantasy Bus did not provide the drivers/servers with uniforms, i.e. the claimant testified that he had to wear a nice shirt and tie which he provided himself; Nelson testified that when he first met with the people who drove he told them that they liked them to dress nice and testified that Metts was not provided with any type of uniform of clothing. There is no dispute that the vehicles used for the bus/limousine service were those of Fantasy Bus, i.e. the claimant testified that he drove the Fantasy Bus's two buses and the limousine and picked up and delivered fares, Nelson testified that Metts drove vehicles for Fantasy Bus and that the vehicles Metts drove were those owned by Fantasy Bus. The claimant was the only one to testify about a commercial drivers license, stating that he had had this license before he started working for Fantasy Bus and has continued to maintain this license after he left Fantasy Bus.

There was a dispute in the testimonies as to the frequency and number of hours the claimant worked for Fantasy Bus. The claimant testified that at the beginning of the week they would let him know if they had fares lined up for the week, or he would be on a day-by-day pay basis where if they got a new fare in, he'd receive it that day. Metts further testified, though, that he would receive a phone call, or when he reported in to take care of the buses he would receive his schedule; he stated that he was not on a regular schedule, but he still came in to work at Fantasy Bus on a pretty daily basis to maintain and work on buses. The claimant stated that the days and number of hours he worked changed from week to week, but he did not recall any weeks where he didn't work at all for Fantasy Bus. I don't recall taking off any time prior to the September, 1993 injury, the claimant said, and stated that he did not work for anyone else during this time. Metts stated that he did not know how often the other drivers or servers who were working for Fantasy Bus worked. He stated that he did not know when all of the other people worked, and stated that he did not know if any of the other people had full-time jobs other than working for Fantasy Bus. The claimant, who testified that he had worked two more days after the September 18, 1993 injury, admitted that an Income Statement from Fantasy Bus reflected that he had earned \$450.00 for the month of September, 1993 which at \$10.00 an hour meant he had worked only a total of 45 hours that month. Nelson explained how the people who drove and served for Fantasy Bus knew to come to work for Fantasy Bus. I would get a trip and I'd just start at the top of the list and call people and see if they wanted to take the job or not; and if somebody didn't want to work I would go to the next name, Nelson said. Nelson testified that the people who drove and served for Fantasy Bus worked varying hours and from time to time, and some weeks they did not work at all. Nelson noted that almost all of the other individuals like Metts that were listed on Claimant's Exhibit P had full-time jobs. He explained that he was aware that these people had full-time jobs because he had to work around their jobs in order to get them to work with him sometimes. I also drove with these people and sat and talked to them; I pretty much can tell you which job each one of them had, Nelson stated. He stated that he disagreed with Metts if Metts had said the normal shift he worked would have been approximately eight hours. The minimum booking was four hours in the evening, and normally people did four and sometimes stretched it to five; with a wedding, the minimum booking is two hours, Nelson testified. Metts did not work everyday, Nelson said. He stated that two days a week would be pretty consistent with what Metts had worked. Noting that Metts never returned to work for Fantasy Bus after September of 1993, Nelson stated that the total payments that Metts would have received from Fantasy Bus Bus would be the \$3602.70 (as reflected on Claimant's Exhibit No. P), which would equate to roughly 360 hours. It is found considering the evidence, that it establishes that for the year of 1993, Metts worked about 8 months and three weeks; or 360 hours divided by approximately 35 weeks = 10.29 hours/week.

In holding that the claimant was an employee under “the relative nature of the work test” the *Phillips* court considered the following:

“In applying this test, the *Gaston* court looked at the fact that ‘truck drivers require a degree of skill,’ but balanced that fact against other facts like that the driver in this case worked for the company continuously and exclusively. *Id.* (citing *Ceradsky*, 583 S.W.2d at 199). Moreover, it was found that the work the driver did for the company was the entirety of its business enterprise and, therefore, ‘essentially established the renderer of the service an employee within the purposes of the compensation law.’ *Id.* (quoting *Ceradsky*, 583 S.W.2d at 198). As such, in *Gaston*, even though the employment contract the parties entered into expressly designated the driver an independent contractor, and also in face of the fact that the driver owned the truck which he drove, under the ‘relative nature of the work test’ the court concluded that the driver was an ‘employee.’ 849 S.W.2d at 76.

Under “the relative nature of the work test,” there can be no doubt that Mr. Phillips was likewise an ‘employee’ of Hallier Services. Similar to *Gaston*, supplying truck drivers (like Mr. Phillips) was the entirety of Hallier Services’ business. Mr. Phillips, after beginning to work for Hallier Services, drove trucks continuously for that organization, and Hallier Services provided the requisite liability insurance throughout their employment relationship. And although Mr. Phillips was not bound by contract from driving for other trucking companies like in *Gaston*, the record below establishes that Mr. Phillips, while employed by Hallier Services, never drove for another trucking company and subsisted on the earnings paid to him by Hallier Services. Moreover, none of the indicia of independence present in *Gaston* exists here: there was no contract designation of Mr. Phillips as an “independent contractor,” nor did Mr. Phillips own the trucks that he drove. Accordingly, under the “relative nature of the work test,” Mr. Phillips must be considered an ‘employee.’” *Phillips*, 92 S.W.3d at 283-284.

In this case, the claimant did not own the vehicles he used to pick up and deliver fares, the vehicles were owned by Fantasy Bus. The claimant gave undisputed testimony that he worked only for Fantasy Bus continuously, and no evidence was presented establishing that Metts worked for another performing the same duties during the time he worked for Fantasy Bus; although the evidence indicates that Metts worked part-time hours for Fantasy Bus, the Income Statement supplied by Fantasy Bus reflects that Metts worked the most continuously of the drivers and servers (i.e. Metts’ year to date income was \$3602.70 while Tom Fortson’s was \$222.50 and Steve Gonzalez’ was \$1489.50). Although there is dispute as to whether or not the claimant was told that he was hired by Fantasy Bus as an independent contractor, there is no contract document expressly designating Metts as an independent contractor. Most importantly, it is found that the evidence establishes that the work Metts did for Fantasy Bus was the exclusive business of the company, and thus, as stated in *Phillips*, was “the entirety of its business enterprise and, therefore, essentially established the renderer of the service an employee within the purposes of the compensation law.” The claimant argued in his memorandum of law: “Also, a provision Mr. Metts’ services were part of the regular business of Fantasy Bus, and that without said services, Fantasy Bus would not have been able to operate.” (sic) It is found that under the “relative nature of the work test”, Metts must be considered an “employee” for workers’ compensation purposes at the time of his September, 1993 injury.

The question of whether or not the employer, Fantasy Bus, was subject to the provisions of Missouri Workers’ Compensation law must be addressed. Section 287.030 defines “employer”, and in subsection 1(3) of the Section are the following additional qualifications:

Any of the above-defined employers must have five or more employees to be deemed an employer for the purposes of this chapter unless election is made to become subject to the provisions of this chapter as provided in subsection 2 of section 287.090, except that construction industry employers who erect, demolish, alter or repair improvements shall be deemed an employer for the purposes of this chapter if they have one or more employees. An employee who is a member of the employer's family within the third degree of affinity or consanguinity shall be counted in determining the total number of employees of such employer.

In its argument in its memorandum that there is no evidence there were five or more employees employed for five and ½ work days at the time of Metts’ alleged injury, the Second Injury Fund wrote:

“Giving the Claimant every benefit of the doubt, he is only able to establish three potential employees, Mike Nelson, Ginger Taylor, and if he is found to be credible as to all of the above, himself. All testimony establishes that Mike Nelson was an employee of Fantasy Bus. Because Ginger Taylor was an officer of the corporation, it is likely that she would be found an employee as well. If one assumes that Claimant was an

employee, that still only establishes three employees. There is no evidence to counter Mike Nelson's testimony that the other people working for Fantasy Bus were independent contractors. Claimant testified that he did not know if taxes were being removed from their paychecks. He testified that he did not know if they had the ability to take fares as they wished. He did not know anything about their relationship with Fantasy Bus.

It was previously determined in this Award that the claimant, Metts, must be considered an "employee" for workers' compensation purposes at the time of his September, 1993 injury under "the relative nature of the work test". There is no dispute in the evidence that there were other people performing the duty of driver or server for Fantasy Bus at the time Metts worked there, and that these people were listed in Claimant's Exhibit No. P (a document entitled Income Statement and noted by Ginger Taylor to have been prepared by the company's accountant): a. Metts testified – the people beside myself were Tom Fortson, Tammy Morgan, Steve Gonzales, Mike Miller, Marsha Lawson, Tamara Gonzales, and Michelle Lewandowski; and to the best of my knowledge, these people, like myself, were drivers and servers working on the bus for Fantasy Bus and were employed by Fantasy Bus at the time I was injured while working for Fantasy Bus on September 18, 1993. b. Nelson testified – I would get a trip and I'd just start at the top of the list and call people and see if they wanted to take the job or not and if somebody didn't want to work I would go to the next name. Usually we would try to have two people when the vehicle required was a bus in order to operate it and to accommodate the passengers, Nelson said, and if the vehicle was a limousine we would have one. The people listed in Claimant's Exhibit No. P were noted and Nelson stated that the people listed - Tom Fortson, Tammy Morgan, Steve Gonzalez, Ray Dornsef, Jim Metts - all of these people worked in the month of September, 1993; he stated that the other people listed on the document - Mike Miller, Marsha Lawson, Tamara Gonzalez, M. Lewandowsky and John Jones – all also worked at some time in the calendar year of 1993 for Fantasy Bus. Nelson testified that he also personally worked with these people. c. Taylor testified that Fantasy Bus used people to drive the buses and people to be waiters on the buses; she stated that these people were paid hourly, per trip. When discussing the people that worked for Fantasy Bus in this manner and were paid hourly, Taylor noted the people listed in Claimant's Exhibit No. P - the names starting with Tom Fortson down to M. Lewandowsky. It is found that the substantial weight of the evidence establishes that at the time of the claimant's September 1993 injury, Fantasy Bus had five or more people performing the limousine/bus service jobs which was the exclusive business of the company, and thus establishes that there were five or more "employees" for purposes of workers' compensation under "the relative nature of the work test" at the time of the claimant's September 1993 injury.

The Second Injury Fund argued in its memorandum that the claimant could not establish, nor did any other testimony establish, that any of these people were employed for 5 1/2 days at the time of the claimant's alleged injury. Nelson's testimony alone, it is found, establishes that Fantasy Bus employed and/or had working five "employees" in the month of September 1993: Nelson testified that Tom Fortson, Tammy Morgan, Steve Gonzalez, Ray Dornsef, Jim Metts all worked in the month of September, 1993 for Fantasy Bus. Additionally, in its holding that Section 287.020.1 RSMo (Supp. 1990) provides that an "employee" means every person in the service of any employer, under any contract of hire, express or implied, oral or written. Subsection 6 of that statute says that a person who is employed by the same employer for more than five and one-half consecutive work days shall for the purpose of this chapter be considered an "employee" the Court in *Breeze v. Helm & Sons Lumber Co.*, 23 S.W.3d 886, 888-9 (Mo.App. S.D. 2000) noted:

The "five and one-half consecutive work days" requirement has been the subject of judicial interpretation. In *Metcalf v. Castle Studios*, 946 S.W.2d 282, 285 (Mo.App. W.D. 1997) the Western District of this Court said:

Section 287.020.6 requires a person to be employed - not working - for more than 5 1/2 consecutive work days. An employee need not actually work more than 5 1/2 consecutive days but need only be in the employer's employment for that length of time. To conclude otherwise would render persons working five days a week, eight hours a day, not covered by the [Act]. This would mean that an employer whose business was open seven days a week, but who required his employees to work five days for 40 hours a week, would be exempt even if the employer employed more than 1000 employees. This simply was not the legislature's intent. The General Assembly apparently intended the requirement that an employee must be employed for at least 5 1/2 consecutive days to exclude temporary employees - those who were employed for only five days or less, terminated, and then rehired at a later time for another five days or less. The *Metcalf* court concluded that since Castle Studios employed at least five persons for more than five and one-half consecutive days, it was subject to the Act. *Id.* at 286."

It is found that the evidence establishes that Fantasy Bus was an employer subject to the provision of the Missouri Workers' Compensation law at the time of the claimant's September 1993 injury.

Hence, it is found that the evidence establishes that on or about September 18, 1993 the claimant was an “employee” of Fantasy Bus for workers’ compensation purposes under “the relative nature of the work test”, and the employer (Fantasy Bus) was subject to Missouri Workers’ Compensation law in that it had five or more employees employed for five and one half consecutive work days.

**ISSUE: Whether or not there was an accident arising out of and in the course of the claimant's employment; Liability of past medical expenses (reasonableness and necessity)**

The parameters for a compensable accident under Missouri Workers Compensation law are set forth in Section 287.140, subsections 2 and 3 RSMo 2000:

2. The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It can be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

Metts, the claimant, testified that on September 18, 1993 he came into work and was scheduled to pick up some people and take them to the wine country. I was going to be operating one of the larger buses that day, the claimant said, and to prepare for the trip, I cleaned it up, made sure it was fueled up, and I was to make sure the propane tanks were on there to operate the generator that provided electricity for the inside of the bus. I was loading one of the propane tanks and the hinge was broken on one of the heavy doors that come up on the side of the bus which made it really difficult in opening the door, and then taking the propane tank, bending over and putting it up underneath the bus and hooking it up to the generator, I then felt my back pop, Metts testified. I spoke to Mike Nelson that following Monday or Tuesday and told him what happened as far as loading the propane tanks and that I'd hurt my back and couldn't come in to work. The next time I had contact with Fantasy Bus was later on that week, Metts said, and I spoke with Nelson again letting him know that my back pain was extensive and that I couldn't work. Nelson did not offer to provide me medical care or tell me to go seek medical care anywhere, the claimant said. I told him at that time that I was going to go to a doctor and Nelson responded that they didn't have any insurance, Metts testified. The claimant stated that he received medical care at Logan Chiropractic but the pain problems in his back and right leg got worse. I was referred to a physician at Mid America Orthopedic Surgery, Metts stated, where treatment consisted of manipulations, x-rays of his back and an MRI. Eventually I came under the care of Dr. Bailey who performed surgery in December of 1993. Metts agreed that Dr. Bailey released him from treatment in about June of 1995. After I was released by Dr. Bailey in 1995 I continued to have problems with my back and pain going my legs, and I had to go back and have a second surgery with Dr. Bailey, the claimant testified. Dr. Bailey explained that what went wrong with the first surgery that required the second surgery was that when the disc exploded, pieces of disc were floating around in there and it pinched off a nerve and shut down a nerve down my leg, Metts testified. After the second surgery, Dr. Bailey once again released me some time in 1995, the claimant said. I still had constant pain down the right leg at the time Dr. Bailey released me, Metts said, and I ended up going to a Dr. Peter Mirkin, who was suggested to me by a friend, for my back problems. I first saw Dr. Mirkin in November of 1999 and he took some more x-rays and MRI scans and told me that the disc had exploded at L4, 5 and there was nothing left to repair, the claimant said. Dr. Mirkin's recommendation for treatment was a complete fusion, Metts said, and this surgery was performed approximately the day after Thanksgiving. Metts stated that this surgery was successful, though he still has pain. Dr. Mirkin continued to treat me for some time and eventually released me in the spring of 2000, the claimant said. At the time Dr. Mirkin released me I was still having problems referable to my back, but I have not sought any further medical care, Metts stated. On cross examination, Metts was queried if he had ever filed a workman's compensation claim prior to this one, and he answered - No. Metts stated that prior to working for Fantasy Bus he had worked for the City of St. Louis where he drove a tow truck though he did not recall the date; he agreed that he was in an automobile accident prior to working for Fantasy Bus, but

stated that he did not recall the date. Metts was handed documents described as a copy of a Claim for Compensation that was filed with the Division of Workers' Compensation along with the Stipulation for Compromise Settlement. Metts stated that he did not believe it was his signature on the document, but agreed that the document reflected his social security number. Metts agreed that the document reflected the claimed parts of the body that were injured were back, neck, legs and body. He stated that he did not recall this injury ever occurring and did not recall ever filing this claim; Metts stated that he did not recall ever being represented by Attorney Thomas Gregory. The claimant agreed that he lived at the address reflected in the document, and that he had lived there at or around April 1, 1987 (the date of injury reflected on the document was April 1, 1987). Metts stated that he did not know if it was his signature on the second page of the Stipulation for Compromise Settlement form. The claimant agreed that on the first page of the Stipulation for Compromise Settlement form, the third line from the bottom directly above the line number 9 indicated that this settlement is based upon an approximate disability of ten percent of the back. Metts was again asked if it was his testimony that he had never received medical treatment for his back prior to September of 1993, and the claimant responded - not that I recall, no. He stated that he did not recall receiving any money for a Workers' Compensation case.

Mike Nelson, a shareholder and general manager for Fantasy Bus, testified that he did not recall having a conversation with Metts a few days after an injury suffered by Metts. On cross examination, when queried if he was stating that Metts was not hurt on September 18, 1993, Nelson admitted that he wouldn't know. Nelson admitted that he had no information to dispute the fact that Metts did sustain an injury on September 18, 1993. Nelson testified that he did not believe Metts ever personally requested any medical treatment for his back from him, but he really wouldn't remember that. Nelson stated that he was familiar with the bus that Metts testified he was driving the day he claimed to have been injured, September 18, 1993, and that bus does have large propane tanks. To fill these tanks, Nelson testified, you would go to a gas station and they would take a hose and bring it into the tank and fill it up. It would be possible to remove the propane tank, Nelson stated, but you would have to unbolt it, so technically, no. I did not remove the tank to fill it, he said. Nelson stated that that tank was not replaced on September 18, 1993, and, to his knowledge, was never replaced. Nelson was asked, during cross examination, how the propane tank was put into the bus, and he answered that it was put in between the two doors, it had steel straps around it, and it was secured to the bottom of the floor with bolts. I'm not sure how the propane tank is put into the bus, Nelson stated, but I think we used about four guys to lift it in as it weighed a lot when full. Nelson was queried if it was possible the big propane tank on this bus was broken and that portable tanks had to be used in September of 1993 when Metts injured himself. A broken tank; no, not possible, Nelson responded. Ginger Taylor, the other shareholder in the Fantasy Bus company, testified that she was not aware of any problems in the month of September, 1993 with the propane tank on the bus that Metts testified about, and was not aware of any repairs having to be made to the propane tank in the calendar year 1993. Taylor admitted, though, that she was not involved in the day-to-day operations of the buses.

**Medical records** introduced into evidence without objection included the following:

Exhibit No. B: Records from **Logan College Chiropractic Health Center** reflected treatment of Metts from 09/28/93 through 10/18/93 for complaints of pain in the low back radiating down the back of right leg into the right heel; the record indicated that the problems continued through treatment.

Exhibit No C: **Mid-America Orthopedic Surgery, Inc.** records reflected treatment of Metts for back problems from 10/26/93 through 11/15/93. The first page of the record noted a date of onset of 9-18-93. The written Patient's Account of Injury was - "Pt runs a limo service. Injured back in Sep when he reached over to lift a girl out of the back seat. Felt "something snap". Has had severe spasms. Has seen chiropractor. Is being evaluated for WC." A 10/27/93 entry stated it was a letter to Dr. Hainz; the letter included examination findings for Metts, a diagnosis of herniated lumbar disc L4-5, treatment recommendations of medication and an MRI, and also written was "(H)e has been at least two years since he has had trouble with his back. I feel this is work related". A report of an MRI performed on 11/08/93 reflected an impression of - herniated disc to the right at the L4-5 level, posterior bulging disc at the L3-4 level, and degenerative disc disease of the L3-4 and L4-5 discs. The record reflected that after the MRI steroid injections were recommended for Metts, but it was noted that Metts needed to get his Medicaid approved first.

Exhibit No. E: Records from **St. Mary's Health Center** concerned two hospitalizations of Metts for back surgery. The first surgery performed on 12/02//93 by Dr. Gregory Bailey was for the diagnosis of herniated nucleus pulposus L4, 5 right; the procedure was - microlumbar discectomy L4, 5 right. The record reflected that Metts initially presented at St. Mary's Health Center on 11/30/93 for laboratory tests and radiographic studies; these reports reflected that Metts was being tested for a herniated lumbar disc and/or for the surgical procedure of lumbar microdiscectomy. The record included a 03/02/95 operative report which reflected that Dr. Bailey performed a microlumbar discectomy, L-four/five, redo; the diagnosis was herniated nucleus pulposus, L-four/five, recurrent. A 03/03/95 Discharge Summary noted that Metts had undergone a previous discectomy in the past and had started having recurrent symptoms and was found by MRI to have disk herniation L4-5; it was noted that Metts weighed over 250 pounds.

Exhibit No. F: Records from **St. Louis Rehabilitation Institute, Inc.**, concerned physical therapy treatment by referral from Dr. Bailey, physical therapy given from 12/15/93 through 01/13/94. The record included a January 14, 1994 letter to Dr. Bailey in which it was noted that Metts had been seen at the physical therapy clinic for treatment status post lumbar microdiscectomy; it was written that Metts tolerated his treatment well and stated that the soreness had decreased and he still had some dull aches in the right lower extremity, range of motion was limited by approximately 25% and strength in the lower extremities was good/good+ and fair+; it was written that Metts was instructed to continue his exercise program and to see Dr. Bailey for reevaluation.

Exhibit No. G: Records of **Dr. Gregory J. Bailey, M.D.** concerned the doctor's treatment of the claimant for back complaints from November 15, 1993 through June 19, 1995. In the initial treatment note of November 1, 1993, Dr. Bailey wrote that Metts was "loading some propane tanks on a bus and experienced low back pain radiating down the right hip to the leg and the big toe, which had been numb continuously. The patient denies back problems prior to this...." Dr. Bailey wrote about his examination findings and noted that an MRI showed frank disc herniation at L4-5 with a degenerated disc at L3-4 and mild bulge; surgery will be organized as soon as possible, the doctor wrote. In a March 14, 1994 note, Dr. Bailey wrote that Metts was being seen after undergoing a discectomy approximately three months earlier and was doing very well with no problems down the leg except occasional aches. The doctor further noted that Metts did notice a popping in his hip which is related to the facet joint; "(T)here are no simple answers for this as this is related to pressure on the joint from the disc herniation", the doctor wrote. The plan was to follow Metts as needed. The next treatment note was dated February 16, 1995 and an associate of Dr. Bailey, a Dr. Arthur Williams, wrote that Metts was status post L4-5 discectomy in December of 1993 and postoperatively he had pain in the right leg down to the foot and hip pain. "The patient did well following the surgery until approximately two to three weeks ago when he started developing a subacute onset of hip pain with some numbness and tingling in the anterior aspect of his thigh and a sharp pain down to his ankle", the doctor wrote. It was noted that Metts had been seen in the emergency room and had been given pain medication with some benefit. The patient may be suffering from a lumbar facet syndrome, the doctor wrote, and an MRI is recommended. Dr. Bailey saw Metts on February 20, 1995 and wrote:

"This patient returns after being seen about one and a half years ago for a herniated disc. He has been doing well and functioning normally. Apparently, he twisted his back while bending over when he noticed pain in his back."

Dr. Bailey discussed his examination findings, and noted that an MRI had been performed which showed an extruded disc at L4-5 toward the right. The doctor wrote that the necessary treatment was to remove the remnant disc. In an April 17, 1995 note, Dr. Bailey wrote that Metts had undergone a recurrent lumbar discectomy and was doing well and was not having any symptoms radiating down the leg though occasionally his hip was bothersome. In the last treatment note of June 19, 1995, Dr. Bailey wrote permanent restrictions for Metts of no heavy lifting like he had done in the past; it was written that Metts would be seen in follow up as needed

Exhibit No. H: **St. Anthony's Medical Center** record concerned the hospitalization of Metts for surgery that was performed on 11/26/99. The initial history and physical examination report included:

The patient is a 39-year-old male who is status post lumbar decompression several years ago. He has developed severe unrelenting pain down his right leg to the point that he cannot walk. He has had a recent myelogram which reveals postoperative changes, multilevel disk bulging and rather significant displacement of the thecal sac at L4-5 consistent with scarring and/or herniated disk.

The operative report reflected that Dr. R. Peter Mirkin performed the procedure of: 1. Revision laminectomy L4-L5; 2. Posterolateral fusion L4-L5; 3. Interbody fusion L4-L5; 4. Harvest of iliac crest bone graft through a separate skin and fascial incision on the right; 5. Segmental instrumentation with VSP pedicle screw system; and 6. Application of EBI stimulator. The pre- and post-operative diagnosis was – Recurrent disc protrusion and stenosis L4-5 with right sided radiculopathy. The record reflected that physical therapy treatment was given to Metts after surgery.

Exhibit No. K: Medical records of **Tesson Heights Orthopedics/Dr. R. Mirkin, M.D.** reflected that the doctor began treating Metts for complaints of low back pain on 11/03/99. The doctor wrote in the entry the following:

James Metts is a 39-year old male who has a long history of intermittent low back problems. He is status post two lumbar decompression procedures several years ago. He complains of persistent low back pain with radiating pain down his legs. He states that the pain down his right leg is severe. He has had intermittent pain for many years but for the last several weeks, it has been especially severe.

Dr. Mirkin wrote that he had reviewed x-rays of Metts' spine and Metts had severe degenerative changes at L4-5. In the 11/8/99 entry the doctor wrote that his recommended myelogram/post myelogram CT had been performed and showed an extradural compression of the nerve roots, which was consistent with a herniated disc and possibly some scar tissue. Dr. Mirkin noted in an 11/26/99 entry that Metts had been admitted to St. Anthony's Medical Center for the surgery of lumbar laminotomy with fusion and fixation one level with placement of elec. stim device, invasive with bone graft. In a 12/06/99 entry it was written that Metts was in for follow up of his surgery and was doing well, his leg pain was much improved. Dr. Mirkin wrote in a 02/04/00 entry that Metts was being seen in follow up for a lumbar fusion and was doing extremely well, he was neurologically intact and had no neurotension signs. In a 04/03/00 entry the doctor wrote that Metts was doing extremely well, his leg pain was completely gone and he had minimal back pain; the doctor noted that upon examination Metts was neurologically intact, and that x-rays showed a consolidating fusion. It was written that Metts was being returned to full duty work, and would be seen again in three months. The record reflected that Metts was a no show for his last appointment on 06/05/00.

Exhibit No. L: **Dr. Thomas F. Musich, M.D.** evaluated Metts on June 23, 1999 and prepared a report dated June 28, 1999. Dr. Musich wrote that Metts had sustained an acute injury to his low back while performing his routine job activities as a limousine and bus driver for Fantasy Bus & Limousine, noting:

“According to Mr. Metts, on or about September 18, 1993, while performing his routine job activities this patient sustained injuries to his low back while lifting a girl that passed out in the back of a limousine and while lifting 80 to 100 pound propane tanks into a bus. During those incidents that occurred within 24 hours, Mr. Metts felt something snap in his low back and complained of severe spasm.”

Dr. Musich discussed Metts' treatment after the September, 1993 incident, including that Metts was seen by a chiropractor and then referred to Mid America Orthopedics Surgery where, according to the records, Dr. Vanderlugt began conservative treatment for Metts in October, 1993, and then Metts was referred to Dr. Bailey who performed surgery on December 2, 1993. Dr. Musich wrote that a review of the medical records from December 1993 until February 1995 indicated that Metts had no significant ongoing complaints referable to his low back or right lower extremity, but Metts stated that the medical records were inaccurate, he had noted continuous low back pain and right radiculopathy since the initial injury in September 1993 and there was no significant relief of his ongoing low back pain and right radicular symptoms subsequent to his initial surgical intervention. Due to deterioration of his chronic low back pain and right radiculopathy, Dr. Musich wrote, Metts returned to Dr. Bailey in February 1995 and following a second lumbar MRI Dr. Bailey provided additional surgical treatment in March 1995. Dr. Musich noted that the March 2, 1995 operative report included that Metts was doing well after initial surgery, did some bending over and lifting and started having initial pain in his back radiating down the right leg. Once again Metts objects to this history in that his lumbar pain and right radiculopathy have been continuous since September 1993, Dr. Musich wrote. The doctor wrote that Metts had not been treated by any neurosurgeon or orthopedic surgeon subsequent to March 1995, but states that he has been treated, intermittently, by chiropractors since the initial injury in September 1993. Metts denies any recollection of lumbar injury prior to or subsequent to September 18, 1993, Dr. Musich wrote. Metts' complaints at the time of the evaluation were discussed by Dr. Musich and included - constant low back pain and right radiculopathy that are aggravated by repetitive bending, lifting any weight over 40 pounds and any prolonged positioning over 30 minutes. Prior to September 18, 1993, the doctor wrote, Metts had no complaints referable to his low back and had no significant complaints referable to his right leg. Physical examination findings at that time were discussed by Dr. Musich. The doctor wrote the following impressions on June 28, 1999:

It is my opinion, based upon a reasonable degree of medical certainty, that James Metts sustained an acute injury affecting his low back on or about September 18, 1993, while employed by Fantasy Bus & Limousine Service. It is my medical opinion that the work injury of September 18, 1993, is a substantial factor in this patient's ongoing complaints referable to his low back and right lower extremity.

Furthermore, it is my medical opinion that this patient's ongoing complaints are secondary to a lumbar disc herniation and disc bulge of the LS spine producing chronic, residual complaints referable to the low back and right lower extremity.

In a separate June 28, 1999 report, Dr. Musich answered the question of reasonableness and necessity of the medical treatment and charges for Metts between September 1993 and June 1993. It is my medical opinion that all of the treatment and charges for Metts' care from Mid America Orthopedic Surgery, Deaconess West, St. Mary Hospital, South St. Louis Rehab Inst. and Microsurgery and Brain Research Inst. were reasonable and appropriate, the doctor wrote. In an August 30, 1999 report, Dr. Musich wrote that he reviewed Logan Chiropractic treatment records for September and October 1993 and accompanying billing statements, and it was his opinion that this was reasonable and necessary treatment in an attempt to

improve Metts' chronic low back pain and radicular symptoms.

Dr. Musich prepared an August 14, 2001 report after re-evaluating Metts that day. The doctor noted that at the time of his evaluation of Metts in June of 1999 he noticed that "Metts had significant ongoing complaints referable to his low back and right lower extremity, following significant surgical intervention, which was performed by Dr. Greg Bailey in December 1993 and March 1995". Metts has noticed continuous low back pain and right radiculopathy subsequent to my initial evaluation in June 1999, Dr. Musich wrote. Metts told me that he began working as a sales consultant for Timber Creek Resorts in 1998 selling time share condos and he did not perform any manual labor and did not perform any lifting or straining of his low back; he worked for Timber Creek Resorts until they declared bankruptcy in February 2001, the doctor wrote. Dr. Musich wrote:

Mr. Metts also tells me that his low back pain and radiculopathy significantly deteriorated in, approximately October 1999 without any significant traumatic injury, or incident. Mr. Metts states that his right leg totally, "went out", making him unable to bear weight on his right lower extremity.

Dr. Musich noted that Metts was initially evaluated by Dr. Mirkin on November 3, 1999 and Dr. Mirkin performed fusion surgery on Metts' back on November 26, 1999. "According to the operative report", Dr. Musich wrote, "there was severe degeneration and an extruded disc fragment with severe scarring of the nerve root on the right, with signs of previous nerve root injury on the right". Subsequent to the November 1999 surgery Metts has noticed ongoing complaints of severe low back pain and bilateral radiculopathy to the level of both feet and numbness and tingling in both legs; Metts did not have left leg symptoms prior to the surgical intervention in November 1999, Dr. Musich wrote. Dr. Musich wrote about his examination findings on August 14, 2001, and included the following in his written impression:

It is my medical opinion that the work injury of September 18, 1993 is a substantial factor in this patient's ongoing complaints referable to his low back and both lower extremities. It is also my medical opinion that this patient's ongoing complaints are secondary to lumbar disc herniation and disc bulging, accompanied with lumbar radiculopathy in both lower extremities.....I found no significant pre-existing disability for James Metts prior to September 1993.

In an October 10, 2001 report, Dr. Musich answered the question of reasonableness and necessity of the medical treatment and charges for Metts between November 1999 and April 2000. I reviewed the medical records and billing statements from St. Anthony's Medical Center, South County Anesthesiology, St. County Radiologist and Dr. Peter Mirkin regarding the medical care and treatment Metts received between November 1999 and mid April 2000, Dr. Musich wrote, and it is my medical opinion that this medical care and the corresponding billing statements were all reasonable and appropriate treatment for Metts' chronic low back pain and radiculopathy.

At issue is whether there is competent and substantial evidence establishing that the claimant suffered an accident arising out of and in the course of his employment with Fantasy Bus; whether or not he suffered an injury that was clearly work related; whether or not the claimant's work activities on or about September 18, 1993 were a substantial factor in the cause of an injury.

"For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause and extent of the disability when the facts fall within the realm of lay understanding.

"An injury may be of such a nature [however] that expert opinion is essential to show that it was caused by the accident to which it is ascribed." (Citations omitted) *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 704 (Mo.App. 1974)

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"Medical causation not within 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." *Selby v. Trans World Airlines, Inc.*, 831 S.W.2d 221, 222 (Mo.App. 1992).

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“...an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. When the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific techniques for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding...” *Knipp v. Nordyne, Inc.* 969 S.W.2d 236, 240 (Mo.App. 1998).

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“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)

In this case, highly scientific techniques were necessary for determination of a diagnosis by the doctors (i.e. MRIs and myelograms were performed on various occasions to an aid in the diagnosing of the condition of the claimant’s back). Consequently, it is found that medical opinion is essential on the issue of causation of the claimant’s back conditions diagnosed in this case.

There is a dispute as to what the claimant’s work duties were at Fantasy Bus, thus the initial determinations are whether or not the claimant was performing duties that arose out of and in the course of the claimant’s employment, and then whether or not these duties resulted in an injury..

“The terms ‘out of’ and ‘in the course of’ are separate tests which must be met for an injury to be compensable. *Davison v. Florsheim Shoe Co.*, 750 S.W.2d 481, 483 (Mo.App. 1988); *Page*, 686 S.W.2d at 532. Case law has defined the phrase ‘arising out of’ to mean the injury is a natural and reasonable incident of the employment; there must be a causal connection between the nature of the duties or conditions the employee is required to perform and the resulting injury. ‘[I]n the course of’ is occurring within the period of employment at a place where the employee may reasonably be, while the person is reasonably fulfilling the duties of employment or engaged in doing something incidental thereto. *Parrish v. Kansas City Security Service*, 682 S.W.2d 20, 26 (Mo.App. 1984); *Davison, supra* 750 S.W.2d at 483.” *Jordan v. Farmers State Bank*, 791 S.W.2d 1, 2 (Mo.App. 1990).

At issue is whether or not the main event the claimant alleges resulted in injury to his back could have occurred. The claimant testified that in preparation to take a group of people to wine country in Herman on September 18, 1993 in one of the larger buses, he prepared for the trip by cleaning the bus, making sure it was fueled up, and he was to make sure the propane tanks were on there to operate the generator that provided electricity for the inside of the bus. Metts testified that he was loading one of the propane tanks and one of the heavy doors that come up on the side of the bus had a broken hinge which made it really difficult to open the door and carry propane tank, and while bending over and putting the propane tank underneath the bus and hooking it up to the generator he felt his back pop. Nelson agreed that the bus Metts testified he was driving on the day he claimed to have been injured did have large propane tanks that were put in between two doors; the tank had steel straps around it and was secured to the bottom of the floor with bolts, he said. Nelson stated that he did not remove the tank to fill it; to fill these tanks you would go to a gas station and they would take a hose and bring it into the tank and fill it up. It would be possible to remove the propane tank, Nelson stated, but you would have to unbolt it, so technically, no. During cross examination, Nelson stated that he was not sure how the propane tank was put into the bus, but, he added, I think we used about four guys to lift it in as it weighed a lot when full. Nelson admitted that he had no information to dispute the fact that Metts did sustain an injury on September 18, 1993. Taylor offered no testimony on the procedure with propane tanks on the buses; she stated only that she was not aware of any problems in the month of September, 1993 with the propane tank on the bus that Metts testified about, and that she was not aware of any repairs having to be made to the propane tank in the calendar year 1993. Considering all of the evidence in this case, including the medical records, it is found that the claimant gave basically a consistent history of activities leading to back symptoms on or about September 18, 1993. The claimant, it is found, has a poor conception of matters, is a poor communicator and historian, and has some credibility problems in light of strong evidence that he had a prior back injury resulting in some disability which, at the hearing, he denied having at hearing. Notwithstanding, it is found that Nelson has some credibility problems also; it is hard to understand how Nelson could testify at one point that technically it would not be possible to remove the propane truck because you would have to unbolt it, and in another instance testify that he thought he used four guys to lift the propane tank as it weighed a lot when it was full. No evidence to dispute that Metts was working for Fantasy Bus on or about September 18, 1993 during his normal work hours was presented. It is found that the substantial weight of the evidence supports the claimant’s allegation that on or about September 18, 1993 he suffered a work related event that resulted in back symptoms.

The next determination is what injury, if any, was caused by the September 18, 1993 work event(s). Dr. Musich gave the medical expert opinion in this case, and stated that after examination of Metts and a review of the medical records, it was his opinion that Metts sustained an acute low back injury on or about September 18, 1993 while employed by Fantasy Bus Bus & Limousine Service, and indicated that the work injury was a lumbar disc herniation and disc bulge of the lumbosacral spine producing chronic, residual complaints referable to the low back and right lower extremity. Treatment records at or near the time of the September 18, 1993 event noted the following symptoms, diagnoses and opinions: a. Logan College Chiropractic Health Center record reflected treatment of Metts from 09/28/93 through 10/18/93 for complaints of pain in the low back radiating down back of right leg into right heel. b. Mid-America Orthopedic Surgery, Inc. records reflected treatment of Metts for back problems; a 10/27/93 entry included examination findings, a diagnosis of herniated lumbar disc L4-5, and also written was "(H)e has been at least two years since he has had trouble with his back. I feel this is work related". c. St. Mary's Health Center records included a 12/02//93 surgical report by the surgeon Dr. Gregory Bailey who wrote that for the diagnosis of herniated nucleus pulposus L4, 5 right; the procedure to be performed was – microlumbar discectomy L4, 5 right. In its memorandum of law, the Second Injury Fund argued:

"...because Dr. Musich was not made aware of a prior back injury....which may have been (a) relevant (fact) that the doctor would have needed to know in giving his opinion, Dr. Musich's opinions as to medical causation cannot be found credible. Not knowing...about a prior injury to the same body part are clearly weaknesses in the factual basis for Dr. Musich's opinion, and therefore, his opinions cannot be found to be credible".

In *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1973), the Court stated:

"A claimant must show not only causation between the accident and the injury but also that a disability resulted and the extent of such disability. While proof of cause of injury is sufficiently made on reasonable probability, proof of permanency of injury requires reasonable certainty." (Citations omitted.)

The issue in this case is as to medical causation, and thus the lower standard of reasonable probability is all that is required. It can be concluded that Dr. Musich was under the impression that Metts had never had a prior back injury, but Dr. Musich did note reviewing medical records, and the Mid-America Orthopedic Surgery, Inc. record included the comments - "(H)e has been at least two years since he has had trouble with his back". There is evidence of a prior low back injury suffered by the claimant on April 1, 1987 (See the Receipt for Compensation attached to the Memorandum of Law for the Second Injury Fund), however, there is no evidence (i.e. medical records) establishing which portion of the low back the claimant injured in 1987; additionally, there is no medical evidence of treatment for the claimant's back at or near the time of the September 18, 1993 work related event and injury described by Dr. Musich as an acute low back injury. It is found that the substantial weight of the evidence supports Dr. Musich's opinion that on September 18, 1993 while performing his work duties for Fantasy Bus, Metts suffered an acute low back injury of herniated lumbar disc L4-5.

The evidence reveals that the claimant underwent additional surgeries in the same area of his back after the December 2, 1993 surgery by Dr. Bailey, those subsequent surgeries being on March 2, 1995 by Dr. Bailey and on November 26, 1999 by Dr. Mirkin. The claimant alleges that these subsequent surgeries were causally related to the September 18, 1993 work related injury. Considering the medical evidence, Dr. Musich wrote that a review of the medical records from December 1993 until February 1993 indicated that Metts had no significant ongoing complaints referable to his low back or right lower extremity, but that Metts stated the medical records were inaccurate as he had noted continuous low back pain and right radiculopathy since the initial injury in September 1993 with no significant relief of his ongoing low back pain and right radicular symptoms subsequent to his initial surgery. Due to deterioration of his chronic low back pain and right radiculopathy, Dr. Musich wrote, Metts returned to Dr. Bailey in February 1995 and following a second lumbar MRI Dr. Bailey provided additional surgical treatment in March 1995. Dr. Musich noted that the March 2, 1995 operative report included that Metts was doing well after initial surgery, did some bending over and lifting and started having initial pain in his back radiating down the right leg and that once again Metts objected to this history stating that his lumbar pain and right radiculopathy had been continuous since September 1993. Dr. Musich wrote that Metts had not been treated by any neurosurgeon or orthopedic surgeon subsequent to March 1995, but Metts stated that he has been treated intermittently by chiropractors since the initial injury in September 1993; there are no treatment records in evidence, it is found, reflecting intermittent chiropractic treatment for Metts' back subsequent to the Logan College Chiropractic Health Center treatment record indicating treatment ending for Metts 10/18/93. Metts denies any recollection of a lumbar injury subsequent to September 18, 1993, Dr. Musich wrote. Dr. Musich prepared an August 14, 2001 report after re-evaluating Metts and wrote that at the time of his evaluation of Metts in June of 1999 he noticed that "Metts had significant ongoing complaints referable to his low back and right lower extremity, following significant surgical intervention, which was performed by Dr. Greg Bailey in December 1993 and March 1995", and that Metts stated continued subsequent to Dr. Musich's June 1999 evaluation. Metts told me that he worked as a sales consultant for Timber Creek Resorts from 1998 until the company's

bankruptcy in February of 2001, and he did not perform any manual labor and did not perform any lifting or straining of his low back, the doctor wrote. Dr. Musich wrote:

Mr. Metts also tells me that his low back pain and radiculopathy significantly deteriorated in, approximately October 1999 without any significant traumatic injury, or incident. Mr. Metts states that his right leg totally, “went out”, making him unable to bear weight on his right lower extremity.

Dr. Musich noted that Metts was initially evaluated by Dr. Mirkin on November 3, 1999 and Dr. Mirkin performed fusion surgery on Metts’ back on November 26, 1999. “According to the operative report”, Dr. Musich wrote, “there was severe degeneration and an extruded disc fragment with severe scarring of the nerve root on the right, with signs of previous nerve root injury on the right”. Subsequent to the November 1999 surgery Metts has noticed ongoing complaints of severe low back pain and bilateral radiculopathy to the level of both feet and numbness and tingling in both legs, Dr. Musich wrote. Dr. Musich gave a written opinion in his August 14, 2001 report:

It is my medical opinion that the work injury of September 18, 1993 is a substantial factor in this patient’s ongoing complaints referable to his low back and both lower extremities. It is also my medical opinion that this patient’s ongoing complaints are secondary to lumbar disc herniation and disc bulging, accompanied with lumbar radiculopathy in both lower extremities.

Reviewing the medical records, Dr. Bailey’s treatment notes subsequent to the December 1993 surgery included a March 14, 1994 note in Dr. Bailey noted that Metts was being seen after undergoing a discectomy approximately three months earlier and was doing very well with no problems down the leg except occasional aches. The doctor further noted that Metts did notice a popping in his hip which is related to the facet joint; “(T)here are no simple answers for this as this is related to pressure on the joint from the disc herniation”, the doctor wrote. The plan was to follow Metts as needed. The next treatment note was eleven months later, dated February 16, 1995, and an associate of Dr. Bailey (a Dr. Arthur Williams) wrote that Metts was status post L4-5 discectomy in December of 1993 and postoperatively he had pain in the right leg down to the foot and hip pain. “The patient did well following the surgery until approximately two to three weeks ago when he started developing a subacute onset of hip pain with some numbness and tingling in the anterior aspect of his thigh and a sharp pain down to his ankle”, the doctor wrote; an MRI was ordered. Dr. Bailey saw Metts on February 20, 1995 and wrote: “This patient returns after being seen about one and a half years ago for a herniated disc. He has been doing well and functioning normally. Apparently, he twisted his back while bending over when he noticed pain in his back.” Dr. Bailey noted that an MRI had been performed and showed an extruded disc at L4-5 toward the right. The doctor wrote that the necessary treatment was to remove the remnant disc. St. Mary’s Health Center records included an 03/02/95 operative report which reflected that Dr. Bailey performed a microlumbar discectomy, L-four/five, redo; the diagnosis was herniated nucleus pulposus, L-four/five, recurrent. A 03/03/95 Discharge Summary noted that Metts had undergone a previous discectomy in the past and had started having recurrent symptoms and was found by MRI to have disk herniation L4-5; it was noted that Metts weighed over 250 pounds. In an April 17, 1995 note, Dr. Bailey wrote that Metts had undergone a recurrent lumbar discectomy and was doing well and was not having any symptoms radiating down the leg though occasionally his hip was bothersome. In the last treatment note of June 19, 1995, Dr. Bailey wrote permanent restrictions for Metts of no heavy lifting like he had done in the past; it was written that Metts would be seen in follow up as needed. Records of Dr. R. Mirkin, M.D. reflected that the doctor began treating Metts for complaints of low back pain on 11/03/99. The doctor wrote in the entry the following:

James Metts is a 39-year old male who has a long history of intermittent low back problems. He is status post two lumbar decompression procedures several years ago. He complains of persistent low back pain with radiating pain down his legs. He states that the pain down his right leg is severe. He has had intermittent pain for many years but for the last several weeks, it has been especially severe.

A St. Anthony’s Medical Center record concerned the hospitalization of Metts for surgery performed by Dr. Mirkin on 11/26/99. The initial history and physical examination report included:

The patient is a 39-year-old male who is status post lumbar decompression several years ago. He has developed severe unrelenting pain down his right leg to the point that he cannot walk. He has had a recent myelogram which reveals postoperative changes, multilevel disk bulging and rather significant displacement of the thecal sac at L4-5 consistent with scarring and/or herniated disk.

The operative report reflected a diagnosis of: Recurrent disc protrusion and stenosis L4-5 with right sided radiculopathy. In a 12/06/99 follow up treatment entry, Dr. Mirkin wrote that Metts was in for follow up of his surgery and was doing well, his leg pain was much improved. Dr. Mirkin wrote in a 02/04/00 entry that Metts was doing extremely well, he was

neurologically intact and had no neurotension signs. In a 04/03/00 entry Dr. Mirkin wrote that Metts was doing extremely well, his leg pain was completely gone and he had minimal back pain; the doctor noted that upon examination Metts was neurologically intact, and that x-rays showed a consolidating fusion. It was written that Metts was being returned to full duty work, and would be seen again in three months. The record reflected that Metts was a no show for his last appointment on 06/05/00. Considering the evidence, it is found that the medical records indicate that the claimant suffered continuing problems from the initial September 18, 1993 work related low back injury, but also suffered acute, intervening events and/or aggravations/exacerbations resulting in increased symptoms and new clinical findings. It is found that the substantial weight of the medical evidence does not support Dr. Musich's opinion that the work injury of September 18, 1993 is a substantial factor in all of Metts' ongoing complaints referable to his low back and both lower extremities subsequent to his release from treatment for the September 18, 1993 injury by Dr. Bailey on or about March 14, 1994.

In light of the above findings, it is found that the evidence establishes that reasonable and necessary medical treatment for the claimant's September 18, 1993 work related injury was the treatment provided by: a. Logan College Chiropractic Health Center from 9/28/93 through 10/18/93; b. Mid-America Orthopedic Surgery, Inc. 10/26/93 through 11/15/93; c. St. Mary's Health Center for the 12/02/93 hospitalization and surgery; and d. St. Louis Rehabilitation Institute, Inc. physical therapy treatment by referral of Dr. Bailey, physical therapy given from 12/15/93 through 1/13/94.

"The pertinent portion of Section 287.220.5 states:

If an employer fails to insure or self-insure as required in section 287.280, funds from the second injury fund may be withdrawn to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury or disability of an injured employee in the employ of an uninsured employer..." *Mann v. Varney Constr.*, 23 S.W.3d 231, 233 (Mo.App. E.D. 2000).

In this case, there is no stipulation between the parties that the employer, Fantasy Bus and Limousine, was insured at the time of the claimant's work related injury on September 18, 1993, and no evidence of an insurer for Fantasy Bus was presented at the hearing. Consequently, and in light of the findings in this Award, the Second Injury Fund is found liable for the reasonable and necessary medical expenses to cure and relieve the claimant from the effects of the September 18, 1993 work related injury suffered by the claimant, pursuant to Sections 287.280.1 and 287.220.5 RSMo. In its memorandum of law, the Second Injury Fund argues:

'In cases in which there is a Medicaid lien, Second Injury Fund liability for Claimant's medical expenses does not extend to the full amount of the medical bills, but rather is limited only to the amount of the Medicaid lien. *Mann v. Varney Construction*, 23 S.W.3d 231, 233-34 (Mo.App. E.D. 2000). In such cases, health care providers cannot accept payment from Medicaid and then recover the remainder from the Claimant. Therefore, the Court in *Mann* found that to award the full amount of the bills, rather than the Medicaid lien, would be a windfall to Claimant.

This case is analogous to *Mann* as to some of the bills in that Claimant has not shown that each of these bills remains due and owing and that the amounts have not been written off by the various providers. It appears from the face of the St. Mary's Health Center bills that the amounts due were written off after a period of time. No evidence was presented by Claimant to refute this information or to show that St. Mary's was continuing to pursue Claimant for these bills. Therefore, the Second Injury Fund should not be found liable for the bills totaling \$11,955.93 from St. Mary's Health Center.

The same appears to be true for the Logan College of Chiropractic bills. It appears from the face of the bill that at least \$237.00 of the \$400 bill was written off. Again, no evidence was presented by Claimant to refute this information or to show that Logan College of Chiropractic was continuing to pursue Claimant for these bills. Therefore, the Second Injury Fund should not be found liable for the bills totaling \$237.00 from Logan College of Chiropractic.'

The court in the *Mann* case stated:

"The scope of SIF liability in cases where the employer is uninsured is defined in Section 287.220.5 and is not expanded by Section 287.270. We further find that it would be against public policy to allow claimants to recover a windfall from the SIF when their employers had not made insurance contributions required by law.

We find the Commission did not err in applying Section 287.220.5 and awarding Claimant only the amount Medicaid paid for Claimant's medical expenses." *Mann*, 23 S.W.3d at 233-224.

Considering the medical bills found to be compensable in this case, it is found that the Second Injury Fund is liable for the

following: a. Logan College Chiropractic Health Center bill from 9/28/93 through 10/18/93 – the bill reflects total charges of \$400.00; there are credits or negative assessments against the charges of a \$63.00 total, a \$100.00 credit in the “Receipt” column of the bill, and there is a “write off” amount of \$237.00; thus, the bill reflects a balance of (\$400.00 less [(-\$63.00) + (-\$237.00)] = (-\$300.00); and a \$100.00 receipt} which equals a balance of \$0.00, and is the balance reflected on the bill. The claimant testified that he did not pay any of the medical bills. The Logan College Chiropractic Health Center bill does not indicate the source of the \$100.00 receipt, and thus an award of this amount would be purely speculative. Consequently, it is found that there is no balance of medical charges from Logan College Chiropractic Health Center for which the Second Injury Fund is liable. b. Mid-America Orthopedic Surgery, Inc. 10/26/93 through 11/15/93 – this bill reflects that adjustments were made by collection agency leaving a remaining balance of \$0.00. It is found that there is no balance of medical charges from Mid-America Orthopedic Surgery, Inc. for which the Second Injury Fund is liable. c. St. Mary’s Health Center for the 11/30/93 pre-surgery testing and the 12/02-03/93 hospitalization and surgery – the bill reflected total charges of \$230.25 for laboratory testing on 11/30/93 in preparation for the 12/02/93 surgery, and indicated that Missouri welfare was billed and indicated a state Medicaid payment of \$230.25<sup>[3]</sup>; a bill for services on 12/02-03/93 totaling \$4,936.93 indicated that there was no insurance coverage and that the bill remains outstanding. It is found that the Second Injury Fund is liable for these charges of \$4,936.93 and for reimbursement to the State of Missouri, Medicaid, for the charges of \$230.25. d. St. Louis Rehabilitation Institute, Inc. physical therapy treatment by referral of Dr. Bailey, physical therapy given from 12/15/93 through 1/13/94 – the bill reflects total charges for physical therapy service of \$1172.00, and that these charges are still outstanding. It is found that the Second Injury Fund is liable for these charges of \$1172.00. Thus, as there is sufficient factual basis upon which to award the medical charges as denoted in this paragraph [See, *Martin v. Mid-America Farms*, 769 S.W.2d 105 (Mo. banc 1989)], it is found that the Second Injury Fund is liable in this case for reasonable and necessary medical expenses as a result of the claimant’s September 18, 1993 work related injuries in the total amount of \$6339.18.

#### Medical fee dispute

Applications for direct pay were filed by: a. St. Anthony’s Medical Center for medical/surgical/laboratory services to Metts on 11/26/99 – 11/29/99 in the total amount of \$26,342.50; b. South County Radiologists, Inc. for radiographic studies performed on Metts on 11/5/99, 11/26/99, and 4/15/00. (See Court Exhibit No. AA) It has previously been determined in this Award that the substantial and competent evidence establishes that the claimant suffered acute, intervening events and/or aggravations/exacerbations resulting in increased symptoms and new clinical findings subsequent to his release from treatment for the September 18, 1993 injury by Dr. Bailey on or about March 14, 1994, and thus the work-related injury of September 18, 1993 is not found to be a substantial factor in the need for medical treatment subsequent to March 14, 1994. Thus charges for medical treatment subsequent to March 14, 1994 are not found compensable in this case. Consequently, compensation is denied for the medical charges noted in this paragraph as filed by St. Anthony’s Medical Center and South County Radiologists, Inc.

Date: December 31, 2003

Made by: /s/ LESLIE E. H. BROWN  
LESLIE E. H. BROWN  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

/s/ RENEE T. SLUSHER  
RENEE T. SLUSHER  
Director  
Division of Workers' Compensation

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<sup>[1]</sup> At the hearing it was agreed and stipulated to by the parties that these documents would be submitted under certification cover and marked as Employer/Insurer’s Exhibit No. 1; these documents, (as well as a Receipt for Compensation form reflecting payment from the Second Injury Fund for permanent partial disability based on preexisting disability and a April 1, 1987 work related primary injury), were attached to the Memorandum of Law from the Second Injury Fund.

<sup>[2]</sup> Ruling: Claimant’s objection on grounds of form and foundation of the employer’s question is overruled.

[\[3\]](#) The St. Mary's Health Center record included registration forms apparently signed by Metts which reflected that Missouri Welfare/Medicaid were involved in this treatment.