

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

Injury No. 07-001298

Employee: James Morris  
Employer: Captain D's  
Insurer: Federal Insurance Company  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480, RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated May 3, 2016, with the following correction.

In the last sentence of the third paragraph on page 18 of the administrative law judge's award, the administrative law judge states as follows: "I find and conclude, based on the whole record, that Claimant's permanent and total disability arises from the disabling injuries caused from the *last* accident on January 14, 2016, combined with the permanent disabilities preexisting that date" (emphasis in original). We correct the foregoing to read, instead, as follows: "I find and conclude, based on the whole record, that Claimant's permanent and total disability arises from the disabling injuries caused from the *last* accident on January 14, 2007, combined with the permanent disabilities preexisting that date."

The award and decision of Administrative Law Judge Victorine R. Mahon, issued May 3, 2016, as corrected herein, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15th day of December 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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John J. Larsen, Jr., Chairman

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James G. Avery, Jr., Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

**AWARD**

Employee: James Morris

Injury No. 07-001298

Dependents: N/A

Employer: Captain D's

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

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

Insurer: Federal Insurance Co. c/o Broadspire (TPA)

Hearing Date: February 24, 2016 (record closed March 23, 2016)

Checked by: VRM/ps

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 14, 2007.
5. State location where accident occurred or occupational disease was contracted: Lebanon, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was taking materials from a company vehicle that had been wrecked in a car accident when he slipped on some steps sustaining injury.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Low back and right knee.
14. Nature and extent of any permanent disability: Permanent and partial disability as to Employer/Insurer; permanent total disability as to the Second Injury Fund.

- 15. Compensation paid to date for temporary disability: None.
- 16. Value of necessary medical aid paid to date by employer/insurer: None.
- 17. Value of necessary medical aid not furnished by employer/insurer: Alleged \$9,617.99.
- 18. Employee's average weekly wages: \$1,487.08.
- 19. Weekly compensation rate: \$718.87 (TTD/PTD); \$376.55 (PPD).
- 20. Method of wage computation: By stipulation.

**COMPENSATION PAYABLE**

- 21. Amount of compensation payable:

**For permanent partial disability -**

12.5 percent to the body as a whole referable to the lumbar spine (50 weeks)  
 10 percent of the right leg at the knee (16 weeks)  
 66 weeks x of \$376.55 (PPD rate) = \$24,852.30

**For past medical care -**

Emergency room bill of 1/14/2007 = 837.00

**TOTAL:     \$25,689.30**

- 22. Second Injury Fund Liability:

**For Permanent Total Disability -**

Beginning January 7, 2008, and continuing for a period of 66 weeks, the Second Injury Fund shall pay the sum of \$342.32 per week, which is the differential between the permanent partial disability and permanent total disability rates. Thereafter, the Second Injury Fund shall pay the full permanent total disability rate of \$718.87 per week for the remainder of Claimant's lifetime.

- 23. Future requirements awarded:

Employer/Insurer shall provide future medical treatment to cure and relieve the effects of the work related injuries and disabilities.

The compensation awarded herein is subject to review and modification as provided by law. Interest shall apply as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John Newman, Esq.

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

Employee: James Morris

Injury No. 07-001298

Dependents: N/A

Employer: Captain D's

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

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

Insurer: Federal Insurance Co. c/o Broadspire (TPA)

Hearing Date: February 24, 2016 (record closed March 23, 2016)

Checked by: VRM/ps

**INTRODUCTION**

The undersigned Administrative Law Judge conducted a Final Hearing on February 24, 2016, in two cases involving the same parties: Injury Number 07-000330 with an injury date of January 3, 2007 and Injury Number 07-001298 with an injury date of January 14, 2007. James Morris (Claimant) appeared personally and through his attorney, John Newman. Greg Pearman appeared on behalf of Captain D's (Employer), Federal Insurance Co. (Insurer), and Broadspire (Third Party Administrator). The Treasurer of Missouri, as custodian of the Second Injury Fund, appeared by Assistant Attorney General Catherine Goodnight. Upon Claimant's request, and hearing no objection, the record remained open 30 days for the receipt of Wilbur Swearingin's deposition. Claimant submitted the deposition timely. It was marked as Exhibit 4 and received into evidence. The Administrative Law Judge thereafter closed the record. The parties were afforded the opportunity to submit written suggestions or briefs. The parties agreed to the following stipulations of fact and issues:

**STIPULATIONS**

1. On January 3, 2007 and January 14, 2007, Captain D's was an employer operating under and subject to the Missouri Workers Compensation Law, and during this time was fully insured by Federal Insurance Company in care of its third party administrator, Broadspire Services, Inc.
2. On January 3, 2007 and January 14, 2007, James Morris was an employee of Employer and working under and subject to the Missouri Workers' Compensation Law.
3. On the above dates, Claimant was injured in separate accidents that occurred in the course and scope of employment with Captain D's.
4. The accidents occurred in Laclede County, Missouri; however, parties agreed to venue in Greene County, Missouri. Venue and jurisdiction are proper.
5. Notice was proper and the claim was filed timely.
6. Claimant's average weekly wage in both cases was \$1,487.08, yielding a temporary total disability and permanent total disability rate of \$718.87, and a permanent partial disability rate of \$376.55.

7. Employer/Insurer paid \$280 in medical treatment in relation to Injury Number 07-000330. Employer/Insurer paid no medical treatment in relation to Injury Number 07-001298.
8. Employer/Insurer has paid no temporary total disability with respect to either injury.
9. The parties agree that the following issues are to be resolved by the hearing:

### **ISSUES**

1. Are Claimant's injuries and disability medically and causally related to one or both of the work accidents occurring on January 3, 2007 and January 14, 2007?
2. Is Claimant entitled to permanent partial disability or permanent total disability compensation?
3. Is Claimant entitled to future medical treatment?
4. Is Claimant entitled to reimbursement of approximately \$9,617.99 in past medical expenses?
5. What is the date of maximum medical improvement?
6. What, if any, is the liability of the Second Injury Fund?
7. Counsel for employee seeks an attorney fee of 25 percent.

### **EXHIBITS**

The only exhibits offered were as follows:

Claimant's Exhibit 1.	Medical Records – various providers
Claimant's Exhibit 2.	Deposition – Dr. David Volarich, with exhibits
Claimant's Exhibit 3.	Deposition – Dr. David Volarich, with exhibits
Claimant's Exhibit 4.	Deposition – Mr. Wilbur Swearingin, with exhibits
Employer's Exhibit A.	Report – Dr. Ted Lennard
Employer's Exhibit B.	Deposition – James Morris (June 11, 2008)
Employer's Exhibit C.	Withdrawn
Employer's Exhibit D.	Medical Record – St. John's, Lebanon, Missouri (January 3, 2007)
Employer's Exhibit E.	Medical Report – Dr. Benie Parrish
Employer's Exhibit F.	Medical Record – St. John's, Lebanon, Missouri (January 6, 2007)

The Second Injury Fund offered no exhibits or testimony.

## FINDINGS OF FACT

James Morris (Claimant), born January 27, 1962, is 54 years old, and resides in Lebanon, Missouri. He attended schools in Fair Grove and Springfield, but he dropped out after the tenth grade. He has no GED or formal vocational training. Despite this limited education and training, he has done remarkably well for himself, which is a testament to his strong work ethic.

While in his teens, Claimant hauled hay. He also worked at restaurants washing dishes, cooking, and cleaning. In 1978 or 1979, he began working for Captain D's as a cook. He quit that company, trying alternative employment in bricklaying and house building. He then returned to Captain D's, and gradually assumed greater responsibilities. He later became a store manager, and eventually was promoted to the position of regional manager over several stores in a multiple state area. In all, Claimant worked 21 years for Captain D's. Even though he spent most of his career in supervisory positions, the work was physically and mentally taxing. In addition to any paperwork, he was responsible for inspections, staffing and maintenance. The job required extensive standing, walking, driving, and some lifting. Claimant performed these job duties despite multiple preexisting and symptomatic conditions. Following the two work accidents that are the subject of this hearing, Claimant was forced to quit his job with Captain D's, last working in May 2007. He qualified for Social Security Disability in October 2007.

### **Preexisting Conditions**

Right Knee – In the 1970s, Claimant suffered a right tibial plateau fracture in a motorcycle accident. He underwent an open reduction and internal fixation. He was immobile for several months. He could not serve in the military because of this knee injury. Claimant said the right leg was stiff by the end of the day and he would get off his feet as soon as possible after the workday. Claimant said the right leg worsened through the years. It stopped him from running. It “hurt like hell,” but it did not stop him from performing his job. As noted in his deposition, “it’s something I’ve been dealing with for 30 years, so I mean, it’s not new to me to feel pain in that leg, you know....I don’t gripe about it.” (Exhibit D, p. 49).

Lumbar Spine – In 1999, while working for Captain D's, Claimant was helping to close a store in Olathe, Kansas. He fell out of the back of a store truck, hurting his back. He was diagnosed with a herniated disc at L4-5 on the left and a bulging disc at L5-S1. He underwent surgery on January 4, 1999, which included left L4-5 laminotomy and foraminotomy and removal of the herniated disc at L4-5 on the left. Claimant was off work just four weeks, but thereafter he continued to have problems. While his treating surgeon Dr. Canlas gave him no specific lifting restrictions, the physician advised Claimant that he would never be 100 percent. Claimant thereafter guarded his back when lifting.

Chest Pains/High Blood Pressure – After the 1999 truck incident, and after having been promoted to regional manager, Claimant was working long hours and traveling to stores in at least five different cities. He developed chest pains sufficiently severe to seek medical advice. While he was told at that time that he was too young to have heart problems, he was treated for high blood pressure and anxiety.

His chest pains did not subside, continuing throughout the years. Just three days after the January 3, 2007 work accident which is a subject of this hearing, Claimant experienced a sudden onset of shortness of breath and a cold sweat and mood disturbance while waiting for food in a drive-thru. He felt nauseous and light headed so he drove himself to the emergency room. He subsequently underwent the testing and treatment for his heart. According to the medical records, Claimant saw a cardiologist on

January 31, 2007. On February 1, 2007, Claimant was recommended for an echocardiogram and a left and right heart retrograde catheterization, left ventriculogram coronary angiography and right femoral angiography with angio-EAL. A percutaneous transluminal coronary angioplasty was performed on February 2, 2007. In the discharge summary, Dr. Hanna, the cardiologist, diagnosed severe carotid artery disease of the left anterior artery with more disease of the obtuse margin. These conditions obviously were long standing. Claimant was discharged on February 3, 2007 with medications for his heart, high blood pressure and cholesterol.

Cervical – Claimant also has had prior neck problems causing his hand to go numb. Consequently, he avoided holding his hand overhead.

### **The 2007 Work Accidents**

On January 3, 2007, Claimant was traveling to a Captain D's store in Lebanon, Missouri. Although he was not traveling at a high rate of speed, a vehicle hit him head-on. Medical records indicate that Claimant had a laceration at the bridge of his nose and tenderness in his neck with pain in the left wrist. He also had headaches and contusions to his head, face, chest, left wrist/hand and left knee. Claimant said his back also hurt him. He sought treatment at St. John's Hospital emergency room in Lebanon. Claimant was prescribed medication, given a splint for the left wrist, and underwent x-rays. The x-rays were negative for fractures. Claimant advised his employer of the accident and then followed-up with his primary care physician, Dr. Parrish, as directed by the emergency room staff.

Claimant saw Dr. Parrish two days later on January 5, 2007, noting pain at a level 4. Dr. Parrish diagnosed a cervical strain and left wrist pain. He did not address Claimant's back pain. He recommended gentle range of motion exercises for the neck after a hot shower on a daily basis and prescribed medication. He told Claimant to return in two weeks.

On January 14, 2007, Claimant sustained yet another work accident. There were work materials in the vehicle that had been wrecked in the January 3, 2007 motor vehicle accident. While in the process of unloading those materials from the vehicle, Claimant slipped down some steps at the store. He returned to the emergency room at St. John's Hospital Lebanon where he presented with back pain and pain in the right knee. He was noted to have undergone a prior low back surgery and a prior right knee surgery. He underwent x-rays of the lumbar spine and the right knee. These were negative except for indications of prior surgeries and degenerative changes related to the lumbar spine. Claimant declined a knee immobilizer. He was diagnosed with a lumbar strain and right knee sprain, prescribed medication, given a 10-pound lifting restriction for 3 days, and advised to follow-up with his primary care physician.

### **Post Accident History**

Claimant saw Dr. Parrish on January 23, 2007, complaining of cervical spine pain and chest pain. Nothing was mentioned regarding the left wrist pain, right knee pain or low back pain. Claimant's subjective left wrist complaints, cuts, and lacerations associated with the motor vehicle accident of January 3, 2007 eventually resolved. Other than the time spent obtaining medical treatment, Claimant missed no time from work specifically as a result of January 3, 2007 and January 14, 2007 incidents. Claimant never specifically requested any medical treatment for either of the 2007 work accidents, although he had continuing complaints.

In addition to his primary care physician, Claimant saw Dr. Frewin on February 26, 2007, with complaints of worsening right knee pain and associated swelling that was aggravated by prolonged

standing and walking and driving long distances in conjunction with his job. Dr. Frewin diagnosed traumatic degenerative osteoarthritis of the right knee and possible non-union of medial tibial plateau fracture and multiple osteochondral loose joint bodies in the right knee. He discussed the spectrum of possible treatments. Claimant told Dr. Frewin he was most worried about his heart, emphasizing a 20-year history of chest pains. He continued to have neck pain associated with the motor vehicle accident in January 2007.

Claimant saw Dr. Steve Butcher on March 13, 2007, to discuss his medical history and any disabilities. Dr. Butcher noted complaints of right knee pain while driving, and back pain while lifting. He noted Claimant's belief that his pain was worsening. Claimant complained of stress from a domestic problem and a strenuous work schedule. Dr. Butcher recorded that Mr. Morris was continuing to work 60-80 hours per week as of March 13, 2007. Dr. Butcher assessed the claimant with ASCAD, aortic stenosis, lumbar disc disease, osteoarthritis of the right knee, DROP attacks probably due to heart disease and recommended ruling out a TIA. He recommended that Claimant avoid heavy lifting, excessive work hours, and excessive walking or standing. He referred Claimant for diagnostic testing of the brain and lumbar spine.

As recommended by Dr. Butcher, Claimant underwent testing on March 19, 2007 at Cox Medical Center which included an MRI of the brain associated with a possible TIA and an MRI of the lumbar spine associated with the low back pain and history of a laminectomy. The MRI of the back demonstrated degenerative disc disease at L5-S1, a small central disc herniation at L4-5 with mild spinal stenosis, and spurring at L5-S1 with an annular disc bulge without spinal stenosis. About a year later, Claimant began treating at the Cox Medical Center Pain Clinic for low back and right knee complaints, receiving epidural steroid injections.

Claimant last worked for Captain D's in May 2007. He stated he did not file for unemployment benefits. He applied for, and was approved for Social Security Disability in October 2007, although he did not receive benefits until November 2007. He also received long term disability through Captain D's.

### **Current Complaints**

After the slip and fall on January 14, 2007, Claimant had ongoing neck pain and low back pain which caused him increased difficulty performing his job duties. Although he continued to work long hours for a few months, he had to modify some of his duties. Claimant said that the second work injury on January 14, 2007, made his back pain much worse than the motor vehicle accident. He was also having significant pain in his right knee and developed left lower extremity pain. Claimant explained that as much as the right leg had hurt in the past, after the January 14, 2007 accident, his pain was much worse. When Claimant returned to work following the last work accident, his back and legs were still hurting. Extensive sitting bothers his leg. His legs fall asleep every day. He also had pain in his arms. Driving long distances and sitting or standing for long periods of time bother him. He cannot bend over very much.

Claimant no longer can go bass boat fishing as the boat rides make him feel terrible. He has sold his boat. All but one of Claimant's children is grown and independent. He is divorced, lives alone, and cleans his own home out of necessity, although he takes breaks while performing household tasks. He must alter his posture. He shops for groceries once a week. He can push the shopping cart, but he is unable to walk and lift like he used to do. He takes multiple prescription medications each day, but they

do not completely relieve the pain. He opined that if he took enough narcotics to take away the pain he would be a vegetable.

Employer offered Claimant an alternate supervisory position which would have allowed him to work from home, but Claimant said he could not adequately perform his job from behind a desk. He said there needed to be "eyes" on the store. He would have difficulty training employees and speaking with customers because he could not be on his feet. Although he subsequently underwent a back surgery with internal fixation, his pain did not resolve. He has never tried to work again. Claimant's only source of income after October 2007 has been Social Security Disability.

### **Independent Medical Opinions**

#### Dr. David Volarich - IME January 7, 2008

Claimant saw Dr. David Volarich for an Independent Medical Examination (IME) at the referral of his attorney on January 7, 2008. Dr. Volarich said work-related motor vehicle accident was the prevailing factor in causing a closed head trauma, cervical and lumbar injuries, and a left wrist sprain. It also was his opinion that the work accident on January 14, 2007 was the prevailing factor in causing the aggravation of Claimant's lumbar syndrome and aggravation of right knee syndrome.

Dr. Volarich noted Claimant's preexisting injuries and conditions leading up to January 3, 2007, had included 1) chronic lumbar syndrome secondary to disc herniation and surgery in 1999, degenerative disc disease and degenerative joint disease at L4-5 and L5-S1; 2) coronary artery disease, bicuspid aortic valve with stenosis; 3) right knee tibial plateau fracture with open reduction and internal fixation of the medial tibial plateau with retained hardware, advanced post-traumatic degenerative arthritis and varus deformity and loose bodies; and 4) prior right arm humerus fracture.

Dr. Volarich found that Claimant had reached maximum medical improvement associated with the work injuries as of the date of his examination. He provided permanent partial disability ratings for the January 3, 2007 injury as follows:

- \* 15 percent to the body as a whole for the cervical spine strain/sprain injury [later increased to 25 percent];
- \* 12.5 percent to the body as a whole for the lumbosacral spine due to aggravation of lumbar syndrome; and
- \* 5 percent to the left upper extremity rated at the wrist due to the strain/sprain injury that required conservative care. This accounts for stiffness and clicking in the left wrist.

For the January 14, 2007 injury, he provided the following permanent partial disability ratings:

- \* 15 percent to the body as a whole for the aggravation of the lumbar syndrome; and
- \* 15 percent to the right lower extremity at the 160-week level due to aggravation of the right knee syndrome.

Dr. Volarich provided permanent partial disability ratings for medical conditions that preexisted January 3, 2007, as follows:

- \* 25 percent to the body as a whole due to the prior lumbar spine disc herniation and surgery;
- \* 25 percent to the body as a whole associated with cardiovascular and heart disease;
- \* 65 percent to the right knee at the 160-week level due to the tibial plateau fracture and open reduction and internal fixation.

Dr. Volarich concluded that “[t]he combination of his disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.” (Exhibit 2, Depo. Ex. B). He further opined that Claimant is permanently totally disabled as a result of “the work injuries of 1/3/07 in combination with his preexisting medical conditions.” (Exhibit 2, Depo. Ex. B, p. 13). Additionally, Dr. Volarich advised that in order to maintain his current state, Claimant will require ongoing care for his pain syndrome using modalities including, but not limited to, narcotics and non-narcotic medications, muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints.

Dr. Volarich Supplemental IME January 28, 2008

In his supplemental report dated January 28, 2008, Dr. Volarich said he had reviewed medical bills from the treating providers, including Dr. Parrish, Sun River Orthopedics, Cox Radiology, Cox Medical Center, Dr. Butcher, and St. John’s in Lebanon. He reviewed the medical records in conjunction with the bills and indicated that the bills in the amount of \$9,617.99 were fair, reasonable, customary and necessary to cure and relieve the effects of the work-related injuries on January 3, 2007 and January 14, 2007.

Dr. Volarich Supplemental IME August 4, 2008

Dr. Volarich issued a supplemental report dated August 4, 2008 indicating he reviewed additional records from Cox Medical Center for treatment the claimant received from April 1, 2008 through June 10, 2008, associated with treatment related to Claimant's cervical and lumbar spine. He indicated that Claimant had suffered no new injuries since he saw him on January 7, 2008, but due to the increased cervical complaints and the results of the MRI on May 19, 2008, Dr. Volarich increased the cervical spine permanency rating from 15 percent to 25 percent.

Dr. Volarich Deposition November 7, 2008

Dr. Volarich iterated in his November 7, 2008 deposition, that Claimant is permanently totally disabled. He noted, however, that his initial report erroneously said the permanent total disability stemmed from the January 3, 2007 accident in conjunction with the preexisting conditions. As Dr. Volarich explained:

Based on my medical assessment alone, it was my opinion that Mr. Morris was permanently and totally disabled as a direct result of the work-related injuries of 1/3/07, in combination with his preexisting medical conditions. I noted – I made a mistake there too – it should be 1/3/07 and 1/14/07, both of the work injuries.

(Exhibit 2, p. 14).

Dr. Volarich stated that the majority of the restrictions associated with Claimant's lumbar spine are due to his preexisting surgical repairs. He stated the majority of the restrictions associated with the lower extremities are due to the preexisting conditions including Claimant’s prior right knee injury and

surgery. Dr. Volarich said he was aware that Claimant had returned to work with long hours after both of the work accidents. Dr. Volarich acknowledged that there is no mention of Claimant experiencing low back pain in the St. John's Hospital Lebanon emergency room records for January 3 or January 6, 2007, or the report from Dr. Parrish dated January 5, 2007. He said he took Claimant at his word that he had conveyed complaints of back pain to the emergency room staff, but those complaints simply did not get recorded.

With respect to the neck injury from January 3, 2007, Dr. Volarich stated a subsequent MRI verified that Claimant had a disc protrusion at C5-6. Dr. Volarich had said this objective finding confirmed what he found on his physical examination of Claimant, including radiating pain in to the left arm and hand. For that reason, Dr. Volarich increased his rating for the neck to 25 percent.

Dr. Volarich imposed a number of physical restrictions which are detailed in his report. When asked in deposition if he could break down restrictions relative to the spine, between the January 3, 2007 car accident versus the January 14, 2007 slip and fall, Dr. Volarich responded:

A. That's very difficult thing to break down, and that's why I didn't try to do anything because it would be more of a guess than anything else. I could say with reasonable medical certainty, that the majority of the limitations would be due to the surgical repair that occurred before his current work injuries.

(Exhibit 2, p. 16).

Likewise, Dr. Volarich said the majority of the restrictions for the lower extremities were due to Claimant's preexisting condition because of the severity of the preexisting fracture that had required surgical repair. He also said the restrictions he placed on Claimant with regard to the heart also preexisted the work injuries.

Dr. Volarich Supplemental IME December 10, 2012

Dr. Volarich reevaluated Claimant on December 10, 2012, and issued an addendum report. Dr. Volarich noted that subsequent to his evaluation of Claimant on January 7, 2008, Claimant had undergone an MRI of the cervical spine and an additional MRI of the lumbar spine. He was seen by Dr. Wade Ceola on January 8, 2009 with complaints of low back pain and radiating pain into his lower extremities and cervical pain with radiation into both arms. Dr. Ceola reviewed the MRIs, diagnosed a failed response to physical therapy and injections, and recommended surgery. On July 29, 2009, Dr. Ceola performed an anterior cervical discectomy and fusion at C5-6 and C6-7. Claimant underwent postoperative physical therapy. He also continued to have complaints of ongoing low back pain.

Dr. Ceola saw Claimant again on May 27, 2010, noting at that time that Claimant had been in two motor vehicle accidents on *May 1, 2010 and May 24, 2010*. Dr. Ceola diagnosed Claimant with whiplash and a concussion and recommended physical therapy for his cervical and lumbar spine. Over the next year, Claimant continued to experience ongoing neck and back pain. An additional MRI of his lumbar spine on May 18, 2011, provided new findings. Dr. Ceola's subsequent diagnoses included an acute foot drop, brachial neuropathy, lumbago, and a new large herniation at L4-5. He recommended surgery.

Claimant underwent surgery with Dr. Ceola on May 25, 2011, which included left L4-5 hemilaminectomy with discectomy. Due to ongoing complaints, Claimant had an additional MRI on June 19, 2011, and a CT myelogram on June 29, 2011. These revealed a large recurrent herniation which impinged the cauda equina nerve roots. Dr. Ceola reviewed the studies and recommended a

fusion. On July 1, 2011, Dr. Ceola performed a bilateral discectomy at L4-5 and decompression of the neural elements followed by posterior and posterolateral fusion at L4-5. Claimant continued to receive follow-up treatment from Dr. Ceola associated with the 2010 motor vehicle accidents and the surgeries.

Dr. Volarich's diagnoses regarding the injuries of January 3, 2007 and the diagnoses regarding the injury of January 14, 2007 did not change in his December 10, 2012 report. His diagnoses regarding the medical conditions and injuries preexisting January 3, 2007 did not change. He restated his opinion that Claimant was permanently totally disabled as a result of the work-related injuries on January 3, 2007 and January 14, 2007 in combination with each other and his preexisting medical conditions. Dr. Volarich indicated that Claimant may require ongoing care for his pain syndromes.

Dr. Volarich Supplemental Deposition August 8, 2013

In a supplemental deposition completed on August 8, 2013, Dr. Volarich said that his opinions had changed with regard to his recommendations for future treatment because Claimant had undergone some additional surgeries. Dr. Volarich said Claimant will need treatment at a pain clinic for chronic radicular and neuropathic pain, epidural steroid injections, foraminal service root blocks, trigger point injections, TENS units, radiofrequency ablation procedures and consideration for a spinal cord stimulator, and oral medications. Asked whether these treatments were directly related to his work injuries, Dr. Volarich answered:

A. Not completely. They would be related to the fact that he had injuries to the neck and back from work, but he also had subsequent deterioration, a couple of car wrecks and such, and had surgeries during that time, so it's – it's a mixture of subsequent problems as well as the work injuries and I think also as well as the preexisting difficulties in his low back.

(Exhibit 3, p. 8).

Until after the intervening 2010 car accidents, Dr. Volarich had made no surgical or even pain clinic recommendations. Dr. Volarich said that it was the two car accidents in May 2010 that “really pushed him over the edge to require the surgical repairs, yes.” (Exhibit 3, p. 16). Dr. Volarich said none of Claimant's subsequent surgeries – a fusion at C5-6 and C6-7, and a discectomy at L4-5, and subsequent fusion in the low back, were related to the work accidents in January 2007. He said at the time he last saw Claimant, he was taking Hydrocodone, amitriptyline and Diclofenac, and these medications were beneficial relating to Claimant's back and leg, including the preexisting conditions. When Dr. Volarich first saw the claimant in January 2008, Claimant did not have the foot drop issue noted by Dr. Ceola in 2011. Claimant's preexisting lower extremity complaints were related to the right knee and the foot drop complaints were associated with the left lower extremity.

Dr. Ted Lennard IME February 26, 2015

Dr. Ted Lennard examined Claimant on February 26, 2015. Dr. Lennard said as a result of the injury on January 3, 2007, Claimant suffered a cervical strain, facial lacerations, left chest wall strain, left knee strain and left wrist strain. He said the majority of those injuries ultimately resolved without further problems. As a result of the work injury on January 14, 2007, Dr. Lennard found that Claimant had suffered a lumbar strain. He stated the lumbar strain resolved and Claimant had reached maximum medical improvement. Dr. Lennard said Claimant was able to return to full unlimited work following the incidents on January 3, 2007, and January 14, 2007.

With respect to the lumbar spine, Dr. Lennard stated the accidents on January 3, 2007 and January 14, 2007 were not the cause or prevailing factor necessitating the subsequent surgeries on May 25, 2011 and July 1, 2011. Likewise, Dr. Lennard stated that the work accidents on January 3, 2007 and January 14, 2007 were not the cause or the prevailing factors necessitating the C5-7 fusion surgery in February of 2009.

Dr. Lennard assigned a five percent permanent partial disability to the body as a whole, attributable to the cervical spine, because of the work injury on January 3, 2007. He gave a five percent permanent partial disability to the whole body attributable to the lumbar spine as a result of the January 14, 2007 work accident. Dr. Lennard provided permanent partial disability ratings of 15 percent to the body for the non-work-related C5-7 fusion surgery which occurred on February 29, 2009. Dr. Lennard provided preexisting permanent partial disability ratings of 10 percent to the body as a whole related to the lumbar spine surgery in 1999 and 20 percent to the body as a whole for the two subsequent non-work-related lumbar spine surgeries which occurred on May 25, 2011 and July 1, 2011.

Dr. Lennard stated Claimant required no additional treatment for the cervical strain he sustained on January 3, 2007 or the lumbar strain he suffered on January 14, 2007. He did not believe the Claimant suffered other injuries which necessitated treatment. Dr. Lennard provided restrictions stating that from a functional standpoint, Claimant should avoid activities that require overhead use of upper extremities, repetitive reaching forward, lifting greater than 20 pounds, prolonged bending, and static sitting without regular changes in body positions. Dr. Lennard stated none of these limitations resulted from the work accidents of January 3, 2007 or January 14, 2007.

### **Vocational Opinion**

#### Wilbur Swearingin

Mr. Swearingin is a vocational rehabilitation expert who evaluated Claimant on June 16, 2008. Mr. Swearingin noted that Claimant had complaints of back pain, left leg pain, neck pain radiating into the shoulders and arms, headaches and dizzy spells. Mr. Swearingin noted that Claimant had a long history of pain in his right knee from a motorcycle accident and a history of depression. Mr. Swearingin noted that Claimant had only a 10<sup>th</sup> grade education and demonstrated academic skills equaling that of 8<sup>th</sup> to 10<sup>th</sup> grade. He noted that Claimant was unable to perform the essential duties of his prior occupation and that Claimant had multiple restrictions.

Considering Claimant's multiple impairments, medical restrictions and limitations, Mr. Swearingin concluded that Claimant was not employable or placeable in the open labor market. While Mr. Swearingin said it was conceivable that Claimant might be able to work "something very sedentary" for two hours, it would not be self-supporting. He opined that Claimant was permanently and totally disabled due to a combination of his preexisting impairments and disabilities and those impairments and disabilities that arose from his work injuries in January 2007.

### **Past Medical Expenses**

Claimant testified during trial that he received a limited amount of medical treatment associated with the work injuries on January 3, 2007 and January 14, 2007. He submitted medical bills into evidence for treatment totaling \$9,617.99, which included treatment from Dr. Parrish on January 5 and January 23, 2007 in the amount of \$306.00, treatment from Dr. Frewin at Sun River Orthopedics on February 26, 2007 in the amount of \$349.00, treatment from Cox Radiology on March 19, 2007 in the amount of

\$4,750.01, treatment from Cox Medical Center on March 19, 2007 in the amount of \$1,263.02, treatment from Dr. Butcher on March 13 and March 27, 2007, April 6, 2007, May 7, 2007, July 6 and July 13, 2007 in the amount of \$819.50 and treatment from St. John's Hospital Lebanon on January 3, 6, and 14, 2007 in the amount of \$2,130.46.

The bills Claimant submitted for reimbursement included not only the treatment Claimant received at the emergency room on January 3, 2007 and January 14, 2007 for the work injuries, but also for treatment on January 6, 2007 that was associated with a heart-related issue. There is no evidence that the medical treatment obtained on January 6, 2007 at St. John's Hospital Lebanon was related to the work injury of January 3, 2007. Claimant admitted he never requested that Captain D's provide him with treatment after the January 3, 2007 or January 14, 2007 incidents. There is no evidence suggesting that Captain D's ever denied treatment or was aware that Claimant needed additional treatment for his work accidents.

Claimant admitted that his medical bills were paid by his personal health insurance. Employer/Insurer contends that Claimant also received a third-party settlement for the January 3, 2007 injury; however, subrogation was not made an issue in this hearing. There is no evidence that Claimant's bills were "written-off."

### **Additional Findings**

Claimant personally appeared before me. I find that his testimonies at the trial and in deposition are substantially consistent. I find him credible. As noted above, Claimant's last day of work was in May 2007. He has not worked anywhere since June 1, 2007.

As to the credibility of the experts, both Drs. Volarich and Lennard find that Claimant sustained permanent injuries as a result of the work accidents on January 3, 2007 and January 14, 2007. To the extent that Dr. Volarich and Dr. Lennard disagree as to what disabilities were sustained, I generally find Dr. Volarich more persuasive because his initial examination, performed one year after the accidents, was much closer in time to the accidents than that of Dr. Lennard. I do not agree with Dr. Volarich's assessment of the wrist disability and I find some of his ratings excessive. I find Mr. Swearingin, the sole vocational expert in this case, to be credible.

### **CONCLUSIONS OF LAW**

Claimant bears the burden of proving all material elements of his claim to a reasonable probability. *Cardwell v. Treasurer of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008), and *Duncan v. Springfield R-12 School District*, 897 S.W.2d 108, 114 (Mo. App. S.D. 1995). When a claimant has alleged permanent total disability, he must prove his inability to return to any employment, and not just the inability to return to the last employment. § 287.020.6 RSMo Cum. Supp. 2006<sup>1</sup>. In determining whether Claimant can return to any employment, Missouri law allows consideration of his age, education, as well as his physical disabilities. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). The central question is whether, in the ordinary course of business, an employer would reasonably be expected to hire Claimant in his physical condition. *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D.2000), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 200 (Mo. banc 2003).

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<sup>1</sup> All future references to statutory provisions are those in effect at the time of the work injuries in January 2007.

## **Medical Causation**

Medical records substantiate that Claimant was hurt in separate accidents occurring on January 3, 2007 and January 14, 2007. Both Dr. Lennard and Dr. Volarich opined that Claimant was injured in two separate accidents on January 3, 2007 and January 14, 2007. Both physicians provided separate permanency ratings for the injuries. There is competent and substantial evidence in the record to support the finding and conclusions that Claimant sustained injuries and permanent disability from each of the two separate work accidents.

## **Maximum Medical Improvement**

Dr. Volarich stated that Claimant had reached maximum medical improvement by January 7, 2008, with respect to each of the 2007 work accidents. I accept January 7, 2008 as the maximum medical improvement as to each of the work accidents. Consequently, the injuries from the January 3, 2007 injury were not at maximum medical improvement at the time Claimant sustained the additional injuries from the January 14, 2007 work accident.

## **Permanent Disability – Liability of Employer/Insurer**

When a claimant alleges permanent total disability, as in the instant case, the Administrative Law Judge first must consider the liability of the employer in isolation by determining the degree of disability due to the last injury. *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1, 4 (Mo. App. W.D. 2007), and *Hughey v. Chrysler Corp.* 34 S.W.3d 845, 847 (Mo. App. E.D. 2000). If Claimant's last injury in and of itself rendered Claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount. *Feld v. Treasurer of Missouri as Custodian of Second Injury Fund*, 203 S.W.3d 230, 233 (Mo. App. E.D. 2006).

Permanent total disability means an employee is unable to compete in the open labor market. *Forshee v. Landmark Excavating and Equip.*, 165 S.W.3d 533, 537 (Mo. App. E.D. 2005). This means the inability to perform the usual duties of the employment in a manner that such duties are customarily performed by the average person engaged in such employment. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849 (Mo. App. S.D. 1995). While "total disability" does not require that the Claimant be completely inactive or inert, *Sifferman v. Sears Roebuck and Co.*, 906 S.W.2d 823, 826 (Mo. App. S.D. 1996), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W. 2d 220 (Mo. banc 2003), it does require a finding that Claimant is unable to work in any employment in the open labor market, and not merely the inability to return to his last employment. *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo. App. S.D. 2001), *overruled on other grounds Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). It is within the province of the Administrative Law Judge to determine the extent of any permanent disability. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo. App. E.D. 1998).

Even though Claimant reinjured some areas of his body that had been injured in the past, Dr. Volarich gave separate ratings for the preexisting conditions and the disabilities from each of the work accidents, thereby satisfying the requirement set forth in *Plaster v. Dayco*, 760 S.W.2d 911 (Mo. App. S.D. 1988). While both Drs. Lennard and Volarich opined that Claimant sustained permanent disabilities from each of the 2007 work injuries, neither rating physician, nor any of the medical records, suggest that Claimant is permanently and totally disabled as a result of either of the 2007 work-related accidents alone. I conclude Claimant was not permanently and totally disabled from the work accidents alone.

*January 3, 2007 Accident*

As a result of the January 3, 2007 motor vehicle accident, there is substantial, competent, and credible evidence that Claimant sustained immediate and continuing pain and stiffness in the cervical spine. Considering all of the evidence, I find and conclude that Claimant sustained a 15 percent permanent partial disability to the body as a whole referable to the cervical spine (400 weeks x 15% = 60 weeks of disability).

Even though contemporaneous medical records do not substantiate his subjective complaints of lower back pain and injury from the motor vehicle accident, Claimant's deposition and hearing testimonies consistently mention back pain stemming from the motor vehicle accident, as well as from the later January 14, 2007 accident. Dr. Volarich also believed that Claimant hurt his back in the motor vehicle accident. Claimant explained at the hearing, however, that his back was worse after the January 14, 2007 accident. He also advised Dr. Volarich that his back was more severe after the January 14, 2007 (Exhibit 2, p. 27). Given the whole record, I find and conclude that the back injury from the motor vehicle accident was a strain of less significance than the injury sustained in the work-related fall 11 days later. I find and conclude that Claimant sustained a 5 percent permanent partial disability to the lumbar spine from the motor vehicle accident (400 x 5% = 20 weeks of disability).

Claimant said his wrist resolved. Dr. Volarich found clicking upon examination, but given Claimant's lack of complaint, I conclude there was no permanent *disability* in the wrist. Just because I have found Dr. Volarich credible with respect to other disabilities, does not mean that every word that comes from this witness's mouth is binding on the fact finder and not subject to dispute. *Riley v. City of Liberty*, 404 S.W.3d 434, 441 (Mo. App. W.D. 2013).

Therefore, as a result of the January 3, 2007 work accident, Employer/Insurer owes to Claimant \$30,124.00 in permanent partial disability benefits (80 weeks x \$376.55 (PPD rate)).

*January 14, 2007 Accident*

Following the January 14, 2007 work accident, Claimant returned to working extraordinarily long hours. He explained, however, that he suffered ongoing pain in his back and knee and had to modify the way in which he performed his job duties. He said the pain in his knee was much worse than what he had experienced in the past. Claimant should not be penalized because of his commendable work ethic. I accept Dr. Volarich's finding that Claimant sustained significant disabilities from the January 14, 2007 accident, although I again do not agree with the amount of all of his ratings. I find and conclude that Claimant suffered an additional 12.5 percent permanent partial disability to the lumbar spine (50 weeks) and 10 percent permanent partial disability to the right leg at the 160-week level (16 weeks). At the rate of \$376.55, Employer/Insurer owes to Claimant \$24,852.30 in permanent partial disability for the January 14, 2007 work accident (66 weeks x \$376.55 = \$24,852.30).

**Reimbursement for Past Medical Treatment**

Claimant seeks reimbursement of \$9,617.99 in medical expenses. Section 287.140 RSMo, states in pertinent part:

1. [T]he employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability to cure and relieve from the effects of the

injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

\* \* \*

10. The employer shall have the right to select the licensed treating physician, surgeon, chiropractic physician, or other health care provider; provided, however, that such physicians, surgeons or other health care providers shall offer only those services authorized within the scope of their licenses. For the purpose of this subsection, subsection 2 of section 287.030 shall not apply.

This statute, while requiring an employer to provide an injured employee with medical care, gives the employer control over the selection of the medical provider. *Poole v. City of St. Louis*, 328 S.W.3d 277, 291 (Mo. App. E.D. 2010). Only when the employer fails to do so is the employee free to pick his own provider and assess the costs against his employer. *Id.* “Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment.” *Id.*

Dr. Volarich identified as fair and reasonable the bills for which Claimant seeks reimbursement. Some of these bills, however, clearly are unrelated to Claimant’s work accidents. For instance, the emergency room bill for January 6, 2007, unquestionably was for treatment of Claimant’s cardiac condition and not for the work injuries.

Moreover, Claimant never requested treatment from Employer/Insurer. There is no evidence that Employer or its Insurer was aware that Claimant required additional treatment for the work accident and failed to provide the same. Rather, Claimant merely chose his own treating physicians. Employer/Insurer is not liable for the medical bills, with two exceptions.

Employer/Insurer is responsible for the payment of the emergency room bills incurred immediately after the work accidents on January 3, 2007 and January 14, 2007. By seeking medical care in an emergency situation, Claimant did not voluntarily elect to forego Employer’s obligation to provide medical treatment. *See e.g., Meyers v. Wildcat Materials, Inc.*, 258 S.W.3d 77, 81 (Mo. App. S.D. 2008) (citing circumstances in which an employee does not forego the employer’s payment of medical bills).

Employer/Insurer contends it has no liability even of these emergency room bills, noting that Claimant’s bills were paid through insurance and a third party recovery from the automobile accident. Section 287.270 RSMo, often referenced as the “collateral source rule,” generally precludes consideration of savings or insurance derived from any source other than the employer or its insurer when awarding medical benefits. As noted in *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo banc 1989), Courts have consistently held that award of past medical expenses is supported when the employee presents 1) the bills, 2) the medical record reflecting the treatment giving rise to the bills; and 3) testimony identifying the bills. The burden then shifts to Employer to demonstrate that the bill is unreasonable or the liability for the bill has been extinguished. *Farmer-Cummings v. Per. Pool of Platte county*, 110 S.W.3d 818, 822-23 (Mo. banc 2003); *Ellis v. Missouri State Treasurer*, 302 S.W.3d 217, 225 (Mo. App. S.D. 2009). Employer/Insurer failed in its burden. Employer/Insurer shall pay \$1,073.46 for the medical bill incurred on January 3, 2007, in Injury No. 07-000330, and \$837.00 for the past medical bill incurred on January 14, 2007, in Injury No. 07-001298.

## Future Medical Treatment

Section 287.140 RSMo, requires an employer to provide past as well as future medical treatment as reasonably may be required to cure or relieve an employee from the effects of a work-related injury. "Cure or relieve" means treatment that will give comfort, even though restoration or soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). Claimant must only show by a reasonable probability that future medical treatment is needed for a work-related injury. *Null v. New Haven Care Ctr., Inc.*, 425 S.W.3d 172, 181 (Mo. App. E.D. 2014). Future care for pain relief should not be denied simply because Claimant has reached maximum medical improvement. *Pennewell v. Hannibal Reg'l Hosp.*, 390 S.W.3d 919, 926 (Mo. App. E.D. 2013). It also is immaterial that the medical treatment might simultaneously benefit non-compensable condition. *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 270 (Mo. App. S.D.2004).

Dr. Lennard recommended no additional treatment. Dr. Volarich initially reported that Claimant required treatment for Claimant's neuropathic pain. In his August 8, 2013 deposition, he recommended a number of treatment modalities which he opined were for Claimant's preexisting injuries, the work injuries, and the subsequent non-work-related injuries which included two motor vehicle accidents. While Dr. Volarich was not clear in his latter deposition as to which treatments were for which disabilities or injuries, he had not changed his mind that Claimant required some treatment for pain. I conclude that the evidence supports an Award of future medical treatment to cure or relieve the effects of the 2007 work injuries and resulting disabilities.

## Second Injury Fund

To recover against the Second Injury Fund, Claimant must prove he sustained a compensable injury, referred to as "the last injury." § 287.220.1 RSMo. He must prove he had a preexisting permanent partial disability, whether from a compensable injury or otherwise, that: (1) existed at the time the last injury was sustained; (2) was of such seriousness as to constitute a hindrance or obstacle to his employment or reemployment; and (3) equals a minimum of 50 weeks of compensation for injuries to the body as a whole or 15 percent for major extremities. *Dunn v. Treasurer of Missouri as Custodian of Second Injury Fund*, 272 S.W.3d 267, 272 (Mo. App. E.D. 2008). "Once the threshold is met, all of [Claimant's] disabilities should be considered in calculating the extent of the fund's liability." *Treasurer v. Witte*, 414 S.W.3d 455, 468 (Mo. banc 2013). "By its plain and ordinary language, section 287.220.1 does not require a disability from the last injury to meet a numerical threshold to trigger liability." *Witte*, 414 S.W.3d at 466.

The Second Injury Fund is liable for permanent total disability if the disability from the last work injury and the preexisting disabilities together result in total disability.

[E]xcept that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under Section 287.200 out of a special fund known as the "Second Injury Fund"....

§ 287.220.1 RSMo.

This case poses quite a predicament because Dr. Volarich, while finding Claimant permanently and totally disabled, did so by combining the preexisting disabilities with *both* of the January 2007 work accidents. When asked to separate his restrictions, Dr. Volarich failed to do so. He did state, however, within a reasonable degree of medical certainty, the majority of the limitations were due to Claimant's preexisting conditions. Mr. Swearingin, while also opining that Claimant is unable to sustain employment on the open labor market, does not assist in drawing a demarcation between the January 3, 2007 and January 14, 2007 work accidents. This case is further complicated because the January 3, 2007 work accident was not at maximum medical improvement when the "last" accident occurred on January 14, 2007.

As recently held in *Patterson v. Cent. Freight Lines*, 452 S.W.3d 759, 766 (Mo. App. E.D. 2015), the Administrative Law Judge and the Commission can consider all of the evidence in determining the amount of an employee's disability and need not adhere to the same percentages assigned by experts." 452 S.W.3d at 767. "[U]ltimately, the employability of an individual is a technical matter within the Commission's expertise." *Id.*

Dr. Volarich and Mr. Swearingin elucidated these facts with which I agree: Claimant is permanently and totally disabled. Claimant was permanent and totally disabled as of January 2008, prior to Claimant's subsequent 2010 car accidents. Further, Claimant's permanent total disability is not from either one of January 2007 injuries in isolation, nor is it from the preexisting conditions in isolation. I disagree with the experts, however, that the combination of disabilities which create permanent total disability must include the January 3, 2007 work injuries. I find and conclude, based on the whole record, that Claimant's permanent and total disability arises from the disabling injuries caused from the *last* accident on January 14, 2007, combined with the permanent disabilities preexisting that date.

Claimant's preexisting conditions were significant, disabling, and posed hindrances or obstacles to his employment or re-employment. His surgically repaired knee with hardware clearly kept him from military service. He had difficulty standing, although he did it. While he could function, his preexisting right knee "hurt like hell." While he worked extraordinarily long hours and drove to multiple locations on a regular basis, he was in pain and had to get off his feet as soon as he arrived home. He had ongoing pain in his back, and had to guard his back at work. He had chest pain that bothered him for years. As much as these conditions posed him problems in the past, Claimant was quite clear in his testimony that his pain was even worse after the January 14, 2007 accident. Moreover, it was after the January 14, 2007 work accident, and three months of self-accommodation, and heart problems, that he finally determined he simply could not continue.

I reach this determination having considered Claimant's limited education, age, academic skills, and past employment, the expert opinions, and particularly Claimant's testimony. Most convincing in this case is Claimant's demonstrated extraordinary work ethic despite continual pain. If Claimant could work, I am convinced he would be working.

I further find and conclude, however, that Claimant did not present sufficient credible evidence demonstrating that the preexisting disabilities, combined with the injuries from the January 3, 2007 accident were greater than their simple sum. Therefore, I award no enhanced permanent partial disability against the Second Injury Fund in relation to Injury No. 07-000330.

## SUMMARY

### **Injury No. 07-000330 (January 3, 2007 accident)**

With respect to the injuries sustained in the work accident of January 3, 2007, Employer/Insurer owes to Claimant \$30,124.00 in permanent partial disability, \$1,073.46 in past medical treatment, and future medical treatment to cure and relieve the effects of the work injuries. There is no Second Injury Fund liability.

### **Injury No. 07-001298 (January 14, 2007 accident)**

With respect to the last work accident and the injuries sustained on January 14, 2007, Employer/Insurer owes Claimant \$24,852.30 in permanent partial disability, \$837.00 for past medical treatment, and future medical treatment to cure and relieve the effects of the work injuries.

Due to the permanent disabilities sustained from the work accident on January 14, 2007, combined with the preexisting permanent partial disabilities existing prior to January 14, 2007, Claimant is permanently and totally disabled beginning January 7, 2008. From that date, and continuing for a period of 66 weeks, the Second Injury Fund shall pay \$342.32 per week, which is the differential between the permanent partial disability and permanent total disability rates. Thereafter, the Second Injury Fund shall pay the full permanent total disability rate of \$718.87 per week for the remainder of Claimant's lifetime, subject to review and modification as provided by law.

With respect to each case – Injury No. 07-000330 and Injury No. 07-001298 – Claimant's legal counsel, John Newman is awarded a lien of 25 percent of the Awards as a reasonable fee for necessary legal services provided to Claimant.

This Award is subject to review and modification as provided by law. Interest shall be paid as provided by law.

Made by: /s/ Victorine R. Mahon  
Victorine R. Mahon  
Administrative Law Judge  
Division of Workers' Compensation