

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

Injury No.: 03-057614

Employee: James Nelson
Employer: R & R Trucking
Insurer: Liberty Mutual Insurance
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: June 11, 2003
Place and County of Accident: Bloomingfield, Indiana

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 16, 2007. The award and decision of Chief Administrative Law Judge L. Timothy Wilson, issued July 16, 2007, 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 31st day of January 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Nelson

Injury No. 03-057614

Dependents: N/A
Employer: R & R Trucking
Additional Party: Second Injury Fund
Insurer: Liberty Mutual Insurance
Hearing Date: March 19, 2007

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

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? YES
2. Was the injury or occupational disease compensable under Chapter 287? YES
3. Was there an accident or incident of occupational disease under the Law? YES
4. Date of accident or onset of occupational disease: JUNE 11, 2003
5. State location where accident occurred or occupational disease was contracted: BLOOMINGFIELD, IN
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:
HAULING MILITARY LOAD OF ORDINANCE
12. Did accident or occupational disease cause death? NO
13. Part(s) of body injured by accident or occupational disease: BACK AND LEFT HIP
14. Nature and extent of any permanent disability: PERMANENT TOTAL DISABILITY
15. Compensation paid to-date for temporary disability: \$36,011.16
16. Value necessary medical aid paid to date by employer/insurer? \$25,682.63
17. Value necessary medical aid not furnished by employer/insurer? -0-
18. Employee's average weekly wages: \$451.21
19. Weekly compensation rate: \$300.81
20. Method wages computation: STIPULATION

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: UNKNOWN
4.286 weeks of temporary total disability (or temporary partial disability) (\$1,289.28)
N/A weeks of permanent partial disability from Employer
N/A weeks of disfigurement from Employer

22. Second Injury Fund liability: NONE

TOTAL: UNKNOWN

23. Future requirements awarded: FUTURE MEDICAL AND PERMANENT TOTAL DISABILITY BENEFITS OF \$300.81 FOR LIFETIME OF CLAIMANT

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25 PERCENT of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

JOSEPH WALSH

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Nelson

Injury No. 03-057614

Dependents: N/A

Employer: R & R Trucking

Additional Party: Second Injury Fund

Insurer: Liberty Mutual Insurance

Hearing Date: March 19, 2007

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

Checked by: LTW

AWARD

The above-referenced workers' compensation claim was heard before the undersigned Administrative Law Judge on March 19, 2007. The parties requested the evidentiary record to be left open for submission of additional evidence, resulting in the undersigned sustaining the request and closing the record on April 18, 2007. In addition, the parties were afforded an opportunity to submit briefs or proposed awards.

The employee James Nelson, appeared personally and through his attorney Joe Walsh, Esq. The employer R & R Trucking, and its insurer Liberty Mutual Insurance Co., appeared through their attorney James Blickhan, Esq. The Treasurer of Missouri, as the Custodian of the Second Injury Fund, appeared through her attorney Christina Hammers, Assistant Attorney General.

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

- (1) On or about June 11, 2003 R & R Trucking was an employer operating under and subject to The Missouri Workers' Compensation Law, and during this time was fully insured by Liberty Mutual Insurance Co.
- (2) On the alleged injury date of June 11, 2003 James Nelson was an employee of the employer, and was working under and subject to The Missouri Workers' Compensation Law.
- (3) On or about June 11, 2003 the employee sustained an accident, which arose out of and in the course and scope of employment with R & R Trucking.
- (4) The above-referenced employment and accident occurred in the State of Indiana. However, the employee's contract of employment with the employer was made in Missouri. The parties agree to venue lying in Joplin, Missouri. Venue is proper.
- (5) The employee notified the employer of his injury as required by Section, 287.420, RSMo.
- (6) The Claim for Compensation was filed within the time prescribed by Section 287.430, RSMo.
- (7) At the time of the alleged accident, the employee's average weekly wage was \$451.21, which is sufficient to allow a compensation rate of \$300.81 for both temporary total disability and permanent disability compensation.
- (8) Temporary total disability benefits have been provided to the employee in the amount of \$36,011.16, representing 120 6/7 weeks, payable for the periods of June 16, 2003 to December 15, 2004, and June 27, 2005 to April 21, 2006.
- (9) The employer and insurer have provided medical treatment to the employee, having paid \$25,682.63 in medical expenses.

The sole issues to be resolved by hearing include:

- (1) Whether the employee has sustained injuries that will require additional or future medical care in order to cure and relieve the employee of the effects of the injuries?
- (2) Whether the employee is entitled to temporary total disability compensation, payable for the period of December 5, 2004 to June 27, 2005?
- (3) Whether the employee sustained any permanent disability as a consequence of the alleged accident; and, if so, the what is the nature and extent of the disability?
- (4) Whether the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is liable for payment of additional permanent partial disability compensation or permanent total disability compensation?

EVIDENCE PRESENTED

The employee testified at the hearing in support of his claim. In addition, the employee offered for admission the following exhibits:

Exhibit A..... Deposition of David T. Volarich, D.O.
 Exhibit B..... CV of David T. Volarich, D.O.
 Exhibit C..... Medical Report from David T. Volarich, D.O.
 Exhibit D. Psychological & Vocational Report from Samuel Bernstein, Ph.D.
 Exhibit E..... Deposition of Samuel Bernstein, Ph.D.
 Exhibit F..... Medical Records
 Exhibit G..... Medical Records from Hassan Chahadeh, M.D.
 Exhibit H..... Medical Records from J. Barton Kendrick, II, M.D.

Exhibit I..... Medical Records from Dennis Estep, D.O.
Exhibit J..... Medical Records from Freeman Hospital
Exhibit K..... Medical Records from Freeman Occumed
Exhibit L..... Letter Dated January 16, 2005
Exhibit M..... Letter Dated June 17, 2005

Exhibits A, B, C, D, E, F, G, H, I, J and K were received and admitted into evidence. Exhibits L and M were received but denied admission.

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

Exhibit 1..... Deposition of Edward J. Prostic, M.D.
Exhibit 2..... Deposition of Patrick Lawrence Hughes, M.D.
Exhibit 3..... Deposition of Terry L. Cordray, M.S.
Exhibit 5..... Deposition of James Nelson

Exhibits 1, 2, 3 and 5 were received and admitted into evidence. Exhibit 4 was marked, but not offered for admission into evidence.

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

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

- Minute Entries
- Request for Hearing
- Notice of Hearing
- Answer of Employer & Insurer to Amended Claim for Compensation
- Answer of Second Injury Fund to Amended Claim for Compensation
- Amended Claim for Compensation
- Report of Injury
- Answer of Employer & Insurer to Claim for Compensation
- Answer of Second Injury Fund to Claim for Compensation
- Claim for Compensation

Finally, the undersigned took official or judicial notice of the life expectancy tables for the employee James Nelson, which, at the time of the hearing, identified a life expectancy of 26.71 years.

DISCUSSION

The employee James Nelson is 50 years of age, having been born on July 10, 1956, making him 50 years old. Mr. Nelson is a resident of Livingston, TX, and has been for the past 12 years. Prior to living in Livingston, Mr. Nelson lived in Houston, TX.

Mr. Nelson did not graduate from high school, as he completed 11 years of primary and secondary education. However, Mr. Nelson obtained a GED, and attended one semester at the University of Houston. Mr. Nelson is described as an average student.

During most of his employment history Mr. Nelson worked as a truck driver. As a truck driver, Mr. Nelson enjoys a commercial driver's license, which includes endorsements for triples, doubles, tankers, and HAZMAT. He has mainly driven tankers – delivering HAZMAT and explosives to military bases and commercial rock quarries. When he delivered to the commercial rock quarry, he unloaded cargo that could weigh from 55 to 100 pounds per piece, including dynamite and other explosives. When he drove flatbed trucks, he covered the loads with tarps weighing approximately 100 pounds. Typically, he would drive for 10 hours, and then take an 8-hour break. Since 1987, he has team-drove with his wife. He typically drove 70 percent of the time, with his wife driving the remaining 30 percent.

Primary Injury – June 11, 2003.

On or about June 11, 2003 Mr. Nelson sustained an injury by accident, which arose out of and in the course of his employment with R & R Trucking. Notably, since suffering this June 11, 2003 injury, Mr. Nelson has not engaged in employment.

The accident of June 11, 2003 occurred while Mr. Nelson was hauling a military load of ordinance to the Crane Naval Yard in Bloomington, IN. When he reached the Naval Yard that night, he attempted to drop his trailer on a new gravel pad but slipped on rocks while trying to release the pin. As he slipped, he grabbed a metal bar with his arm to catch himself and felt a pop in his back. After reporting the injury to his employer, Mr. Nelson went to a hotel to rest. The next morning he could not get out of bed due to low back and left hip pain.

In light of Mr. Nelson suffering pain and not being able to drive, R & R Trucking referred him immediately to the Center for Occupational Health in Bloomington, Indiana, resulting in Mr. Nelson presenting to this health care provider on the same day (June 12, 2003). The attending physician diagnosed Mr. Nelson with a low back strain, and prescribed pain medications and muscle relaxants. Additionally, the attending physician placed restrictions on Mr. Nelson, but discharged him from his care with directions allowing his wife to drive for him. In traveling from Bloomington, Indiana to Joplin, Missouri, Mr. Nelson traveled the entire distance while lying in the seat.

Upon arriving in Joplin, R & R Trucking referred Mr. Nelson to Dr. Estep at Freeman Occupational Health Clinic for further evaluation. In light of this referral, on June 18, 2003, Mr. Nelson presented to Dr. Estep with complaints of low back and left hip pain. Dr. Estep diagnosed Mr. Nelson with an injury to his low back, referable to the lumbar disk, L4-L5, with radiculopathy, as well as spondylolisthesis. Thereafter, Dr. Estep restricted Mr. Nelson's employment activity, and prescribed physical therapy, which Mr. Nelson obtained. However, according to Mr. Nelson, the physical therapy caused him more pain. Mr. Nelson thus halted the physical therapy, and referred him for epidural steroid injections (ESIs) (which he did not receive at that time).

Mr. Nelson continued to treat in Joplin, presenting with low back and left hip pain, and incontinence. The treatment in Joplin continued until July 5, 2003, at which time he returned home to Texas.

Mr. Nelson saw his personal care physician Dr. Newman in Livingston, TX, with complaints of incontinence and constipation, low back and left hip pain. He was referred to Dr. Kindrick on July 28, 2003, who also recommended ESIs. He was referred for two ESIs with Dr. Chang. According to Mr. Nelson, the first injection did not help, and that he became very ill after the second. At this time, Dr. Kindrick recommended surgery; however, Dr. Newman would not release him for surgery due to uncontrolled diabetes and hypertension.

Notably, in the early 1990s Mr. Nelson was diagnosed with diabetes and hypertension. However, prior to 2003, these conditions were controlled with medication; but, following the June 11, 2003 injury, the diabetes and hypertension became uncontrolled. In his office visit note of July 8, 2004, Dr. Kindrick states, "It is my contention that certainly the patient had pre-existing conditions; however, these were made symptomatic by the work compensable injury."

Mr. Nelson underwent a Functional Capacity Evaluation at Wellquest Healthcare on July 21, 2004, upon the request of Dr. Kindrick. The FCE demonstrated Mr. Nelson could perform at the light/medium physical demand level. It was identified that he could lift 15 lbs. constantly, 35 lbs. frequently and 70 lbs. occasionally. He also demonstrated that he could sit, stand and walk, but needed to alternate between the three positions. Because his job as a truck driver fell under the category of medium/heavy physical demand, it was recommended that Mr. Nelson be given restrictions identified in the FCE.

Due to Mr. Nelson's continuing pain complaints, R & R Trucking referred Mr. Nelson to Dr. Chahadeh at Interventional Pain Management. Mr. Nelson continues to treat with Dr. Chahadeh, who prescribes pain medication on a monthly basis. Mr. Nelson testified that the pain medications do not totally alleviate his pain; he still has constant pain in his low back and his left hip. Dr. Chahadeh prescribes him Indocet (generic Percocet), 10/325 mg, Kadian 30 mg, and Soma, a muscle relaxant, 350 mg.

According to Mr. Nelson, prior to June 2003, he did not have to take pain medication or muscle relaxers on a daily basis. Mr. Nelson stated that, because of his pain and the medications, he has difficulty concentrating and

focusing. The medications also affect his reflexes causing him to respond more slowly. Because he takes these medications, it is not recommended that he drive or operate machinery. Additionally, Dr. Newman prescribes Caduet, which is for high cholesterol and high blood pressure; and he prescribes Avandia, Mediforman and Antrara, which are for the diabetes.

Mr. Nelson testified he has difficulty sleeping more than approximately four hours per night. He may get up four to five times a night because of suffering increased low back pain and needing to relieve himself, as he cannot hold his bladder. Because of his low back pain, he must get up and move around for a period before laying back down to sleep. He must lay down up to six times per day due to low back pain and fatigue from not sleeping at night. He continues to have incontinence approximately once per week, which he testified was an improvement from the year after his injury. Mr. Nelson indicated that at the time of the hearing, his pain level was a seven out 10.

Mr. Nelson testified that he limits his activity and can't do much without constantly changing positions. He usually has to change positions from sitting to standing to laying down every 35 to 45 minutes. He has difficulty getting out of chairs and moving around. He cannot bend over without help getting back up. He cannot twist at the hips. He believes his lifting restrictions are 15 to 20 pounds. He cannot lift overhead or away from his body. He has trouble walking on uneven terrain and slopes, and difficulty walking up steps and ladders without an increase in pain. Long drives increase his pain along with damp, cold weather. Extreme temperatures make his back worse. He has no difficulty performing his own personal hygiene; however, it does increase his pain, and he is very slow in taking care of himself. He cannot get in and out of a bathtub without help. He had no such problems before June 2003.

Mr. Nelson is unable to help his wife with household chores. He has difficulty using a vacuum, or a broom to sweep because of the twisting. He indicated that he has to pay people to do things around the house. In his deposition of March 21, 2006, he mentioned that he had always hired someone to mow his lawn; however, at the hearing he testified that when he was home, he was able to mow himself prior to June 2003, and only paid others to mow when he was gone. He now is unable to mow or do any outside activities.

Pre-existing Injuries/Conditions

Prior to the June 11, 2003 incident, Mr. Nelson suffered from several pre-existing injuries or conditions. In 1982 Mr. Nelson injured his left foot when he slipped while dragging a lawn mower backwards, pulling the lawn mower over his left foot. This incident resulted in him severing his big toe and the next two toes on his left foot. The two smaller toes were re-attached; however, the physician could not save completely his left big, leaving him with a stump. Subsequent to suffering this injury, according to Mr. Nelson, he suffered from a loss of balance, but over time he got accustomed to the loss and did not hinder him in other ways. When questioned by the Second Injury Fund, Mr. Nelson testified that, following the injury to his left foot, he continued to drive a truck and that the loss of his big toe did not affect the ability to drive a truck. Also, according to Mr. Nelson, the injury to his left foot did not affect his ability to do things around the house, or participate in hobbies.

In addition, prior to the June 11, 2003 incident, Mr. Nelson suffered from high blood pressure, unstable angina and diabetes. On one occasion, prior to 2003, Mr. Nelson was hospitalized for unstable angina and chest pain. On cross examination by the employer's attorney, Mr. Nelson admitted that his wife drove a time or two when he felt as if he was having chest pain. When questioned by the Second Injury Fund, he stated that, upon being taken off the drug Vioxx, his chest pain quit and he had no continuing problems. Additionally, while suffering from high blood pressure prior to 2003, Mr. Nelson sufficiently controlled this condition with medications, and did not encounter any problems with his high blood pressure until subsequent to suffering the work-related injury on June 11, 2003.

In regards to the diabetes, Mr. Nelson indicated that, prior to the June 11, 2003 incident, he sufficiently controlled his diabetes with medication; although he experienced some instances of diabetic neuropathy, particularly in the toes on his left foot, which would occasionally tingle. Notably, Mr. Nelson first learned of his diabetic condition in the mid 1990s, when he began having vision problems and could not see road signs. However, upon being treated for this condition with medication, the symptoms substantially resolved. According to Mr. Nelson, he experienced very few problems with his diabetes until after suffering the work-related injury to his

back injury in June 2003. Additionally, in regards to the diabetes, Mr. Nelson is not insulin-dependent. Yet, he is having problems affording his diabetic medications, and, consequently, does not take all the medications that are prescribed to him, which influences negatively his overall medical condition. Further, as a preexisting condition, the June 11, 2003 injury aggravated Mr. Nelson's diabetes, causing it to become symptomatic.

Finally, prior to June 11, 2003 Mr. Nelson suffered from depression, which necessitated him taking anti-depressant medication. According to Mr. Nelson, the medication helped his frame of mind. Further, in regards to this mental condition, Mr. Nelson has a family history of suicide on both sides of his family. And, he, at the age of 15, attempted suicide. Yet, while Mr. Nelson has suffered from depression for most of his life, he has never been hospitalized for depression, nor has he treated with a psychologist or a psychiatrist. Moreover, his symptoms improved and he controlled his depression with anti-depressant medication, allowing him to work regularly despite having depression. On cross-examination by the employer's attorney, Mr. Nelson admitted that, prior to 2003, because of being too depressed to get up and drive, his wife drove for him a couple of times per year. Subsequent to suffering the June 11, 2003 injury, and not being able to work, Mr. Nelson could no longer afford the anti-depressant medications, causing him to quit taking the antidepressants. Consequently, the lack of medication, in combination with other stressors, including the destruction of his home by Hurricane Rita, Mr. Nelson's depression worsened after his injury of June 2003.

Expert Testimony

Mr. Nelson proffered two experts in support of his claim of permanent total disability – David Volarich, D.O. and psychologist/vocational expert Samuel Bernstein, Ph.D. Dr. Volarich issued a report of his independent medical examination on Oct. 27, 2005; his deposition was taken on March 30, 2006. Dr. Volarich recommends in his report that Mr. Nelson undergo vocational evaluation to determine if he is able to return to the open labor market. He indicated that he would defer to a vocational expert on the issue of permanent total disability, but would not object if Mr. Nelson could find work within his restrictions. The restrictions imposed by Dr. Volarich, relative specifically to the June 11, 2003 incident and injury to Mr. Nelson's low back, include:

1. Limit repetitive bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks to an as needed basis;
2. Not handle any weight greater than 15-20 lbs., and limit this task to an occasional basis assuming proper lifting techniques;
3. Not handle weight over his head or away from his body, nor should he carry weight over long distances or uneven terrain;
4. Avoid remaining in a fixed position for any more than about 30 minutes at a time including both sitting and standing;
5. Change positions frequently to maximize comfort and rest when needed including resting in a recumbent fashion to rest as needed;
6. Pursue an appropriate stretching, strengthening, and range of motion exercise program in addition to non-impact aerobic conditioning such as walking, biking, or swimming to tolerance daily.

On cross-examination by the Second Injury Fund, Dr. Volarich stated that he had not identified any restrictions assigned to Mr. Nelson prior to June 2003.

In addition, Mr. Nelson offered in support of his claim, the testimony and opinions of Samuel Bernstein, Ph.D. In this regard, Dr. Bernstein opined that Mr. Nelson was unemployable in the open competitive labor market because of the severity of his impairments and how they affect him in terms of all exertional activities, combined with his diabetes, problems with incontinence [which is related to his 2003-work injury] and depression. Dr. Bernstein thus opines that the June 11, 2003 injury, in combination with the preexisting medical conditions, render Mr. Nelson unemployable in the open and competitive labor market. However, upon being cross-examined by the

Second Injury Fund, Dr. Bernstein admitted that, the sole restriction of having to lie down throughout the day, without consideration of the restrictions and limitations associated with the preexisting conditions, renders Mr. Nelson unemployable in the open and competitive labor market. In this context, Dr. Bernstein propounds the following testimony,

Q: And since his work injury, he has to lay down during the day because of pain?

A: Right.

Q: And, of course, prior to that injury, he was not having to do that?

A: Again, he was working.

Q: Okay. Whether someone is employable or not, is someone who has to lay down throughout the day to ease their pain employable?

A: They're not.

Q: Okay. So if someone has to do that because of a back injury, that alone would probably make them unemployable?

A: Well, I can't cut them up. I have to look at the total combination, but obviously, with those limitations, you wouldn't be working.

The employer and insurer proffered the reports and depositions of three expert witnesses – Edward Prostic, M.D., Patrick Hughes, M.D., and vocational expert Terry Cordray, M.S., CRC. In his report dated May 9, 2006, as an examining physician, Dr. Edward Prostic opined that the June 11, 2003 incident caused Mr. Nelson to suffer an injury to his low back and an aggravation of the pre-existing degenerative disease of the lumbar spine at the level of L4-L5. Dr. Prostic further opined that, at this time, surgery is not indicated for Mr. Nelson. Yet, Dr. Prostic recommends that Mr. Nelson “continue with intermittent heat or ice and massage and to do therapeutic exercises.” In addition, Dr. Prostic is of the opinion that Mr. Nelson is able to return to work as a truck driver, but is governed by restrictions that include no lifting weights greater than 50 pounds, and must be able to stop and stretch every two hours. Finally, Dr. Prostic opined that the accident of June 11, 2003 caused Mr. Nelson to sustain a permanent partial impairment and disability of 10 percent to the body as a whole, referable to the low back.

Dr. Patrick Hughes, who is a psychiatrist, opines that Mr. Nelson suffers from lifelong dysthymia. According to Dr. Hughes, dysthymia is a chronic biochemical type of depression. Further, according to Dr. Hughes, dysthymia is a genetic condition resulting in the underutilization of serotonin and norepinephrine by the brain. He further indicated that Mr. Nelson's dysthymia was well-controlled by the use of anti-depressant medication, and he only felt symptoms when he was off the medication. Additionally, Dr. Hughes opined that, the June 11, 2003 injury, secondary to the distress associated with the back pain, persistent unemployment and financial limitations, caused Mr. Nelson to suffer from an adjustment disorder with mixed features, or reactive depression. However, Dr. Hughes is of the opinion that Mr. Nelson's psychiatric condition, relative to both conditions, is mild and easily treatable with the resumption of antidepressants.

In addition, when questioned about Mr. Nelson's capability of working, Dr. Hughes stated,

At the time that I saw him, he was not taking the anti-depression medication that should clear virtually all this up anyway. So at the time that I saw him, I judged his impairments to be in the mild range of all four classes assessed, which is not in my experience of treating patients over 22 years severe enough to make the majority of American adults, especially adult males, even take off work, let alone be unable to work.

Finally, vocational expert Terry Cordray opined that Mr. Nelson would be capable of sedentary work, when looking at all of the various doctor's restrictions, with the exception of Dr. Volarich's restriction of being able to recline and rest as needed. But for that exception, Mr. Cordray identified a number of potential employment opportunities listed with the Texas Workforce Commission in April 2006, for which Mr. Nelson was qualified. In his deposition, Mr. Cordray noted that he did not identify any restrictions assigned to Mr. Nelson prior to June 2003, nor did Mr. Nelson confide to Mr. Cordray that he was having any problems doing his job prior to June 2003 due to

any health concerns or injuries.

FINDINGS AND CONCLUSIONS

The Workers' Compensation Law for the State of Missouri underwent substantial change on or about August 28, 2005. However, in light of the underlying workers' compensation case involving an accident date of June 11, 2003, the legislative changes occurring in August 2005 enjoy only limited application to this case. The legislation in effect on June 11, 2003, which is substantive in nature, and not procedural, governs substantively the adjudication of this case. Accordingly, in this context, several familiar principles bear reprise.

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

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

Yet, the employee need not establish the elements of the case based on absolute certainty. It is sufficient if the employee shows them to be a reasonable probability. "Probable", for the purpose of determining whether a worker's compensation the employee has shown the elements of a case by reasonable probability, means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. See, *Cook v. St. Mary's Hospital*, 939 S.W.2d 934 (Mo. App., W.D. 1997); *White v. Henderson Implement Co.*, 879 S.W.2d 575, 577 (Mo. App., W.D. 1994); and *Downing v. Williamette Industries, Inc.*, 895 S.W.2d 650 (Mo. App., W.D. 1995). All doubts must be resolved in favor of the employee and in favor of coverage. *Johnson v. City of Kirksville*, 855 S.W.2d 396, 398 (Mo. App. W.D. 1993).

I. Medical Care

On or about June 11, 2003 Mr. Nelson sustained an injury by accident, which arose out of and in the course of his employment with R & R Trucking. The injury occurred while Mr. Nelson was hauling a military load of ordinance to the Crane Navel Yard in Bloomington, IN. When he reached the Naval Yard that night, he attempted to drop his trailer on a new gravel pad but slipped on rocks while trying to release the pin. As he slipped, he grabbed a metal bar with his arm to catch himself and felt a pop and then pain in his low back, which began to radiate to the legs, left worse than right.

The June 11, 2003 caused Mr. Nelson to sustain a herniated disk of the lumbar spine at the level of L4-L5, as well as an aggravation of the preexisting spondylolisthesis, degenerative disc disease, and degenerative joint disease, causing instability in the low back with associated lower extremity radicular symptoms. The nature and severity of this injury necessitated Mr. Nelson's receipt of extensive medical care, which included diagnostic studies, epidural steroid injections, and pain management. Notably, the medicine prescribed for Mr. Nelson included prescriptions for Percocet, Endocet, Caduet, Met Formin, Soma, Mobic, Vicodin, Vioxx, Topamax, Kadian, Carisoprodol, Avandia, and Narco.

Further, in or around August or September 2004 the attending orthopedic surgeon recommended surgery for Mr. Nelson's low back. Unfortunately, Mr. Nelson did not receive clearance from his other physician treating him for his hypertension and diabetes mellitus, which were not sufficiently under control. Consequently, Mr. Nelson continued to receive treatment for his low back, which involved conservative care in the nature of pain management and prescriptions of pain medications, under the care of Hasson Chahadeh, M.D.

The evidence is supportive of a finding that Mr. Nelson is at maximum medical improvement, although it is not

readily apparent when he reached maximum medical improvement. Notwithstanding, on or about October 27, 2005 Mr. Nelson presented to David Volarich, D.O. for an independent medical examination and evaluation, and at the time of this examination Dr. Volarich determined Mr. Nelson to be at maximum medical improvement. Yet, in identifying Mr. Nelson to be at maximum medical improvement, Dr. Volarich opined that Mr. Nelson continues to need medical care in order to cure and relieve him from the effects of the June 11, 2003 injury.

The parties offer differing medical opinions, relative to the question of whether Mr. Nelson is in need of future medical care, causally related to the June 11, 2003 injury. Notably, only Dr. Prostic appears to be of the opinion that Mr. Nelson is not in need of additional medical care. In contrast, the attending treating physicians continue to offer Mr. Nelson with treatment. And, Dr. Volarich opines that, relative to the June 11, 2003 injury, Mr. Nelson should be provided, among other treatment, pain management “of his lumbar radicular syndrome and instability at the L4-5 level,” as well as “[e]pidural steroid injections, trigger point injections, foraminal nerve root blocks, and similar treatments.” Additionally, while not recommending low back surgery, Dr. Volarich notes that, in the future, surgery may be reasonable and necessary in order to cure and relieve Mr. Nelson from the effects of the June 11, 2003 injury.

Accordingly, after consideration and review of the evidence, I find and conclude that, on or about October 27, 2005, Mr. Nelson reached maximum medical improvement. Yet, he continues to need medical care in order to cure and relieve him from the effects of the June 11, 2003 injury. Therefore, the employer and insurer are ordered to provide Mr. Nelson with future medical care, which is reasonable, necessary and causally related to the June 11, 2003 accident. This medical care should include, but not necessarily be limited to, pain management provided by Dr. Chahadeh, or such other qualified physician and such other treatment, as may be recommended by Mr. Nelson’s treating health care providers.

II.

Temporary Total Disability Compensation

The evidence indicates that the employer and insurer provided Mr. Nelson with temporary total disability compensation in the amount of \$36,011.16, payable for the periods of June 16, 2003 to December 5, 2004, and June 27, 2005 to April 21, 2006. The employer and insurer, however, did not provide Mr. Nelson with any temporary disability compensation for the intermediary period of December 5, 2004 through June 26, 2005. The employer and insurer did not readily explain or identify their reason(s) for not providing Mr. Nelson with temporary disability compensation for this intermediary period, and for which Mr. Nelson now seeks payment of temporary total disability compensation.

Yet, the evidence is supportive of a finding that, during the period of December 5, 2004 through June 26, 2005 Mr. Nelson was temporarily and totally disabled, and entitled to receipt of temporary total disability compensation. Notably, during this intermediary period Mr. Nelson did not work, and was not employable in the open and competitive labor market. Nor did he receive any employment compensation from his employer, or unemployment compensation as a governmental benefit.

Accordingly, having found Mr. Nelson to have reached maximum medical improvement on October 27, 2005, I find and conclude that, as a consequence of the June 11, 2003 accident, Mr. Nelson was temporarily and totally disabled for the period of June 11, 2003 through October 26, 2005 (124 weeks). Thus, Mr. Nelson is entitled to \$37,300.44 in temporary total disability compensation (124 weeks x \$300.81 compensation rate = \$37,300.44). In light of the employer and insurer having paid to Mr. Nelson \$36,011.16 in temporary total disability compensation, the employer and insurer owe to Mr. Nelson the additional sum of \$1,289.28, which represents the additional temporary total disability compensation that is unpaid and owed to Mr. Nelson.

III.

Nature & Extent of Permanent Disability

The parties offer differing medical and vocational opinions relative to the nature and extent of the permanent disability, and the potential liability of the Second Injury Fund, caused by the June 11, 2003 incident. Yet, the parties do not readily dispute the severity of Mr. Nelson’s condition, and the likelihood of Mr. Nelson being unemployable in the open and competitive labor market. Further, in resolving this issue, I find Mr. Nelson to be credible and accept as true his complaints of pain, as well as his restrictions and limitations.

Mr. Nelson asserts he is permanently and totally disabled, and suffers from this disability because of the June 11, 2003 injury to his low back, in combination with his pre-existing disabilities or conditions. Mr. Nelson thus argues the Second Injury Fund is liable for payment of permanent total disability. Similarly, the employer and insurer argue that, if Mr. Nelson is permanently and totally disabled, such disability is the liability of the Second Injury Fund.

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as a result of the last compensable injury; and the work-related disability must combine with a prior permanent partial disability to result in total disability. Section 287.220.1 RSMo. 1994, *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App. 1990), *Anderson v. Emerson Elec. Co.*, 698

S.W.2d 574, 576 (Mo.App. 1985).

Where a preexisting permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability **after** the employer has paid the compensation due the employee for the disability resulting from the work related injury.

Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo.App. 1992) (emphasis added).

In determining the extent of disability attributable to the employer and the Second Injury Fund, an Administrative Law Judge must determine the extent of the compensable injury first. *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-43 (Mo.App. 1996). If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. *Id.* It is, therefore, necessary that Mr. Nelson's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability, thereby alleviating any Second Injury Fund liability.

"The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." Section 287.020.7 RSMo. 1994. "The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. [citation omitted.] The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired." *Reiner*, 837 S.W. 2d at 367.

Mr. Nelson sustained an injury to his low back on June 11, 2003, while in the course and scope of his work duties. Dr. Volarich has placed physical restrictions on Mr. Nelson related to his low back that severely limit his ability to return to gainful employment, according to both Dr. Bernstein and Terry Cordray. Mr. Nelson has testified that he must lay down several times each day to alleviate his low back pain, and Dr. Volarich has placed a restriction on Mr. Nelson that he should be allowed to rest in a recumbent position as needed.

In his report, Dr. Bernstein opined that Mr. Nelson was unemployable in the open labor market due to a combination of his primary and pre-existing disabilities. On cross-examination, however, Dr. Bernstein stated that Mr. Nelson's need to recline daily to relieve his back pain, considered alone, renders him unemployable. Similarly, the vocational expert secured by the employer and insurer, Terry Cordray, agrees that, if Mr. Nelson is governed by the restriction imposed by Dr. Volarich, which permits Mr. Nelson to rest in a recumbent position as needed, Mr. Nelson is unemployable in the open and competitive labor market.

After considering the medical records, together with the testimonies of the physicians, vocational experts, and the testimony of Mr. Nelson, I do not find any basis to conclude that the restrictions imposed by Dr. Volarich are unreasonable or unnecessary. Accordingly, after consideration and review of the evidence, I find and conclude that, as a consequence of the accident of June 11, 2003, considered alone, the employee is permanently and totally disabled. Therefore, in light of the foregoing, the employer and insurer are ordered to pay to the employee James Nelson, the sum of \$300.81 per week for the employee's lifetime. The payment of permanent total disability compensation by the employer and insurer is effective as of October 27, 2005, when Mr. Nelson reached maximum medical improvement.

IV. Second Injury Fund

In light of the aforementioned ruling, the Claim for Compensation, as filed against the Treasurer of Missouri, as the Custodian of the Second Injury Fund, is denied.

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

Date: _____7/16/07_____

Made by: _____/s/ L. Timothy Wilson_____

L. Timothy Wilson
Chief Administrative Law Judge
Division of Workers' Compensation
Signed July 10, 2007

A true copy: Attest:

_____/s/ Jeffery W. Buker_____

Division of Workers' Compensation