

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

Injury No.: 05-010798

Employee: David Steed
Employer: Air-Serve Group, Inc.
Insurer: Crum & Forster Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 23, 2008. The award and decision of Chief Administrative Law Judge Kenneth J. Cain, issued September 23, 2008, 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 27th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

FINAL AWARD

Employee: David Steed Injury No. 05-010798
Dependents: N/A
Employer: Air-Serve Group, Inc.
Insurer: Crum & Forster Insurance Company
Additional Party: Missouri State Treasurer as Custodian of the Second Injury Fund
Hearing Date: July 8, 2008, briefs filed July 29, 2008 Checked by: KJC/pd

FINDINGS OF FACT AND RULINGS OF LAW

- 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 6, 2005.
- 5. State location where accident occurred or occupational disease was contracted: State of Kansas with contract of hire in Missouri.
- 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
- 7. Did employer receive proper notice? Yes.
- 8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
- 9. Was claim for compensation filed within time required by Law? Yes.
- 10. Was employer insured by above insurer? Yes.
- 11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee, while in the course and scope of his employment as a service coordinator for Air Serve was involved in a vehicular accident.
- 12. Did accident or occupational disease cause death? No. Date of death? N/A
- 13. Part(s) of body injured by accident or occupational disease: left tibia plateau fracture, left acetabular fracture, right and left patellar fractures and a back strain.
- 14. Nature and extent of any permanent disability: left tibia plateau fracture, left acetabular fracture, right and left patella fractures and a back strain.
- 15. Compensation paid to-date for temporary disability: \$27,907.88.

16. Value necessary medical aid paid to date by employer/insurer? \$127,732.22.
17. Value necessary medical aid not furnished by employer/insurer? Undetermined
18. Employee's average weekly wages: \$460.
19. Weekly compensation rate: \$306.67.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

unpaid medical expenses: Undetermined

91 weeks for temporary total disability (temporary partial disability) @ 306.67 per agreement of the parties; the employer is granted a credit for the \$27,907.88 previously provided.

N/A - weeks for permanent partial disability from employer.

N/A - weeks of disfigurement.

Permanent total disability benefits from employer: See additional findings of fact and rulings of law.

22. Second Injury Fund liability: N/A

TOTAL: Undetermined

- Future requirements awarded: See additional findings of fact and rulings of law.

Said payments to begin as of date of the award and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Steed

Injury No. 05-010798

Dependents: N/A

Employer: Air Service Group, Inc.

Insurer: Crum & Forster Insurance Company

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

Hearing Date: July 8, 2008; briefs filed July 29, 2008

Checked by: KJC/pd

Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

- Whether Mr. Steed was an employee of Air Service Group, Incorporated and working under the provisions of the Missouri workers' compensation law;
- Accident;
- The nature and extent of the disability sustained by the Employee;
- Liability of the Employer for future medical benefits;
- Liability of the Employer for mileage reimbursement;
- Liability of the Employer for past temporary total disability benefits for the period August 4, 2006 to August 23, 2007;
- Liability of the State Treasurer as Custodian of the Second Injury Fund for compensation; and
- Whether the Employer and the Second Injury Fund have a subrogation interest in any third-party recovery made by any alleged tort feaser.

At the hearing, Mr. David Steed (hereinafter referred to as Claimant) testified that he was born on June 15, 1950 and that he attended school through the seventh or eighth grade. He stated that he did not believe that he attended high school. He stated that he received his GED in the early 1970s.

Claimant testified that he received vocational training as a truck driver in 1974. He stated that he was in the military from 1968 to 1970 where he was trained in aviation.

Claimant testified that beginning in 1971 he served two-and-a-half to three years in the reformatory after being convicted of burglary and theft. He stated that afterwards he worked on various labor-type jobs. He stated that on one job he built "huge wood pallets." He stated that his other jobs were over-the-road truck driver, furniture deliverer, roofer and construction laborer. He stated that in his job with Rent Mart he used a computer and collected money.

Claimant testified that he worked for three years at Air-Up and until it was purchased by the Air-Serve Group. He stated that his job at Air-Up required him to install air machines, drill holes, run conduits and to do wiring. He stated that his job title was service coordinator.

Claimant testified that his territory covered the states of Kansas, Missouri, Iowa and Nebraska. He stated that he was based out of Kansas. He stated that he regularly did heavy lifting and occasionally up to 100 pounds. He stated that the machines were set on 500 pound concrete blocks. He stated that he had to maintain and repair the machines, collect money and do a lot of driving.

Claimant testified that Air-Serve purchased Air-Up in October 2004. He stated that both companies were in the same business. He stated that his job duties at both companies were the same. He stated that his supervisor at Air-Serve was Jeff Gravesman.

Claimant testified that he first met Mr. Gravesman when Gail, who worked at Air-Up, told him to bring the money from the machines to Nebraska instead of depositing it in the bank. He stated that he met with Gail and Mr. Gravesman in Nebraska and that Gail informed him that Mr. Gravesman had purchased the company. He stated that Mr. Gravesman instructed him to bring the company van to Holt, Missouri on the following Monday for a meeting.

Claimant testified that on Monday, October 4, 2004 he met with Mr. Gravesman in Holt, Missouri. He stated that while in Holt, Missouri Mr. Gravesman sent him on a route with Brian to make sure that he knew how to do the job and to evaluate whether the new company was going to hire him.

Claimant testified that after he and Brian had serviced some of the machines, Mr. Gravesman offered him a job. He stated that he accepted the job offer in Holt, Missouri. He stated that on the following day he signed various papers related to his employment with Air-Serve while still in Holt, Missouri.

Claimant identified various documents signed and dated by him October 5, 2004, which he alleged that he executed in Holt, Missouri. Those documents included a W-4, the personnel policy, a covenant not-to- compete, the internet policy, the driving policy, and a terms of employment policy, which provided that his hiring date was October 1, 2004.

Claimant testified that he sustained an injury at work on January 6, 2005 while in the state of Kansas and driving from Great Bend, Kansas to Erdman, Kansas. He stated that he was in the company van when the accident occurred.

Claimant testified that the accident occurred on the same route he always took to make that drive. He stated that the route he took was the shortest and used less gasoline. He acknowledged that the route was "more of a back roads" type route and not an interstate highway.

Claimant testified that the accident occurred when a garbage truck failed to stop at a stop sign and struck his company van. He stated that the van rolled over and slipped off the road. He stated that he was taken by ambulance to the hospital.

Claimant testified that he sustained various injuries in the accident. He stated that he broke his left leg and fractured his left hip socket and that metal plates were inserted in both. He stated that he fractured his pelvis. He stated that he broke his right and left kneecaps. He stated that he could see the bones coming out of his skin in his left leg. He also stated that he broke his false teeth, cut his lip, cut the inside of his mouth, broke his eyeglasses, and sustained scars on his lower lip. He stated that his Employer replaced his false teeth but not his eyeglasses.

Claimant testified that he had physical therapy in Wichita, Kansas. He stated that in September 2007 he had surgery on his left knee.

Claimant testified that he still had constant pain in his left knee, hip and low back. He stated that his right knee was painful but not constantly so. He stated that he experienced back pain with standing and walking for more than 10 to 15 minutes. He stated that he was on morphine and other medications due to his pain and his inability to sleep. He stated that he was depressed.

Claimant testified that his medications affected his concentration and made him "groggy" and tired. He stated that he was "miserable most of the time."

Claimant testified that he had to lie down during the day to relieve his pain. He stated that during a typical

day he had to lie down five to six times. He stated that he could walk about 100 feet. He stated that if he walked any further he used a cane. He stated that he required a cane to go up and down steps. He stated that he could not go grocery shopping. He stated that if he walked he experienced a burning, stabbing pain in his left hip.

Claimant testified that he had never experienced any back problems until his injury at work. He stated he could only drive 30 to 40 miles. He stated that that he did not do laundry, mow the lawn or shovel snow. He stated that he did wash dishes.

Claimant admitted that he had sustained a war injury in 1969 while he was in Vietnam. He stated that his injury occurred during a mine mishap and that he lost the three middle fingers on his left hand. He stated that his left hand injury had never interfered with his ability to do any job. He stated that he was right-hand dominant.

Claimant testified that now he was not sure if he could do any jobs. He stated that he did not try vocational rehabilitation because he did not believe that it would be of any benefit. He stated that he was 58 years old and that he planned to retire in four years. He stated that he believed that it would take two years to be retrained and then another two years to find a job. He stated that he hoped to be retired by that time.

Claimant testified that he felt depressed and with no reason to go on. He stated that he was in pain every day. He admitted that in the 1970s he took an anger management class and that he spoke with a psychologist.

On cross-examination by his Employer, Claimant admitted that he had a computer at home. He admitted that he had extensive experience in working with computers.

Claimant admitted that he did not do any work in Missouri after he became employed by Air-Serve. He admitted that due to his hand injury it was "somewhat" difficult to do his job where he worked with the pallets. He indicated, however, that his left hand was "very strong" and that it was probably as strong as his right hand. He admitted that he had some loss of grip strength in his left hand and that it was more difficult to do fine detailed work with it.

Claimant admitted that his vehicular accident at work occurred on a day when the roads were slick, icy and snow-packed. He admitted that he exited off a major United States highway and onto state and city roads to get to his destination. He admitted that he could have gone further on the U.S. highway.

Claimant testified that he was specifically told on January 6, 2005 to go to Erdman, Kansas to service the machine. He admitted that after the accident a psychologist recommended a vocational rehabilitation referral to help him find a job.

Claimant testified that on a scale of 1 to 10 the pain in his left hip and left knee was 4 to 6. He stated that his low back pain was 3 to 4 if not worse. He admitted that he had not attempted to find a job since the accident. He acknowledged that the problems with his hand and his criminal background had made it more difficult for him to find work.

On cross-examination by the Second Injury Fund, Claimant admitted that he had obtained a certificate from a truck driving school after his military injury involving the loss of his three fingers. He admitted that subsequent to his left hand injury he had worked as a self-employed handyman where he did roofing, climbing, hung heavy shingles and framed doors. He stated that he never had any accommodations on any job due to his left hand injury.

Claimant testified that his hobbies prior to the accident at work included model railroad work. He stated that he did fine dexterity work. He stated that he assembled railroad cars. He stated that he took computer courses in the 1990s and did keyboard work. He stated that he used to do woodworking and work around his house.

The medical evidence consisted of the deposition testimony of Paul Stein, M.D., George Fluter, M.D., Ty Schwertfeger, M.D., and Chris Fevurly, M.D. There were also numerous medical reports and records admitted into evidence.

Dr. Stein testified that he was board certified in neurosurgery. He stated that he did a surgical internship at the Albert Einstein College of Medicine in New York and that his residency was at the Mayo Clinic.

Dr. Stein testified that he examined Claimant on January 16, 2007. He stated that he was asked to evaluate Claimant by an attorney with the law firm representing Claimant's Employer. His deposition was taken by Claimant.

Dr. Stein testified that he had performed "quite a few" examinations for the attorney who asked him to evaluate Claimant. He stated that he had worked on numerous cases for both employees and the defense in workers' compensation matters. He stated that he was frequently appointed by administrative law judges in Kansas to perform independent medical examinations.

Dr. Stein testified that Claimant sustained several fractures to his lower extremities in the January 6, 2005 accident at work. He stated that Claimant sustained a right patella fracture, a left acetabular dislocation fracture or a fracture of the hip socket and a left open tibial plateau fracture. He stated that Claimant walked with a limp. He stated that Claimant's left leg was shorter than his right leg, which he attributed to the accident. He also stated that Claimant did not describe "a whole lot of back pain," but did complain of right hip pain.

Dr. Stein concluded that Claimant had also developed a psychological impairment due to the accident. He stated Claimant should not do squatting, kneeling, crawling or climbing ladders. He stated that Claimant should do minimal stair climbing, bending, lifting and walking on uneven surfaces. He stated that Claimant should alternate sitting, standing and walking as needed. He stated that Claimant would not be able to "deal with more than a four-hour workday."

On examination by Claimant's Employer, Dr. Stein admitted that Claimant's primary complaints involved his left hip and left knee. He admitted that Claimant complained of what was "probably" moderate pain. He stated that it was difficult to examine and test Claimant's left knee for stability due to Claimant's complaints of pain. He stated that Claimant had a normal range of motion of both knees.

On redirect examination, Dr. Stein admitted that Claimant also complained of right hip and low back pain. On examination by Claimant's Employer, Dr. Stein testified that Claimant had sustained a 16 percent whole person impairment due to his injuries from the January 6, 2005 accident. He stated that his rating only included the physical injuries and not any disability due to any psychological injuries.

Dr. Fluter testified on Claimant's behalf on April 1, 2008. He stated that he specialized in physical medicine and rehabilitation. He stated that Claimant was referred to him by Dr. Buhr, an orthopedic surgeon, for pain management purposes. He stated that Claimant's employer was paying for the treatment.

Dr. Fluter indicated that he treated Claimant for a right patella fracture, a left acetabular dislocation with an open reduction and the insertion of plates and screws and a left tibial plateau fracture, which also required an open reduction and the insertion of plates and screws. He further stated that he treated Claimant for chronic

pain and that Claimant had a sciatic type problem resulting in some atrophy of the buttocks and leg muscles. He stated that Claimant was depressed. He stated that each of the conditions was caused by Claimant's January 2005 vehicular accident.

Dr. Fluter testified that Claimant was on a "fairly" extensive list of medications. He stated that all the medications prescribed for Claimant were reasonable and necessary to cure and relieve Claimant from the effects of the January 2005 accident. He stated that Claimant would require those medications on an indefinite basis. He stated that the medications needed to be monitored on a regular basis. He stated that there was a possibility that Claimant would need a spinal cord stimulator.

Dr. Fluter concluded that Claimant had sustained a permanent partial impairment to the body as a whole of 21 percent based on the AMA guidelines. He stated that his rating did not include any disability due to Claimant's alleged back pain arising from the buttocks involvement, which under the AMA guides was considered to be a minor impairment. He stated that Claimant's lumbosacral involvement would "probably" represent a 5 percent whole body impairment. He stated that based upon all the impairments and using the Combined Values Chart in the AMA guides, Claimant had sustained a permanent partial impairment of 25 percent of the whole person. He stated that the AMA guides did not rate depression and that he did not render such a rating.

Dr. Fluter testified that his rating was for Kansas and that under Missouri law "I felt that the disability impairment would be 20 percent whole body impairment and that would be in addition to the 21 percent whole body impairment – well, I guess now it would be 25 percent whole body impairment related to the structural factors, so that would I guess give a 45 percent impairment."

Dr. Fluter stated that based on his notes from February 29, 2008, "When I was using the 21 percent impairment rating, it would have been a 41 percent total body impairment or disability." He stated that although Claimant had reached maximum medical improvement, he did not recall identifying a particular date when he did so. He stated that he believed that Claimant was at maximum medical improvement as of June 30, 2006, although in August 2007, Claimant had an arthroscopic procedure on his left knee. He noted that Claimant had received an injection into his hip subsequent to June 2006. He then stated, "So I mean I guess you could push the date back to sometime in 2007 after he had completed the arthroscopy and my post-operative care related to that."

Finally, Dr. Fluter testified that Claimant was "basically" limited to sedentary activities. He stated that Claimant was precluded from driving a truck commercially. He stated that it would be difficult for Claimant to work on a regular and consistent basis even at a sedentary level. He noted that in his report in June 2006 he had stated that Claimant's chronic neuropathic pain would prevent him from doing an eight-hours-a-day, five-days-a-week job. He stated that lying down and changing positions were pretty typical for people with chronic pain conditions.

On cross-examination by Claimant's Employer, Dr. Fluter admitted that he had not treated Claimant for any right lower extremity complaints. He agreed that a marital separation could cause of psychological stress. He admitted that on November 15, 2005 he had noted that Claimant's pain was reasonably well-controlled.

Dr. Fluter admitted that although he had noted in August 2005 that Claimant's chief complaint was pain in the left lower extremity; that Claimant had fractured both kneecaps and that in his opinion Claimant had problems with both of his lower extremities. He stated that his notes which referred to some buttock involvement also meant that Claimant had a lumbosacral impairment.

Dr. Fluter stated that he had treated Claimant on a consistent basis from August 2005 to March 2008. He

admitted that he had a 30-minute phone call with Claimant's attorney in February 2008 regarding how to rate disabilities in Missouri. He admitted that he had never previously rendered a Missouri disability rating.

On cross-examination by the Second Injury Fund, Dr. Flutter stated that, "I don't think that his inability to work is for any other reason other than the injury and sort of the subsequent course of his condition."

Claimant's Exhibit L was the deposition testimony of Ty Schwertfeger, M.D., who indicated that Claimant was referred to him for a nerve test, which he was not able to complete due to Claimant's complaints of severe and incapacitating pain even at low intensity shocks.

Employer/Insurer's Exhibit 1 was the deposition testimony of Chris Fevurly, M.D. Dr. Fevurly testified that he was licensed to practice medicine in both Missouri and Kansas. He stated that he practiced clinical "occupational medicine."

Dr. Fevurly noted that prior to the January 2005 accident at work, Claimant had sustained a traumatic injury to his left hand in 1969 and that Claimant had experienced chronic hand pain since that time. He also stated that Claimant's history involved some problems with anger, anxiety and behavioral problems.

Dr. Fevurly noted that Claimant walked with a limping-type gait; but did not require an assistive device. He stated that Claimant had atrophy of the left thigh and calf. He stated that Claimant had a load reduction in the overall range of motion of his left hip. He stated that Claimant had no instability of his left knee and no restriction in his range of motion. He stated that Claimant did have generalized tenderness and crepitation of both knees.

Dr. Fevurly testified that Claimant had some tenderness in his low back and a normal range of motion. He stated that Claimant's straight-leg raising produced back pain, which was not sciatica, and that there were no straight leg raising abnormalities to confirm a nerve root entrapment from the lumbar spine.

Dr. Fevurly concluded that Claimant has sustained a 17 percent whole person impairment as a result of his injuries from the accident at work. He stated that he relied on the Fourth Edition of the AMA Guides in rendering his rating. He stated that under Missouri law Claimant had a 17 percent whole person permanent partial disability. He stated that he had no expectation that Claimant would need a knee or hip replacement in the "foreseeable future." He stated Claimant would require prescription pain medicine in the future for his complaints.

On cross-examination by Claimant, Dr. Fevurly testified that about 60 percent of his practice involved treating patients for employers in workers' compensation cases. He stated that he did about 20 evaluations per year for the law firm representing Claimant's employer. He stated that his examination of Claimant lasted about 45 minutes, which included the taking of a history.

On redirect examination and over Claimant's objection, Dr. Fevurly testified that Claimant had a preexisting impairment and disability of the hand of 23 percent of the whole person. Claimant had opened the door for that opinion when on cross-examination Claimant had inquired of the doctor about his rating for Claimant's preexisting hand injury.

On re-cross examination, Dr. Fevurly was asked to explain why in his opinion Claimant had a 23 percent of the body disability for the left hand injury and only a 17 percent disability for the work-related injuries. Dr. Fevurly indicated that the "seeming" discrepancy was based on the problem with impairment systems and the word "disability." He admitted that prior to the accident at work, Claimant had accommodated well for his preexisting left hand injury.

On redirect examination, Dr. Fevurly testified that a person missing three fingers of the hand would be limited in fine hand and motor activities and in his grip strength.

The remaining medical reports and records were essentially cumulative of the testimony. On July 1, 2005, Bruce R. Buhr, M.D., noted that his impression was: (1) acetabular fracture, healing satisfactorily; (2) left tibial fracture which had healed satisfactorily; (3) bilateral patella fractures which had healed satisfactorily; and (4) psychiatric problems, for which he recommended a psychiatric referral.

Claimant's Exhibit J was the "Independent Medical Evaluation" report of John P. Estivo, D.O. His report was cumulative of the other evidence.

Numerous other depositions were also offered into evidence. Employer's Exhibit 2 was the deposition testimony of Mary W. Titterington, a vocational rehabilitation counselor and consultant. She stated that she evaluated Claimant on February 26, 2008.

Ms. Titterington testified that Claimant did not ask to lie down during the evaluation. She indicated that in rendering her opinions she considered his medical records, the O*NET job base, his history, eighth grade education, school grades, GED, two felony convictions, military service, preexisting impairments, including the amputation portion of his left hand, and his results from various vocational tests.

Ms. Titterington testified that on intelligence testing Claimant's general IQ was in the average range. She stated that other results such as his visual IQ scores were below average and in the category of a slow learner. She stated that the strong variance between the two scores could be indicative of a learning disability.

Ms. Titterington testified that there were similar discrepancies in Claimant's scores on the Wide Range Achievement Test in the reading, where he scored at a 12th grade level and the spelling and arithmetic portions where he scored at a 6th grade level. She stated that Claimant complained that his felony convictions and hand injury had resulted in past problems in finding work.

Ms. Titterington testified that based on the medical restrictions Claimant could not return to any of his past jobs. She stated that his available work pool was further restricted due to his hand injury, the felony convictions and his anger control and emotional issues. She stated that when she combined all the relevant factors and his medical restrictions, his work base had eroded and that he was unemployable in the open labor market. She stated that he would not be a good candidate for vocational rehabilitation due to the same factors.

Ms. Titterington testified that if she ignored Claimant's felony convictions and his preexisting hand impairment, and based her opinion only on Dr. Stein's conclusion that Claimant could do part-time work that Claimant would be able to do certain jobs such as "gate tender, cashier, a night desk light security guard and security monitor {sic}." She stated that Claimant would not qualify for most of those jobs if his felony conviction were considered because he could not be bonded.

Ms. Titterington testified that Claimant's felony convictions and his left preexisting left hand injury were a hindrance or obstacle to his continued employment.

On cross-examination by Claimant, Ms. Titterington admitted that lying down during the work day was not an accepted work practice. She admitted that if Claimant had to lie down during the day, that in and of itself, would render him permanently and totally disabled. She reiterated that in her opinion Claimant was permanently and totally disabled. She stated that he could not return to any of his prior jobs. She stated that Claimant had no transferable job skills. She stated that he could not be retrained.

On cross-examination by the Second Injury Fund, Ms. Titterington admitted that Claimant had worked on numerous jobs subsequent to the partial hand amputation and that he had been a commercial truck driver for 10 years during that period.

Claimant's Exhibit E contained the report of Karen Crist Terrill, a vocational expert. In a letter addressed to Claimant's attorney dated October 19, 2007, Ms. Terrill indicated that Claimant was referred to her to determine the tasks involved in his past jobs and to evaluate his loss of wage earning ability.

Ms. Terrill concluded that Claimant did not have any readily transferable job skills. She stated that he was an older worker. She stated the doctors had limited him to sedentary work. She stated that his work base had eroded due to the postural limitations placed on him.

Ms. Terrill testified that Claimant had limited educational resources and deficits in his "learning process." She stated that considering those factors it was her opinion that he was "realistically and essentially" unemployable. She stated that from a vocational perspective he was permanently and totally disabled.

Numerous depositions of fact witnesses were also admitted into evidence. The deposition testimony of Jeffrey Scott Gravesman, taken on March 28, 2008 by Claimant, was offered into evidence as Claimant's Exhibit B. Mr. Gravesman testified that he was employed by Air-Serve. He stated that he had been the regional sales manager since 2006 and that he hired Claimant.

Mr. Gravesman admitted that he first met Claimant on October 1, 2004 while he was in Nebraska for the purchase of Air-Up by Air-Serve. When asked whether he remembered anything about the hiring of Claimant, Mr. Gravesman testified "not – not good details, no."

Mr. Gravesman admitted that he vaguely remembered Claimant coming to his home near Holt, Missouri during the hiring process. He stated that Claimant's allegation that he came to Holt, Missouri and went through an orientation to demonstrate that he was able to maintain the machines seemed reasonable.

Mr. Gravesman testified that his home address was actually in Lathrop, Missouri. He stated that he did not recall offering employment to Claimant at his home. He stated he did not know when or where he offered employment to Claimant.

Mr. Gravesman acknowledged that Claimant had signed several employment related documents and dated them October 5, 2004. He acknowledged that those documents included a W-4 tax form, the terms of employment, salary, personnel policies, internet policy, covenant not to compete and the driving policy. He stated that Claimant was a good employee and that he liked Claimant.

On examination by Air-Serve, Mr. Gravesman testified that he did not witness Claimant sign any of the documents referred to on direct examination. On cross-examination by the Second Injury Fund, he related that he did recall Claimant being at his house.

Claimant's Exhibit B was the Payroll Earnings Statement covering the period October 31, 2004 to January 31, 2005.

Claimant's Exhibit C was the deposition testimony of Brian Cates, taken by Claimant's employer. Mr. Cates testified that he was the operations manager for Air-Serve Group and that he had been employed by

the company for four years.

Mr. Cates was asked about various documents. Claimant objected on the basis that a proper foundation had not been set out for the admission into evidence of the documents. Mr. Cates admitted that he was not the custodian of the records and that while he worked in the Kansas City region, the documents were maintained in the St. Louis office. The documents were not admitted into evidence and the objection to Mr. Cates' testimony regarding the documents was sustained.

Claimant's Exhibit S was a document entitled Mileage-David Steed. It indicated that as of April 4, 2008 Claimant had traveled a total of 1,599.48 miles and that in May 2008 he traveled an additional 56 miles.

LAW

After considering all the evidence, including the depositions of Drs. Stein, Fluter and Fevurly, the medical reports and records, the records deposition of the psychologist, the depositions of the fact witnesses, the testimony at the hearing, the other exhibits and observing Claimant's appearance and demeanor, I find and believe that Claimant met his burden of proving that his contract of hire with Air Serve was entered into the State of Missouri. Therefore, Missouri has jurisdiction over the claim.

Claimant proved that he sustained an accident as that term is defined by Missouri law. He proved that he was still temporarily and totally disabled during the period August 4, 2006 through August 30, 2007. He proved that his employer failed to pay such benefits during that period. His employer is therefore ordered to pay the temporary total disability benefits for that period.

Claimant proved that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident at work. His employer is ordered to pay the permanent total disability benefits as set out in the award.

Claimant proved that he was in need of future medical aid to cure and relieve him from the effects of his injuries. His employer is ordered to provide the treatment and to continue to do so for so long as he remains in need of it. He did not prove his employer's liability for the mileage reimbursement claim or the Second Injury Fund's liability for any compensation.

Also, while Claimant's employer and the Second Injury Fund made an issue as to whether either would be entitled to a subrogation interest in any third party recovery effectuated by Claimant due to the injuries he sustained in the January 2005 accident or the treatment he received for it; the statute is clear and beyond dispute that any party making a payment in a workers' compensation case has a subrogation interest in such a third party recovery.

Jurisdiction

Claimant had the burden of proving all material elements of his claim. Fischer v. Archdiocese of St. Louis-Cardinal Ritter Inst., 703 S.W. 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton v. Big Boy Steel Erections, 121 S.W. 3d 220 (Mo. banc 2003); Griggs v. A.B. Chance, Co., 503 S.W.2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 936 S.W.2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out above.

The applicable statute pertaining to jurisdiction provides as follows:

"This chapter shall apply to all injuries received and occupational diseases contracted in this state, regardless of where the contract of employment was made, and also to all injuries received and occupational

diseases contracted outside of this state under contract of employment made in this state, unless the contract of employment in any case shall otherwise provide, and also to all injuries received and occupational diseases contracted outside of this state where the employee's employment was principally localized in this state.”

§287.110.2 RSMo. 1994.

Thus, pursuant to the statute, Missouri has jurisdiction over any claim where the contract of hire was entered into Missouri or the accident occurred in Missouri or the employment was principally localized in Missouri. Claimant's accident occurred in Kansas and there was no allegation or any evidence that his employment was principally localized in Missouri. Therefore, the issue was whether his contract of hire was entered into Missouri.

Claimant clearly proved that his contract of hire with Air-Serve was entered into Missouri. Claimant made a credible witness. He testified that he met with Gail Dunbar of Air-Up and Mr. Gravesman, currently the branch manager of Air-Serve in Nebraska on Friday October 1, 2004, during the purchasing of Air-Up by Air-Serve. He stated that during the meeting Mr. Gravesman instructed him to bring the company van to Mr. Gravesman's home in Holt, Missouri on the following Monday. Claimant testified that he met with Mr. Gravesman in Holt, Missouri on Monday October 4, 2004. He stated that Mr. Gravesman sent him on a route with Brian on that day to determine whether he could do the job. He stated that Mr. Gravesman offered him a job on October 5, 2004 while he was still in Holt and that he accepted the job on that day.

Mr. Gravesman admitted that he hired Claimant. He admitted that Claimant brought the company van to his home in rural Lathrop, Missouri. He admitted that it sounded reasonable that he would have sent Claimant out with Brian prior to making the offer of employment. He admitted that he had no independent recollection as to where he offered the job to Claimant, but acknowledged that all the employment related documents such as the W-4, employment policies, terms of employment, driving policy, internet policy and covenant not to compete were signed by Claimant and dated October 5, 2004.

Thus, based on the most credible, competent evidence Claimant clearly proved that he accepted the employment offer with Air-Serve in Missouri and that Missouri had jurisdiction over his claim. No contrary evidence was offered.

Accident

The applicable statute pertaining to accident provides as follows:

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

- (1) In this chapter the term ‘injury’ is hereby defined to be an

injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

- An injury shall be deemed to arise out of and in the course of the employment only if:
 - it is reasonably apparent, upon consideration of all

the circumstances, that the employment is a substantial factor in causing the injury; and

(b) it can be seen to have followed as a natural

incident of the work; and

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

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

§287.020 RSMo. 1994.

Claimant clearly proved that he sustained an accident arising out of and in the course and scope of his employment with Air-Serve. The uncontroverted evidence showed that Claimant's job required him to drive a company van to various locations to service equipment for his employer. The uncontroverted evidence showed that his route covered various locations in the state of Kansas as well as in other states.

Claimant testified that while enroute to service his employer's equipment he was driving a company van and stopped at a traffic signal when a garbage truck ran a stop sign and struck the van. He testified that the van rolled over and went off the road and into a ditch. He testified that he sustained serious and severe injuries in the accident.

Again, Claimant made a credible witness. His employer did not dispute nor deny that Claimant was involved in a vehicular accident. Instead, his employer argued that Claimant did not sustain a compensable accident under Missouri law because the accident occurred on a snowy day in January on a back road rather than a four-lane major highway. His employer speculated that possibly Claimant was going home or someplace else when the accident occurred, rather than doing work in furtherance of his employer's business.

Claimant's employer offered no evidence to support its theory. Its theory was based on pure speculation, conjecture and surmise. There was no evidence in the record, which supported its theory. Claimant testified that he always drove the same route to the location he was going on the day of the accident. He testified that the back roads involved a shorter, more direct and less time consuming route. He stated that he was saving his employer money on gasoline by taking the shorter route. His employer failed to offer one scintilla of evidence which disputed Claimant's testimony or which supported its theory.

Claimant's employer cited no cases or authorities or any evidence which supported its theory that driving on a back road during inclement weather constituted any evidence that an accident did not arise out of and in the course and scope of employment when a more accessible highway existed. There is no such authority. There was no such evidence.

Claimant clearly proved that his accident occurred in the course and scope of his employment. He was clearly performing duties in furtherance of his employer's business when the accident occurred. There was no evidence that he had deviated from his employment. Moreover, even if he had deviated from his employment, the evidence clearly showed that when the accident occurred he was on a direct route to where he was supposed to go. He clearly proved that he sustained an accident as defined by Missouri law.

Nature and Extent of Disability

Section 287.020.7 RSMo. defines “total disability” as the inability to return to any employment and not merely “. . . inability to return to the employment in which the employee was engaged at the time of the accident.” The terms “any employment” mean “any reasonable or normal employment or occupation.” Fletcher v. Second Injury Fund, 922 S.W. 2d 402 (Mo. App. 1996); Crum v. Sachs Electric, 768 S.W. 2d 131 (Mo. App. 1989).

To prove his entitlement to permanent total disability benefits, Claimant needed to show that he was unable to compete in the open labor market. Fletcher; Cearcy v. McDonnell Douglas Aircraft, 894 S.W. 2d 173 (Mo. App. 1995); Reiner v. Treasurer, 837 S.W. 2d 363 (Mo. App. 1992).

Missouri courts have held that various factors may be considered in determining whether a person is permanently and totally disabled, including the person’s physical and mental condition, age, education, job experience and skills. Tiller v. 166 Auto Auction, 941 S.W. 2d 863 (Mo. App. 1997); Olds v. Treasurer, 864 S.W. 2d 406 (Mo. App. 1993); Patchin v. National Supermarkets, Inc., 738 S.W. 2d 166 (Mo. App. 1987).

Neither Claimant nor his employer offered ratings which were credible under Missouri law. Both chose to offer ratings where the doctors were also opining under Kansas law and clearly did not understand how to rate disability under Missouri law. Both rating doctors relied on the AMA Guides in rendering their ratings. Claimant even chose to rely primarily on an opinion from a doctor who practiced in Kansas and had never previously rendered a Missouri disability rating. Claimant alleged depression but chose not to get a disability rating for the depression. Fortunately for Claimant, however, the nature of his injuries, the restrictions and limitations placed upon him by Drs. Stein, Fluter and Fevurly and the vocational testimony clearly showed that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 vehicular accident at work.

Dr. Fluter, whose opinion Claimant primarily relied on as proof of his alleged permanent total disability, admitted that he had never previously rendered a Missouri disability rating. His rating was vague and inconsistent and did not make sense under Missouri law. Similarly, Claimant’s employer primarily relied on Dr. Fevurly’s rating. His rating was also vague and inconsistent and did not make sense under Missouri law. Dr. Fevurly could not even explain why in his opinion Claimant’s less serious injury to his left hand from 1969 had resulted in a permanent partial impairment of 23 percent to the body as a whole and the more serious work related injuries involving a dislocation and fracture to the hip socket requiring a metal plate, a left tibial plateau fracture, requiring a metal plate, bilateral fractured patellas and back pain had resulted in only a permanent partial impairment to the body as a whole of 17 percent. His attempted explanation for the discrepancy in the two ratings did not make sense. His attempted explanation clearly showed that he had no reasonable basis for the apparent discrepancy and that his rating opinion was conclusory and unsupported.

The restrictions given to Claimant by Drs. Stein, a neurosurgeon, and Fluter clearly supported Claimant’s allegation that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident at work. Dr. Stein testified that due to the injuries Claimant sustained in the January 2005 accident at work, Claimant would not be able to “deal with more than a four-hour workday.” He explained, however, that Claimant needed to alternate sitting, standing and walking. He stated that Claimant could only do minimal stair climbing and walking on uneven surfaces. He concluded that Claimant should do only minimal lifting and bending and no squatting, kneeling or crawling. He noted Claimant’s complaints of back pain, and found that the accident had resulted in a decrease in length of Claimant’s left leg as compared to his right leg. He concluded that Claimant had developed a psychological impairment as a result of the accident. Dr. Stein’s restrictions and conclusions clearly supported Claimant’s allegation that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident at work.

Dr. Fluter's opinions provided further support for Claimant's allegation that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident at work. Dr. Fluter testified that Claimant's injuries from the January 2005 accident would preclude Claimant from working eight hours a day for five days a week. He stated, "I don't think he really has the capacity to perform gainful work to any degree." He later indicated that in his opinion Claimant's inability to work was due to the injuries Claimant sustained in the January 2005 accident. Dr. Fevurly noted that Claimant had a load restriction on his hip due to the fractured hip socket.

In addition, the vocational evidence supported Claimant's allegation that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident. Ms. Titterington, a vocational expert, chosen by Claimant's employer to provide an opinion stated that in the vocational field Claimant would be considered an older worker. He is 58 years old. He has a limited education. He did not complete high school but did obtain a GED. His formal education was received more than 40 years ago. Ms. Titterington testified that Claimant had no transferable job skills. She indicated that he could not return to any of his past jobs. She concluded that from a vocational standpoint, Claimant was permanently and totally disabled.

Ms. Terrill performed a vocational assessment on Claimant's behalf for purposes of his Kansas workers' compensation case. Her opinions were premised primarily on certain aspects of Kansas law, such as work disability. Although her conclusory opinions were entitled to little weight under Missouri law, she also indicated that Claimant was permanently and totally disabled solely due to the injuries he sustained in the January 2005 accident at work.

Thus, based on the most credible, competent evidence, Claimant proved that he was permanently and totally disabled. He is an older worker with numerous medical restrictions and a limited education with no transferable job skills. He proved that his permanent total disability resulted solely from the injuries he sustained in the January 2005 vehicular accident at work.

All the restrictions which clearly precluded Claimant from working were due to the injuries he sustained in the January 2005 accident at work. His injuries from the January 2005 accident at work were sufficient to render him permanently and totally disabled regardless of any disability he had sustained as a result of his preexisting left hand injury. Dr. Fluter testified that "I don't think that his inability to work is for any other reason than the injury and sort of the subsequent course of his condition," The evidence clearly supported Dr. Fluter's opinion.

In addition, there was no credible medical or vocational evidence that Claimant's permanent total disability was caused by a combination of the disability he sustained in the January 2005 accident and his preexisting impairment to his left hand. Claimant's employer did not offer any evidence that Claimant's overall disability to his body as a whole was greater than the simple sum of the disability from the impairments considered individually. That is a prerequisite to establishing Second Injury Fund liability under Missouri law. See §287.220 RSMo. 2005. Claimant's employer did not offer any evidence that Claimant's disability from the January 2005 accident at work had combined with his preexisting left hand injury to result in a greater overall disability to his body as a whole than the simple sum of the disability from the impairments considered individually so as to establish Second Injury Fund liability. *Id.*

Claimant proved that he became permanently and totally disabled effective with October 26, 2007. His last surgery was in September 2007. His employer last paid temporary total disability benefits on October 25, 2007. The most credible evidence showed that his condition became permanent as of October 26, 2007. Thus, his employer became liable for permanent total disability benefits effective with October 26, 2007. His

employer is ordered to pay the benefits beginning with that date and to continue to pay such benefits for so long as he remains so disabled. The benefits shall be paid at the agreed upon rate of \$306.67 per week.

Finally, it was recognized that Ms. Titterington, a vocational expert, who testified on Claimant's employer's behalf, concluded that Claimant's permanent total disability resulted from a combination of the disability he sustained in the January 2005 accident and his preexisting impairment to his left hand and his preexisting "felony convictions." The evidence clearly did not support her opinion.

As noted above, there were no medical opinions that Claimant's disability from the January 2005 accident and his preexisting disability to his left hand had combined to result in a greater overall disability to his body as a whole than the simple sum of the disability from the impairments considered individually. There were no medical opinions that Claimant's alleged permanent total disability resulted from a combination of his disability from the January 2005 accident and his preexisting impairment. The medical evidence and the restrictions placed on Claimant clearly showed that he was rendered permanently and totally disabled solely by the injuries he sustained in the January 2005 accident at work.

In addition, Claimant had accommodated very well to his disability resulting from his 1969 left hand injury. He worked for nearly 36 years with his left hand injury. He did heavy labor and intensive work during most of the 36 years. He did heavy lifting. He worked as an over-the-road truck driver. He did roofing and hung heavy shingles and framed doors using his injured left hand. He was a furniture deliverer. He testified that he was essentially unimpaired due to his 1969 left hand injury. There was simply no credible evidence that his preexisting left hand injury had combined with the severe injuries from his January 2005 vehicular accident to render him permanently and totally disabled.

Furthermore, Claimant's employer argued that if Claimant were in fact permanently and totally disabled; the Second Injury Fund was liable for the benefits based on Ms. Titterington's opinion that Claimant's preexisting "felony convictions" had combined with his injuries from the January 2005 accident to render him permanently and totally disabled. That argument lacked merit.

Ms. Titterington offered no credible evidence in support of her conclusory opinion. Claimant was able to find work for more than 30 years despite his felony conviction. Also, and more importantly the statute clearly provides that the Second Injury Fund is only liable for benefits, whether permanent total or permanent partial if the disability from the injury on the job combines with the preexisting disability to result in a greater overall disability to the employee's body as a whole than the simple sum of the disability from the impairments considered individually. See §287.220 RSMo. 1994.

Nothing in the statute provides that a felony conviction constitutes a disability within the meaning of the statute. Claimant's employer cited no cases or authority where Second Injury Fund liability had been premised on disability from an injury on the job combining with a preexisting felony conviction to result in Second Injury Fund liability. There are no such cases or authority.

The applicable statute as referred to above in discussing disability refers to injuries, partial disability and a percentage of disability. Claimant's employer did not explain how Claimant's 36 year old felony conviction would be considered an injury or partial disability or how it could be measured to constitute a percentage of disability. Claimant's employer's argument was completely lacking in merit.

The evidence clearly showed that Claimant's permanent total disability resulted solely from the injuries he sustained in the January 2005 accident at work. Accordingly, his employer is liable for the permanent total disability benefits.

Future Medical Treatment

Claimant clearly proved that he was in need of future medical treatment to cure and relieve him from the effects of the injuries he sustained in the January 2005 accident at work. All the doctors who offered an opinion on the issue, including Dr. Fevurly, who testified on Claimant's employer's behalf, agreed that Claimant would need future medical treatment to cure and relieve him from the effects of his injuries. There was no contrary evidence. Thus, Claimant clearly proved his need for future medical aid to cure and relieve him from the effects of his injuries. His employer is ordered to provide such treatment and to continue to provide it for so long as he remains in need of it.

Temporary Total Disability Benefits

Claimant proved his employer's liability for temporary total disability benefits for the period August 4, 2006 to August 23, 2007. His employer paid such benefits from January 7, 2005 to August 3, 2006 and from August 24, 2007 to October 25, 2007. There was no evidence, however, that Claimant's condition had become permanent as of August 4, 2006 or that Claimant was capable of working during the period August 4, 2006 to August 23, 2007 and then became unable to work again on a temporary basis from August 24, 2007 to October 25, 2007.

The uncontroverted evidence showed that Claimant received additional treatment after his employer terminated his temporary total disability benefits on August 3, 2006. Claimant had arthroscopic surgery on his left knee on September 7, 2007. Dr. Fluter, an authorized treating physician, testified that Claimant did not reach maximum medical improvement until Dr. Buhr released Claimant from treatment subsequent to the September 7, 2007 surgery. Dr. Fluter was credible in his opinion.

Claimant's employer offered no credible contrary evidence. As noted above, there was no credible evidence that Claimant's condition had become permanent as of August 4, 2006 or that he became capable of working on a temporary basis on that date. There was no credible evidence that Claimant was capable of working during the period August 4, 2006 to August 23, 2007. The most credible evidence clearly supported Claimant's allegation that he was temporarily and totally disabled during the disputed period. His employer is therefore ordered to provide temporary total disability benefits for the period August 4, 2006 to August 23, 2007.

Mileage Reimbursement

Claimant argued that his employer was liable for mileage reimbursement. The applicable statute pertaining to mileage reimbursement provides as follows:

"When an employee is required to submit to medical examinations or necessary medical treatment at a place outside of the local or metropolitan area from the place of injury or the place of his residence, the employer or its insurer shall advance or reimburse the employee for all necessary and reasonable expenses. . . "

§287.140.1 RSMo. 1994

Thus, to prove his employer's liability for mileage reimbursement, Claimant needed to show that the treatment he received was outside the metropolitan area from where he lived and where the accident occurred. Claimant did not make such a showing. Claimant testified that he lived in Newton, Kansas at the time of the accident. He stated in his brief that his accident occurred in McPherson County, Kansas. He asserted mileage reimbursement under Missouri law.

Claimant offered no evidence showing that any of his treatment for which he requested mileage reimbursement was rendered outside the metropolitan area from either where he lived or the accident occurred. In fact, the evidence tended to show otherwise. He stated in his brief that the roundtrip mileage

from his home to Dr. Fluter's office was 56 miles. That in and of itself, did not show that the treatment was rendered outside the metropolitan area from where he lived. In some cities, such as Kansas City, Missouri, where the case was heard, he could travel from one end of the city to another and remain in the metropolitan area, although the roundtrip mileage was in excess of 56 miles. In addition, he offered no evidence as to whether Dr. Fluter's office was in the metropolitan area of where the accident occurred.

Similarly, the farthest distance Claimant alleged for mileage reimbursement was 62 miles. Again, he offered no evidence showing that the 62 miles was outside the metropolitan area from where he lived or where the accident occurred. He offered no evidence as to what constituted the metropolitan areas of Newton, Kansas or McPherson County, Kansas. His claim for mileage reimbursement must fail. He did not prove his employer's liability for the mileage reimbursement requested.

Subrogation

Claimant's employer and the Second Injury Fund placed in issue whether either would have a subrogation interest in any third party recovery made by Claimant as a result of his injuries from the January 2005 vehicular accident. The statute at §287.150 clearly provides a subrogation interest to any party making a payment should the employee effectuate such a third party recovery.

Date: _____

Made by: _____

Kenneth J. Cain

*Chief Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Jeff Buker

Director

Division of Workers' Compensation