

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

Injury No.: 03-031687

Employee: James Taylor
Employer: City of Kansas City, Missouri
Insurer: Self-Insured
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 Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 23, 2009. The award and decision of Administrative Law Judge Mark S. Siedlik, issued July 23, 2009, 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 4th day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: James Taylor

Injury No. 03-031687

Dependents: N/A

Employer: City of Kansas City, Missouri

Insurer: Self-Insured

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

Hearing Date: May 12, 2009

Checked by: MSS/lh

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: April 2, 2003.
5. State location where accident occurred or occupational disease was contracted: Kansas City, 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, self insured by City of Kansas City, Missouri.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was involved in altercation with an inmate while attempting to subdue him, and was knocked to the ground, with other guards and the inmate falling on top of him.
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: Body as a whole.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: \$115,393.38

16. Value necessary medical aid paid to date by employer/insurer? \$145,654.57
17. Value necessary medical aid not furnished by employer/insurer? None to date.
18. Employee's average weekly wages: \$649.32.
19. Weekly compensation rate: \$483.69/\$340.12
20. Method wages computation: Mo. Rev. Stat. §287.250.1(5).

COMPENSATION PAYABLE

21. Amount of compensation payable: Permanent and total disability, the responsibility of the Employee/Insurer.
22. Second Injury Fund liability: None

TOTAL: To be determined.

23. Future requirements awarded: Future medical care, weekly benefits for Claimant from Employer/Insurer.

Said payments to begin upon date of 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. T K Thompson.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: James Taylor

Injury No. 03-031687

Dependents: N/A

Employer: City of Kansas City, Missouri

Insurer: Self-Insured

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

Hearing Date: May 12, 2009

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On May 12, 2009, the employee and the Second Injury Fund appeared for a final hearing. The Division had jurisdiction to hear this case pursuant to Section 287.110. The employee, James Taylor appeared in person and with counsel, T. K. Thompson. The employer appeared through counsel, Anthony Bush. The Second Injury Fund appeared through Assistant Attorney General, Maureen Shine. This is an alleged permanent total disability case. The primary issue the parties requested the Division to determine was whether or not Mr. Taylor is permanently and totally disabled and whether City of Kansas City, Missouri or the Second Injury Fund has any liability for permanent total disability benefits. For the reasons outlined below, I find that James Taylor is permanently and totally disabled from the 4/2/03 last accident in isolation, and therefore, I find that The City of Kansas City, Missouri is liable for permanent total disability benefits and that there is no permanent total disability liability assessed against the Second Injury Fund.

STIPULATIONS

The parties stipulated that:

1. On or about April 2, 2003 (“the injury date”), the Employer was operating under and subject to the provisions of the Missouri Workers’ Compensation Law with its liability self insured by the City;
2. Mr. James Taylor was its employee operating under and working subject to the Missouri Workers’ Compensation Law; at the time of injury, he was working in Kansas City, Missouri;
3. Mr. Taylor filed his claim within the time allowed by law; and gave proper notice to the Employer in a timely manner;
4. Employee’s compensation rate is \$483.69/\$340.12

5. Past temporary total disability benefits of \$115,393.38 representing 239 6/7 weeks have been paid by the Employer.
6. Medical benefits have been provided by Employer totaling \$145,654.57.

ISSUES

The parties requested the Division to determine:

1. The nature and extent of disability; whether James Taylor is permanently and totally disabled; and whether James Taylor is permanently and totally disabled by either the April 2, 2003 injury in isolation or the combined effects of pre-existing disabilities with the April 2, 2003 injury.
2. Whether James Taylor is entitled to future medical benefits.

FINDINGS

CLAIMANT'S WITNESSES

James Taylor

EMPLOYER WITNESSES

None

SIF WITNESSES

None

CLAIMANT'S EXHIBITS

Exhibits A through C were admitted into evidence.

EMPLOYER' S EXHIBITS

Exhibits 1 through 7 were admitted into evidence.

SECOND INJURY FUND EXHIBITS

Exhibit A, Deposition of claimant, James Taylor was admitted into evidence.

Based on the above exhibits and the testimony of James Taylor, I make the following findings.

Factual Background

James Taylor is a 52 year old man who lives with his wife at 5040 N.E. 56th Place, Kansas City, Mo. 64119. He is a 1975 graduate of North Kansas City High School, and completed two years of college courses at Central Missouri State University in Warrensburg, Missouri. He was majoring in Music. He has a law enforcement background, having completed training in first aid, security, and carrying concealed weapons.

On 4/2/03 Mr. Taylor was employed by the City of Kansas City, Missouri at the city jail, the Municipal Correctional Institution, as a correctional officer/security guard. His job required driving a bus, picking up inmates from police departments, transporting inmates to jail and checking them in, which involved taking their money and their clothes, and giving out uniforms and bed linens. He ran the inmate commissary which involved stocking shelves with food, selling food to the inmates, logging the inmates' money in and out of the computer, watching the inmates, and returning clothes and property to inmates who were leaving the jail. During the course of a day, claimant stood, walked, pushed, pulled, bent, drove, reached overhead and lifted from one to thirty pounds. He was under the restrictions from Joseph Ketcherside, M.D., including: no lifting greater than 30 pounds; no prolonged sitting or standing; and no repetitive bending or twisting. The claimant was required to take a pre-employment physical prior to employment with the City, and was allowed to work without restrictions, including "the yard", despite numerous prior lower back surgeries and four left knee surgeries.

On 4/2/03, while handing out clean clothes to inmates, an un-restrained inmate, a 23 year old male, 5'10" tall and 160 pounds allegedly didn't like the wash cloth that he was given, and threw it into another officer's face. He then snapped a towel into Mr. Taylor's face. The claimant and another officer tried to restrain the inmate, but the inmate broke free and ran down the hall. The claimant called for assistance and 2 more officers blocked the inmate at the end of the hallway. Then, all four officers, including the claimant, were wrestling with the inmate. The inmate and someone else stepped on the claimant's left foot. Then everyone fell on the claimant. The total combined weight was approximately 1300 pounds. The claimant fell through the doorway, landing flat on his back, with his right knee flexed and in a valgus direction, and he struck his posterior skull. The claimant was in severe pain in his low back and could not move his right leg. He was transported to North Kansas City Hospital by ambulance, and underwent a CT scan, and X-rays. He was told that he had a torn right ACL, and was placed in a knee brace and referred to Jonathan Blake, D.O. He told Dr. Blake about his low back pain, but was not referred to anyone else at that point. Dr. Blake placed him in an immobilizer, gave him medications, and prescribed him to undergo physical therapy for two days at North Kansas City Hospital, with no relief of his symptoms. He then underwent a right knee allograft hamstring ACL reconstruction at St. Mary's Hospital, on May 15, 2003. Post operatively, he underwent physical therapy at SERC for approximately five months for his right knee and low back pain. During physical therapy, he had a new onset of right lower extremity pain, cramping, numbness, tingling and right buttock burning sensation. He was referred to Dr. Zarr for his low back pain. At this point, he was five months post-right ACL reconstruction. He had symptoms of right knee

instability, swelling, low back pain, right foot cramping, but denied calf cramping, numbness or tingling to either foot. He was treated by Dr. Zarr, and was advised that the back pain was secondary to his gait. He was recommended to have a right total knee replacement, and to continue with Dr. Blake and physical therapy.

In October 2003 claimant underwent a Functional Capacity Evaluation at SERC, following which Dr. Zarr gave him a 5% BAW rating and advised him to follow up with Dr. Blake. He was returned to work on light duty. However, he was advised by his employer that there was no position available that could accommodate light duty restriction. Dr. Blake referred him to North Kansas City Pain Management Clinic. He underwent an EMG by Dr. Hollenbeck and returned to Dr. Charapata, who ordered X-rays and a CT scan. On December 17, 2003 he had a 2nd spinal cord stimulator inserted at Heartland Spinal Hospital. Thereafter, in 2004, claimant underwent two epidural steroid injections under the direction of Dr. Charapata, without subjective relief. On 10/10/05 claimant underwent an elective primary left total knee arthroplasty by orthopedic surgeon, William Bohn, M.D. In 11/05, when leaving his home to go to his first post-operative appointment with Dr. Bohn, following his left primary total knee arthroplasty, he slipped and fell on an icy driveway, landing on his buttocks and sustained twisting injuries to his bilateral knees. Claimant returned in 11/05 for an elective right total knee arthroplasty, performed by Dr. Bohn at Olathe Medical Center. Post-operatively, he underwent physical therapy at North Kansas City Hospital until approximately 3/06. In 2/06, claimant was evaluated at the Olathe Medical Center Emergency Room for subjective low back pain, followed by a ten day admission. During this time, he underwent two lumbar epidural steroid injections, with temporary subjective relief for approximately three weeks. Subsequently, he underwent neurologic consultation by Vito Carabetta, M.D.

On 2/14/06, claimant was walking down his basement steps when his right knee gave out, and he fell down approximately nine steps and landed with his arms straight out and with his right knee flexed, landing in recycle bins, then rolling down approximately four more steps to his right, coming to rest on his low back. At the time he was scheduled for another elective right total knee arthroplasty in 3/06. Following this fall down the steps, claimant had an onset of neck pain and difficulty holding his head and neck in a neutral position, and pain with rotation of his cervical spine. He also experienced headaches, nausea, and shooting pain down his left fifth finger and into his right fourth and fifth fingers as a result of the fall. He was assessed by neurosurgeon Frank Feigenbaum, M.D. at Research Medical Center on 2/22/06 and put in a cervical collar. In 3/06, claimant underwent the right total knee arthroplasty by Dr. Bohn, followed by physical therapy at North Kansas City Hospital. His cervical complaints continued, as well as the headaches, bilateral upper extremities and hand paresthesias, including all fingers, subjective decreased grip strength, and subjective neck pain, and in January 2007 he underwent an anterior cervical discectomy and fusion, including internal fixation, performed by Dr. Feigenbaum at Research Medical Center. Following the cervical fusion he continued to have subjective pain with cervical rotation and holding his head and neck in a neutral or extended position. He also had continued headaches and continued upper extremity paresthesias.

Claimant was still having subjective low back complaints and underwent a CT/Myelogram to his lumbar spine at Research Medical Center under Dr. Feigenbaum's direction, which revealed a bulging lumbar disc, with epidural scar tissue. Thereafter, claimant underwent lumbar surgery at Research Medical Center for scar tissue removal, with post-operative physical therapy at North Kansas City Hospital for one month. Post-operatively, his pain and paresthesias

decreased until 8/07. In April 2007, claimant underwent re-operative L2-L4 laminectomy and bilateral foraminotomies, followed by post-operative physical therapy. In 2007, claimant had subjective pain and instability in his right total knee arthroplasty. Dr. Bohn recommended a revision right total knee arthroplasty which was performed by Dr. Bohn in 5/07 at Olathe Medical Center with thicker poly spacer exchange, followed by post-operative physical therapy at North Kansas City Hospital, which was completed on 11/8/07.

In 8/07 claimant returned to Dr. Feigenbaum with complaints of bilateral wrist pain, left fifth finger and right fourth and fifth finger paresthesias. He underwent bilateral upper extremity EMG/NCV studies, and was diagnosed with bilateral carpal tunnel syndrome, attributable to his continued use of the cane, walker and crutches. Thereafter, claimant underwent bilateral carpal tunnel releases and surgery for bilateral lateral epicondylitis. He also underwent insertion of an intra-theal morphine pump performed by Dr. Charapata. Mr. Taylor has been receiving Social Security Disability since becoming eligible in August, 2004.

On 11/9/07, claimant had a slip and fall injury when tripping over his Maltese dog. In the course of the injury, he stepped backwards to sit on a stool, but missed the stool and landed against his buttock and struck the back of his head on a granite top. He lay on the floor for 90 minutes and was unable to get up until his wife came home and was then taken by ambulance to North Kansas City Hospital Emergency Room. A CT scan of the head and neck revealed no new pathology. He underwent two pain injections and was released with prescription analgesics. He continued to remain sore and stiff in his head, neck and bilateral shoulder blades, as well as his low back

Prior Injuries

Prior to the 4/2/03 primary injury, James Taylor had several injuries which resulted in no permanent partial disability and which did not constitute a hindrance or obstacle to his work. Those include left knee surgeries in 1969, 1971, 1982 and 1983 performed by Dr. Gordon Thorn; oral surgery for dental implants; and nasal reconstruction for fractured nose. He also sustained fractures of the jaw, zygomatic arch, right clavicle two times, bilateral ribs, fingers and left forearm. He testified that none of these injuries left him with permanent problems or hindered him in his work in any way

On 10/26/88, while working as a dock worker at Stationer's Office Supply, claimant lifted a 3 by 4 foot metal desk and felt immediate low back pain with pain down his left leg. He was diagnosed with a herniated disc and underwent a microdiscectomy on the left at L5-S1 on 11/22/88 performed by Joseph Ketcherside, M.D., which relieved his symptoms for a while. Six months later, he returned to Dr. Ketcherside with pain. Diagnostic tests revealed scar tissue and re-herniated disc. He then underwent a lumbar laminectomy at L4-5 and L5-S1 performed by Dr. Ketcherside which relieved his symptoms, followed by physical therapy. He was released at maximum medical improvement with restrictions of no lifting in excess of 30 pounds. Claimant settled his workers' compensation claim with the employer for 27.5% PPD to the BAW. Thereafter, he moved to lighter work at Embassy Suites as Director of Security where he was able to work within Dr. Ketcherside's restrictions until June 19, 1993 when he injured his low back again. On that date, claimant was in the lobby, walking on a tile floor that had been recently mopped. He slipped and tried to catch himself with his left hand on a railing. He fell, landing flat on his back. Claimant underwent treatment with Dr. Ketcherside who performed a

left L4-5 discectomy, and instrumented posterior and facet fusion from L4 to S1 on 9/13/93. Thereafter, claimant continued to have pain and back problems. A second surgery was performed on 1/31/94 in the form of an anterior lumbar interbody fusion, L4-5 and L5-S1. Restrictions imposed at MMI were lifting limits of 30 pounds. Mr. Taylor went on Social Security Disability following the second fusion surgery in January 1994 and remained on SSD until 1996 when he went to work for the City of Kansas City, Missouri at the Zoo. He was able to maintain that employment and work within Dr. Ketcherside's restrictions with little or no problem. Thereafter, in 2000 claimant moved to the Kansas City Municipal Correctional Institution where he worked as a correctional officer. He was able to maintain that employment until 4/2/03 with little or no problem. Claimant testified that the employer allowed him to stretch out when he needed to and to sit on a stool as needed due to his low back condition.

Medical evidence

Ronald Zipper, M.D., testified on behalf of the claimant. Dr. Zipper opined that as a result of the 4/2/03 injury, James Taylor sustained (a) an injury to the cervical spine, that was the prevailing factor that causally resulted in unstable cervical spine, resulting in a two level cervical discectomy and fusion; (b) an injury to his right knee that was the prevailing factor in the claimant's necessitating a primary total knee arthroplasty, considered failed, with total knee revision arthroplasty, with fair results, as noted by subjective complaints and objective physical findings, and (c) an injury to his lumbar spine that was the prevailing factor in the claimant's necessitating a two level lumbar surgery, with on-going chronic pain syndrome that required an implantable pain pump, as recommended within the medical record. As a result of the 4/2/03 primary injury, Dr. Zipper assessed 50% PPD to the right knee; an additional 8% PPD to the body as a whole for the lumbar spine over and above the previously settled low back injury of 27.5%; 23% PPD to the body as a whole for the two level cervical fusion with persistent paresthesias; for a sum total of 44% PPD to the body as a whole attributable to the 4/2/03 primary injury. In addition, Dr. Zipper opined that the combination of the claimant's pre-existing injuries, superimposed on the injuries sustained on 4/2/03 have rendered the claimant permanently and totally disabled.

James S. Zarr, M.D.'s 6/20/98 report was admitted into evidence pursuant to the Statute and by stipulation of the Second Injury Fund. Dr. Zarr opined that the right total knee replacement and part of the low back injury is work related in nature. However, he opined that with regard to the neck, both elbows, both wrists and left knee, he had no evidence to document that these are work related conditions. For the right total knee replacement, he assessed 35% PPD of the right knee at the 160 week level or 14% to the Body as a Whole. With regard to the work related component of his low back disability, Dr. Zarr rendered a 5% whole body permanent partial disability rating, for a total combined rating of 18% to the body as a whole.

Vocational evidence

Vocational expert, Mary Titterington, testified on behalf of the claimant. She opined that 1) the restrictions established by Dr. Zarr and Dr. Zipper preclude claimant from returning to any of his former jobs as he performed them; 2) Dr. Zarr's restrictions would allow him to perform sedentary work. Mr. Taylor's skills would transfer to the sedentary level within the security industry. He would not qualify for any security positions at the current time given the extensive medication usage and his overall low functioning level; 3) At the current time, with his multiple

impairments including his bilateral knee replacements, his extensive back surgeries, as well as both his carpal and cubital tunnel syndrome problems, his work base is eroded. There is no expectation that any employer would hire him for any job as it is customarily performed in the open labor market. Mr. Taylor would be viewed as a risk rather than an asset in any employment situation; 4) Mr. Taylor would be unable to perform the essential characteristics of work including reporting to work on a daily basis, staying on task, meeting production goals for quality and quantity of work, getting along with co-workers, customers and supervisors, and accepting supervision; and 5) Mr. Taylor would not be a good candidate for vocational rehabilitation given his overall low functioning. There is no expectation that any vocational services would restore his employability.

On cross examination by the Second Injury Fund, Ms. Titterington admitted that, even though Mr. Taylor had been given lifting restrictions from his prior low back surgeries, he was able to work full time as a corrections officer at the Municipal Correctional Institution in a light to medium position (Dr. Zipper termed it a medium position) up until the 4/2/03 injury. With regard to the fact that Mr. Taylor currently has to lie down during the day due to pain issues, Ms. Titterington admitted that such need is normally not an accepted work practice and renders one unemployable, considered in isolation. She did qualify her answer by countering that Mr. Taylor was allowed to lie down in order to stretch out his back at work prior to the primary injury. She further admitted that Dr. Zipper's restrictions render Mr. Taylor unemployable "in my estimation".

Rulings

In a Missouri workers' compensation case, the law clearly provides that the employee has the burden of proving all material elements of the claim. *Fischer v. Archdiocese of St. Louis-Cardinal Richter Institute*, 793 S.W.2d 195 (Mo. App. E.D. 1990). It is the claimant's burden to prove "not only causation between the accident and the injury, but also that a disability resulted and the extent of such disability." *Griggs v. A.B. Chance Company*, 503 S.W.2d 697 (Mo. App. W.D. 1973). Further, "proof of permanency of injury requires reasonable certainty." *Id.* This proof must be based on competent and substantial evidence and not merely on speculation. *Moriarty v. Treasurer of the State of Missouri*, 141 S.W.3d 69 (Mo. App. E.D. 2004).

The claimant alleges that he is permanently and totally disabled. However, to show that the disability constitutes a permanent and total disability under the Missouri workers' compensation law, the claimant must show that, given the employee's situation and condition, he or she is not competent to compete in the open labor market. Under the Missouri Worker's Compensation Act total disability is defined as the inability to return to any employment. *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 210 (Mo. App. E.D. 1999). The words inability to return to any employment mean that the employee is unable to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sale*, 631 S.W.2d 919, 922 (Mo.App. S.D. 1982). The primary determination for permanent total disability is whether the employee is able to compete in the open labor market. *Messex*, 989 S.W.2d at 210. A determination of permanent total disability focuses on the ability or inability of the employee to perform the usual duties of various employments in the manner that such duties are customarily performed by the average person engaged in such employment *Gordon v. Tri-State Motor Transit*, 980 S.W.2d 849, (Mo. App. 1995). There are many factors that may be considered in

this assessment including a claimant's physical and mental condition, age, education, job experience and skills in order to determine whether a claimant is permanently and totally disabled. See *Tiller v. 166 Auto Auction*, 941, S.W.2d 863 (Mo. App. 1997).

If a claimant is found to be permanently and totally disabled, it becomes a determination for the finder of fact to determine whether the claimant is permanently and totally disabled due to the last accident alone or as a result of a combination of the claimant's pre-existing injuries, triggering Second Injury Fund liability. The statutory basis for determining Second Injury Fund liability is found at Section 287.220.1 R.S.Mo. By unambiguous language, the legislature has imposed potential liability on the Second Injury Fund for claimants who, "at the time of the last injury, had some partial disability" Section 287.220.1 R.S.Mo. The administrative law judge is to consider the degree of the employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained. This statutory formula for determining Second Injury Fund liability incorporates a medical causation component. The employer's liability must be determined first, and the statute provides that the employer shall be liable only for the disability resulting from the last injury considered alone, in and of itself. The statute then provides if the compensation for which the employer at the time of the last injury is less than the compensation provided in the chapter for permanent and total disability, then, in addition to the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent and total disability from the Second Injury Fund. Applying this language, if it is clear that the last injury considered alone and of itself results in permanent and total disability, the employer is responsible for the full permanent and total disability benefits and the Second Injury Fund has no liability. *Gasson v. Treasurer of the State of Missouri*, 134 S.W.3d 75 (Mo. App. W.D. 2004). When these cases and the relevant statutes are applied to the facts of this case, it is clear that employees permanent and total disability results from the last accident considered alone and in isolation.

Based upon all of the evidence, the medical records, claimant's testimony at hearing, and the medical and vocational testimony, it is clear that the permanent and total disability results from the 4/2/03 primary injury considered in isolation.

Although claimant clearly had pre-existing injuries, he recovered fully from those injuries and returned to work. Granted, following the 1988 low back injury and surgeries, restrictions were imposed on Mr. Taylor's work but he was able to obtain work at Embassy Suites and work within Dr. Ketcherside's restrictions of lifting no more than 30 pounds. He testified that after recovering from the 1988 injury, and obtaining employment with Embassy Suites, he never missed any time from work due to low back problems. The employer did accommodate him to some extent in allowing him to stretch out when he needed to.

Following the 1993 injury and surgeries, claimant made a full recovery with lifting restrictions of 30 pounds. He then took a job with the Kansas City Zoo as a security guard on the midnight shift, walking around and making sure the buildings were secure and the temperature was correct for the animals. This job allowed him to move around as necessary. Claimant testified that he did not have any problems performing that job or doing the walking and standing necessary except when the weather was cold. He stated that he never missed any time from work at the Zoo due to low back problems, and the employer never made any accommodations for him due to any back problems. He was able to perform his job satisfactorily despite his restrictions, and always received good evaluations and regular raises.

Thereafter, in 1996 claimant went to work as a correctional officer at the Municipal Corrections Institution, the city jail (hereinafter, MCI), where he worked until 1998 with no problems due to his low back. He left MCI for approximately a year and a half from 1998 to 2000 for treatment of a flare up of his multiple sclerosis, which then went into remission. During this period, he went on Social Security Disability again. Thereafter, in 2000, claimant returned to his job at MCI and worked until the primary injury of 4/2/03 with no problems. Again, he testified that he missed no time from work due to low back problems, and he received no accommodation with his work from his employer. Claimant had previously undergone insertion of a pain pump in 1999 by Dr. Charapata for back pain. (Claimant's recollection at hearing was that the pain pump was inserted in 2001, but the records reflect that it was inserted in 1999. There were replacement pain pumps inserted numerous times following the primary injury.) However, he was able to return to his full time job at MCI thereafter with no problems. Claimant testified that at MCI he always had a good work history: he was always able to perform his job satisfactorily and to the best of his ability; he was never disciplined or demoted for failing to perform his job properly; nor was he ever terminated from a job for poor performance. He always received good performance evaluations and regular raises prior to the primary injury of 4/2/03.

As a result of the 4/2/03 primary injury, claimant has undergone four lumbar surgeries, three right knee surgeries, including a right total knee replacement and a 2nd replacement revision surgery. He also underwent two surgeries on the left knee as a result of the primary injury, including a left knee replacement. In addition, claimant has undergone a cervical fusion, bilateral carpal tunnel surgery, and bilateral elbow surgery, as well as at least two replacements of his pain pump, all as a result of the primary injury. Consequently, Mr. Taylor is in constant pain in his low back and legs. On an average day, his back pain is a seven on the 0-10 pain scale, and on a bad day, it is ten plus. He testified that his back and leg pain was never that bad prior to the 4/2/03 primary injury. Currently, as a result of the primary injury, claimant can't bend over, he can't kneel or squat, he can't twist, and he can't lift anything. He can only stand and walk for very short periods, testifying the he was doing well to stand long enough to take a shower. He can only walk for approximately twenty minutes, provided he ambulates very slowly. In addition, he cannot sit for very long before he has to get up and move around.

Since the 4/2/03 primary injury, claimant has to take Hydrocodone 10/650 three times per day, Flexeril three times per day, as well as Oxycontin and Oxycodone 20 mg. on bad days. Since the 4/2/03 primary injury, claimant has become depressed due to the extreme pain that he experiences on a constant basis. He currently takes Cymbalta for depression and sees a psychologist to cope with the pain stemming from the 4/2/03 primary injury. However, before the primary injury, claimant could sit, stand, and walk for as long as he needed or wanted to. He never had to take all these medications before 4/2/03, and he certainly wasn't taking Oxycontin or Oxycodone before the primary injury. He testified that he never took any antidepressant medication prior to the 4/2/03 primary injury. Nor did he consult a psychologist or psychiatrist before 4/2/03.

Claimant testified that since the 4/2/03 injury, he is unable to drive for very long due to his pain. He has to stop and get out and walk around for fifteen minutes after an hour's drive. But before the primary injury, he was able to drive for as long as he needed or wanted to without having to stop and walk around for fifteen minutes. Since the neck fusion, claimant experiences severe migraine headaches for which he takes prescribed medication on a daily basis. Also, since the 4/2/03 injury, claimant experiences pain in both knees. On a bad day, his right knee

pain is an eight out of 10. However, he testified that he never had right knee pain of an eight level before the 4/2/03 injury, and had never sustained a knee injury or had treatment of the right knee prior to 4/2/03.

Mr. Taylor testified that since the 4/2/03 injury, he is no longer able to engage in his hobbies of hunting and fishing. He can no longer go out in a boat because it increases his back pain. In addition, he can no longer ride his motorcycle because it increases his back pain. However, he was able to engage in all of these activities before the 4/2/03 primary injury.

As a result of the 4/2/03 primary injury, Mr. Taylor testified that he is unable to sleep through the night due to his low back and leg pain. He only sleeps about three hours before he wakes up in pain. However, he was able to sleep through the night prior to the 4/2/03 injury. Currently, as a result of the 4/2/03 injury, claimant testified that he has to lie down during the day due to back and leg pain for up to an hour at least twice a day. In fact, he told vocational expert, Mary Titterington, that he lies in his recliner for three hours at a time during the day. However, he certainly did not have to do that prior to the 4/2/03 primary injury as he was working full time, 40 hours a week, as a Correctional Officer.

Currently, as a result of the primary injury, claimant testified that he cannot perform any household chores: vacuuming tears up his back; he can't stand long enough to wash the dishes; he can't do the laundry; he can't take out the trash; he can't perform any maintenance on his car or change the oil; he can't perform any maintenance on his house now either. But he was able to perform all of those tasks before the 4/2/03 primary injury. He testified that although he is able to take care of his personal hygiene and dress himself, he has a hard time bending over to tie his shoes. He never had that problem before 4/2/03. Claimant testified that he never had the type of pain or problems that he is currently experiencing before the 4/2/03 primary injury. In fact, he stated that if he had not had the injury on 4/2/03, he would still be working for the City at MCI. He concluded that it is the 4/2/03 injury that has left him in the debilitated state that he is in today, and has changed his life completely for the worse.

After careful review of the evidence, including the claimant's hearing testimony, his deposition, as well as the depositions of Dr. Zipper, and vocational expert, Mary Titterington, and the medical report of Dr. Zarr, I find that James Taylor has proven that he is unemployable in the open labor market and therefore permanently and totally disabled as a result of the 4/2/03 injury in isolation. I agree with the testimony of Mary Titterington that the claimant is unemployable in the open labor market. Dr. Zipper testified the claimant is permanently and totally disabled as a result of a combination of the primary with the preexisting injuries. However, I disagree with Dr. Zipper's opinion that it is the combination of the primary injury with the preexisting injuries that renders claimant unemployable and, therefore, permanently and totally disabled. The overwhelming evidence of the lat accident and the plethora of surgeries that followed encompassing four lumbar surgeries, five surgeries with replacements to both knees, coupled with a cervical fusion and bilateral upper extremity surgeries dwarf any pre-existing conditions of ill. The Claimant's own testimony of his pre-existing conditions left him with no permanent problems and did not hinder his employment opportunities in any fashion.

Missouri case law has consistently held that where the opinions of experts conflict, the fact-finding body determines which opinion is more credible. See *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3rd 43, 48 (Mo. App. E.D. 1999); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo. App. 1984). And, where there are conflicting opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co.*, 1 S.W.3rd 43, 48 (Mo. App. E.D. 1999); *George v. Shop 'N Save Warehouse Foods*, 855 S.W.2d 460 (Mo. App. 1993); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

I feel that looking at Mr. Taylor's overall presentation attributable to the 4/2/03 primary injury, his disability is totally disabling. That evidence coupled with the evidence of Mr. Taylor's current inability to perform a majority of the pre-4/2/03 injury household tasks and hobbies, coupled with his severe pain, inability to sleep through the night, need to lie down during the day on a daily basis, and the inability to access the open labor market are all a result of the 4/2/03 injury in isolation, and find permanent total disability on that basis. The most credible evidence suggests, all of claimant's current pain complaints, the necessity of the cervical fusion, the bilateral knee surgeries, the lumbar surgeries, the bilateral wrist and elbow surgeries, the need for chronic narcotic pain medication, and the current depression, all result directly from the 4/2/03 primary injury, considered in isolation.

Based upon the claimant's testimony at the hearing, together with the medical records and the deposition testimony of vocational expert, Mary Titterington, as well as the medical testimony, I find that claimant has met his burden of proving that he is permanently and totally disabled as a result of 4/2/03 primary injury.

Conclusion

In this case, claimant met his burden of proving permanent and total disability. When pertinent case law and the relevant statutory authority are applied to the facts in this case, it is clear that Mr. Taylor is permanently and totally disabled due to the 4/2/03 injury considered alone and in isolation. All of the substantial and competent evidence demonstrates that his inability to access the open labor market results from the effects of the 4/2/03 injury and treatment necessitated in isolation. Therefore, I find that Mr. Taylor is permanently and totally disabled, and that such permanent and total disability is the result of the 4/2/03 injury in isolation, and award benefits to be paid by the City accordingly. Thus, there is no Second Injury Fund liability in this case. Permanent total disability rests with the City of Kansas City, Missouri, and the April 2, 2003 injury. Based on the evidence presented, the last temporary total disability payment was made on December 31, 2007, and permanent total disability benefits would then be due from January 1, 2008 to the present and continuing. I further find the Claimant's need for future medical care to cure and relieve his injuries of April 2, 2003 is the responsibility of the Employer/Insurer and is left open for care as necessary, to the right knee, cervical and lumbar spine.

Date: _____

Made by: _____

Mark S. Siedlik
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation