

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

Injury No.: 08-003246

Employee: William Tordt  
Employer: Don Wessel Oldsmobile Honda, Inc.  
Insurer: Missouri Automobile Dealers Association  
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 § 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 § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 7, 2012. The award and decision of Administrative Law Judge Victorine R. Mahon, issued February 7, 2012, 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 25<sup>th</sup> day of July 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T  
Chairman

\_\_\_\_\_  
James Avery, Member

\_\_\_\_\_  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: William Toridt

Injury No. 08-003246

Dependents: N/A

Employer: Don Wessel Oldsmobile Honda, Inc.

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

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

Insurer: Missouri Automobile Dealers Association

Hearing Date: December 15, 2011

Checked by: VRM/db

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: January 22, 2008.
5. State location where accident occurred or occupational disease was contracted: Greene County, Missouri.
6. Was above employee in employ of above employer at the time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant was in the sales lot and fell on ice.
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 leg.
14. Nature and extent of any permanent disability: Permanent Total Disability.

15. Compensation paid to-date for temporary disability: \$12,953.02.
16. Value necessary medical aid paid to date by employer/insurer? \$74,217.76.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wage: \$708.81.
19. Weekly compensation rate: \$472.56 / \$389.04.
20. Method of wage computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Employer and Insurer are liable for Permanent Total Disability.

**TOTAL: SEE BELOW.**

22. Second Injury Fund liability: None.
23. Future Requirements of the Award:

Beginning August 1, 2009, and continuing and for the remainder of Claimant's lifetime, Employer and Insurer shall pay permanent total disability in the benefit amount of \$472.56 each week. This Award is subject to review and modification as provided by law.

The compensation awarded to Claimant shall be subject to a lien in the amount of 25 percent of all payments to Claimant in favor of the following attorney for necessary legal services rendered to Claimant: E. Joseph Hosmer.

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

Employee: William Tor dt

Injury No. 08-003246

Dependents: N/A

Employer: Don Wessel Oldsmobile Honda, Inc.

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

Insurer: Missouri Automobile Dealers Association

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

Checked by: VRM/db

### **INTRODUCTION**

The parties appeared for final hearing before the undersigned Administrative Law Judge on December 15, 2011. Claimant William Tor dt appeared in person and with his attorney, E. Joseph Hosmer. Don Wessel Oldsmobile Honda, Inc. (Employer), and Missouri Automobile Dealers Association (Insurer), appeared by William Belden. Assistant Attorney General Susan Colburn represented the Treasurer of the State of Missouri as custodian of the Second Injury Fund. The parties agreed to the following facts:

### **STIPULATIONS**

On January 22, 2008, Claimant sustained an injury by accident in Greene County, Missouri, which arose out of and within the course of his employment with Employer. The hearing is being conducted in the proper venue. Jurisdiction is not challenged. On the date of the injury, Don Wessel Oldsmobile Honda, Inc., was an employer subject to, and Claimant was covered by, the Missouri Workers' Compensation Law. Employer was fully insured with Missouri Automobile Dealers Association. Notice was proper and the claim was filed timely. Employer/Insurer paid \$74,217.76 in medical bills. The parties agree to leave open the issue of future medical. Employer/Insurer paid \$5,198.16 in temporary total disability and \$7,754.86 in temporary partial disability. Claimant's average weekly wage was \$708.81. The permanent partial disability is \$389.04, and the permanent total disability rate of \$472.56.

### **ISSUES**

The parties agree that the sole issues to be resolved are:

1. What is the nature and extent of Claimant's disability?
2. What is the liability of Employer/Insurer and the Second Injury Fund for Claimant's disability?

## **EXHIBITS**

Claimant offered the following exhibits, which were admitted:

- A. Deposition of Dr. Koprivica with Volumes I and II of medical records
- B. Diagram
- C. Curriculum Vitae – Wilbur Swearingin
- D. Vocational Report – Wilbur Swearingin

Employer/Insurer offered the following exhibits:

- 1. Wage Statement Form (withdrawn)
- 2. TTD/TPD Payment Records (withdrawn)
- 3. Reports of Dr. Hartman (admitted)
- 4. Deposition – Dr. Caffrey, with report (admitted)

## **FINDINGS OF FACT**

Claimant was born May 31, 1939. He graduated from North Phoenix High School in 1956. He then enlisted in the United States Army. He spent the next 21 years in the armed forces. His assigned duties included security, signal corps, motor pool, missile ordnance, and finally, recruiting. After leaving the Army in 1977, he worked seven years as a licensed broker. From 1984 to 1985, he worked in automotive sales for Vincel Buick. Claimant worked approximately one year at Associate Financial, which was a personal loan company. He then worked for a trucking company as an account manager, and in sales from 1986 until March 1991. He returned to Vincel Buick in automotive sales from March 1991 until March 1992. He started employment with Don Wessel Olds-Honda, Inc., his last employer, in March 1992.

### **The Accident**

On January 22, 2008, Claimant was performing an inventory check on a used car. As he opened the trunk he slipped on ice and fell to the pavement. He testified he hit his back side and may have lost consciousness for a few minutes. He attempted to get up, but could not use his left side and could not get off of the ground. He used his cell phone to call several numbers. He was able to reach another car salesman. He was taken by ambulance to Cox South Emergency Room.

The day following the work injury, Dr. Michael Hartman, an orthopedic surgeon, diagnosed Claimant with left intertrochanteric femur fracture with subtrochanteric fracture. Dr. Hartman performed cephalomedullary nailing, left femur with Stryker long gamma nail. Claimant described the procedure as a rod inserted in his femur from the top all the way down to his left knee with a bolt in the top part of the rod and screws in the lower part of the rod in his knee.

Following the surgery, Claimant was moved to Cox Walnut Lawn, where he remained for rehabilitation until February 14, 2008. He thereafter continued to receive in-home rehabilitation care.

On February 19, 2008, approximately five days returning home, Claimant fell while using his walker. Claimant fell backwards and fractured the interlocking screws in his knee. On February 21, 2008, Dr. Hartman performed another surgery to remove and replace the two screws in his knee. Dr. Hartman's diagnosis was left intertrochanteric femur fracture, subtrochanteric femur fracture, and distal femur fracture. In an April 8, 2008 office note, Dr. Hartman states:

Plain x-rays of the left hip demonstrated gamma nail fixation. The fracture along the medial calcar does show evidence of healing. The long spike in the subtrochanteric region does not show any evidence of healing at this time. The distal femur fracture has remained in position but does not show any signs of any healing at this point.

Upon Claimant's request, Dr. Hartman released Claimant to work effective April 8, 2008, but with the restriction of part-time, light-duty, desk-type work.

Claimant returned to work in late April or early May. He worked Monday, Wednesday and Friday, four hours each day, while in a wheelchair. His employer paid him \$7.50 per hour, along with temporary partial disability. In June 2008, Claimant no longer needed the wheelchair at work and began to use a walker. In June 2008, Claimant's hours were increased to eight hours per day on Monday, Wednesday and Friday, and four hours per day on Tuesday and Thursday. He continued to work using a walker until October 14, 2008, when his hours were increased to eight hours per day, five days a week. He used a cane while at work after October 14, 2008.

Prior to the work injury of January 22, 2008, Claimant had worked full time, eight hours per day, six days per week. He earned more than \$700.00 a week in winter and \$900.00 a week in summer. The seasonal differential was due to an increased volume in sales during the summer. Prior to the work injury, Claimant devoted 75 percent of his work day with car sales, and the remainder of his time was spent with inventory control and special financing. When Claimant returned to work after the injury, he was given no car sales, no inventory control, virtually no customer contact, and no special finance work. His duties consisted of scanning records and writing manuals. He worked with no supervision, could get up and move around as necessary, and work at his own pace. He used a stair-lift to get to the second floor. He was allowed to take breaks as needed. Throughout his 17 years of working for Employer, Claimant was unaware of any person having performed this last job.

On July 8, 2009, General Manager Randy Madsen spoke to Claimant about retiring. Mr. Madsen told Claimant to finish out the month and not come back. Claimant did not return to employer after July 31, 2009. Claimant had not intended on retiring.

Claimant thereafter drew unemployment while attempting to find other employment. His work search included other car dealerships, as well as other places of employment in the Springfield-Branson area. Claimant said no one would take a chance on him. In the two and one-half years since his dismissal from Don Wessel Olds-Honda, Claimant has found no work.

## **Current Complaints**

Claimant has left hip and left knee pain. He is unable to stand, walk or sit in one position for more than one-hour. He always uses a cane for stability, which limits his ability to lift with more than one hand. He can only use his left hand to lift up to 25 pounds. He cannot squat, crawl or kneel. He had none of these limitations or complaints prior to the work injury.

Claimant currently takes medications, including Tramadol for left hip and left knee pain on a daily basis from one to three times per day. He takes Ambien every night to help with sleep since his left hip and left knee pain keep him awake.

## **Preexisting Condition**

**1. Diabetes** – Claimant was diagnosed with diabetes in the 1980's. He did not become insulin dependent until sometime in the early 2000's. He also was diagnosed with diabetic neuropathy in his feet and legs, for which he has been prescribed Davocet on an as needed basis. He also has taken Neurontin, or its generic equivalent (Gabapentin), on a daily basis because of this condition. He credibly testified that this condition does not cause him significant problems. His diabetes is well controlled and does not interfere with his activities. He never missed any work because of diabetes or neuropathy.

**2. Minor Ailments** – In December 26, 2007, Claimant had a blister on his right foot and had one visit to the doctor. The condition healed without difficulty shortly thereafter. He went to Cox Urgent Care on January 23, 2006, complaining of dizziness and weakness; however, he had given blood earlier that day. He was diagnosed with dehydration, which resolved, and he required no further treatment. He went to Cox Urgent Care on March 17, 2006, with cellulitis in his elbow. That condition resolved shortly thereafter as well. In addition to the medications listed above for the diabetes and neuropathy, Claimant takes Zocor for high cholesterol and a low-dose aspirin for cardiovascular risk. He did not indicate any complications from these medications or from the associated conditions.

**3. Vision Problems** – Claimant underwent laser photocoagulation to destroy abnormal retinal vessels, after which he had no further problems. He also has had a vitrectomy to remove the contents of the vitreous chamber of the eye and replace the contents with a solution. The treatments caused him no problems. He had cataracts removed and lenses implanted in each eye prior to the last work accident. These implants improved his vision.

**4. Fall in 2007** - Claimant fell at work on January 18, 2007, after which he was seen at the Family Walk-In Clinic. He was diagnosed with a contusion of his left hand and left flank. This condition, requiring only one office visit, healed without complications.

## **Testimony of Claimant's Spouse**

Billie Tordt has been married to Claimant for 43 years. She has had an occasion to observe him on a daily basis since the work injury. She saw her husband as being very

active with no significant problems prior to the last work injury. Now, however, she has observed her husband exhibit pain after sitting 30 to 40 minutes. He no longer can take his mile-long walks in their neighborhood. He no longer can take the grandchildren to Silver Dollar City because of Claimant's left hip/knee pain and instability. He cannot do simple things that he used to perform easily. She now has to perform most chores, including changing light bulbs and cleaning the gutters which had been Claimant's duties.

### **Expert Testimony**

**1. Dr. Brent Koprivica** specializes in occupational medicine. He opined that as a result of the work injury of January 22, 2008, Claimant suffered a loss of motion of his left hip, and severe atrophy of the left thigh, which is three centimeters smaller than the right. Dr. Koprivica believes the atrophy of his left thigh was consistent with ongoing weakness in Claimant's left lower extremity and with difficulties with gait and balance. Dr. Koprivica noted a discrepancy in the length of Claimant's legs, with the left leg being two centimeters shorter than the right. The shortening was caused by the trauma to the bone.

Dr. Koprivica testified that Claimant's left hip and left knee complaints were residual from the intertrochanteric and subtrochanteric comminuted fracture that had been treated with open reduction internal fixation with nonunion of the subtrochanteric component of the femoral fracture. Dr. Koprivica opined that Claimant's subsequent fall at home resulted in a distal femoral shaft fracture that was producing the chronic left knee pain. Dr. Koprivica testified the work-related fall of January 22, 2008 was the direct, proximate and prevailing factor in the identified fractures, and the resultant complaints of pain in the left hip and that that the subsequent fall at home was the prevailing factor in his ongoing left knee pain. Dr. Koprivica testified the objective findings were surgical scarring; loss of motion of the left hip; the subtrochanteric pain correlating with the nonunion that occurred there; the atrophy in the left leg; and the leg length discrepancy.

Dr. Koprivica apportioned 50 percent permanent partial disability of the left lower extremity at the hip level and an additional 25 percent permanent partial disability of the left lower extremity at the level of the knee. Globally, Dr. Koprivica testified Claimant had an overall 70 percent permanent partial disability of the left lower extremity at the 207-week level. He restricted Claimant from squatting, crawling, kneeling or climbing entirely. He said Claimant needed a cane for gait assistance and postural allowances. Dr. Koprivica also recommended restrictions in captive sitting, standing, or walking of no more than an hour, with the ability to change position as necessary, and only occasional lifting or carrying up to 25 pounds, using the left upper extremity.

Dr. Koprivica found no significant preexisting disability, although the diabetes would be an impairment. Finally, Dr. Koprivica opined that Claimant was "permanently and totally disabled based on the disability attributable to the January 22, 2008, injury considered in isolation in and of itself." (Dr. Koprivica Depo. p. 21). He said Claimant needed pain medication indefinitely, along with pain medication management.

**2. Dr. Michael Hartman** did not testify by deposition. His medical reports are admitted as Exhibit 3. In a report dated February 10, 2009, Dr. Hartman stated that the intertrochanteric and shaft fractures eventually went on to union. Dr. Harman noted the 1 centimeter leg length discrepancy. He said on a radiographic evaluation, there is a 14 degree difference in the neck shaft angle of the right femur when compared to the left femur. He rated Claimant as suffering a 25 percent impairment of the lower extremity impairment and a whole person impairment of 10 percent.

In his report of June 2, 2009, Dr. Hartman stated that while the intertrochanteric fracture is healed, “a portion of the subtrochanteric fracture has gone on to nonunion.” Dr. Hartman does not address whether the subtrochanteric nonunion would change his impairment rating since four months earlier he was under the erroneous assumption that the subtrochanteric fracture had healed. He does state, however, that Claimant may need some future surgical intervention because of symptomatic hardware, progressive hip and/or knee arthritis, or continued pain from the subtrochanteric nonunion site.

### **Credibility Finding of Medical Experts**

While Dr. Hartman was a treating physician and an orthopedic surgeon, his failure to address the union versus nonunion, in the context of his permanency rating, is perplexing. Dr. Hartman’s impairment rating was given when he was under the impression the subtrochanteric fracture had healed, when in fact it had not. Dr. Hartman later even indicated a “possible reason for requiring further surgical intervention would include symptomatic hardware, progressive hip and/or knee arthritis, or continued pain from the subtrochanteric nonunion site.” Without further explanation, it is impossible to know whether Dr. Hartman’s impairment rating would encompass the nonunion of the subtrochanteric fracture and the continued pain from such nonunion.

Despite the fact that Dr. Hartman is a specialist in orthopedic surgery, I find his “impairment” rating less credible and persuasive than the more thorough opinion provided by Dr. Koprivica in this case. Dr. Koprivica’s deposition testimony, as well as his report, appear accurate and demonstrate a clear understanding of Claimant’s past employment history, medical history, the history from the occupational injury, and Claimant’s current complaints and limitations. I find credible and persuasive the opinions of both physicians that Claimant will benefit from additional medical treatment, which accounts for the parties’ stipulation to leave that issue open.

**3. Patrick Caffrey, Ph.D.** is a licensed psychologist in private practice. At one time he was certified as a rehabilitation counselor in the mid 1980’s. Dr. Caffrey allowed his certification to lapse in 1990 and has not attempted to obtain a recertification since then. He did, however, maintain his license as a psychologist. Dr. Caffrey performed an extensive examination of Claimant, after which he concluded that Claimant was employable on the open labor market, despite his injury. Dr. Caffrey concluded that Claimant possessed transferable skills that would allow him to approach the world of work and market his transferable skills based on his knowledge and experience.

Dr. Caffrey’s opinion, however, is based on incorrect assumptions. Contrary to Dr. Caffrey’s understandings, Claimant had never worked as a bank manger, electronic

design engineer, or electronic research engineer. Incredibly, Dr. Caffrey admitted that these positions require a college degree, which Dr. Caffrey *knew* Claimant did not possess. Dr. Caffrey's answer to that quandary was as follows:

Q. How could he perform work as an engineer without a college degree?

A. Well, he had probably have to get one.

(Ex. 4, Tr. 42). Such suggestion simply seems unreasonable given Claimant's age. Dr. Caffrey admitted that he had no understanding of the Code of Federal Regulations addressing work experience and transferability of skills.

**4. Wilbur Swearingin** testified live at the hearing. He has been a certified rehabilitation counselor since 1990. He described the requirements to become a certified rehabilitation counselor. Mr. Swearingin evaluated Claimant on March 22, 2010 and reviewed the medical records and Claimant's deposition testimony. Mr. Swearingin took an education and employment history and had Claimant undergo vocational testing. Mr. Swearingin testified although Claimant has preexisting diabetes and peripheral neuropathy and retinopathy, these prior conditions did not affect his ability to perform work activities. As such, Mr. Swearingin did not find Claimant had any vocational disabling conditions prior to the occupational injury of January 22, 2008. Considering the medical restrictions outlined by Dr. Koprivica, Mr. Swearingin testified in his professional opinion Claimant was unable to perform work in the open labor market, and was permanently and totally disabled because of the occupational injury of January 22, 2008 in isolation.

Mr. Swearingin reviewed the report of Dr. Patrick Caffrey dated May 26, 2011 as well as Dr. Caffrey's deposition testimony of December 2, 2011. Mr. Swearingin testified Dr. Caffrey performed a psychological assessment; however, he did not perform an appropriate vocational evaluation as he did not use proper methodology. Mr. Swearingin noted Dr. Caffrey is not certified as a rehabilitation counselor, and has not been for more than 20 years. Mr. Swearingin noted Dr. Caffrey's erroneous employment history indicating Claimant had worked as an electronics design engineer, electronics research engineer, and bank manager. Also, Mr. Swearingin testified only the last 15 years of a person's work history would be relevant in determining transferability of skills in a vocational evaluation. Mr. Swearingin also noted the Career Assessment Inventory Test Dr. Caffrey administered to Claimant was simply a list of jobs in which an employee might express some interest. He indicated that there was no connection between those interests and the employee's skills to perform such employment.

#### **Credibility Assessment – Vocational Experts**

Mr. Swearingin gave more credible and persuasive testimony. His opinion was based on a more accurate understanding of Claimant's work history and transferable skills. I accept Mr. Swearingin's opinion over that of Dr. Caffrey.

## CONCLUSIONS OF LAW

Claimant has the burden of proving all elements of his claim to a degree of reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App. E.D. 2008). Claimant seeks Permanent Total Disability against either Employer or the Second Injury Fund. The appropriate test for determining the liability of the respective parties is set forth in *APAC Kansas, Inc. v. Smith*, 227 S.W.3d 1 (Mo. App. W.D. 2007). The Administrative Law Judge first must consider of the liability of Employer in isolation by determining the degree of Claimant's disability due to the last injury. 227 S.W.3d at 3.

### Last Accident

The term "total disability" means the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. § 287.010.6 RSMo 2000. The test for permanent, total disability is the worker's ability to compete in the open labor market, with the critical question being whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 48 (Mo. App. W.D. 2007); *Ransburg v. Great Plains Drilling*, 22 S.W.3d 726, 732 (Mo. App. W.D. 2000) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.2d 220 (Mo. banc 2003). In making this determination, the fact finder may look at numerous factors and not just physical ability. *BAXI v. United Technologies Automotive*, 956 S.W.2d 340 (Mo. App. E.D. 1997). One of those numerous factors is the employee's age. *Reves v. Kindell's Mercantile Co., Inc.*, 793 S.W.2d 917, 920 (Mo. App. S.D. 1990) *overruled on other grounds*, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

For the reasons detailed in the Findings of Fact, I have found the opinions of Dr. Koprivica and Wilbur Swearingin more credible and persuasive than the contrary opinions of Employer/Insurer's experts. Mr. Tordt is a man in his 70s, with a significant injury to the lower extremity necessitating the use of a cane. While Employer provided Claimant with employment for a significant period of time subsequent to the work accident, such job appears to have been gracious benevolence on Employer's part. Claimant's description of the job duties clearly indicates that such employment was "make work" and not a job available on the open labor market. Claimant sought unsuccessfully for a substantial period of time to find alternative employment, to no avail.

Prior to the last injury, while Claimant suffered some physical conditions such as diabetes with associated neuropathy, there is no evidence that his conditions rose to the level of disabilities. Certainly, the preexisting conditions did not interfere with Claimant's work. Given all of the circumstances of this case, I accept that the expert opinions of Dr. Koprivica and Wilburn Swearingin that Claimant is permanently and totally disabled from the last work injury on January 22, 2008, considered in isolation. The Second Injury Fund has no liability.

As Claimant last worked July 31, 2009, I find and conclude that he is entitled to permanent total disability beginning August 1, 2009. Beginning August 1, 2009, Employer/Insurer shall pay to Claimant the permanent total disability rate of \$472.56 for the remainder of Claimant's lifetime, subject to review and modification as provided by law.

As stipulated by the parties, Employer/Insurer shall provide future medical benefits to cure and relieve the effects of the work related injury.

E. Joseph Hosmer shall have a lien in the amount of 25 percent of all amounts awarded for necessary and reasonable legal services provided to Claimant.

Made by: \_\_\_\_\_

Victorine R. Mahon  
Administrative Law Judge  
Division of Workers' Compensation