

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

Injury No.: 11-106035

Employee: Joseph Fronck
Employer: Production Delivery Services, Inc.
Insurer: New Hampshire Insurance Co.
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read the briefs, reviewed the evidence, and considered the whole record, we find that the award of the administrative law judge awarding compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge (ALJ) with this supplemental opinion.

Discussion

Employer/insurer's application for review alleges the ALJ's award is erroneous because the ALJ:

- Unreasonably failed to consider [that the] video [of employee's injury] does not depict a head injury.
- Unreasonably dismissed Employer's expert medical opinion retained by [an] individual not involved in the compensation case.
- Unreasonably considered claimant's expert opinions despite erroneous assumptions that formed the basis of those opinions.
- Failed to consider [that] notice of a "work" injury was not given.

Employer/insurer's brief provides a number of valid reasons why the ALJ could have made different credibility determinations that would support a denial of permanent total disability benefits against the employer/insurer.

The employer challenges the ALJ's credibility determinations. Cognizant of this issue, after a thorough review of the evidence, the ALJ found that "The convincing and credible evidence supports a finding that the accident was the prevailing factor in causing PTSD, post-concussion syndrome, and physical injury to the upper extremities,

Employee: Joseph Fronck

- 2 -

low back, and neck.”¹ The ALJ further specifically found the employee met his burden of establishing his right to recover permanent total disability benefits, stating:

His claim is supported by credible lay testimony, medical/psychological and vocational evidence. Claimant’s testimony of the accident, the effects, and his current struggles are persuasive. His friends credibly described the dramatic shift in Claimant’s personality, mental wellbeing, and overall ability to function. His injury is no less debilitating simply because it impacted his mental rather than physical health.²

Surveillance Video of Employee’s Work Injury

Employer/insurer alleges that the ALJ erred by failing to consider a video that “does not depict a head injury.”³ The record includes only one surveillance video DVD: Claimant’s Exhibit 17, titled “Surveillance Video of Accident.” The ALJ demonstrated her consideration of this evidence by time-specific references to segments of the video she incorporated in her award.⁴ The ALJ found the video showed that when hit without warning from behind by a small station wagon:

The car struck Claimant’s lower body directly from behind, with the rear bumper aligned with Claimant’s upper calf at the knees and the top of the rail lights at his buttocks/low back. Claimant’s knees buckled, his upper body pitched violently forward as he extended a hand towards the ground, he hit the ground rolling back and to the right, and landed sprawled on his back with his head on the ground (emphasis added).⁵

We find the ALJ’s description of the surveillance video entirely accurate.

Credibility of Medical and Vocational Experts

The Commission is not required to defer to an ALJ’s credibility determination and may come to a different conclusion, so long as there is competent and substantial evidence to support our award.⁶ That said we give careful consideration to an ALJ’s credibility determination based on her first-hand observation of witnesses. Based upon our review of all of the evidence in this case, we are not persuaded to disagree with the ALJ’s determination of the employee’s credibility or the overall weight given to the expert medical and vocational opinions in this case.

¹ Award, p. 18.

² *Id.*

³ Employer/insurer’s Application for Review, dated November 15, 2017.

⁴ Award, p. 5.

⁵ *Id.*

⁶ *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo., 2003); *McCutchen v. People’s Corporation*, 195 S.W.3d 421 (Mo. App., 2006).

Employee: Joseph Fronek

- 3 -

Whether Employee's Failure to Give Written Notice of his Injury as Required by § 287.420, RSMo Defeats his Claim

Section 287.420 RSMo provides, in pertinent part:

No proceedings for compensation for any accident under this chapter shall be maintained, unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer no later than thirty days after the accident, unless the employer was not prejudiced by failure to receive the notice.

Section 287.420 requires that an employer be notified regarding the time, place, and nature of an injury. Section 287.020.3(5) defines injury as "violence to the physical structure of the body." Read in conjunction, what is required is that employer be notified regarding the time, place, and nature of the trauma sustained.

An injured worker is not required by § 287.420 to provide his employer with a medical diagnosis, or to keep employer apprised of symptoms and/or opinions (professional or otherwise) regarding the etiology of said symptoms.

The employee is free to secure medical treatment on his own; the employer may be relieved of liability for related medical expenses but, under such circumstances, neither § 287.420 nor any other provision of the Act results in forfeiture of the claim.

We note that although the ALJ finds that employer did not receive written notice of the employee's injury within thirty days it appears that witness Mrs. Michelle Harkins, employer's secretary/treasurer and human resources director, prepared a written account of the April 10, 2011, accident within this time frame.⁷ It appears, then, employer possessed a written notice within thirty days. Section 287.420 does not require that such notice be given by the employee. Regardless, the employer had actual notice of employee's injury so there can be no prejudice.

Past Medical Expenses

Employer's application for review states no error in the ALJ's award of \$6,444.95 in past medical expenses. Employer's brief argues that no further payments for past medical expenses should be required because any such medical expenses are unrelated to the work injury but rather related to the employee's "own personality and life stressors."⁸ Employer makes no argument that bills ordered paid by the ALJ's award were for treatment at a time when employer was unaware of the need for same and/or tendering medical care. We affirm the ALJ's award of \$6,444.95 for past medical expenses,

⁷ When deposed on October 28, 2015, Mrs. Harkins testified that approximately a week after the employee's accident she "engaged Mr. Fronek and did the correct paperwork necessary for the State of California Labor Board and the Workman's Compensation Board to file a claim." *Transcript* 753.

⁸ Employer/insurer's Petitioner's Brief, p. 53.

Employee: Joseph Fronck

based on medical bills admitted into evidence at the hearing and the employee's credible testimony that the bills were incurred as a result of the work injury.⁹

Award

We affirm and adopt the award of the administrative law judge as supplemented herein.

The award and decision of Administrative Law Judge Karla Ogrodnik Borezi, issued October 30, 2017, is attached and incorporated herein to the extent not inconsistent with this supplemental decision.

The Commission approves and affirms the administrative law judge's allowance of an 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 10th day of July 2018.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

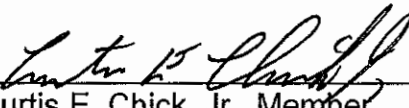




John J. Larsen, Jr., Chairman

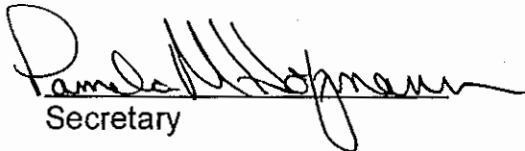
CONCURRING OPINION FILED

Reid K. Forrester, Member



Curtis E. Chick, Jr., Member

Attest:



Secretary

⁹ Award, pp. 10, 17.

Employee: Joseph Fronek

CONCURRING OPINION

I have read the briefs of the parties and reviewed the whole record. I have considered all of the competent and substantial evidence based on the record as a whole.

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I reluctantly concur with the majority's supplemental opinion affirming the ALJ's award allowing compensation.

Employer/insurer was disadvantaged in its investigation and defense of employee's claim by employee's failure to provide written notice of his injury within thirty days, as the law provides. However, the majority correctly notes the employer/insurer's agent, secretary/treasurer and human resources director Mrs. Michelle Harkins, prepared a written account of the employee's April 10, 2011, accident within this time frame, and thereby satisfied the provisions of § 287.240. Unfortunately, employer's compliance with best practices relating to reporting work injuries defeats its defense on the issue of notice in this case.

I have carefully viewed the surveillance video the employee produced as evidence that employee sustained a head injury at work on April 10, 2011. Even after watching the tape in slow motion, I am unable to conclude that it clearly depicts the employee striking his head on the ground after being hit from behind by a vehicle in employer's parking lot. That said, I agree with the majority's deference to the ALJ's credibility findings based on her first-hand observation of the employee as well as her description of the employee's April 10, 2011, accident.


Reid K. Forrester, Member

AWARD

Employee: Joseph Fronck

Injury No.: 11-106035

Dependents: N/A

Employer: Production Delivery Services, Inc.

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Co.
c/o Chartis Claims, Inc.

Checked by: KOB

Hearing Date: July 18, 2017

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 10, 2011
5. State location where accident occurred or occupational disease was contracted: Ohio
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: While he was assisting in the loading of a truck, a car suddenly and unexpectedly struck Claimant from behind.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Body as a whole/Psych, upper extremities, back and neck.
14. Nature and extent of any permanent disability: Permanent, Total Disability
15. Compensation paid to-date for temporary disability: \$32,390.60, representing a period from September 30, 2012 to August 3, 2013
16. Value necessary medical aid paid to date by employer/insurer? \$50,558.03

- 17. Value necessary medical aid not furnished by employer/insurer? \$6,444.95
- 18. Employee's average weekly wages: Not specifically determined.
- 19. Weekly compensation rate: \$736.15/\$418.58
- 20. Method wages computation: By stipulation

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Unpaid medical expenses: \$6,444.95

Permanent total disability benefits from Employer beginning August 4, 2013, for Claimant's lifetime

- 22. Second Injury Fund liability: No

TOTAL:

INDETERMINATE

- 23. Future requirements awarded: See Award.

Said payments to begin 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% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Jill Bollwerk

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Joseph Fronek

Injury No.: 11-106035

Dependents: N/A

Employer: Production Delivery Services, Inc.

Additional Party: Second Injury Fund

Insurer: New Hampshire Insurance Co.
c/o Chartis Claims, Inc.

Before the
Division of Workers'
Compensation
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: KOB

PRELIMINARIES

The matter of Joseph Fronek ("Claimant") proceeded to hearing to determine the benefits to which he was entitled under the Missouri Workers' Compensation Act (the "Act"). Attorney Jill Bollwerk represented Claimant. Attorney Reid Highlander represented Production Delivery Services, Inc. ("Employer") and its Insurer, New Hampshire Insurance Co. c/o Chartis Claims, Inc. Assistant Attorney General Rachel Houser appeared on behalf of the Second Injury Fund.

The parties stipulated on or about April 10, 2011, Claimant was in an accident; Employer was subject to the Act; Venue is proper in the City of St. Louis; and Claimant filed the claim within the time required. At the relevant time, Claimant earned an average weekly wage sufficient for a rate of \$736.15 for temporary total disability ("TTD") and permanent total disability ("PTD") benefits, and \$418.58 for permanent partial disability ("PPD") benefits. Employer/Insurer paid TTD benefits totaling \$32,390.60, representing a period from September 30, 2012 to August 3, 2013. Employer also paid \$50,558.03 in medical expenses as of the day of the hearing.

The parties agreed the issues for Trial were limited to the following:

1. Notice;
2. Whether the injury occurred within the course and scope of employment;
3. Medical causation;
4. Past medical expenses;
5. Future medical treatment;
6. The nature and extent of permanent disability; and
7. The liability of the Second Injury Fund.

The following exhibits were marked, offered and admitted, except Exhibit 21, which was withdrawn, with numeric exhibits from Claimant and alphabetic from Employer:

1. Report of Dr. Woiteshek.
2. Deposition of Gary Weimholt.
3. Deposition of Adam Sky.
4. Deposition of Brian Stucki with records.

5. Deposition of Michelle Harkins with employment file.
6. Additional records of Dr. Stucki.
7. Records of Dr. Vandenburg.
8. Records of Presbyterian Community Hospital.
9. Records of University Hospital with bills.
10. Records of Birdsall with bills.
11. Bills of Dr. Helfgott.
12. Walgreens" bills.
13. Records of Kassi Corle with bills.
14. Bills of Dr. Stucki.
15. Bill of Dr. Vandenburg.
16. Records of Dr. John Ferguson.
17. Video surveillance of accident.
18. Medical and TTD payment history.
19. Letter stipulating to Missouri jurisdiction.
20. Bill from Cincinnati EMS.
21. Exhibit withdrawn.
22. Records of Dr. James Pinkston.
23. Records of Dr. Donald Smith.
24. Dr. Stucki's February 2017 report.
25. Correspondence dated February 25, 2015.
 - A. Deposition of Dr. Wunder with reports.
 - B. Deposition of Jim England dated January 12, 2017 with reports.
 - C. Deposition of Jim England dated June 17, 2017 with reports.
 - D. Deposition of Dr. Harbit with reports.
 - E. Records from the Cincinnati Fire Department.

The Second Injury Fund did not offer any exhibits. Any objections contained within the depositions not otherwise ruled upon in this Award are now overruled.

FINDINGS OF FACT

Fact Witnesses, Records, and other Evidence

Claimant is a 63-year-old man who spent nearly his entire career driving trucks. He did not earn a high school degree or its equivalency, but worked at a various jobs including at a pizza parlor and gas station before becoming a truck driver in 1982, doing mostly over the road driving. His prior psychiatric history is insignificant¹. In mid-2004, Claimant began working for Employer, hauling theatrical equipment across country for trade shows, musical productions and special events. Claimant lived in St. Louis, but was dispatched out of California. When he was driving, Claimant lived out of his truck. He testified he "was working all the time."

¹ An event that occurred in his childhood was described as an attempted suicide, but Dr. Sky persuasively explains the event is of "questionable significance." Claimant and his mother "faked" the event to try to get his father to stop drinking. There is no evidence treatment flowed from the long-ago event, and Claimant never had symptoms or needed treatment for any mental disease until after the accident. Therefore, I find Claimant's prior history of metal disease lacking significance.

On Sunday, April 10, 2011, Claimant was in Cincinnati with the Celtic Women show, which had just ended its run at the Aronoff Center for the Arts. It was particularly hard to maneuver trucks at the Aronoff loading dock, so after he loaded his truck and moved it to the street, Claimant returned to the loading dock area to assist his colleague, Brad. It was customary for the drivers to help each other, often communicating via radio, and to wait for all drivers before leaving the venue. Claimant and Brad could not begin the process of maneuvering Brad's truck out of the loading area because several cars were in the way. Thus, just before 6:00 p.m. on Sunday, April 10, 2011, Claimant was standing in the center of the back lot area on the Aronoff Center.

Much of what happened was captured on video² (Exhibit 17). There were several vehicles parked in the back lot area, including three cars and two trucks, one black and the other red. Claimant and another man were engaged in conversation as they emerged from behind the cab of the black truck and walked to the center of the back lot. It did not appear Claimant was holding anything. Claimant stood watching his companion walk back towards the truck. At the same time, a woman entered a small station wagon parked behind Claimant and started to back up. Suddenly and without warning, the car hit Claimant -- he never saw it coming. The car struck³ Claimant's lower body directly from behind, with the rear bumper aligned with Claimant's upper calf at the knees and the top of the tail lights at his buttocks/low back. Claimant's knees buckled, his upper body pitched violently forward as he extended a hand towards the ground, he hit the ground rolling back and to the right, and landed sprawled on his back with his head on the ground. It is impossible to determine the degree of force with which Claimant's head hit or landed on the ground.

Claimant briefly remained face up on the ground as up to ten people encircled him, appeared to call for help, and offered aid. He testified he "woke up on the ground" and he thought, "Brad was looking right at me [but] I had no clue what happened." He eventually rose to a sitting position, with one leg bent and the other extended, writhing and gesturing. The police arrived within seven minutes, and two minutes later an EMT knelt down to minister to Claimant, although he stayed briefly and did not appear to provide any treatment on the spot. Within 14 minutes from when he was struck, Claimant was helped to his feet and walked off camera. The first responders dispersed, except for the investigating officers who spoke to witnesses. By the end of the video some 30 minutes after the accident, business resumes with the black truck moving into place in the lot and people returning to their tasks.

Claimant felt emergency care was necessary and he was transported by ambulance to University Hospital. He told the EMTs he did not lose consciousness, although he later concluded he must have blacked out because he "didn't remember flying through the air." At the hospital, Claimant complained of pain in his left hand and severe pain in his stomach which hurt so much that he felt that there was no doubt he would need surgery. At the time, his internal pain was overwhelming and his fingers really hurt, so he did not focus on other injuries. X-rays showed no fractures. City of Cincinnati EMS charged \$786.00 and University Hospital billed \$3,779.00 for services provided to Claimant on April 10, 2011.

² The security camera swept from side to side, so it did not capture all the relevant action. However, it did record the critical moment of impact and was stopped and focused on events for part of the time.

³ The blow occurs at 17:56:56 on the video. From 17:59 to approximately 18:06, the camera remains fixed and focused on Claimant, but then resumes the sweeping motion of the entire area.

Larry Jacoboski, a co-worker who witnessed the accident, called supervisor Jim Harkins with details of the accident. Right after he left the hospital, Claimant received a call from Jim to confirm he was okay. Mrs. Harkins, an officer and HR manager for Employer and Jim's wife, testified she had a conversation with Claimant a few days or a week after the accident, after which she filed a form in her home state of California⁴ reporting the accident. Thus, Employer had actual knowledge of the accident. Claimant did not ask for any treatment at that time and there is no evidence safety policies were discussed. He took a cab back to his truck and drove the truck to the next venue.

From April to October, Claimant worked as usual, but he had problems. His left ring and middle fingers continued to hurt for months and his right ankle was completely numb. A few days after the accident, Claimant began to gradually develop what felt like a sinus headache. The headache came and went, but got worse with time. He also developed what he thought was an irrational fear of cars. His behavior changed and he knew something was wrong when he realized he had been staring at the button on a new shirt for over an hour. In addition to focusing on little objects like that for long periods of time, he also began to have crying spells, and his hands would shake when he would get around cars. Claimant emotionally explained how he tried to conquer this fear by making himself cross the parking lot of a Denny's restaurant and how he sat in a parking lot for twelve hours because he could not get out of the truck.

Claimant's next medical care did not occur until October 19, 2011, when he went to the PIH Health Hospital⁵ in Whittier, CA with complaints of chronic frontal headaches after being struck by a car four months previously and "pain with placing hand on back." Dr. Birdsall assessed sciatica, post-concussive syndrome and chronic daily headaches. The pain medications were ineffective, and the next day Claimant presented to the PIH Hospital emergency room with the same head and neck complaints, where he was more fully worked up but no additional findings were made apparent.

Dr. Birdsall referred Claimant to a neurologist, Dr. Paul Helfgott, in Whittier, California. (Ex. 10). On October 26, 2011, Dr. Helfgott examined Claimant and watched the video surveillance of the accident taking place. Claimant complained to Dr. Helfgott of pain in his left hand and right shoulder, intermittent numbness in his right ankle, and right sided head pain. Claimant also reported concerns about strange behaviors such as fixating visually on small objects, a crying spell for no reason, and the fact that he was swindled in a scam. Dr. Helfgott diagnosed post-concussion syndrome, post-traumatic stress disorder, arthritis in the left hand, and exacerbation of lumbar degeneration leading to L5-S1 nerve root compression. Dr. Helfgott recommended psychiatric care and counseling, but did not see the need for any intervention for the lumbar radiculopathy at that time. An outstanding bill totaling \$279.88 for care provided by Dr. Helfgott remains.

On October 27, 2011, Michelle Harkins, received bills from PIH Hospital, spoke to Claimant, and issued an Employee Insubordination/Violation notice for improperly reporting the April 11 accident. In the notice, Mrs. Harkins admits Employer had actual notice that an accident occurred but alleges Claimant never said he was "on duty." As of October 27th,

⁴ Mrs. Harkins testified she "reopened" the case in January 2012, at which time agents of Insurer first filed Missouri report of injury in her name.

⁵ Claimant thought Sherry from the office referred him there.

according to Mrs. Harkins' write up, Employer was aware Claimant's doctors diagnosed him with PTSD from the accident and he needed treatment.

On January 9, 2013, Claimant returned to Dr. Birdsall with complaints of headaches and right foot numbness since "[a]uto vs peds several months ago." Claimant was not taking his previously prescribed medications, due to side effects, so Dr. Birdsall prescribed amitriptyline. Claimant testified he had terrible side effects, explaining he woke up in a hotel room, hungry and drooling, but he could not get out of bed. There is an outstanding balance of \$180.00 for Dr. Birdsall's services.

Claimant's behavior was also changing, and his performance started to decline. On January 3, 2012, Claimant had a run-in with a customer at a Best Buy, resulting in him being placed on six-month probation. Claimant admitted at trial his reaction was pretty outrageous and even self-reported his anger issues to Dr. Birdsall. Despite these incidents, Employer did not offer treatment and Claimant kept trying to do his job. On January 20, 2012, the company doctor cleared Claimant to drive a truck for another year.

In mid-July 2012, a situation arose involving missing logs. Claimant was reprimanded for missing logs and, according to Ms. Harkins, this was not the first time. When he could not recreate the logs from memory, Claimant requested the information from the dispatcher but was refused. While it is clear Claimant lost his temper, there is conflicting evidence as to whether or not he was fired. Claimant testified he was then told by Ms. Harkins that they were letting him go because he was "mentally ill." Ms. Harkins, conversely, testified Claimant broke down in her office and discussed his PTSD diagnosis. She decided it was time to re-open the workers' compensation claim so that he could seek the treatment he needed. She instructed him to "go home, re-open the claim, and get the help he needs." Claimant never returned to work for Employer or any other job, after July 6, 2012.

Claimant testified he has no idea what he did for the next month or two after leaving Employer. He drove, unannounced, to his friend Hubert Jones' home in Ruston, Louisiana, but Claimant has no recollection of the drive. Mr. Jones testified Claimant merely arrived on his doorstep in the summer of 2012, looking dazed and disoriented, so Mr. Jones allowed him to stay.

As Ms. Harkins suggested, Employer coordinated medical care for Claimant in Louisiana. The workers' compensation carrier assigned Claimant a nurse case manager, "Nurse Dixie," and set up care with a Dr. Brian Stucki, who first saw Claimant on September 27, 2012. Claimant reported he first complained of problems with his ribs, hand and ankle after the accident, but when those symptoms improved, he developed headaches. Claimant reported sadness, brief loss of balance, thinking difficulty, and being terrified of cars since the accident. Dr. Stucki diagnosed Claimant with "Memory lapse or loss, Post-concussion syndrome, Post-traumatic headache." He ordered neuropsychiatric testing to see if the deficits were cognitive or psychiatric ("i.e. PTSD"), and prescribed amitriptyline for the headaches.

On October 31, 2012, Claimant reported improvement with the amitriptyline, but complained of neck pain since the accident. On November 28, 2012, Claimant reported more problems with balance and memory, blurry vision in his left eye, and difficulty concentrating, as well as headaches returning before it is time to take the next dose of amitriptyline. Dr. Stucki

referred Claimant to "psychology or psychiatry depending on whom we can find who may have the most experience...with his mood and other issues."

Pursuant to Dr. Stucki's order, Employer set up a neuropsychiatric examination with Dr. James Pinkston in January 2013. Dr. Pinkston diagnosed Claimant with "Adjustment Disorder with Mixed Anxiety and Depressed Mood" and felt he required cognitive therapy and continuing medications.

Also consistent with Dr. Stucki's order, psychiatrist, Dr. Herbert Vandenberg examined Claimant on February 12, 2013. Dr. Vandenberg indicated Claimant was struggling with depression, fatigue, recurrent death wishes, and feelings of hopelessness/helplessness, which he diagnosed as "major depression severe and PTSD." He referred Claimant to psychological treatment with Dr. John Ferguson twice a week, as well as continuing amitriptyline and Topamax. Dr. Vandenberg's \$350.00 bill remains unpaid. There is also a total of \$229.07 in bills from Walgreens for amitriptyline from 2016-17.

Dr. Stucki continued to treat Claimant in early 2013. Claimant complained of memory loss, post-traumatic headache, cervicgia, post-concussion syndrome, dreams, balance and sleep problems. Dr. Stucki stated, "In regard to post-concussive syndrome, it is unclear if he will ever get back to prior cognitive baseline." He also said light duty could be done as a trial, but employer would need to minimize stress and not place him in a potentially dangerous environment. He wanted Claimant to continue psychological treatment.

While still in active treatment with Dr. Ferguson, Claimant was sent back to Dr. Pinkston for an impairment rating. He stated Claimant had reached Maximum Medical Improvement and rated the amount of the whole person impairment attributable to the accident as "negligible" or less than 10%. Dr. Pinkston said Claimant would likely benefit from continued supportive or cognitive behavioral therapy.

Employer continued to direct care to both Dr. Stucki and Dr. Ferguson. On September 5, 2013, Dr. Stucki stated Claimant was having more stress, mild worsening of headaches, memory, and concentration, and dreams of the accident. He disagreed with Dr. Pinkston about Claimant's functioning. He opined PTSD aggravates the situation. Dr. Stucki stated "It may be that his inability to work currently stems as much from his PTSD as it does from his post-concussive syndrome." During the time he was with Dr. Stucki and Dr. Ferguson, Claimant had headaches that were responding to the medication, but if he forgot to take a dose, the headaches would be back, and it would take some time before the medication was effective.

Over the course of 2013, Dr. Ferguson saw Claimant biweekly. Among the specific issues discussed were Claimant's anxiety and nervousness, particularly related to driving, nightmares, and limitations on his ability to perform ordinary tasks. He felt Claimant showed all the symptoms of chronic PTSD, and like most of PTSD victims he has seen, Claimant was unaware at the time of the accident just how much it affected him. Dr. Ferguson also said Claimant had difficulty sleeping, showed periodic irritability and bursts of anger, and displayed a highly exaggerated startle response. Dr. Ferguson reported to the nurse that in his professional opinion, Claimant will in no way ever be able to drive an 18-wheeler due to PTSD and troubles with concentration. Dr. Ferguson said in his professional opinion, Claimant was in no way

enjoying his symptoms nor was he receiving any "secondary gains". Dr. Ferguson continued to treat Claimant throughout 2013 and part of 2014.

Employer terminated care in September 2014. Dr. Ferguson wrote a letter on October 14, 2014, diagnosing PTSD, outlining Claimant's symptoms, and relating the PTSD to the accident. Dr. Ferguson thinks Claimant will need counseling for an indeterminable period of time. It is also Dr. Ferguson's opinion Claimant most likely will not be able to resume his career as a professional truck driver due to his lack of focus and anxiety. Dr. Ferguson is no longer being paid to treat Claimant but he talks to him frequently due to concerns about his welfare.

Dr. Stucki followed up with Claimant on October 30, 2014. Dr. Stucki opined Claimant would be unable to perform his job to his previously level due to exacerbation caused by minor stressors.

After Employer terminated care, Claimant returned to St. Louis, where he found his rental property was destroyed, and he had to live in a hotel while he repaired his house. When Employer was not forthcoming with additional care, Claimant sought counseling from Kassi Corley and followed up with Dr. Stucki for prescription renewals, at his own expense. There is a charge of \$675.00 for Ms. Corley's services.

Recently, Claimant saw Dr. Stucki because of low back pain and radiating leg pain as well as problems lifting his foot—the same ankle that was numb right after the accident. Dr. Stucki ordered an EMG and x-rays of the lumbar spine. On February 3, 2017, Dr. Stucki issued a report stating the L5 radiculopathy could be related to the accident, but the Baker's cyst found on his leg and the neuropathy were not related.

Claimant testified to his current problems including his fear of cars. He said if cars are coming at him at certain lighting or speed, sometimes he feels like he cannot react fast enough, which causes him anxiety. He said that it is a pleasurable day when he can get out and go to the grocery store, but then other days he cannot even go to the car.

Claimant testified the confusion and obsessive thought of PTSD wear him out. Claimant still has memory problems, such as forgetting to close his door for three days, vague nightmares, and occasionally continues to focus on small objects. Claimant rarely gets out to see friends, and usually spends his days at home trying to work on projects. He used to love to drive—now he hates it and only drives a few times a month. When he has to drive down to Louisiana to see Dr. Stucki, he leaves days before his appointment and must stop as many as ten times along the way. His headaches are under control with medication, but he occasionally forgets to take medicine and the headaches return, requiring him to rest until the medication kicks in. Although he did not receive much treatment for his physical injuries, he still has complaints. The initial arm pain has returned, his back still hurts, and the back of his legs are painful.

Claimant had other stressors in his life over the last several years, but states he has moved on from those stressors. He has good days and bad days. On good days, he can work around his house for up to three hours. On bad days, he is up all night, and his sleep is inconsistent.

Claimant presented medical bills⁶ at hearing that were not paid by the Employer and Insurer. He testified credibly all of the bills were incurred as a result of the work injury and submitted the supportive documentation and records.

Scott Thomas and **Hubert Jones**, two long-time friends of Claimant who were in regular contact with him, testified on his behalf. Both described the pre-accident Claimant as a laid-back, energetic, happy-go-lucky, "mellow fellow" with lots of friends who was hard to upset. Both men described Claimant as capable at things like home remodeling and electronics wiring. Mr. Thomas, who had known Claimant since Junior High, never saw or heard of Claimant fighting.

Each friend described concerning changes in Claimant after the accident. At first, Claimant seemed "a bit off," and then got more evasive and withdrawn. He seemed confused, was less confident and struggled to complete simple tasks that once came easy to him. Mr. Jones described how one day out of the blue, Claimant showed up at his house in Louisiana appearing dazed and confused, unaware of how he had gotten there. Mr. Jones extended his hospitality, and Claimant ended up staying for a year. During this time, Claimant was withdrawn, distracted, forgetful, fearful of cars, and not as "happy-acting" as usual. His host was particularly concerned when Claimant became quick tempered and easily upset, which was unusual.

Michelle Harkins, who testified by deposition, also noticed changes in Claimant's demeanor after the accident. She testified Claimant starting having some "funny behaviors obviously that were very out of character for him." Mrs. Harkins stated by mid-2012, Claimant was not in a stable mind, and that he needed to seek help. "We really love Joe. Joe has been a great guy. He has been with us a long time, you know. I saw what was happening. He was not in his right mind." She never felt he needed to offer any help before the accident, because "(w)e never had any problem with him up until that point." She alternatively praised Claimant ("Joe Fro, pretty close to perfect") and alleged he was a hothead, particularly when it came to interactions with her husband, Jim.

In addition to confirming Claimant's post-accident personality changes, Mrs. Harkins testified⁷ to certain disciplinary issues, including the Best Buy incident where Claimant admittedly lost his temper with a customer, a 2005 dispute over log entries, and the conflict over the missing logs that came to a head in July 2012. It was after the last log incident Mrs. Harkins decided to "reopen" the workers' compensation case in Missouri and urged Claimant to seek help.

On the issue of notice, Mrs. Harkins had trouble recalling events, but her testimony confirmed she and Mr. Harkins were aware Claimant had been struck by a car in Cincinnati within a week of the incident, and she filed paperwork in California within 30 days of the accident. She was unaware Claimant was having problems and needed medical care until she learned Claimant had been to the hospital in California in October.

⁶ The sum of \$6,444.95 represents the following: \$350.00 bill from Dr. Vandenberg; \$229.07 Walgreens' prescription bill; \$180.00 bill from Dr. Birdsall; \$279.88 bill from Dr. Helfgott; \$3,779.00 certified bill from University Health Center; \$786.00 bill from City of Cincinnati EMS for dates of service 4/10/11; \$675.00 bill from Kassie Corley; and \$166.00 balance from Dr. Stucki.

⁷ Based on second hand information, Mrs. Hawkins suggested in documents from the time and in her testimony that Claimant was standing around smoking a cigarette when he was struck and therefore was not on duty. Finding such argument factually and legally untenable, no further note will be made of such testimony.

Expert Evidence

Dr. Brian Stucki is a neurologist treating patients at the Green Clinic in Ruston, Louisiana, including Claimant. Pursuant to a request from nurse case manager Dixie Ramsey, Dr. Stucki evaluated and commenced treatment of Claimant on Employer/Insurer's behalf on September 27, 2012. Over the next several years, although some symptoms fluctuated, Dr. Stucki maintained the original diagnoses, specifically memory loss, post-concussive syndrome, post-traumatic headache and cervicgia. Dr. Stucki recommended a neuropsychological evaluation, which was done by Dr. Pinkston, a psychiatric evaluation which was done by Dr. Vandenberg, and counseling with Dr. Ferguson. After two years, Claimant was still on amitriptyline, but his capabilities had not improved as far as memory and other tests went. He believed Claimant needed further counseling. Some time passed and Employer's workers' compensation carrier terminated care with Dr. Stucki. Nevertheless, Dr. Stucki continues to see Claimant for follow-up every six to twelve months.

Dr. Stucki wrote a report dated December 15, 2015, in which he noted Claimant's difficulty with memory, depression and poor concentration, and the diagnoses of post-concussive syndrome, chronic post-traumatic headache, cervicgia and memory loss. He stated that the work-related accident was the prevailing medical factor in causing these injuries. Imaging studies did not seem to show any large brain injuries, but changes from traumatic brain injury frequently are not seen on routine MRI and CT scans." Dr. Stucki felt the disability from his post-traumatic headaches and post-concussive syndrome were limiting him to the extent that he could not work, and he felt Claimant was 100% impaired as a result of these injuries. It was his impression Claimant would have difficulty sustaining employment secondary those diagnoses.

As to future medical treatment, Dr. Stucki indicated Claimant will continue to need medication, including amitriptyline, as well as continued psychiatric care. Dr. Stucki's bill was put into evidence at his deposition, showing that the workers' compensation carrier had been paying the bills up until the most recent visits. There is an unpaid balance of \$166.00 in Dr. Stucki's account.

Dr. Adam Sky, a St. Louis psychiatrist, evaluated Claimant, reviewed records, administered tests, and took a history. He noted Dr. Vandenberg diagnosed Claimant with major depressive disorder, characterized as severe, as well as post-traumatic stress disorder. Additionally, Dr. Ferguson noted a number of symptoms consistent with PTSD.

Dr. Sky found Claimant's thought to be logical and linear, but with mild paranoid ideations. It was significant, especially in regards to depression, that Claimant had neurovegetative symptoms, such as trouble sleeping, waking up early, and the absence of being able to take pleasure in things, which are all consistent with true depressive disorder.

Testing revealed a depression score of 33, which is consistent with moderate to severe major depressive disorder, and a PTSD checklist score of 48, close to the average score for military members (50). Dr. Sky convincingly explained how civilians can experience PTSD much like the military, with anxiety, flashbacks, panic attacks, and visions of the traumatic event, often with a delayed onset. The impact of an unexpected trauma is greater because when the mind and body are relaxed, the psychological defenses are not girded for the trauma.

Claimant was thus physically and psychologically unprepared when the vehicle struck him from behind, opening him to greater damage. Furthermore, he testified it can take weeks to months to for symptoms to develop and require treatment, so a several month delay between the onset of trauma and first treatment confirms rather than disproves the diagnosis of PTSD.

To a reasonable degree of medical certainty, Dr. Sky provided Claimant with two diagnoses: 1) major depressive disorder, moderate single episode; and, 2) post-traumatic stress disorder. Dr. Sky stated the accident of April 10, 2011 was the prevailing factor in the psychiatric diagnoses. He recommended continuing treatment through psychological counseling and medication. He felt Claimant had a 50% permanent partial psychiatric disability as a result of the accident, but from a psychiatric standpoint, Claimant lacks the focus, concentration and overall ability to function in the open labor market, particularly in a skilled position. As for the suicide attempt forty years ago, Dr. Sky stated even if the suicide attempt was real, Claimant has since done very well, and has not treated for or been diagnosed with any psychiatric disorder leading up to the accident.

Dr. Sky stated Claimant's PTSD symptoms, including an inability to focus and concentrate, are characteristic of someone who should not be behind the wheel of a truck. He feels his opinions align with Dr. Vandenberg and Dr. Ferguson—doctors who were hired by the workers' compensation carrier and who were authorized to treat Claimant.

Dr. Dwight Woiteshek limited his evaluation to the physical injuries alleged to result from the work-related accident of April 10, 2011. Dr. Woiteshek reviewed all the medical records and performed a medical examination, recording his findings in detail. His diagnoses and ratings as a result of the accident were: 1) Traumatic cervical strain - 20% of the body as a whole; 2) Traumatic lumbar strain— 20% of the body as a whole; 3) Traumatic internal derangement of the right shoulder— 20% at the 232-week level; 4) Traumatic strain of the 4th and 5th fingers of the left hand— 15% at the 175-week level; and 5) Post-Traumatic Stress Disorder (rated by Dr. Sky) He also gave a pre-existing diagnosis of mild degenerative disc disease at C4-C6 which was completely asymptomatic. Dr. Woiteshek stated the work-related injury of April 10, 2011, was the cause of the above diagnoses.

Dr. Melissa Harbit is a forensic psychiatrist who saw Claimant once for a 3½ hour exam, reviewed many, but not all of the records/reports/depositions, and testified on behalf of the Employer/Insurer. Dr. Harbit disputed the conclusions of the treating doctors. She did not believe Claimant met the criteria for PTSD or had major depression. She thought the trauma was not significant enough for PTSD because, despite being hit by a car⁸, he did not undergo a "near death experience," and did not have sufficient avoidance symptoms, notwithstanding the many examples of his fear/avoidance of motor vehicles. She questioned the concept of delayed onset of PTSD. Furthermore, Dr. Harbit disagreed with the diagnosis of major depression, because he did not undergo electro-shock therapy, take medication or require hospitalization. It was Dr. Harbit's opinion Claimant suffers from an Adjustment Disorder with mixed anxiety and depressed mood that is unrelated to the work accident. With respect to the alleged head injury, she assumed Claimant did not strike his head on the ground, but agreed a person could have an acceleration/deceleration head injury without striking their head.

⁸ Among the information she lacked was the video of the accident itself.

Dr. Steven Wunder did not evaluate Claimant for purposes of this worker's compensation matter, but rather saw him on July 28, 2014 at the request of the defense attorney in the third party against the driver who struck Claimant. He was not retained to render any psychiatric opinions, although he conceded the problem that bothered Claimant the most from the accident was the PTSD—a psychiatric disorder.

Dr. Wunder generally discounts the force of the impact (without having seen the video), the nature and extent of the physical injuries because they were not documented in the ER, and the diagnosis made. He felt since there was no loss of consciousness, Claimant could not have post-concussive syndrome, his only physical injuries were an abdominal strain and a hand contusion, and he suffered no disability.

In addition to the medical and psych experts, the competing parties presented vocational testimony. For Claimant, vocational expert, **Gary Weimholt**, took a detailed history, performed vocational testing revealing reading and math scores at the sixth grade level, wrote a report, and gave his deposition on April 20, 2016. The impactful vocational characteristics that affect Claimant's employability are his lack of a high school education, poor academic history, his hypersensitive personality, and being moody, unforgiving, aloof, withdrawn, and unconventional. Claimant would have problems with a 40-hour work week due to his very poor sleep pattern, avoidance of daytime driving, and forgetfulness.

Mr. Weimholt did not think Claimant was a suitable candidate for jobs such as a cashier, sales clerk, and other such jobs. Indeed his problems would make him an unsuccessful applicant for most of the jobs in the economy, particularly in light of his age (62). He opined Claimant was unable to compete in the open labor market, and his permanent and total disability is from the April 10, 2011 injuries standing alone.

James England, a vocational counselor who reviewed records and testified twice on behalf of Employer/ Insurer. Mr. England testified, from a rehab counselor's perspective, he did not see anything that would prevent Claimant from working. However, from a psychological standpoint, he would defer to the doctors as far as the professional opinion on restrictions. He conceded that he had been given several conflicting medical opinions, and as a counselor, he is unable to state which doctors are right or wrong.

Mr. England's opinion is considering the IME doctors hired by Employer/Insurer (Smith, Pinkston, Harbit) and the IME doctor hired by the insurance carrier in the third party case (Wunder), then Claimant is employable in the open labor market. On the other hand, considering opinions of the treating psychologist, Dr. Ferguson, Claimant cannot go back to truck driving, and if you then take into consideration the opinions of the treating physician, Dr. Stucki, along with the IME of Dr. Sky, then Claimant is unable to compete in the open labor market.

RULINGS OF LAW

I. Notice.

Employer's purported notice defense factually and legally fails. Section 287.420 requires, "written notice of the time, place and nature of the injury...no later than thirty days after the accident." The purpose of § 287.420 'is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability.' *Doerr v. Teton Transp., Inc.*, 258 S.W.3d 514, 527 (Mo.App.S.D.2008). There is no evidence of written notice. However, the failure to give timely written notice may be excused if the fact finder determines the failure did not prejudice the employer. *Sell v. Ozarks Med. Ctr.*, 333 S.W.3d 498, 510-11 (Mo. Ct. App. 2011)(citations omitted). A claimant may demonstrate lack of prejudice where evidence of actual notice was uncontradicted, admitted by the employer, or accepted as true by the fact-finder. *Id.*

There is no prejudice. Employer had actual notice Claimant was struck by a car and went to the hospital. Larry Jacoboski told supervisor Jim Harkins who spoke directly to Claimant right after he left the hospital. Claimant's testimony on this point is persuasive. Furthermore, Mrs. Harkins had a conversation with Claimant and filed a California form reporting the accident well within the notice window of the Missouri Act. Other than the day of the injury, Claimant incurred no additional medical treatment until October, and Mrs. Harkins was informed within days. The alleged lack of notice is no defense.

II. Arising Out of and in the Course of Employment.

The clear and convincing evidence establishes Claimant's injury arose out of and in the course of employment. "[T]he term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. Section 287.020.3(1). Section 287.020.3(2) RSMo provides, as follows:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) 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.

The courts have interpreted the foregoing language to involve a causal connection test that employees must satisfy in order to prove that an injury has arisen out of and in the course of the employment. *Johme v. St. John's Mercy Healthcare*, 366 S.W.3d 504, (Mo. 2012)

I find Claimant's injuries resulted from a risk related to and specific to his employment activities on April 10, 2011, and one to which he was not equally exposed in his normal non-employment life. All the credible evidence, including Claimant's testimony and the compelling video, establishes Claimant was standing in the lot behind the theater for no other reason than to perform his job. The accident occurred within the period of employment at a place where

Claimant was expected to be and while he was reasonably fulfilling the duties of his employment. *Anderson v. Veracity Research Co.*, 299 S.W.3d 720, 729 (Mo. App. 2009), citing *Blatter v. Missouri Department of Social Services, Division of Aging*, 655 S.W.2d 819 (Mo. App. 1983).

There are no credible facts to support Employer's argument Claimant was "off duty" on a smoke break. Even if there were, as a traveling employee, Claimant is considered to be in the course of his employment continuously during the trip except when a distinct departure on a personal errand is shown. *Baldrige v. Inter-River Drainage Dist.*, 645 S.W.2d 139, 140 (Mo.App. S.D.1982)(citation omitted); 2 Arthur Larson, *Larson's Workers' Compensation Law* §25.01 (2001).

III. Medical Causation

Section 287.020 further defines a compensable injury under the workers' compensation law: "An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability." § 287.020.3(1).

On the issue of whether the accident was the prevailing factor in causing the injuries, the video evidence as summarized above is particularly compelling. Although at a low speed, Claimant was suddenly and unexpectedly hit by a moving car, which propelled him forward and downward. Injuries at the point of impact at the back and lower extremities, to the outstretched limb and upper body on which he fell, and to his neck from the whiplashing action of being struck with sudden acceleration/deceleration forces are easily observed, and are supported by the medical evidence. One can also observe Claimant eventually ends up on his back with his head on the blacktop.

I am persuaded by the evidence Claimant has presented regarding his physical injuries. Claimant testified to, and the video depicts injuries to, Claimant's upper extremities, low back, and neck. The records contain complaints regarding and diagnoses explaining each of these physical injuries. Claimant's testimony is in line with the records. Dr. Woiteshek⁹ provides the requisite finding that the accident was the prevailing factor in causing the physical disabilities discussed. While Claimant's complaints evolved, and not every complaint is recorded the same by every provider, taken as a whole, there is evidence to support the finding the accident was the prevailing factor in causing the medical conditions and disabilities to the upper extremities (left hand sprain/contusion and right shoulder derangement), low back (pain with burning to right leg/sciatica), and neck (cervicalgia with dizziness/strain).

More controversial are the psychological injuries stemming from the accident. Either Claimant suffers from PTSD and post-concussion syndrome, or has a personality adjustment disorder unrelated to the accident, depending on which experts are most persuasive. Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Vickers v. Missouri Dep't of Pub. Safety*, 283 S.W.3d 287, 295 (Mo. Ct. App. 2009). Considering all the evidence of record, including Claimant's testimony, the video,

⁹ I cannot credit the opinion of Dr. Wunder. It was not generated for purposes of a workers' compensation proceeding, and the apparent bias negates otherwise valid conclusions, if any.

medical records, testimony of treating physicians, and opinions of evaluating experts, I credit and am persuaded by Claimant's evidence establishing he suffers from psychological disabilities including PTSD and post-concussion syndrome as a result of his work accident.

Before analyzing the opinion evidence, it is important to reiterate a factual finding key to the upcoming discussion. It is reasonable to conclude Claimant suffered a concussion, which is a traumatic brain injury affecting brain function, from the force of being pitched forward when his body was struck from behind (acceleration/deceleration event), from his head striking the ground as he fell forward or rolled to his back, or both. To the extent Employer argues there is no concussion and therefore no post-concussive syndrome because the car did not hit his head and his head did not hit the ground, I find such argument unconvincing and without factual support.

Claimant relies on his treating doctors, particularly neurologist Dr. Stucki and psychologist Dr. Ferguson, to establish causation for and disability from his psychological injuries. These providers were approved and paid for by the workers' compensation insurer and saw Claimant multiple times over years. Dr. Stucki directed care within his expertise and referred Claimant for work up by other experts. He testified to the following:

- a. He diagnosed a condition of post-concussion syndrome, chronic post-traumatic headache, cervicgia, and memory loss, and he stated that the accident of April 10, 2011 was the prevailing factor in those diagnoses;
- b. He testified Claimant is 100% impaired as a result of those injuries;
- c. He felt Claimant's inability to work stems as much from his PTSD as it does his post-concussive syndrome;
- d. He testified Claimant would have difficulty sustaining employment secondary to his difficulties.
- e. He thought Claimant would need continuing medication, including amitriptyline, and psychiatric care in the future.

Consistent with Dr. Stucki's suggestion, Claimant was sent to a neuropsychiatric evaluation with Dr. Vandenberg who diagnosed Claimant with major depression-severe, and PTSD, with a GAF of 60. Dr. Helfgott, a neurologist and one of the earliest experts to examine Claimant, diagnosed post-concussion syndrome and post-traumatic stress disorder in October 2011. His opinion is particularly convincing because he saw the video of the accident, saw Claimant soon after the accident, and made his diagnosis before some of the life stressors on which Employer would blame Claimant's disability.

It is the evidence from treating psychologist, Dr. Ferguson, who saw Claimant over 80 times¹⁰ as an approved provider, that is perhaps most compelling on the issue of PTSD. He credibly explained Claimant shows all the symptoms of chronic PTSD, like feelings of fear, helplessness, and disturbing recollections/night terrors, which correlate to the time of his accident. He also explained how, like most PTSD victims, Claimant was unaware at the time following the accident how much the accident affected him. He also stated Claimant would most likely not be able to resume his career as a professional truck driver due to his inability to focus on driving without a degree of anxiety that precludes driving in a safe manner.

¹⁰ According to Claimant, Dr. Ferguson continued to talk to him over the phone, for free, after Employer/Insurer terminated treatment.

Not only are the opinions Dr. Stucki and Dr. Ferguson entitled to greater weight due to their close, long-term relationship with Claimant, but the facts on which the opinions are based are consistent with the facts found herein. Although he only saw Claimant once for an evaluation and did not treat, Dr. Adam Sky's opinion echoes and expounds on the persuasive opinions of these treating doctors, including Dr. Vandenberg. Dr. Sky's description of PTSD symptoms are similar to the facts in Claimant's case, and he does an excellent job of explaining how a sudden, unexpected trauma like being hit from behind can be particularly devastating.

To a reasonable degree of medical certainty, Dr. Sky diagnosed Claimant with major depressive disorder-moderate single episode, and post-traumatic stress disorder. Dr. Sky stated the accident of April 10, 2011 was the prevailing factor in the psychiatric diagnoses. He recommended continuing treatment through psychological counseling and medication. Although he felt Claimant had a 50% permanent partial psychiatric disability as a result of the accident, from a psychiatric standpoint, Claimant lacks the focus, concentration and overall ability to function in the open labor market, particularly in a skilled position.

Employer/Insurer relied on the opinions of several experts, all of whom saw Claimant for one evaluation and thus did not have the advantage of time to judge reliability, clarify misunderstandings, measure progress, or otherwise get to know Claimant. In concluding Claimant did not have PTSD, Dr. Pinkston relied on facts inconsistent with or unsupported by the record, including the suppositions Claimant was only afraid of cars for a month, his memory, balance and focus problems were prescription side effects not injury symptoms, and Claimant had a history of maladaptive personality traits. He did, however, find Claimant had a whole person impairment attributable solely to the 2001 work injury of less than 10%. Dr. Smith relied heavily on Dr. Pinkston's findings, so his opinion is similarly defective.

Dr. Harbit took a history, reviewed the records and reports, and performed an exam. Like Dr. Pinkston, she concluded Claimant had serious preexisting psychiatric illness, which is not otherwise supported by the record. She diagnosed Claimant with Adjustment Disorder with mixed anxiety and depressed mood, not related to the injury, and rejected the diagnoses of PTSD and severe major depression. She felt the delayed onset of symptoms ruled out PTSD, unlike Dr. Sky and Dr. Ferguson, who explained why a PTSD diagnosis is often delayed. I do not find Dr. Harbit's opinion to be well-based in the facts found or otherwise persuasive.

The convincing and credible evidence supports a finding the accident was the prevailing factor in causing PTSD, post-concussion syndrome, and physical injuries to the upper extremities, low back, and neck, along with the resulting disability discussed below.

IV. Past Medical Expenses.

Claimant seeks payment of \$6,444.95¹¹ in past medical expenses for treatment he reasonably required to cure and relieve from the effects of the injury. As found in this award, he has identified the bills as being related to and the product of his injury, and submitted medical records in evidence that relate to the professional services rendered. Thus, he has established a sufficient factual basis for an award of compensation. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105, 111-12 (Mo. banc 1989).

¹¹ See footnote 6.

V. Future Medical Care.

Claimant seeks medical treatment to cure and relieve from the effects of the injury. An employee can be awarded future medical treatment in both permanent total disability awards and permanent partial awards. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. E.D. 1997). Claimant is not required to present evidence on the specific medical treatment which will be necessary in the future in order to receive an award of future medical care. *Id.* However, where future medical benefits are awarded, the medical care must flow from the accident if the employer is to be held responsible. *Id.* The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

The Employer-approved treating neurologist, Dr. Stucki, testified within a reasonable degree of medical certainty, Claimant will likely require continuing medication, including amitriptyline, as well as ongoing psychiatric care. Treating psychologist, Dr. Ferguson, agrees. There is no evidence Claimant requires treatment to cure and relieve his physical injuries. I find it is reasonably probable Claimant is in need of additional medical treatment by reason of his work-related accident. Employer shall provide all medical and psychological treatment as may be reasonably required to cure and relieve from the effects of the injury.

VI. Permanent Disability.

Under the Act, the phrase "total disability" means the inability of a person to return to any employment. § 287.020.7 RSMo 1986. The phrase "inability to return to any employment" has been interpreted by the courts to mean the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average worker who is performing such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.S.D.1982). The test for permanent total disability is whether the injured employee is competent to compete in the open labor market. *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App. E.D. 1990). "The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired." *Id.* An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.*

Claimant has met his burden of establishing his right to recover PTD benefits. His claim is supported by credible lay testimony, medical/psychological and vocational evidence. Claimant's testimony of the accident, the effects, and his current struggles are persuasive. His friends credibly described the dramatic shift in Claimant's personality, mental wellbeing, and overall ability to function. His injury is no less debilitating simply because it impacted his mental rather than physical health.

The persuasive doctors, Dr. Stucki and Dr. Sky, also establish total disability. Dr. Stucki stated it would be difficult for Claimant to sustain employment, and Dr. Sky testified Claimant cannot complete in the open labor market from a psychiatric standpoint.

Furthermore, Claimant's vocational expert supports a finding of PTD. Gary Weimholt testified he does not think Claimant's skills were transferrable due to education, personal interaction, and sleep problems. His age of 62 is a factor as well. Mr. Weimholt stated it was his opinion that Claimant was unable to compete in the open labor market.

James England testified on behalf of Employer. He stated according to the Employer/Insurer doctors, Claimant is employable in the open labor market. On the other hand, if you take into consideration the opinion of the treating psychologist, Dr. Ferguson, Claimant cannot go back to truck driving, and with opinions of Dr. Stucki and Dr. Sky, Claimant is unable to compete in the open labor market. Having credited the opinions of Dr. Stucki and Dr. Sky over Employer/Insurer's experts, I find Dr. England supports a finding of PTD as well.

Claimant has established he is permanently and totally disabled due to his psychological injuries, including PTSD and post-concussive syndrome. Thus, the orthopedic injuries that were rated by Dr. Woiteshek do not factor into the analysis.

VII. Second Injury Fund Liability.

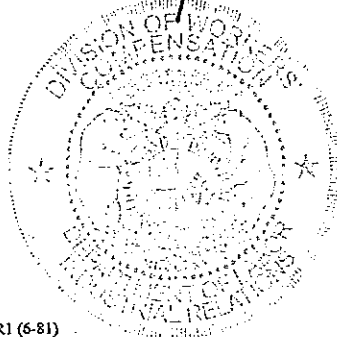
In deciding whether the Second Injury Fund has any liability, the first determination is the degree of disability from the last injury. *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. E.D.,2000). "If a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount." *Blackshear v. Adecco*, 420 S.W.3d 678, 681 (Mo. Ct. App. 2014). Claimant is permanently and totally disabled due to the April 10, 2011 injury in and of itself. The Second Injury Fund has no liability.

CONCLUSION

Employer/Insurer is responsible for the weekly permanent total disability benefit as provided under the Act, beginning August 4, 2013. Attorney Jill Bollwerk is entitled to a fee of 25% of all benefits awarded for services renders.

I certify that on 10-30-17,
I delivered a copy of the foregoing award
to the parties to the case. A complete
record of the method of delivery and date
of service upon each party is retained with
the executed award in the Division's case file.

By [Signature]



Made by: [Signature]
KARLA OGRODNIK BORESI
Administrative Law Judge
Division of Workers' Compensation