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

Injury No. 09-025872

Employee: Richard L. Hertzing

Employer: Beck Motors, Inc.

Insurer: Missouri Automobile Dealers Workers Compensation Trust

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. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Introduction
The parties asked the administrative law judge to resolve the following issues: (1) nature and extent of permanent disability; (2) medical causation as to the back; (3) unpaid temporary disability benefits; (4) Second Injury Fund liability; and (5) employer's alleged drug defense.

The administrative law judge rendered the following findings and conclusions: (1) the injuries to the right leg and back are medically causally related to the April 2009 work injury; (2) employee is permanently and totally disabled from the last injury alone; (3) employee is entitled to $7,191.75 in temporary partial disability benefits; (4) employer's request for a penalty under § 287.120 RSMo is denied; and (5) the Second Injury Fund has no liability.

Employer filed a timely application for review with the Commission alleging the administrative law judge erred: (1) in awarding permanent total disability benefits against the employer; (2) in awarding temporary partial disability benefits to employee; and (3) in deciding not to impose a 50% reduction in benefits pursuant to § 287.120.6(1) RSMo.

Discussion
Commencement of permanent total disability benefits
We agree with the administrative law judge's reading of the testimony from employee's medical expert, Dr. Carr, and we further agree with her determination that Dr. Carr provided the more persuasive testimony as to the issues of medical causation and permanent total disability in this case. Accordingly, we adopt as our own her findings, analysis, and conclusions with respect to these issues. We note, however, that the administrative law judge held that employer is liable for permanent total disability benefits beginning November 5, 2010, the date that the administrative law judge found that employee quit his job for employer. This date was before employee underwent

significant medical treatment for the work injury, including a left hip replacement surgery on May 19, 2011.

> Courts have used various terms to determine when an employee's condition has reached the point where further progress is not expected, including the term maximum medical improvement. *Vinson v. Curators of the University of Missouri*, 822 S.W.2d 504, 508 (Mo. App. E.D. 1991)(interpreting a doctor's testimony of employee's maximum treatment potential to mean maximum medical improvement); *Cooper*, 955 S.W.2d at 575 (using the term maximum medical progress to define the point where no further progress is expected for an employee's condition).
>
> After reaching the point where no further progress is expected, it can be determined whether there is either permanent partial or permanent total disability and benefits may be awarded based on that determination. One cannot determine the level of permanent disability associated with an injury until it reaches a point where it will no longer improve with medical treatment. …
>
> Although the term maximum medical improvement is not included in the statute, the issue of whether any further medical progress can be reached is essential in determining when a disability becomes permanent and thus, when payments for permanent partial or permanent total disability should be calculated.

Cardwell v. Treasurer of Mo., 249 S.W.3d 902, 910 (Mo. App. 2008).

The treating surgeon Dr. Sonny Bal opined that employee reached maximum medical improvement following his left hip surgery as of August 9, 2011. We find Dr. Bal's opinion on this point to be persuasive, and we find that employee was permanently and totally disabled as of that date from the effects of the work injury considered alone. Accordingly, we must modify the award of the administrative law judge regarding the date of commencement of permanent total disability benefits. Employer is liable for permanent total disability benefits beginning August 9, 2011.

Temporary partial disability benefits

Section 287.180 RSMo provides for an award of temporary partial disability benefits where an employee's earning capacity is diminished by the effects of a work injury. The administrative law judge found that employee was only able to work 20 hours per week between October 8, 2009, and March 29, 2010, and again between June 28, 2010, and November 5, 2010, and awarded temporary partial disability benefits consistent with this finding.

Employer argues employee's testimony was insufficient to support the administrative law judge's findings, and suggests employee was required to provide additional evidence to more specifically establish his actual earnings during the relevant time periods. But the Missouri Supreme Court has specifically held that "[t]he ultimate issue

… remains earning capacity, not actual earnings" when calculating temporary partial disability benefits under § 287.180. *Minnick v. South Metro Fire Protection Dist.*, 926 S.W.2d 906, 911 (Mo. App. 1996). Accordingly, employee was not required to prove his actual earnings during the relevant time periods, but could meet his burden of proof by providing evidence of the nature and extent of his work injury and of his ability to compete in the open labor market.

Turning to employee's testimony, we note that he specifically testified that he was able to work a maximum of 4 hours per day during the relevant time periods. Employee's testimony on this point is corroborated by the medical treatment records, including those from the contemporary treating physician Dr. Krautmann suggesting employee was working "half days" during the time periods at issue. Employer did not present any contradictory evidence, such as payroll records or timesheets, to rebut employee's evidence regarding his earning capacity. To the extent employee's testimony on this point was nonspecific, in that he suggested he occasionally worked *less* than 4 hours per day, the administrative law judge's finding that employee was able to work 20 hours per week would appear to favor the employer.

We find employee's testimony on this point to be credible and sufficient to support the administrative law judge's factual finding that employee was capable of working 20 hours per week during the relevant time periods. We do note, however, that the administrative law judge incorrectly found that employee quit his job with employer on November 5, 2010. Instead, the testimony from both employee and his vocational expert, Mr. Eldred, suggests (and we so find) that the date employee quit his job was November 1, 2010.[1] Accordingly, we must modify the administrative law judge's calculation of employer's liability for temporary partial disability benefits as follows.

Employee is entitled to 18 weeks of temporary partial disability benefits for the period June 28, 2010, to November 1, 2010. Combined with the 24 and 4/7 weeks of temporary partial disability benefits to which employee is entitled for the period from October 8, 2009, to March 29, 2010, employee is entitled to the sum of 42 and 4/7 weeks of temporary partial disability benefits at the rate of $167.25 per week. Employer's total liability for unpaid temporary partial disability benefits is thus $7,120.07.

Employer's request for a 50% reduction in benefits under § 287.120.6(1) RSMo

Employer argues that employee's compensation should be subject to a 50% reduction under § 287.120.6(1) RSMo, which provides, as follows:

> Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or nonprescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury

[1] We note also that throughout her award, the administrative law judge stated that employee quit work owing to pain. But employee in fact testified (and we so find) that he resigned because he learned he would be receiving Social Security Disability benefits. We must accordingly disclaim the incorrect statements on pages 7, 10, and 27 of the administrative law judge's award suggesting employee quit on November 5, 2010, due to pain.

> was sustained in conjunction with the use of alcohol or nonprescribed controlled drugs.

To make its case that employee's work injury was sustained in conjunction with the use of non-prescribed controlled drugs, employer points to medical records from St. Mary's Health Center suggesting that an April 16, 2009, urine drug screen of employee was positive for cocaine metabolites, and testimony from its expert toxicologist, Dr. John Vasiliades. Employee, on the other hand, denied using cocaine while he was at work or in the few days leading up to the work injury.

Employer's documentation suggests the urine sample of April 16, 2009, was subject to initial "screening" at St. Mary's Health Center, and then sent for "confirmation" by Quest Diagnostics. It is uncontested, however, that the urine sample was not subject to any additional confirmation testing by a second laboratory. The screening from St. Mary's Health Center indicates: "Testing for above analytes was performed only for medical purposes on urine using screening methodology. Occasional false positives and negatives due to interfering substances can occur. Confirmation testing is available by request." *Transcript*, pages 1788-89. The subsequent report from Quest Diagnostics indicates:

> These results are for medical treatment only
> Analysis was performed as non-forensic testing
>
> *Transcript*, page 3307.

The Quest Diagnostics report also suggests that there were "no" chain of custody protocols performed in the handling of the urine specimen employee provided. *Id*. Dr. Vasiliades acknowledged that the drug testing at issue in this case was non-forensic, meaning that the "chain of custody is not as tight as when we do forensic work." *Transcript*, page 3206. Employer did not present firsthand testimony from a medical review officer or any other personnel involved in the handling or testing of the urine sample employee provided.

Our legal dictionary defines "forensic" as follows: "used in or suitable to courts of law or public debate." *Black's Law Dictionary*, 764 (10th ed. 2014). Especially in light of Dr. Vasiliades's concession that the chain of custody was not as tight with respect to the urine sample employee provided, and in the absence of any firsthand testimony from a medical review officer or other personnel who actually handled and tested the urine sample employee provided, we are not persuaded to credit the non-forensic drug test results from St. Mary's Health Center or Quest Diagnostics over employee's sworn and cross-examined testimony. Rather, we credit employee's testimony and find that he did not use cocaine at work or in the few days prior to the work injury. We find that employee did not have cocaine in his system at the time of the work accident on April 14, 2009, and conclude that employee's work injury was not sustained in conjunction with the use of non-prescribed controlled drugs.

We note that even if we were to credit the documents containing the drug test results, they suggest only that employee had benzoylecgonine in his system at the time he provided the urine sample. Dr. Vasiliades testified that benzoylecgonine is an inactive metabolite produced by the body in the process of breaking down cocaine, and that it

has no pharmacological effect. Although Dr. Vasiliades indicated that the window for detecting benzoylecgonine in the urine after typical recreational use of cocaine is around three days, Dr. Vasiliades did not provide any testimony from which we could determine, with any reasonable degree of specificity, the point at which the substance of cocaine would have been converted in employee's body into benzoylecgonine. Nor did Dr. Vasiliades identify benzoylecgonine as a "controlled" or "illegal" drug, and employer does not direct us to any other evidence that would so establish. This is important because employer's policy prohibited only the "presence of illegal drugs in … [employee's] system," not the presence of inactive metabolites associated with the use of such drugs. *Transcript*, page 1744. Given these circumstances, it would appear that the record lacks any evidence from which we could find that employee failed to obey employer's rule or policy relating to a drug-free workplace.

For the foregoing reasons, we affirm the administrative law judge's determination that employee's compensation is not subject to any reduction under § 287.120.6(1).

Corrections
Finally, we note that the administrative law judge's award contains some apparent typographical or clerical errors, which we hereby correct.

On page 8 of the administrative law judge's award, in the 20th numbered paragraph, the administrative law judge states: "On May 5, 2011, Dr. Bal performed left hip replacement surgery on Claimant." The date of this surgery was in fact May 19, 2011, and we accordingly correct the foregoing sentence as follows: "On May 19, 2011, Dr. Bal performed left hip replacement surgery on employee."

On page 18 of the administrative law judge's award, in the 65th numbered paragraph, the administrative law judge states: "At the time of the work injury, the employer had adopted a rule or policy rating to a drug-free workplace. That policy includes the following provision: It is the policy of Beck Motors to provide a work environment which is free from the use, sale, possession, or distribution of illegal drugs or the improve or abusive use of legal drugs on Beck Motors premises…" We correct the foregoing to read instead as follows: "At the time of the work injury, the employer had adopted a rule or policy relating to a drug-free workplace. That policy includes the following provision: It is the policy of Beck Motors to provide a work environment which is free from the use, sale, possession, or distribution of illegal drugs or the improper or abusive use of legal drugs on Beck Motors premises…"

Conclusion
We modify the award of the administrative law judge as to the issues of employer's liability for temporary partial disability benefits and the date that employer became liable for permanent total disability benefits.

Employer's liability for temporary partial disability benefits is $7,120.07.

Employer is liable for permanent total disability benefits beginning August 9, 2011, the date that employee reached maximum medical improvement.

The award and decision of Administrative Law Judge Vicky Ruth, issued April 21, 2014, is attached hereto and incorporated by this reference to the extent not inconsistent with our findings, conclusions, decision, and modifications herein.

This award is subject to a lien in favor of Randall O. Barnes, Attorney at Law, in the amount of 25% for necessary legal services rendered.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 9th day of January 2015.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____

John J. Larsen, Jr., Chairman

_____

James G. Avery, Jr., Member

_____

Curtis E. Chick, Jr., Member

Attest:

_____

Secretary

AWARD

Employee:	Richard L. Hertzing
Dependents:	N/A
Employer:	Beck Motors, Inc.
Additional Party:	Second Injury Fund
Insurer:	Missouri Automobile Dealers Workers Compensation Trust, c/o MADA Services Corporation
Hearing Date:	January 9, 2014

Injury No. 09-025872

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

Checked by: VR/cs

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 14, 2009.

5. State location where accident occurred or occupational disease was contracted: Freeburg, Osage County, Missouri.

6. Was above employee in the employ of above employer at the time of the 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 fell on his left hip when he stepped down from a ladder and tripped over a five-gallon bucket.

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 hip and back.

14. Nature and extent of any permanent disability: permanent total disability (against the employer/insurer).

15. Compensation paid to-date for temporary disability: $9,908.61.

16. Value necessary medical aid paid to date by employer/insurer? $93,536.98.

17. Value necessary medical aid not furnished by employer/insurer? N/A.

18. Employee's average weekly wages: $430.87.

19. Weekly compensation rate: $287.26.

20. Method of wages computation: By agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer:

    Unpaid temporary partial disability benefits of 43 weeks x $167.25 = $7,191.75
    Permanent total disability benefits of $287.26 per week starting 11/05/10, subject to review and modification pursuant to law.

22. Second Injury Fund liability: None.

23. Future medical awarded: N/A.

Said payments to begin immediately and to be payable and 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: Randall O. Barnes.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Richard L. Hertzing

Dependents: N/A

Employer: Beck Motors, Inc.

Additional Party: Second Injury Fund

Insurer: Missouri Automobile Dealers Workers Compensation Trust, c/o MADA Services Corporation

Hearing Date: January 9, 2014

Injury No. 09-025872

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

PRELIMINARIES

On January 9, 2014, Richard Hertzing (the claimant), Beck Motors (the employer), Missouri Automobile Dealers Workers Compensation Trust, in care of MADA Services Corporation (the insurer), and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing. Claimant was represented by attorney Randall Barnes. The employer/insurer was represented by attorney Matthew Murphy. The Second Injury Fund was represented by attorney David Zugelter, and attorney Brian Hermann observed. Claimant testified in person at the hearing and by deposition. Phillip Eldred also testified at trial. Dr. George Carr, Dr. Chris Fevurly, Terry Cordray, and Dr. John Vasiliades testified by deposition. Claimant submitted his brief on February 7, 2014. The employer/insurer submitted its brief on February 14, 2014, and the record closed at that time. The Second Injury Fund elected not to submit a brief.

STIPULATIONS

The parties stipulated to the following:

1. On or about April 14, 2009, Richard Hertzing (the claimant) was an employee of Beck Motors, Inc. (the employer) when he sustained an injury by accident. The parties agree that Claimant injured his left hip in the accident. The parties do not agree as to whether he injured his back or his left leg in the accident.
2. The accident occurred while Claimant was in the course and scope of his employment with employer.
3. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
4. The employer's liability for workers' compensation was insured by Missouri Automobile Dealers Workers Compensation Trust, in care of MADA Services Corporation.
5. The Missouri Division of Workers' Compensation has jurisdiction and venue in Cole County is proper. For trial purposes, venue is proper in Jefferson City, Missouri.

6. Notice is not an issue.
7. Claimant filed a Claim for Compensation within the time prescribed by law.
8. Claimant's average weekly wage is $430.87, yielding a weekly compensation rate of $287.26[1] for permanent partial and permanent total disability benefits.
9. Temporary disability benefits and/or temporary partial disability benefits have been paid to Claimant in the amount of $9,908.61.
10. Medical aid has been provided in the amount of $93,536.98.

ISSUES

The following issues are to be resolved in this proceeding:

1. Medical causation as to the alleged right leg and back injury.
2. Permanent total disability, or
3. Nature and extent of permanent partial disability.
4. Second Injury Fund liability.
5. Non-payment of temporary total disability benefits and/or temporary partial disability benefits.
6. The employer/insurer requests a 50% penalty pursuant to Section 287.120.6, RSMo. Should a 50% penalty be found, the employer/insurer requests a credit for past benefits and a reduction for future benefits, with the credit to apply to medical benefits as well.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

Exhibit A	Independent Medical Evaluation report of Dr. George Carr.
Exhibit B	*Curriculum Vitae* of Dr. Carr.
Exhibit C	Functional Ability Statement by Dr. Carr.
Exhibit D	List of medical records contained in Exhibit F.
Exhibit D-1	List of medical records contained in Exhibit F-1.
Exhibit E	Deposition of Dr. Carr.
Exhibit F	Binder No. 1 of medical records.
Exhibit F-1	Binder No. 2 of medical records.
Exhibit G	*Curriculum Vitae* of Phillip Eldred.
Exhibit H	Vocational report (5/29/12) by Phillip Eldred.
Exhibit H-1	Addendum to 5/29/12 report by Phillip Eldred.
Exhibit I	Wage Statement Form.
Exhibit J	TTD payment schedule from MADA.
Exhibit K	Employer's drug and alcohol policy.
Exhibit L	Letter (1/22/13) from Randall Barnes to Matthew Murphy.

[1] Although my calculations show that two-thirds of $430.87 is $287.25, the parties stipulated to a compensation rate of $287.26 and therefore, that is the amount that will be used.

Exhibit M	Letter (1/23/13) from Randall Barnes to Matthew Murphy.
Exhibit N	Letter (7/23/12) from Randall Barnes to John Rathmel.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

Exhibit 1	Medical records from St. Mary's Health Center.
Exhibit 2	Medical records from St. Mary's Health Center.
Exhibit 3	Medical records from St. Mary's Health Center.
Exhibit 4	Medical records from The Work Center.
Exhibit 5	Medical records from the University of Missouri Hospital emergency room.
Exhibit 6	Medical records from the University of Missouri Hospital.
Exhibit 7	Medical records from the University of Missouri Orthopedic Clinic.
Exhibit 8	Medical records from Dr. Donald Meyers.
Exhibit 9	Medical records from JCMG/Dr. John Krautmann.
Exhibit 10	Medical records from JCMG/Dr. Jonathan Craighead.
Exhibit 11	Employer's personnel record for Claimant.
Exhibit 12	Records from the Missouri Division of Workers' Compensation.
Exhibit 13	Deposition of Dr. Chris Fevurly.
Exhibit 14	Deposition of Terry Cordray.
Exhibit 15	Deposition of Dr. John Vasiliades.
Exhibit 16	Original Claim for Compensation (8/28/09).
Exhibit 17	Answer to Claim for Compensation of (9/15/09).
Exhibit 18	Amended Claim for Compensation (1/25/11).
Exhibit 19	Answer to Amended Claim for Compensation (2/27/11).
Exhibit 20	Deposition of Claimant (4/29/13).

The Second Injury Fund did not offer any exhibits.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. All depositions were admitted subject to any objections contained therein. Unless noted otherwise, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on April 1, 1956. As of the date of the hearing, he was 57 years of age. Claimant lives in Freeburg, Missouri.

2. Claimant has a high school education. He was in the U.S. Marine Corps for approximately four years. He has not taken any college courses and has not received any vocational education.

3. Claimant has worked in the construction industry for most of his adult life. He also worked in a factory for about five years.

4. Claimant believes he first began working for the employer in the 2000s, although he is uncertain of the exact date. He quit that position to go to work for the Quaker Window Company, during which time he also worked for The Butcher Shop. Claimant later returned to work with the employer, Beck Motors.

5. In regards to his April 14, 2009 injury, Claimant explained that on that date he was employed by Beck Motors. His job duties included maintenance of the premises of Beck Motors, general laborer, farm hand, and car washer. He also performed clean-up duties. He was paid $9.00 per hour for a 40-hour week, and he often worked overtime.

Primary injury - April 14, 2009

6. On April 14, 2009, Claimant was performing maintenance on a roof for his employer, Beck Motors. While climbing down the last rungs of a ladder, Claimant accidentally stepped on a overturned bucket. He slipped and fell hard on his left hip on the asphalt pavement. Claimant immediately reported the accident to his employer, who sent him home for the day. That evening, due to the ongoing and continuing pain, Claimant reported to the emergency room at St. Mary's Hospital.[2] The diagnosis was non-displaced left femoral neck fracture (hip fracture).

7. On April 15, 2009, the Claimant underwent a left hip pinning surgery whereby Dr. John Krautmann inserted three screws into Claimant's hip.[3] The post-operative diagnosis was "undisplaced left femoral head fracture."[4] Claimant was released from the hospital on or about April 16, 2009.

8. From the time of his release from St. Mary's Hospital on April 16, 2009 until October 8, 2009 (when he returned to part-time work), Claimant continued to receive medical treatment and physical therapy.[5]

9. Claimant underwent physical therapy at The Work Center from July 6, 2009 through July 29, 2009. Claimant was unable to walk without assistance for about two months after the surgery. He was off work completely during this period.

10. From October 8, 2009 until March 29, 2010, while working 4 hours a day, Claimant continued to be treated by Dr. John Krautmann.[6]

11. On or about December 16, 2009, Dr. Krautmann recommended that Claimant use compression hose for reported swelling in his left foot.

[2] Exh. 9, p. 00166 (as noted on the bottom right-hand corner).
[3] Exh. 9, p. 00165 (as noted on the bottom right-hand corner).
[4] Exh. 9.
[5] Exh. 9.
[6] Exh. F.

12. On March 29, 2010, due to the continuing pain and swelling, Dr. Krautmann performed surgery on Claimant to remove the hardware from the left femoral neck (left hip).[7] Specifically, the doctor removed three cannulated screws.

13. Claimant was unable to work from March 29, 2010 (the date of the surgery to remove the hardware) until April 28, 2010, when he was returned to work by Dr. Krautmann. At that time, Claimant was provided instructions to work half-time and with the restriction of carrying and lifting no more than 10-15 pounds.[8]

14. Dr. Krautmann released Claimant at maximum medical improvement on July 15, 2010.

15. On August 18, 2010, Claimant saw Dr. Jonathon Craighead for an evaluation.[9] Dr. Craighead diagnosed trochanteric bursitis and mild left hip degenerative joint disease. Dr. Craighead opined that Claimant had a permanent partial disability rating of 7% of the whole person due to the hip injury. The doctor indicated that the rating was justified by Claimant's antalgic gait and mild abductor weakness. However, Dr. Craighead also indicated that he did not believe Claimant was at maximum medical improvement. The doctor recommended a Depo-Medrol injection as well as continued therapy with modalities. He also felt Claimant would benefits from regular anti-inflammatories. Dr. Craighead indicated that given Claimant's current condition, he did not think Claimant could work more than 2.5 hours standing, although he felt Claimant could work 8 hours with seated breaks or seated work sessions.[10]

16. Claimant then worked half-time until November 5, 2010, when he resigned due to his inability to work pain-free.

17. On December 18, 2010, Dr. Krautmann reported that Claimant was scheduled for a lumbar spine MRI. The doctor felt the range of motion of the hip was fine and that Claimant's pain was over the right trochanter. Dr. Krautmann did not believe the pain was from the left hip joint. He recommended pain management assessment. The MRI of the lumbar spine revealed left disc protrusion at L4-5 with impingement of the neural foramen and entrapping of the L5 nerve root.

18. On January 6, 2011, Claimant was seen by Dr. Joseph Meyer at the Columbia Pain Center. Dr. Meyer performed left L4 and L5 lumbar transforaminal epidural injections with fluoroscopic guidance. On February 11, 2011, Claimant returned to Dr. Meyer and reported that he received no improvement with the injections. Dr. Meyer prescribed a TENS unit and Neurontin.

19. On or about April 5, 2011, Claimant was seen by Dr. Sonny Bal, who diagnosed degeneration in the labrum of the left hip and acetabulum. An X-ray of the hip showed a small osteophyte at the left femoral head/neck junction. An April 11, 2011 MRI revealed

[7] Exh. 9, p.00163 (as noted on the bottom right-hand corner of the page).
[8] Exh. F.
[9] Exh. 10.
[10] Exh. 10.

a labral tear on the anterosuperior aspect of the acetabulum. Dr. Bal recommended a total hip replacement.

20. On May 5, 2011, Dr. Bal performed left hip replacement surgery on Claimant.[11]

21. Claimant underwent physical therapy at the Work Center for approximately two and a half months after the May 2011 hip-replacement surgery.

22. On or about August 9, 2011, Dr. Bal opined that Claimant had reached maximum medical improvement.[12] At that time, Dr. Bal felt at that time that Claimant's low back pain was pre-existing and unrelated to the work event of April 14, 2009.

Pre-existing injuries

Knees

23. Claimant injured his right knee in 1982 and 1984 and he injured his left knee in 1987 or 1988.[13] His left knee injury resulted in a worker's compensation claim. That claim was resolved with "approximately 20 percent permanent disability" of the left knee.[14] In his report, Dr. Carr rated Claimant's right knee injury as a 20 percent permanent partial disability and his left knee injury as a 20 percent permanent partial disability.[15]

Right hip and buttocks

24. Claimant suffered an injury from a pallet jack in 1995; this resulted in right hip and buttocks pain.

Back

25. Claimant injured his back in 1999 when he fell 15 to 20 feet off a scaffold.[16] X-rays and an MRI revealed a compression fracture at L-1 and herniated discs at C3-4.[17] In his report, Dr. Carr rated Claimant's prior back injury as a 20 percent permanent partial disability.[18]

Head and spine

26. In July 2000, Claimant was struck by a motor vehicle and suffered a closed head injury and L-1 compression fracture. He was treated at the University Hospital in Columbia, Missouri. Claimant was released without physical restrictions.[19] However, Claimant has little or no recollection of the year following this accident and he continues to suffer from persistent memory deficits and irritability due to this injury.

[11] Exh. F.
[12] Exh. F, p. 00273 (as noted on the bottom right-hand corner of the page).
[13] Exh. F and F-1.
[14] Exh. F and F-1
[15] Exh. A.
[16] Exh. F.
[17] Exh. F.
[18] Exh. A.
[19] Exh. F.

Heart

27. In 2003, Claimant suffered a heart attack and received implanted stents. Nine months later he underwent a quadruple by-pass. Claimant testified that he was returned to work without restrictions.

Neck

28. In December 2004, Claimant was in a motor vehicle accident, which resulted in neck pain.

Current complaints

29. Claimant testified that since his April 2009 fall, he has been in constant pain. The pain begins in his low back on the left side and descends into his left leg. Dr. Krautmann's removal of the screws from his hip did not stop the pain. The pain remains constant, keeping him up at night and hindering his ability to walk. The pain even forces him to lie down during the day. Claimant explained that walking as little as 1000 feet causes pain to set in. Claimant also suffers from swelling in his left leg and general weakness in the leg. He described his low back, left leg, and hip as constantly hurting. The more Claimant uses his left hip, the worse it feels. Going up or down stairs increases his pain. The hip hurts if he walks, if he carries any weight, and if he sits for longer than half an hour. Claimant's injuries have extended to his left foot as well; the left foot pain increases after he does significant activity.

30. Claimant further testified that his left hip and leg prevent him from doing common household chores. He can help dust furniture or do other light chores for a short time and then he has to rest. Before his 2009 work injury he would take care of his yard and cut the grass with a riding mower, but since the injury, riding a lawnmower causes too much pain. He now has difficulty driving because his left leg is not fast enough when braking. Claimant indicated that this condition caused him to give up his driver's license because he fears for his safety.

31. Claimant's injuries also prevent him from participating in the hobbies he previously enjoyed, such as hunting and fishing. Instead, he spends his days watching TV. As described by one physician, Claimant has "basically a sedentary day on a day-to-day basis. He finds it hard to sleep and even hard to [lie] on his left side.[20]

Request for unpaid temporary disability benefits

32. Claimant testified that during the period of October 8, 2009 to March 29, 2010, he worked only 20 hours per week due to the effects of his hip injury. He was paid $9.00 per hour and thus earned $180 per week during this period, but he did not receive any temporary disability benefits.[21] Claimant requests temporary partial disability benefits for this period (24 and 4/7 weeks).

[20] Exh. A., report p. 1.
[21] Exh. J. (Note: although Exhibit J shows a payment starting on April 5, 2010, it appears that the start date of the benefits would have been seven days before – i.e. March 29, 2010.)

33. From March 29, 2010 to April 28, 2010, Claimant did receive temporary total disability benefits.[22]

34. On April 28, 2010, Dr. Krautmann again released Claimant to work halftime.[23] Claimant was paid temporary partial disability benefits until June 28, 2010.[24] The temporary partial disability benefits stopped on June 28, 2010. Claimant, however, continued to work halftime until November 5, 2010. As previously noted, on that date Claimant resigned his job due to his inability to work without pain. Claimant request temporary partial disability benefits for the period of June 28, 2010 until November 5, 2010 (18 and 3/7 weeks).

Dr. Chris Fevurly – Independent Medical Evaluation

35. On November 9, 2011, Dr. Chris D. Fevurly performed an Independent Medical Evaluation of Claimant on behalf of the employer/insurer.[25] He is board-certified in internal medicine, preventative medicine, occupational medicine, and environmental medicine.[26] Dr. Fevurly interviewed Claimant, performed a physical exam, and reviewed various medical records and Claimant's 2011 deposition.[27] Dr. Fevurly noted that Claimant ambulates with an obvious limp and there is an obvious leg length discrepancy, with the right leg two to three centimeters shorter than the left leg.[28] Dr. Fevurly indicated that the April 2009 work injury resulted in a left proximal femoral neck fracture, which injured the left hip joint and eventually led to the need for a total hip replacement.[29] Dr. Fevurly noted that the open reduction and internal fixation of the left femoral neck fracture led to healing of the femoral neck fracture, but the fracture also likely injured the hip joint, leading to chondral/labral injury and loss of cartilage height, which produced the degenerative hip disease that eventually required the total hip replacement.[30] The doctor further noted that Claimant's limping gait from the chronic left hip pain and the mismatched leg length attributed to or caused the chronic left hip muscle girdle pain.[31]

36. Dr. Fevurly indicated that no future medical treatment (other than a shoe lift) is warranted.[32] The doctor opined that Claimant's total hip replacement on the left side resulted in a very good outcome and in a 35% permanent partial disability of the lower extremity/hip.[33] He also noted that there is no evidence that the April 2009 work injury resulted in permanent partial disability as to Claimant's lumbar spine. Dr. Fevurly indicated Claimant should avoid lifting greater than 30 pounds on more than an

[22] Exh. J.
[23] Exh. F.
[24] Exh. J.
[25] Exh. 13.
[26] Exh. 13, p. 8.
[27] Exh. 13, report pp. 2-3.
[28] Exh. 13, report p. 6.
[29] Exh. 13, report p. 8.
[30] Exh. 13, report pp. 8-9.
[31] Exh. 13, report p. 9.
[32] Exh. 13, report p. 9.
[33] Exh. 13, p. 18, and report p. 9.

occasional basis; that he should not climb ladders; and that he cannot use stairs on a repetitive basis. The doctor further found that Claimant cannot stand, walk, or sit continuously for more than 30 minutes without being allowed to alternate between positions. Moreover, Dr. Fevurly opined that the "prior PPD ratings to his knees have not resulted in permanent restrictions."[34]

Dr. George Carr - Independent Medical Evaluation

37. On April 30, 2012, Dr. George Carr examined Claimant for an Independent Medical Examination (IME).[35] Dr. Carr is a family practice physician with training and experience in providing workers' compensation evaluations.[36] The doctor examined Claimant, interviewed Claimant and his wife, and reviewed various medical records. In his examination, the doctor found the following:

    - Cervical spine - range of motion and palpation was normal.
    - Thoracic spine – range of motion and palpation was normal.
    - Lumbar spine – reduced range of motion and some mild parapsinous muscle tenderness and spasm. Straight leg raise was tight bilaterally but did not increase pain.
    - Extremity and joint exam – the upper extremity exam was within normal limits.
    - Lower extremity exam – there was no significant pain to palpation or on range of motion of the right hip. The right knee had some thickening crepitance on range of motion. There was no particular point tenderness to palpation of the right knee. Left lower extremity revealed tenderness to palpation of the left hip and on range of motion. The range of motion was restricted due to pain and stiffness. There was some thickening noted and some crepitance.

38. As to the April 14, 2009 work injury, Dr. Carr diagnosed Claimant with a left hip fracture with left hip pinning, status post hardware removal and status post left hip replacement. He also found that Claimant has a leg length discrepancy due to the multiple surgeries. Dr. Carr diagnosed Claimant with the following pre-existing conditions: low back pain, status post L1 compression fracture; status post right knee surgery with continued pain; status post left knee surgery with persistent pain, and status post closed head injury from motor vehicle accident with persistent memory deficits and irritability.

39. Dr. Carr opined that Claimant has the following permanent partial disabilities as a result of the April 2009 work injury:

    - 80% of the left hip; this accounts for the injury's contribution to his chronic pain with reduced range of motion and limited endurance, and the need for three previous surgeries.
    - 15% of the body as a whole rated at the lumbosacral spine.[37]

[34] Exh. 13, report p. 10.
[35] Exh. A.
[36] Exhs. E and B.
[37] Exh. A.

40. Dr. Carr indicated that it is his opinion that the April 2009 work accident is the prevailing factor and the cause of Claimant's left hip fracture and the need for subsequent surgeries, as well as the cause of persistent back pain and decreased range of motion and endurance. Dr. Carr indicated that based upon his examination, Claimant is not a surgical candidate.[38]

41. Dr. Carr opined that Claimant has the following permanent disabilities from his pre-existing injuries:

    - 20% permanent partial disability (PPD) of the left knee. This rating accounts for the injury, the need for surgery, and the persistent decreased range of motion and limited endurance with persistent pain.
    - 20% PPD of the right knee. This rating accounts for the increased pain with reduced range of motion and limited endurance and the need for the previous surgery.
    - 20% PPD of the body as a whole rated at the lumbosacral spine due to the previous history of L1 compression fracture and herniated disk. This rating accounts for the injury's contribution to his chronic low back pain with reduced range of motion and limited endurance.[39]

42. Dr. Carr noted that these pre-existing disabilities would be a hindrance to Claimant's employment or re-employment.

43. Dr. Carr recommended the following restrictions for Claimant:

    - avoid repetitive bending, twisting, or lifting
    - lift no more than 10 pounds
    - avoid uneven surfaces, ladders, and unprotected heights
    - avoid prolonged vibration
    - avoid repetitive use of his left leg.

44. In addition, Dr. Carr opined that "Based on my previous employment for the Disability Determinations Office of Social Security . . . I feel that the injury to this individual and its subsequent chronic decreased residual capacity of his left hip combined with his educational background and his work history would render him unemployable."[40] He initially stated that the "combination of disabilities creates a substantially greater disability than the simple total of each and a loading factor should be added. The combination of impairments renders Mr. Hertzing completely and permanently disabled."[41]

45. Dr. Carr testified by deposition on August 10, 2012.[42] Dr. Carr recalled that Claimant

[38] Exh. A
[39] Exh. A, p. 6.
[40] Exh. A, p. 6.
[41] Exh. A, p. 6.
[42] Exh. E.

"had a very irregular gait and tended to lump with his left leg. He was quite slow and he was forward flexed. All of those things are consistent with the pain complaints in his back and his hip."[43]

46. Dr. Carr further explained his restrictions via a Functional Ability Statement. In this record, Dr. Carr noted Claimant's limitations in numerous activities and environments:[44]

Activity	Frequency allowed
Climbing	Never
Bending	Never
Kneeling	Never
Crouching	Never
Balancing	Occasionally (up to 2.5 hours)
Crawling	Occasionally (up to 2.5 hours)
Reaching	Occasionally (up to 2.5 hours)

Environment	Frequency allowed
Electrical shock	Never
High exposed places	Never
Explosive	Never
Toxic/caustic chemical	Never
Exposure to weather	Occasionally (up to 2.5 hours)
Extreme cold	Occasionally (up to 2.5 hours)
Extreme heat	Occasionally (up to 2.5 hours)
Wet and/or humid	Frequently (2.5 to 5.5 hours)
Moving mechanical parts	Frequently (2.5 to 5.5 hours)
Radiation	Frequently (2.5 to 5.5 hours)
Noise level (unspecified)	Frequently (2.5 to 5.5 hours).

In addition, Dr. Carr noted that Claimant uses narcotic pain medication (Percocet) and that he needs to lie down during the day to relieve pain.

47. When asked whether Claimant was unemployable because of the last injury alone or because of the combination of injuries, Dr. Carr responded as follows:

> You know, the left hip would make him basically unemployable in most situation, because it was – you know, he had went through three surgeries on it and he's still basically not able to, you know, stand for very long or walk at any distance, so, you know, it could be, you know, a factor that is the only thing causing him to be disabled based on a lot of the factors that I just mentioned, but it certainly would, in combination, make him that way.[45]

48. In his deposition, Dr. Carr was asked which of Claimant's restrictions imposed due to

[43] Exh. E, p. 15.
[44] Exh. C.
[45] Exh. E, p. 23.

the 2009 work injury the doctor would have also placed on Claimant prior to that work injury. Dr. Carr acknowledged that "[i]n many cases what I would have done is make some of them less severe."[46] However, he indicated that many of the restrictions would have been basically the same as those for the 2009 work injury.

Phillip Eldred - Vocational Evaluation

49. On April 1, 2011, Phillip Eldred, a vocational rehabilitation expert, performed a vocational rehabilitation evaluation of Claimant at the request of Claimant's attorney. As part of that evaluation, Mr. Eldred interviewed Claimant, administered vocational assessment tests, and reviewed Claimant's medical history. The records reviewed include ones from St. Mary's Health Center, Dr. Krautmann, The Work Center, Dr. Craighead, Columbia Interventional Pain Center, LLP, the University of Missouri Hospital, Dr. Carr, workers' compensation records, and Claimant's deposition (February 10, 2011).[47] Mr. Eldred also performed WRAT-4 testing (Wide Range Achievement Test), which is a test of basic academic skills in reading, spelling, and math. Mr. Eldred explained these functions are crucial to employment in non-manual labor jobs. Claimant tested as reading at the 6.9 grade level, spelling at the 6.4 grade level, and his ability to do math was at the 6.3 grade level.[48] Mr. Eldred opined that Claimant's results on the PTI-Oral Directions Test show a "low ability to concentrate and listen to verbal directions."[49]

50. After reviewing the physical restrictions and limitations found in the medical records, Mr. Eldred found that Dr. Craighead, Dr. Meyer, and Dr. Krautmann all gave restrictions before the hip replacement surgery. Mr. Eldred explained those restrictions would not have considered Claimant's physical ability after the hip-replacement surgery. Mr. Eldred also found Dr. Bal's restrictions were undefined. After reviewing both Dr. Carr and Dr. Fevurly's limitations, Mr. Eldred found Claimant has "vocational restrictions at less than the sedentary work level."[50]

51. Mr. Eldred indicated that as with any person, Claimant's future employment prospects are "based on his physical capacity to perform work tasks, along with his age, education, work experience, and vocational skills and aptitudes."[51] Mr. Eldred noted that Claimant's physical capacity to perform work was found to be at the "less than sedentary" work level. Mr. Eldred determined that Claimant could not return to his previous work.

52. Mr. Eldred then reviewed Claimant's work history and analyzed his job prospects with the "OASYS" Occupational Access System. He determined that Claimant has no transferable job skills, no training potential, and no ability to perform unskilled jobs. Mr. Eldred even analyzed the labor market assuming Claimant could work a sedentary job. However, he still found that Claimant would not find employment in a competitive

[46] Exh. D, pp. 42-43.
[47] Exh. H, p. 1.
[48] Exh. H, p. 16.
[49] Exh. H, p. 17.
[50] Exh. E, p. 15.
[51] Exh. H, p. 18.

marketplace. Mr. Eldred noted that each of Claimant's prior jobs required physical activity at greater than the sedentary level, and that Claimant has no transferable job skills and no possibility of re-training. Mr. Eldred explained his opinion as follows:

> Richard is fifty-five years of age. Due to Richard's age, he is at the point where age significantly affects a person's ability to do gainful work. Such individuals when restricted to Sedentary Work and who can no longer perform relevant past work and have no transferable job skills have little prospect for obtaining competitive employment. In order for there to be transferability of skills to Sedentary Work for individuals who are of advanced age (55 and over) there must be very little, if any, vocational adjustment required in terms of tools, work processes, work settings, or the industry. As a result of his pain, impairments, and vocational restrictions, it is unlikely an employer in the normal course of business would consider employing Mr. Richard Hertzing.

53. Mr. Eldred examined a sampling of job listings that might appear on the Internet and explained why those positions would not and could not be filled by Claimant. Mr. Eldred examined the retail sales associate position and rejected it since it was above the sedentary level. He rejected the next position, that of a customer service associate, because it was above the sedentary level. Mr. Eldred further explained that Claimant's problems with driving would be an impediment to work. Given that Claimant lives in a rural area, the drive to employment would mean going to Jefferson City or the Lake of the Ozarks. Mr. Eldred indicated that even then, according to acceptable statistics relied upon by the vocational rehabilitation field, the type of job for which Claimant might qualify represents only one-half to one percent of all jobs in Missouri and those jobs are mostly located in major metropolitan areas.

54. Within a reasonable degree of professional and vocational certainty, Mr. Eldred concluded that although Claimant has pre-existing conditions that are an impediment or hindrance to employment, his last injury (April 2009) alone causes him to be unemployable. Mr. Eldred opined that Claimant is unable to perform any of his past work and that it is highly unlikely that any reasonable employer in the normal course of business would hire Claimant for competitive, gainful employment. Mr. Eldred further opined that Claimant does not have any transferable jobs for the sedentary work level even if he could perform work at the sedentary work level, and that he is unemployable in the open labor market.

55. On August 21, 2013, Mr. Eldred provided an addendum to his May 2012 report. He noted that he had reviewed the following additional records and reports: Claimant's April 23, 2013 deposition and the November 2011 records from Dr. Feverly. Mr. Eldred indicated that after reading and reviewing these additional records, his opinion had not changed. He again stated that Claimant "is permanently and totally disabled as a result of his injury on April 14, 2009 in isolation. His limitations for this injury alone are severe enough to cause him to be permanently and totally disabled."[52]

[52] Exh. H-1.

Terry Cordray - Vocational Evaluation

56. Terry Cordray, Vocational Rehabilitation Counselor, testified on behalf of the employer/insurer.[53] On October 16, 2012, Mr. Cordray performed a vocational assessment of Claimant, and on October 20, 2012, he issued his report. Mr. Cordray reviewed numerous records as part of his review, including the following: Claimant's February 2011 deposition, Dr. Carr's deposition, prior Missouri workers' compensation claims of Claimant, a surveillance video, Social Security Disability records and Award, along with records from Dr. Bal, Dr. Craighead, The Work Center, the University of Missouri-Columbia Hospital, Dr. Fevurly, Dr. Krautmann, Rehabilitation Consulting Services, Dr. Carr, Jefferson City Medical Group, Dr. Meyer, St. Mary's Health Center, Dr. Cameron, Dr. Smith, and Mike Frossard, MPT/Laura Jones, MOT, OTR/L.[54] Mr. Cordray also administered certain tests to Claimant. Mr. Cordray noted that the Wide Range Achievement Test, Revised 4 (WRAT-R4) indicates Claimant performed at the low average range in spelling and was at the average range in math.[55] On the Wonderlic Personnel Test (WPT), Claimant tested as being in the average range of intelligence.

57. Mr. Cordray indicated that he reviewed the jobs posted at jobs.mo.gov, the internet site for job positing for the State of Missouri Employment Office. Mr. Cordray then reviewed all jobs posted within 30 miles of Claimant's home zip code, 65035. According to Mr. Cordray, the job postings included positions for cashier, customer service associate, and retail sales positions. Mr. Cordray opined that sedentary and light unskilled jobs do exist within a reasonable commuting distance of Claimant.[56]

58. Mr. Cordray found that Claimant is a high school graduate, that he had performed primarily medium and heavy unskilled jobs, and that he had obtained entry-level light skills in electrical work, carpentry, and painting, and that "he has no other skills."[57] Mr. Cordray stated that Claimant "is not a highly skilled worker."[58]

59. Mr. Cordray opined that based upon Dr. Carr's testimony, Claimant's current physical limitations limit him to sedentary work. Mr. Cordray believes Claimant is employable, just not at his old jobs.[59] According to Mr. Cordray, sedentary, unskilled jobs do exist in the rural Missouri area and these jobs include cashier and customer service representative. Mr. Cordray indicated that there are cashiers at small convenience stores that stock products that require lifting up to 20 pounds but that there are also cashiers that do not do stocking, emptying trash, or cleaning.[60]

[53] Exh. 14.
[54] Exh. 14, p. 2.
[55] Exh. 14, report p. 12.
[56] Exh. 14, report p. 14.
[57] Exh. 14, p. 22.
[58] Exh. 14, p. 22.
[59] Exh. 14, p. 32.
[60] Exh 14, report p. 14.

60. Cross-examination of Mr. Cordray, however, revealed that he failed to consider all of Dr. Carr's records. When questioned about the restrictions imposed by Dr. Carr, and the effect of those restrictions, Mr. Cordray testified as follows:

> Dr. Carr did not mention standing. He didn't limit his standing ability. So actually the definition of sedentary work is no standing over two hours of an eight-hour day And so 10 pounds lifting is not just sedentary work, it's also light work. Light work is work that exceeds sedentary and it's frequent standing. So basically up to six hours a day standing. So [Claimant] could do work that required no more than lifting of 10 pounds but he could do standing work. That would be sedentary jobs such as a cashier or it would be light jobs like retail sales, as long as you're not stocking shelves that you're required to lift over 10 pounds.[61]

61. Additional questioning of Mr. Cordray by Claimant's attorney, Mr. Barnes, includes the following exchange:

> Q: Okay. Now correct me if I'm wrong, but I heard you state earlier that you didn't think Dr. Carr restricted [Claimant's] ability to stand or walk more than two hours; is that correct? Or tell me if I'm wrong.
>
> A: He said - - the only restrictions I have are from his deposition testimony, and from that testimony he said 10 pounds lifting, he should avoid uneven surfaces, but does not comment on standing other than that.
>
> Q: Okay. Let me have you look at this.
>
> **********
>
> Q: Okay. **Would it be a fair statement to say that your opinions that you rendered earlier did not take into account that functional ability statement?**
>
> **A: That's correct. I didn't see it.**
>
> Q: Okay…. Just basically looking at that, would that change your opinions here today?
>
> A: It would change my opinion about Dr. Carr. It wouldn't about my other opinions, because my other opinions . . . are based not only on Dr. Carr, but the comments of Dr. Bal, the restrictions I think of Dr. Craighead, and the restrictions from the - - whether that's a functional capacity evaluation, I don't remember. It looks like the physical - -

[61] Exh. 14, p. 23.

> Q: Frossard?
>
> A: Yes, from the physical therapist. So based on those doctors and that physical therapist, my opinions would stay the same**. Based on this functional ability statement from Dr. Carr**, **the man is totally disabled.**"[62]

62. Mr. Cordray then acknowledged that he was relying on the opinions of Dr. Meyer, Dr. Craighead, Dr. Krautmann, and Mr. Frossard (the physical therapist).[63] He also acknowledged that these doctors and the physical therapist issued their restrictions *before* Claimant had his hip replacement surgery.[64] Mr. Cordray indicated that it is "not for me to decide that the presurgery restriction should be ignored."[65]

63. Although Mr. Cordray opined that Claimant could qualify for a job as a first-line supervisor, he later admitted, "First line supervisors are typically working supervisors. … They're physically doing the same chores as those they supervise. ***So no, he couldn't do those jobs***. But intellectually, he's capable of doing those jobs."[66] Mr. Cordray further agreed that Claimant had never had a clerical job or a first-line supervisory position.[67] In addition, Mr. Cordray admitted he did not know if Claimant could even use a computer.[68]

Employer's drug and alcohol policy

64. Claimant testified that he was unaware the employer was claiming a violation of the employer's alcohol/drug policy until early 2013. He was also unaware the alleged testing had even taken place in April 2009. When he received notice of the drug testing in early 2013, Claimant instructed his counsel to get the company policy. After the policy was received, Claimant contested the results. Claimant indicated that those steps led to Exhibits L and M being mailed, via certified mail, to counsel for the employer/insurer on January 22 and January 23, 2013. The first letter requested the policy. The second letter requested the relief as provided under the policy, to wit: that the employer produce for the employee the sample for re-testing as required by the policy. Claimant further testified that the sample was never provided.

65. At the time of the work injury, the employer had adopted a rule or policy rating to a drug-free workplace. That policy includes the following provision:

> It is the policy of Beck Motors to provide a work environment which is free from the use, sale, possession, or distribution of illegal drugs or the improve or abusive use of legal drugs or alcohol on Beck Motors premises, and to require employees to perform all Beck Motors-related job duties, either on or off Beck

[62] Exh. 14, p. 33 - 35. [Emphasis added.]
[63] Exh. 14, pp. 35-36.
[64] Exh. 14, p. 36.
[65] Exh. 14, p. 37.
[66] Exh. 14, p. 52. [Emphasis added.]
[67] Exh. 14, p. 53.
[68] Exh. 14, p. 53.

> Motors premises, without the presence of illegal drugs, alcohol, or inappropriate legal drugs in their systems.[69]

66. The policy also addresses the testing procedures to be used in relation to the drug-free workplace as follows:

> TESTING PROCEDURES
> When an employee's first test result is positive, the testing laboratory will notify Beck Motors Safety Coordinator and the employee. If the employee challenges the positive result, the employee may pay to have the sample tested at another laboratory of his/her choice. If the employee does not challenge the positive result, then the positive result is accepted as confirmed. If the employee challenges the positive result, and the other laboratory confirms the positive result, then the result is confirmed as positive. If the employee challenges the result and the other laboratory does not confirm the positive result, then Beck Motors may request another sample or accept the result as a false positive.[70]

67. On or about April 15, 2009, a urine sample was collected by St. Mary's Health Center as part of the treatment rendered to Claimant and in anticipation of the surgery that was to be performed on Claimant. That sample tested positive for cocaine.[71]

68. The testing laboratory did not inform Claimant of the allegedly positive drug test. Instead, nearly four years later, the employer informed Claimant of the allegedly positive test.

69. Claimant, though his attorney, subsequently requested the sample for retesting – as provided by the policy – but the sample was never provided.

Dr. John Vasiliades

70. Dr. John Vasiliades testified by deposition, which was taken on August 2, 2013, on behalf of the employer/insurer.[72] Dr. Vasiliades indicated that he has a bachelor's degree in chemistry and a doctorate in chemistry; he also did a fellowship in clinical chemistry and toxicology.[73] Dr. Vasiliades testified that Claimant's drug screening test was positive for the presence of cocaine metabolite BE.[74] Dr. Vasiliades explained that in forensic urine drug testing or clinical drug testing, when one is testing for cocaine, the test looks for the major metabolite of cocaine, which is benzoylecgonine or BE, in the urine.[75] Dr. Vasiliades noted that Claimant's drug testing was non-forensic drug testing, which means that the chain of custody is not as tight as in forensic testing.[76]

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[69] Exh. K.
[70] Exh. K.
[71] It appears that the sample also tested positive for opiates, which were prescribed during that hospital stay.
[72] Exh. 15.
[73] Exh. 15, p. 7.
[74] Exh. 15, p. 17.
[75] Exh. 15, p. 11.
[76] Exh. 15, pp. 19-20, p.. 36.

71. Dr. Vasiliades indicated that based on the drug test, Claimant consumed cocaine sometime within two or three days of the date the urine was collected – which was April 15, 2009.[77] Thus, Dr. Vasiliades believes Claimant had cocaine in his system on April 14, 2009, the date of the work injury.[78]

72. Dr. Vasiliades was asked whether Claimant was under the influence of the drug (cocaine) at the time of the accident. In response, he testified as follows:

> What I can say at this point is not – urine is a good way for identifying people who use drugs. You cannot use the urine concentration as an indicator of the impairment of an individual who has used that drug.
>
> Because there are two things I don't know, as I said before. I do know that the drug was taken in the body. What I do not know is when the drug was taken, and I do not know the amount of the drug that was taken.
>
> If we want to show impairment of an individual, we need to get a blood sample to determine the concentration of the parent compound, cocaine, which is in the body at the time of the accident. In this case, we do not have that. So, therefore, I cannot give an opinion in terms of impairment, but I do know that cocaine was taken in the system probably within a three-day window for him to be positive.[79]

73. Upon questioning, Dr. Vasiliades agreed that he cannot determine whether Claimant ingested or used cocaine two minutes before the workplace accident, two hours before, or two days before.[80] Moreover, he agreed that he cannot, within a reasonable degree of toxicological certainty, say that cocaine was actively affecting Claimant's brain and nervous system (or any other system of the body) at the time of the injury.[81] In addition, **Dr. Vasiliades agreed that he cannot say within a reasonable degree of certainty that Claimant's injury was in conjunction with Claimant being under the influence of cocaine**.[82] Likewise, Dr. Vasiliades agreed that he cannot say within a reasonable degree of certainty that Claimant suffered this injury while he was affected by the presence of cocaine.[83]

74. Because the drug test performed on Claimant was non-forensic testing, Dr. Vasiliades indicated that he could not attest to how the sample was handled, who possessed the sample, or who transferred the sample.[84]

75. Dr. Vasiliades testified that the symptoms of using cocaine, or the "high" from doing so,

[77] Exh. 15, p. 28.
[78] Exh. 15, p. 28.
[79] Exh. 15, p. 30. [Emphasis added.]
[80] Exh. 15, p. 59.
[81] Exh. 15, p. 59.
[82] Exh. 15, pp. 59-60.
[83] Exh. 15, p. 60.
[84] Exh. 15, p. 37.

last for one to two hours after using the cocaine.[85]

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

Under Missouri Workers' Compensation law, the claimant bears the burden of proving all essential elements of his or her workers' compensation claim.[86] Proof is made only by competent and substantial evidence, and may not rest on speculation.[87] Medical causation not within lay understanding or experience requires expert medical evidence.[88] When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.[89]

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.[90] Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.[91]

The fact finder is encumbered with determining the credibility of witnesses.[92] It is free to disregard that testimony which it does not hold credible.[93]

Issue 1: Medical causation.
Issue 2: Permanent total disability or
Issue 3: Nature and extent of permanent partial disability.
Issue 4: Second Injury Fund liability.

To be entitled to workers' compensation benefits, Claimant has the burden of proving that the alleged injury was directly caused by the accident, that there is a causal connection between the accident and the compensable injury, and that the injury resulted in the disability claimed.[94] The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.[95]

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[85] Exhibit 15, pp. 65-66.
[86] *Fischer v. Archdiocese of St. Louis,* 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus*., 83 S.W.3d 581, 583 (Mo. App. 2002).
[87] *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).
[88] *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).
[89] *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).
[90] *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).
[91] *Webber v. Chrysler Corp*., 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).
[92] *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).
[93] *Id*. at 908.
[94] *Kerns v. Midwest Conveyor*, 126 S.W.3d 445 (M. App. W.D. 2004), *Rana V. Landstart TLC*, 46 S.W.3d 613, 622 (Mo. App. W. D. 2001).
[95] Section 287.020.3(1), RSMO. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005 unless otherwise noted.

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."[96]

An "injury" is defined to be "an injury which has arisen out of and in the course of employment. 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."[97] An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and 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 non-employment life.[98]

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.[99] The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.[100] A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.[101] It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.[102]

Section 287.020.7, RSMo, provides that "total disability" is 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.[103] The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.[104] The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.[105] When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.[106] If the last injury in and of itself renders a claimant

[96] Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.
[97] Section 287.020.3(1).
[98] Section 287.020.3(c).
[99] *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).
[100] *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).
[101] *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).
[102] *Rana* at 626.
[103] See also *Houston v. Roadway Express, Inc*., 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).
[104] *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).
[105] *Id*.
[106] Section 287.200.1, RSMo.

permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.[107]

That is, Second Injury Fund liability for permanent total disability benefits exists only if the employee suffers from a pre-existing permanent partial disability that combines with a compensable injury to create a disability greater than the simple sum of disabilities. When such proof is made, the Second Injury Fund is liable only for the difference between the combined disability and the simple sum of the disabilities. In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability. Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury. In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first. If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made. Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.[108] An employee's ability or inability to perform simple physical tasks such as sitting,[109] bending, twisting,[110] and walking[111] may prove that the employee is permanently totally disabled. An employee's age may also be taken into consideration.[112]

Claimant seeks an Award of permanent total disability against the employer or the Second Injury Fund, or in the alternative, permanent partial disability benefits. Claimant also alleges that the 2009 work accident caused injury to his left hip, leg, and back. Although the employer/insurer agrees that Claimant sustained a work accident during the course and scope of his employment, the employer/insurer dispute that Claimant sustained an injury to his left leg and back because of that accident. The employer/insurer also argues that Claimant is permanently and totally disabled due to his 2009 work accident combined with his pre-existing disabilities.

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[107] *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).
[108] *Maddux v. Kansas City Public Service Co*., 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G. Const*., 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc*., 882 S.W.2d 274 (Mo.App. S.D. 1994); Groce *v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).
[109] *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).
[110] *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).
[111] *Keener v. Wilcox Elec. Inc*., 884 S.W.2d 744 (Mo.App. W.D. 1994).
[112] *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc*. 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc*., 631 S.W.2d 919 (Mo.App. S.D. 1982).

I find that Claimant has met his burden of proof as to the issue of causation for the injuries to Claimant's left leg, hip, and back. In making this determination, I find the opinion of Dr. Carr to be credible and convincing. Dr. Carr found that the 2009 work injury was the prevailing factor and the cause of Claimant's left hip fracture and the need for subsequent surgeries, as well as the cause of persistent back pain and decreased range of motion and endurance.

Dr. Carr also opined that Claimant's left hip injury resulted in (1) an 80% permanent partial disability (PPD) of the left hip, which "accounts for the injury's contribution to his chronic pain with reduced range of motion and limited endurance and the need for three . . . surgeries, and (2) a 15% PPD of the body for the lumbosacral injury, because of "that injury's contribution to claimant's chronic low back pain syndrome with reduced range of motion and limited endurance."[113]

The next question is whether the April 2009 work injury resulted in Claimant sustaining permanent total disability or permanent partial disability. The first step in determining whether Claimant is permanently and totally disabled is to determine the nature and extent of the last (the primary) injury alone. **I find that there is competent and substantial evidence that the Claimant is permanently and totally disabled as the result of the April 2009 injury alone.** In making this determination, I find the reports and opinions of Dr. Carr and Mr. Eldred to be most credible and convincing. I also note that the opinion of Mr. Cordray as to Claimant's employability was not credible or convincing in this case; he overlooked or was not provided important records from Dr. Carr (FCE records) and he relied heavily on other doctors' opinions and records that did not take into account Claimant's hip replacement surgery. And although Claimant has some memory problems, I find that he was credible and testified to the best of his ability. As noted above, I have found that the 2009 work injury was the prevailing factor in causing injury to Claimant's left hip and back. Dr. Carr opined that the 2009 work injury resulted in permanent partial disability of 80% of Claimant left hip and 15% of his back. Dr. Carr also opined, albeit phrased somewhat awkwardly, that Claimant is permanently and totally disabled as a result of that April 2009 work injury alone. Mr. Eldred determined that Claimant is permanently and totally disabled as a result of his April 2009 work injury in isolation; Mr. Eldred's opinion was thorough, well-reasoned, and convincing. Although Mr. Eldred acknowledged that Claimant had pre-existing disabilities that were a hindrance or obstacle to employment, Mr. Eldred determined that Claimant's limitations from the 2009 work injury were severe enough alone to cause him to be permanently and totally disabled and unemployable in the open labor market. Even the vocational expert of the employer/insurer, Mr. Cordray, acknowledged that if one accepts the restrictions and limitations found by Dr. Carr, Claimant is permanently and totally disabled from the last injury alone.

Issue 4: Unpaid temporary Total or Temporary Partial Disability

Temporary total disability is provided for in Section 287.170, RSMo. This section provides, in pertinent part, that "the employer shall pay compensation for not more than four hundred weeks during the continuance of such disability at the weekly rate of compensation in effect under this section on the date of the injury for which compensation is being made." The

[113] Exh. A.

term "total disability" is defined in Section 287.020.6, as 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." The purpose of temporary total disability is to cover the employee's healing period, so the award should cover only the time before the employee can return to work.[114] Temporary total disability benefits are owed until the employee can find employment or the condition has reached the point of "maximum medical progress."[115] Thus, TTD benefits are not intended to encompass disability after the condition has reached the point where further progress is not expected.[116] This is reflected in the language that TTD benefits last only "during the continuance of such disability."[117]

Section 287.180.1 addresses temporary partial disability, in relevant part, as follows:

> For temporary partial disability, compensation shall be paid during such disability but not for more than one hundred weeks, and shall be sixty-six and two-thirds percent of the difference between the average earning prior to the accident and the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in the open labor market. The amount of such compensation shall be computed as follows:
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> *******
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> (4) For all injuries occurring on or after August 28, 1991, the weekly compensation shall be an amount equal to sixty-six and two-thirds percent of the injured employee's average weekly earnings as of the date of the injury, provided that the weekly compensation paid under this subdivision shall not exceed an amount equal to one hundred five percent of the state average weekly wage.[118]

If an employee's employer refuses to give work to an employee when it has work available to perform, the employee may be deemed to be unable to find reasonable employment and thus temporarily totally disabled, if the employee cannot compete for employment in the open labor market.[119] In *Herring v. Yellow Freight System, Inc.*, the court noted that factors that may be relevant to an employee's employability on the open labor market include, but are not limited to, the following: 1) the anticipated length of time until the employee's condition will reach the point of maximum medical progress; 2) the nature of the employee's continuing course of medical treatment; and 3) whether there is a reasonable expectation that the employee will

[114] *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo. App. W.D. 1997), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d at 226 (Mo. Banc 2003). See also *Birdsong v. Waste Management*, 147 S.W.3d, 132, 140 (Mo.App. S.D. 2004).
[115] *Cooper* at 575.
[116] *Cooper* at 575; *Smith v. Tiger Coaches, Inc*., 73 S.W.3d 756, 764 (Mo. App. E.D. 2002), *overruled on other grounds by Hampton*, 121 S.W.3d at 225.
[117] Section 287.170.1, RSMo.
[118] Section 287.1, RSMo 2000.
[119] *Herring v. Yellow Freight System, Inc*., 914 S.W.2d 816 (Mo.App. W.D. 1995).

return to the employee's former employment with the employer.[120] If the anticipated length of time that remains until an employee's condition will reach the point of maximum medical progress is very short, it will always be reasonable to infer that the employee cannot compete for employment in the open labor market.[121] The ability or inability of an employee to return to employment refers to an employee's ability to perform the usual duties of the employee's regular employment in the manner that such duties are customarily performed by the average person engaged in those duties.[122]

The employer/insurer paid temporary disability benefits in the amount of $9,908.61. Claimant alleges that he is due additional Temporary Partial Disability benefits from October 8, 2009 to March 29, 2010 and from June 28, 2010 to November 4, 2010. The employer/insurer argues that no additional temporary disability benefits are due because, it alleges, there is no evidence in the record that provides a basis for calculating an unpaid temporary total or temporary partial disability benefits.

Between October 8, 2009 and March 29, 2010, the employer failed to pay Claimant any disability benefits. Claimant testified credibly that during that period of time he worked four hours per day and that he worked only four hours per day because of his injuries from the 2009 work incident. During this period, he was not paid any temporary partial disability compensation while working part time.[123]

Missouri law is clear that a worker does not have to be totally and permanently disabled to receive temporary partial disability. As explained by the Western District:

> We disagree that evidence that (a claimant) could perform (some) labors during the disability period precluded a finding that he suffered temporary partial disability. The Commission in effect treated temporary disability as an all-or-nothing system of compensation, and in effect held that if a worker is not disabled from all work during the recovery period, then he has no temporary partial disability. To the contrary, by its very nature, §287.180 envisions cases where a reasonably diligent worker is partially able to work subject to certain limitations and restrictions. The proper statutory standing is rather: the amount which the employee, in the exercise of reasonable diligence, will be able to earn during the disability, to be determined in view of the nature and extent of the injury and the ability of the employee to compete in an open labor market.…
>
> Missouri has made this point clearly in cases involving claims of temporary or permanent total disability. Cases in this area specifically state that neither the worker's ability to engage in occasional or light duty work nor the worker's good fortune in obtaining work other than through competition on the open labor market should disqualify the worker from receiving such total disability benefits under the Workers' Compensation Law. See e.g., *Gordon v. Tri-State Motor*

[120] *Cooper v. Medical Center of Independence*, 955 S.W.2d 570 (Mo.App. W.D. 1997).
[121] *Id.*
[122] *Caldwell v. Melbourne Hotel*, 116 S.W.2d 232 (Mo.App. 1938).
[123] Exh. J.

> *Transit Co., 908 S.W.2d 849 (Mo.App.1995) (*claimant who did household repair work, lawn mowing, and automotive repair was entitled to total disability benefits because he did such activities at his own pace and with the assistance of others); *Brookman v. Henry Transportation, 924 S.W.2d 286 (Mo.App.E.D.1996)* (mechanic who was not capable of doing his normal job nor competing on open job market but who was released to do light duty work after falling from ladder and whose condition was expected to improve was entitled to temporary total benefits, despite fact that, because of economic necessity, claimant swept floors for two weeks, did remodeling work for four weeks and worked as a telemarketer for three weeks).[124]

Thus, the fact that Claimant worked part-time for the employer between October 8, 2009 and March 29, 2010, does not preclude temporary disability benefits. To the contrary, as noted by the Court in *Minnict*, the fact that Claimant was "able to perform light work at his place of employment" means there should be "no factual issue as to what he was able to earn during (that) period."[125]

Claimant testified credibly that due to the effects of his hip injury, he worked only 20 hours per week between October 8, 2009 and March 29, 2010. At his hourly rate of $9.00 per hour, he earned $180.00 per week. I find that pursuant to Section 287.180 RSMo., Claimant is owed temporary partial disability payment for that period of 24 and 4/7 weeks from October 8, 2009 to March 29, 2010, at the rate of $167.25 per week. This compensation rate is computed by taking Claimant's agreed-upon average weekly wage of $430.87 and subtracting his earned wages of $180.00. That calculation results in a figure of $250.87. Per the statute, two-thirds of that figure is $167.25.

From March 29, 2010 to April 28, 2010 Claimant received temporary total disability benefits.[126] On April 28, 2010, Dr. Krautmann again released Claimant to work halftime.[127] Claimant was paid temporary partial disability until June 28, 2010.[128]

The temporary partial disability payments stopped on June 28, 2010. Claimant, however, continued to work halftime until November 5, 2010, when he resigned due to his inability to work pain-free. I find Claimant has met his burden of proof that he is entitled to temporary partial benefits from June 28, 2010 to November 5, 2010, at the rate of $167.25 per week. That time period is 18 and 3/7 weeks.

Thus, for both periods, Claimant is entitled to 43 weeks of temporary partial disability benefits at a compensation rate of $167.25, which equals $7,191.75.

[124] *Minnick v. South Metro Fire Protection District*, 926 S.W.2d 906, 910 (Mo.App. W.D. 1996).
[125] *Id*. at 911.
[126] Exh. J.
[127] Exh. F at p. 00147.
[128] Exh. J.

Issue 5: Penalty for alleged drug use

The employer attempts to invoke §287.120.6(1), RSMo to reduce Claimant's award. This attempt fails for two reasons: (1) the employer/insurer did not meet its burden of proof that Claimant violated any policy of the employer; and (2) the evidence does not establish that Claimant's injury was "sustained in conjunction with the use of … drugs" as required for §287.120.6(1) to apply.

Section 287.120.6(1) provides as follows:

> Where the employee fails to obey any rule or policy adopted by the employer relating to a drug-free workplace or the use of alcohol or non-prescribed controlled drugs in the workplace, the compensation and death benefit provided for herein shall be reduced fifty percent if the injury was sustained *in conjunction with the use* of alcohol or non-prescribed controlled drugs.[129]

In this case, the policy at issue provides the following procedures:

> TESTING PROCEDURES
> When an employee's first test result is positive, the testing laboratory will notify Beck Motors Safety Coordinator and the employee. If the employee challenges the positive result, the employee may pay to have the sample tested at another laboratory of his/her choice. If the employee does not challenge the positive result, then the positive result is accepted as confirmed. If the employee challenges the positive result, and the other laboratory confirms the positive result, then the result is confirmed as positive. If the employee challenges the positive result, and the other laboratory does not confirm the positive result, then Beck Motors may request another sample or accept the result as a false positive.[130]

Thus, the employer's policy clearly provides for both notification to the employee and the employee's right to challenge a positive test. In this case, the employee was not provided timely notice of the drug test and was not allowed to have the sample tested at a laboratory of his choice – in spite of the policy's language allowing this step. The following is the timeline of the employer's knowledge of and failure to follow its own drug policy:

1. On April 14, 2009, Claimant was injured while in the employ of Beck Motors.
2. On June 22, 2009 the employer knew of the alleged positive drug test results.[131]
3. On September 15, 2009, an answer for the employer was filed concerning the first claim for compensation filed by the claimant. There was no mention of failure to comply with any employer's policy.

[129] Section 287.120.6(1), RSMo.
[130] Exh. K.
[131] Exh. 15.

4. On January 28, 2011, an answer for the employer was filed concerning the amended claim for compensation filed by the claimant. There was no mention of the failure to comply with any employer's policy.
5. On July 23, 2012, counsel for Claimant requested from the employer's counsel, via certified letter pursuant to Section 287.215, disclosure of all materials which could be deemed as statements of Claimant. There was no disclosure of the testing.[132]
6. In January 2013, (46 months after the injury and six months after the claimant's request for disclosure), the employer finally notified Claimant of a positive drug screen.
7. On January 22, 2013, counsel for Claimant requested copies of the rules and policies in place at Beck Motors at the time of the injury, as well as the report and urinalysis sample that was tested.[133]
8. On January 23, 2013, counsel for Claimant challenged the positive result of the testing and requested the sample be provided for re-testing.[134] The sample was never provided.

As seen in this timeline, the requirements of the policy were not met. The testing laboratory did not inform Claimant of the alleged positive drug test. Instead, it was the employer who informed Claimant of the positive test and that was nearly four years after the results were known. Even then, the notification was through counsel and only in the context that the employer would challenge any worker's compensation award on the basis of a positive test.

By omitting the notification, the employee's opportunity and contractual and statutory right to challenge the test result was rendered useless. The timeline also clearly shows that after the untimely notification, Claimant's counsel immediately requested the sample for retesting. The sample was never produced by the employer and Claimant was denied the process outlined in the employer's own policy. Under the clear terms of the employer's policy, Claimant has the right to challenge a positive test result and send the sample to a testing vendor of his choosing. By waiting nearly four years to disclose the result to Claimant, the employer violated the straightforward and simple terms of notifying the employee. The employer then compounded the violation by failing to provide the sample. The employee should not be deemed to have violated the policy if the employee asks for retesting *pursuant to the policy* and the sample is not provided.

In the alternative, even if one find that Claimant did violate the employer's drug-free workplace policy, the employer/insurer failed to show that the "injury was sustained *in conjunction with the use* of alcohol or non-prescribed controlled substances," as required by the statute. There is no evidence that Claimant's alleged drug use was *in conjunction with* his injury. In fact, the employer/insurer's own expert, Dr. John Vasiliades, reported that Claimant's alleged drug use was not *in conjunction with* his injury, but instead occurred at least one to two days before the injury.[135] In his deposition, Dr. Vasiliades agreed that he cannot determine whether

[132] Exh. N.
[133] Exh. L.
[134] Exh. M.
[135] Exh. 2, p. 2.

Claimant ingested or used cocaine two minutes before the workplace accident, two hours before, or two days before.[136] Moreover, he agreed that he cannot, within a reasonable degree of toxicological certainty, say that cocaine was actively affecting Claimant's brain and nervous system (or any other system of the body) at the time of the injury.[137] In addition, **Dr. Vasiliades agreed that he cannot say within a reasonable degree of certainty that Claimant's injury was in conjunction with Claimant being under the influence of cocaine**.[138] Likewise, Dr. Vasiliades agreed that he cannot say within a reasonable degree of certainty that Claimant suffered this injury while he was affected by the presence of cocaine.[139]

Dr. Vasiliades also testified that persons under the influence of cocaine exhibit symptoms of restlessness, dizziness, dilated pupils, dry mouth, irritability, gasping respirations, hyperactive reflexes, fever, hallucinations, and euphoria. There is no evidence in the record to suggest that Claimant exhibited any of these symptoms – either on the day of the injury or in the hospital at the time of the drug test.

The request of the employer/insurer for a penalty under Section 287.120.1(1) is denied.

Summary

The issues and the resolution thereof are as follows:

1. **Medical causation as to the alleged right leg and back injury**. Yes, the injuries to the right leg and back are medically causally related to the April 2009 work injury.

2. **Whether claimant is permanently and totally disabled?** Yes, Claimant is Claimant is permanently and totally disabled from the (primary) work injury alone. As such, the employer/insurer is responsible for permanent total disability benefits of $287.26 per week from November 5, 2010, and ongoing, subject to review and modification under the law.

3. **Or, in the alternative, what is the nature and extent of permanent partial disability?** N/A.

4. **Does the Second Injury Fund have any liability in this case?**
No, the Second Injury Fund bears no liability in this case.

5. **Whether the employer/insurer owes any unpaid temporary total benefits and/or temporary partial disability benefits?** Yes, see the body of the Award.

6. **Whether a drug penalty should be assessed against the employee?** No.

[136] Exh. 15, p. 59.
[137] Exh. 15, p. 59.
[138] Exh. 15, pp. 59-60.
[139] Exh. 15, p. 60.

Any pending objections not expressly ruled on in this award are overruled.

This Award is subject to a lien in the amount of 25% of the payments hereunder in favor of the claimant's attorney, Randall Barnes, for necessary legal services rendered to the claimant. All past due compensation shall bear interest as provided by law.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation