Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

TEMPORARY OR PARTIAL AWARD
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 05-052329

Employee: Mark Alcorn

Employer: McAninch Corp.

Insurer: Zurich American Insurance Co.

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund (Open)

Date of Accident: June 3, 2005

Place and County of Accident: Polk County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo, which provides for review concerning the issue of liability only. Having reviewed the evidence and considered the whole record concerning the issue of liability, the Commission finds that the award of the administrative law judge in this regard is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms and adopts the award and decision of the administrative law judge dated September 19, 2006.

This award is only temporary or partial, is subject to further order and the proceedings are hereby continued and kept open until a final award can be made. All parties should be aware of the provisions of section 287.510 RSMo.

The award and decision of Chief Administrative Law Judge Victorine R. Mahon, issued September 19, 2006, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 9th day of February 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

_____
William F. Ringer, Chairman

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Alice A. Bartlett, Member

_____
John J. Hickey, Member

Attest:

_____

Secretary

TEMPORARY OR PARTIAL AWARD

Employee: Mark Alcorn

Injury No. 05-052329

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

Dependents: N/A

Employer: McAninch Corp.

Additional Party: Treasurer of the State of Missouri,
Second Injury Fund

Insurer: Zurich American Insurance Co.

Hearing Date: August 11, 2006

Checked by: VRM/meb

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: June 3, 2005
5. State location where accident occurred or occupational disease contracted: Polk County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant injured back while driving a dump truck at a road construction site.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Back
14. Compensation paid to-date for temporary disability: $3,379.50.
15. Value necessary medical aid paid to date by employer/insurer? $8,757.38
16. Value necessary medical aid not furnished by employer/insurer? See Award.

17. Employee's average weekly wages: $1,013.85 approx.

18. Weekly compensation rate: $675.90 (TTD)

19. Method wages computation: Agreement.

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: No medical bills are outstanding.

56 and 6/7 weeks of past temporary total disability from June 4, 2005 through the date of hearing on August 11, 2006.

TOTAL: $38,429.38

Future temporary total disability shall begin August 12, 2006, and shall be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

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

William W. Francis, Jr.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Mark Alcorn

Injury No. 05-052329

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

Dependents: N/A

Employer: McAninch Corp.

Additional Party: Treasurer of the State of Missouri,

Second Injury Fund

Insurer: Zurich American Insurance Co.

Hearing Date: August 11, 2006 Checked by: VRM/meb

INTRODUCTION

The parties appeared before the undersigned Administrative Law Judge for an emergency hearing on August 11, 2006. The claimant seeks additional temporary total disability and the provision of additional medical treatment. William W. Francis, Jr., represented the claimant, Mark Alcorn. Kevin Johnson represented the employer, McAninch Corporation, and its insurer, Zurich Insurance, and third party administrator, GAB Robins N.A. The Second Injury Fund did not participate in this proceeding. The claimant and the employer/insurer stipulated to the following facts:

STIPULATIONS

On June 3, 2005, Mark Alcorn was an employee covered under the Workers' Compensation Act and the employer, McAninch Corporation, was fully insured. The incident is alleged to have occurred near Bolivar, Missouri, in Polk County. Venue is appropriate in Springfield, Missouri. The employer/insurer paid five weeks of temporary total disability in the amount of $3,379.50 and provided medical treatment in the amount of $8,757.38. The claimant's average weekly wage was $1013.85, and the temporary total disability rate is $675.90.

ISSUES

1. Did the claimant sustain an injury or contract an occupational disease arising out of and in the course of claimant's employment with McAninch Corporation?

2. Is the alleged injury or occupational disease medically and causally related to the claimant's work at McAninch Corporation?

3. Is claimant entitled to additional medical care?

4. Is claimant entitled to additional temporary total disability?

The employer/insurer expressly reserved for future determination all other issues.

EXHIBITS

The following exhibits were submitted by the claimant and admitted without objection:

A. Medical Records of Cox Occupational Medicine and Workers' Compensation Center

B. Medical Records of Springfield Neurological and Spine Institute

C. Independent Medical Examination Report of Dr. Shane Bennoch

F. Curriculum Vitae of Dr. Shane Bennoch

The following exhibits were submitted by the employer and were admitted:

1. Curriculum Vitae of Dr. Cary Bisbey (admitted without objection)
2. Report of August 2, 2006, by Dr. Cary Bisbey (admitted over objection)
3. Curriculum Vitae of Peggy Shibata (admitted over objection)
4. Photographs of the test construction site (admitted over objection)
5. Acceleration test printouts (admitted over objection)
6. Photographs of the Missouri job site (admitted without objection)

EVIDENTIARY RULING

Claimant's attorney objected to the medical report of Dr. Cary Bisbey because it had been made in anticipation of litigation and not in accordance with "the statute." The exhibit was admitted provisionally, but the parties were allowed to address its admissibility in their briefs. Dr. Bisbey testified live at the hearing, and claimant's counsel admitted that the physician's report was provided to him at least seven days in advance of the hearing. This satisfies the requirements of § 287.210, RSMo. Nothing in the Workers' Compensation Act precludes the admission of a medical report merely because it was created in anticipation of litigation. A medical report is not a business record which, to be admitted as an exception to the hearsay rule, must normally be prepared in the usual course of business at or near the time of the event rather than in anticipation of litigation. *See e.g. Huffy Corp. v. Custom Warehouse, Inc.*, 169 S.W.3d 89, 92 (Mo.App. E.D. 2005) (discussing the admissibility of business records). The claimant's objection to the medical report is overruled, and the exhibit is admitted.

FINDINGS OF FACT

Mark Alcorn possesses a ninth-grade education and has worked as a heavy equipment operator in the construction industry for 28 years. He currently is unemployed and unable to work due to the work injury he sustained on June 3, 2005. While the claimant has a prior history of hypertension, colon cancer, and a sprain to his knee, he reports no prior neck or back injuries.

The accident occurred on or about June 3, 2005, while claimant was working on a road construction project, operating an articulating dump truck. Claimant was on the job for a few weeks. During his employment he would haul as many of 50 loads per day, each weighing about 40 tons. While the truck was fitted with adjustable air ride seats, claimant testified that there were deep ruts in the haul road and borrow pit of three to four feet in depth and claimant would bounce around inside the truck. Claimant explained that because it had rained it was muddy in some areas. He said he complained to his supervisor and to his business agent about the work conditions.

Medical Treatment

On the morning of June 3, 2005, claimant began having severe pain around the beltline after he had been performing his usual work duties as an articulating dump truck driver for the employer at a road construction site. The next morning, on June 4, 2006, the claimant reported the pain to his employer and was told to go to the emergency room. Claimant went to the Cox Hospital emergency room the next day on June 5, 2006, with low back pain and was referred to Cox Occupational Medicine. On June 6, 2006, claimant saw Dr. Bisbey at the Cox Occupational Medicine facility.

Dr. Bisbey diagnosed the claimant with low back pain and prescribed narcotic medication and physical therapy. While claimant asked to be taken off work, Dr. Bisbey ordered that claimant return to a modified work schedule of no more than eight hours per day; and he directed that the claimant engage in duties that had only minimal jarring. Dr. Bisbey suggested in his report and testimony that claimant was magnifying his symptoms. As claimant explained, however, the construction work he was performing was not completed in an eight-hour day and the medication that Dr. Bisbey prescribed required that it not be taken if driving, working, or operating machinery. Claimant believed he could not perform any of his usual duties if he followed Dr. Bisbey's restrictions and took his medication as prescribed. Although the employer's safety director later testified that there was light duty available, including the answering of phones, the construction work site was located in a rural area. Claimant could only get to the construction site by driving there -- something he could not do if he took the medication as prescribed.

Dr. Bisbey also recommended physical therapy. Claimant attended three sessions, after which the therapist told him that no progress was being made. Claimant did not thereafter return to physical therapy because he wanted to know what was going on with his back before he continued any treatment which was not helping him.

An MRI conducted on June 15, 2005, revealed an L3-4 small broad-based disc protrusion laterally to the left. There was no evidence of a disc herniation or significant stenosis. At the time of the June 15, 2005 MRI, the claimant's pain was not situated to the left; but he later developed pain on the left as well as on the right.

Claimant continued to see Dr. Bisbey until June 21, 2005, but contended that the physician hurt him physically. Claimant then was referred to Dr. Rahman and saw that doctor on June 28, 2005. Dr. Rahman diagnosed a disc protrusion and continued physical therapy. Claimant then saw Dr. Woodward on August 4, 2005, this time with pain in the right buttock and numbness in the right thigh. Dr. Woodward ordered modified work duty with no use of heavy equipment. On August 17, 2005, Dr. Woodward recommended a Z joint steroid injection, but the employer/insurer refused to authorize such treatment. Dr. Woodward released claimant to modified duty on September 5, 2005, indicating that there was nothing more that could be done for him. When the claimant thereafter contacted the

employer for a work assignment, he was told there was no job available at the time.

The claimant continued to experience pain and numbness. The employer/insurer eventually approved an examination by Dr. Rahman. On June 29, 2006, Dr. Rahman reviewed an additional MRI performed on March 8, 2006, diagnosed a fat lateral disc at L3-4 and ordered a CT and myelogram to better define the anatomy and compression. The employer/insurer denied additional diagnostic testing.

The claimant currently takes hydrocodone for pain. He continues to complain of pain with sitting, standing, and walking long distances. He continues to have numbness in his right upper thigh area. He suffers sleep disturbances. He states that he has not worked since leaving his job with McAninch, but he admits to having drawn unemployment insurance in order to support himself. The record is not clear how many weeks of unemployment the claimant drew. Claimant said he would rather have had treatment.

Keith Bough

Keith Bough, a co-worker who appeared under subpoena, testified credibly and indicated that he hoped his testimony would not jeopardize his job. While he believed the haul road was smooth, he admitted that he had seen some rough spots on the construction site that were several feet deep. He saw the claimant driving his truck over rough terrain.

Darin Still

Darin Still, the claimant's landlord, verified that the claimant previously was active and had always paid his rent in a timely fashion prior to his recent disability. Still had known the claimant for three years and knew him to be an honest individual. He is allowing the claimant to temporarily live in Still's rental house property free of charge. Still dispelled any suggestion that the claimant was remodeling the house in which he lives.

Dr. Cary Bisbey

Dr. Cary Bisbey last examined the claimant on June 21, 2005, and refilled the claimant's medication prescriptions on July 20, 2005. Dr. Bisbey believed the claimant suffered from a mild strain and did not believe the claimant sustained a work-related injury. He conceded, however, that rough terrain could cause a back injury if there were sufficient G forces. He agreed that MRIs are not infallible and that there were no events in the medical records to assign an injury beyond the date of June 3, 2005. Dr. Bisbey recalled the claimant saying he had prior neck and back problems, but the physician could not find a reference to such preexisting problems in his notations in the claimant's medical records. Dr. Bisbey concurred that the steroid injection ordered by Dr. Woodward may have been appropriate. He agreed that he would not have prescribed narcotics for the claimant if he believed that the claimant had no injury. He admitted to conversing about the work environment with Dan Deike, the employer's safety director.

Dan Deike

Dan Deike, the employer's safety director, had reviewed the entire work site; and he did not believe there were sufficient ruts or rough terrain to cause any injury to the claimant's back. He said he had maneuvered the road construction site with a passenger vehicle. Mr. Deike admitted that he was not on the work site on June 3, 2005, or June 4, 2005, but he was there subsequently. He identified a number of photographs of the work site that had been taken to document the haul road and borrow pit during a routine inspection tour. Mr. Deike conceded that the pictures were not taken on June 3, 2005, or June 4, 2005.

While Mr. Deike indicated that the employer had light-duty work available for the claimant, he admitted that he was aware that Dr. Bisbey had prescribed medication. It is the employer/insurer's position that the claimant could have driven himself to work and then taken his medication after he had arrived at the work site.

Mr. Deike appears very credible, but he was not present at the work site on or immediately after the claimant was injured. While he personally was able to maneuver the construction site with a passenger vehicle without injury to himself, he cannot state with any certainty what the conditions were like when the claimant experienced pain at the belt line or when the claimant reported his injury because he was not there at the time.

Peggy Shibata

Peggy Shibata, a bioengineer from Packer Engineering, conducted an experiment to determine the amount of force an articulating dump truck driver would experience while performing claimant's job duties. She conducted her experiment in Iowa at a location she believed had the same type of soil and conditions as to those at the Missouri work site where claimant was employed. She concluded, following her experiment, that the force was not injurious, based on standards set by NASA.

Peggy Shibata's testimony is not persuasive. She had not observed the job site to which the employee was assigned, but relied on photographs of the job site taken on a different date than the date of injury. There was no mud at the test site in Iowa as there had been in Missouri. While Ms. Shibata used the same model of truck for her experiment (Caterpillar D400 Series 2), it was not the same truck used by claimant. There is no evidence as to whether the truck used in the experiment was adjusted the same as the truck used by claimant. She could not testify that the weight of the loads were the same as those carried by the claimant on the date of his injury. Moreover, Ms. Shibata used a test subject of a different height, weight, and gender as the claimant. While she said that such factors had no impact on the outcome of her experiment, she failed to explain why such deviations were irrelevant.

Dr. Shane Bennoch

Dr. Shane Bennoch, testifying on the claimant's behalf, had reviewed the medical records and examined the

claimant. He believes the claimant suffers from work-related musculoligamentous low back pain and disc disease or nerve entrapment. He concluded that the claimant had not reached maximum medical improvement. Dr. Bennoch did not believe the claimant was malingering. Even if the claimant exaggerated to Dr. Bennoch the number of hours he had worked for the employer, Dr. Bennoch said the injury could have occurred even if the claimant only worked three hours a day.

With respect to the MRI of June 15, 2005, as read by a radiologist, Dr. Bennoch said it was important to correlate the MRI with the patient's examination. He uncovered no evidence suggesting a new injury other than the one sustained by the claimant on or about June 3, 2005. He further testified that the back injury sustained by the claimant can cause irritation and inflammation, depending on the activity. One can have good and bad days which often accounts for the difference in complaints associated with back pain. The pain can wax and wane and inflammation can change. Dr. Bennoch said it is inaccurate to conclude that every change in symptoms after the June 15, 2005, MRI is unrelated to the work injury of June 3, 2005. Dr. Bennoch said MRIs are not static and that the follow-up MRI of March 8, 2006, is not inconsistent with the MRI of June 15, 2005, as it contains indications of the prior findings as well as a change in the L4-5. Dr. Bennoch gave no indication that the MRI of March 8, 2006, presented a new injury.

Dr. Bennoch agreed with the suggestion of Dr. Woodward that claimant could have benefited from the Z joint injection. Dr. Bennoch testified that further testing is needed to address the claimant's current complaints. He is familiar with Dr. Rahman and has not found him to order tests that were medically unnecessary. Without equivocation, Dr. Bennoch said the claimant's job was a substantial factor in causing the claimant's back injury and subsequent diagnosis. Dr. Bennoch's testimony is found credible in this instance.

CONCLUSIONS OF LAW

Work Accident

Claimant testified that the work he preformed for McAninch Corporation caused him pain and injury in his back. There is no evidence that this man, who had been a heavy equipment operator for nearly three decades, had any prior back problems. Even employer/insurer's doctor admitted that the claimant had a problem with his back severe enough to justify narcotic medication. There was no evidence that claimant was engaged in any alternative activity that would have created such pain or injury. The employer/insurer's photographs are not persuasive because the photographs were not taken on the date of the claimant's work injury. Moreover, the employer/insurer failed to prove that Ms. Shibata's experiment was performed under conditions sufficiently similar to those under which the claimant worked.

Therefore, absent any other explanation, I find that the claimant sustained an injury within the course and scope of his employment.

Medical Causation

Where the opinions of medical experts are in conflict, the fact-finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.,* 676 S.W.2d 872, 877 (Mo. App. S.D. 1984). Where the medical opinions are conflicting, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop 'N Save Warehouse Foods,* 855 S.W.2d 460, 462 (Mo. App. E.D. 1993).

The parties' experts disagree as to causation. Claimant must show that his work was a substantial factor in the cause of his injury. A "causative factor may be substantial even if not the primary or most significant factor. There is no bright-line test or minimum percentage…defining 'substantial factor.'" *Cahall v. Cahall,* 963 S.W.2d 368, 371 (Mo. App. E.D. 1998), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). While an injury is not compensable merely because work is a triggering or precipitating factor, a work-related accident can be both a triggering event and a substantial factor. *Loven v. Greene County,* 94 S.W.3d 475, 478 (Mo. App. S.D. 2003). Dr. Bennoch's testimony is unequivocal that work was a substantial factor in the cause of the claimant's back pain and injury. While Dr. Bisbey did not believe the work was a substantial factor in the development of the claimant's injury, there is no other evidence in the record to account for the claimant's back injury. I accept Dr. Bennoch's opinion on this issue in this case.

Future Medical

Section 287.140, RSMo, requires an employer/insurer to provide medical treatment as reasonably may be required to cure and relieve an employee from the effects of the work-related injury. To "cure and relieve" means treatment that will give comfort, even though restoration to soundness is beyond avail. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 249 (Mo. banc 2003). The claimant must prove the need for treatment by "reasonable probability" rather than "reasonable certainty." *Downing v. Willamette Industries, Inc*., 895 S.W.2d 650, 655 (Mo. App. W.D. 1995), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). "Probable" means founded on reason and experience, which inclines the mind to believe, but leaves room for doubt. *Sifferman v. Sears, Roebuck & Co.,* 906 S.W.2d 823, 828 (Mo.App. S.D.1995), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003).

Three physicians -- Dr. Woodward, Dr. Rahman, and Dr. Bennoch -- all suggested additional medical or diagnostic treatment for claimant to cure or relieve the effects of his work injury. Dr. Woodward had ordered steroid

injections. Even Dr. Bisbey agreed that such injections may be appropriate. Dr. Rahman and Dr. Bennoch believe additional diagnostic testing is needed. There is substantial support in the record for additional medical treatment. The employer/insurer shall provide the additional medical and diagnostic treatment as recommended by Dr. Rahman.

Temporary Total Disability

The employee has the burden of proving entitlement to temporary total disability benefits. *Seeley v. Anchor Fence Company,* 96 S.W.3d 809, 821 (Mo. App. S.D.2002), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). The purpose of temporary total disability benefits is to cover the cost for a worker's healing period. 96 S.W.3d at 821. Temporary total disability is paid until the employee can return to work, his condition stabilizes, or he has reached a point where further progress is not expected. *Minnick v. South Metro Fire Protection Dist.,* 926 S.W.2d 906, 909 (Mo. App. W.D.1996), *overruled on other grounds Hampton v. Big Boy Steel Erection,* 121 S.W.3d 220 (Mo. banc 2003). The test is whether an employee is able to compete in the open labor market, given the employee's present physical condition. *Cooper v. Medical Center of Independence,* 955 S.W.2d 570, 575 (Mo. App. W.D.1997). The record as a whole supports a finding that the claimant is unable to compete in the open labor market given his present condition and is entitled to past and future temporary total disability.

With respect to past temporary total disability, the testimonies of Dr. Bennoch and the claimant support a finding that the claimant has been temporarily and totally disabled since the date the claimant reported his injury on June 4, 2005, up to and including the date of hearing -- August 11, 2006 (61 weeks and six days). The employer/insurer paid claimant a total of five weeks of temporary total disability, thus reducing the claimant's entitlement to 56 weeks and six days.

The claimant grudgingly admitted, however, that he drew unemployment benefits during a period of time he claims he was totally disabled, but stated that his application for unemployment was made out of financial desperation when the employer/insurer cut off temporary total disability. To be eligible for unemployment benefits under § 288.040.1, RSMo, the applicant is required to demonstrate that he is able and available for work. But, in *Thornsen v. Sachs Electric Co.,* 52 S.W.3d 611 (Mo. App. W.D. 2001), the appellate court rejected the contention that an employee's application for unemployment estopped an entire award of temporary total disability. Thus, based on the evidence in this record that the claimant was unable to work, he is entitled to temporary total disability. Absent evidence of how much unemployment claimant received, there is nothing to support a reduction in those benefits.

Section 287.170.3, RSMo 2000,[1] provides that an employer shall be entitled to a dollar- for-dollar credit against any benefits owed pursuant to this section in an amount equal to the amount of unemployment compensation paid to the employee and charged to the employer during the same adjudicated or agreed upon period of temporary

total disability. While there is insufficient evidence on the record at this time to determine the amount of employer's credit, this award is only temporary and the credit issue shall remain open for future consideration.

Costs of Recovery

The employee presented no evidence of costs. Therefore, none are awarded. The claimant's attorney is entitled to the standard 25 percent attorney's fee.

Date: September 19, 2006

Made by: /s/ Victorine R. Mahon
Victorine R. Mahon
Associate Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Patricia "Pat" Secrest
Patricia "Pat" Secrest
Director
Division of Workers' Compensation

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[1] This provision was amended in 2005 and now provides that the employee is disqualified from receiving temporary total disability during any period of time in which the claimant applies and receives unemployment compensation. The injury in the instant case, however, occurred prior to the enactment of this amended provision.