

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

Injury No.: 07-134940

Employee: Dennis Bales
Employer: Clarkson Construction Company
Insurer: ACIG Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have reviewed the evidence and briefs and have considered the whole record. Pursuant to § 286.090 RSMo, the Commission modifies the award and decision of the administrative law judge (ALJ) dated January 10, 2012.

Among other findings, the ALJ found that employer willfully ignored the recommendations of their authorized treating physician, failed to offer employee work within Dr. Wheeler's restrictions, and failed to pay employee compensation during the time employee was unable to work. The ALJ, therefore, concluded that employee is "entitled to penalties against the employer and insurer pursuant to § 287.560 RSMo in the amount of \$15,411.44, representing 25% of the amount of temporary total disability due and owing." We find that the ALJ's application of § 287.560 RSMo to award a penalty of 25% of the temporary total disability benefits awarded is improper and legally unfounded under Missouri Workers' Compensation Law.

Section 287.560 RSMo provides, in relevant part, as follows:

The division, any administrative law judge thereof or the commission, shall have power to issue process, subpoena witnesses, administer oaths, examine books and papers, and require the production thereof, and to cause the deposition of any witness to be taken and the costs thereof paid as other costs under this chapter. ... [I]f the division or the commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them.

We exercise our discretion under § 287.560 RSMo, with great caution and only where the case for costs is clear and the offense egregious. See *Nolan v. Degussa Admixtures, Inc.*, 276 S.W.3d 332, 335 (Mo. App. 2009).

In this case, the ALJ did not make a finding that employer/insurer defended this case without reasonable ground. However, even if the ALJ's cited instances of employer/insurer's nonfeasance with respect to the treatment of employee is construed

¹ Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

FINAL AWARD

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Employer: Clarkson Construction Company
Insurer: ACIG Insurance Company
Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund
Hearing Date: September 22, 2011 Checked by: MSS/cy

FINDINGS OF FACT AND CONCLUSIONS 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: September 7, 2007
5. Location where accident occurred or occupational disease was contracted: Johnson County, Kansas
6. Was the above employee in the employ of the above employer at time of alleged accident or occupational disease? Yes
7. Did the employer receive proper notice? Yes
8. Did the accident or occupational disease arise out of and in the course of employment? Yes
9. Was the claim for compensation filed within time required by Law? Yes
10. Was the employer insured by the above insurer? Yes
11. Describe the work employee was doing and how the accident occurred or the occupational disease contracted: Employee slipped and fell on a wet sheet of plywood.
12. Did the accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: low back, psyche, body as a whole
14. Nature and extent of any permanent disability: Permanent Total Disability
15. Compensation paid to-date for temporary disability: \$-0-
16. Value of necessary medical aid paid to date by employer? \$6,387.89
17. Value of necessary medical aid not furnished by employer? -0-
18. Employee's average weekly wages: Sufficient for maximum rate
19. Weekly compensation rate: \$742.72/\$389.04
20. Method of wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of Compensation payable from the Employer:
83 weeks of temporary total disability totaling \$61,645.76
Attorney fees of \$15,411.44 pursuant to \$287.560 for unpaid temporary total disability.
Permanent Total Disability benefits from Employer, beginning on May 29, 2009, and thereafter, for claimant's lifetime at the rate of \$742.72, pursuant to the Missouri Workers' Compensation Laws.
22. Second Injury Fund Liability: None.
23. Future requirements awarded:
Future medical care and treatment to relieve claimant from this injury as it relates to this injury.

Said payments to begin May 29, 2009, and to be payable and be subject to modification and review as provided by law.

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Employee's Exhibits:

- A. Deposition of Terry L. Cordray, M.S.
- B. Deposition of John D. Pro, M.D.
- C. Deposition of P. Brent Koprivica, M.D.
- D. Deposition of Sheba Khalid, M.D.
- E. Fernando M. Egea, M.D. medical rating dated September 9, 1994 (Exhibit admitted as to Employer only)
- F. Medical records of Jonathan Chilton/Midwest Neurosurgery Associates
- G. Medical records of Concentra-Alden
- H. Medical records of Eden Wheeler, M.D.
- I. Medical records of Excelsior Springs Medical Center
- J. Medical records of Kearney Family Medicine
- K. Medical records of Northland Internal Medicine
- L. Medical records of Paincare, P.A.
- M. Medical records of Robert L. Buzard, M.D.
- N. Medical records of Liberty Hospital
- O. Lowry Jones, Jr., M.D. independent medical evaluation dated December 23, 2010 (Exhibit admitted as to Employer only)
- P. Missouri Division of Workers' Compensation records (Exhibit P is admitted in its entirety as to Employer. All contents except for the report of Dr. Egea is admitted against the Second Injury Fund)
- Q. Deposition of Dennis Bales

Employer's Exhibits:

- 1. Prior Stipulation for Compromise Settlement
- 2. September 9, 1994, report of Dr. Egea
- 3. October 26, 2007, letter addressed to employee from Clarkson Construction Wage Statement
- 4. Employee information card

5. Deposition of Dennis Bales
6. Deposition of Dr. Carl Ledbetter
7. Deposition of Dr. Tristen Cook

Second Injury Fund's Exhibits:

None.

STIPULATIONS:

- Employer Clarkson Construction was operating under and subject to the provisions of the Missouri Workers' Compensation Act and its liability was fully insured by ACIG Insurance Company.
- On or about September 7, 2007, Dennis Bales was an employee of Clarkson Construction and was working under the Missouri Workers' Compensation Act.
- On or about September 7, 2007, Dennis Bales suffered an accident arising out of and in the course of his employment.
- Employer had notice of Dennis Bales' accident.
- Employee's claim was filed within time allowed by law.
- The average weekly wage is sufficient for the maximum rate yielding a rate of \$742.72 for temporary total disability and permanent total disability and a rate of \$389.04 for permanent partial disability.
- Medical aid was furnished by the employer in the amount of \$6,387.89.
- Temporary total disability paid by the employer was \$0.
- Employer shall be entitled to a credit for compensation awarded based upon the settlement reached in Kansas for this claim.

ISSUES:

The issues to be determined by the hearing are as follows:

- Whether the employee's medical condition was casually related to his September 7, 2007, accident.
- Whether the employee is entitled to additional medical care.
- Whether the employee is liable for temporary total disability benefits from October 26, 2007, through May 29, 2009.
- Nature and extent of disability.
- Second Injury Fund liability.
- Whether the employee is entitled to a penalty against the employer and insurer pursuant to Section 287.560 RSMo., for the employer and insurer's failure to pay temporary total disability benefits when the authorized treating physician opined employee was temporarily totally disabled and required further medical care.

FINDINGS OF FACT:

A hearing was held on September 22, 2011, before the Honorable Mark S. Siedlik. Employee appeared in person and was represented by Kristi L. Pittman. The employer and insurer were represented by Andrew Mendelson and the Second Injury Fund was represented by Andrew Dickson.

Medical Evidence

Mr. Bales was initially seen by Dr. Jack Lausterer of Concentra Medical Centers on September 7, 2007. Dr. Lausterer reported Mr. Bales slipped on wet plywood at work and his right foot and leg went out from under him, causing him to twist. Dr. Lausterer reported Mr. Bales had marked pain in his back and numbness in his legs following the fall as well as sciatic type burning pain in his back that radiated into his calf area. Mr. Bales reported "glove" like numbness of his whole right lower extremity and tingling in his left lower extremity. Dr. Lausterer reported Mr. Bales' back pain was constant and "fairly intense." Dr. Lausterer felt Mr. Bales was suffering lumbar radiculopathy by history and exam. He prescribed pain medications and ordered an MRI. He ordered Mr. Bales to remain off work until he was seen back in the clinic in three days. Mr. Bales returned to Concentra Medical Centers on September 10, 2007, and was seen by Dr. Tell Copening. Dr. Copening reported Mr. Bales was medically unable to work and his pattern of symptoms had not improved. Mr. Bales reported paresthesia of the entire right leg. Dr. Copening noted an MRI had been ordered; assessed lumbar radiculopathy; continued his pain medications; and scheduled physical therapy three times a week for two weeks.

Mr. Bales underwent an MRI on September 12, 2007, at Liberty Hospital which showed a posterior disc bulge at the L4-5 level causing AP stenosis and associated bilateral recessed stenosis due to degenerative changes to the facet joints and hypertrophied ligamentum flavum. The MRI also noted a T-11 interior wedge fracture. Mr. Bales returned to Dr. Copening on September 14, 2007, and Dr. Copening felt the MRI was negative. However, he continued to prescribe pain medications and stated Mr. Bales was medically unable to work. Dr. Copening also referred Mr. Bales to a spine specialist. Dr. Copening completed a request for a specialist/facility referral and indicated Mr. Bales was to see Dr. Lowry Jones for a consult and treatment. Unfortunately, this referral was never authorized. Mr. Bales returned to Concentra Medical Centers on September 17, 2007. Dr. Copening's notes reflect he had a conversation with the "insurance adjuster" that morning and the adjuster requested Mr. Bales see a physiatrist rather than a spine specialist. She also reported Mr. Bales' company would find light duty for him and, therefore, Dr. Copening restricted Mr. Bales to modified activity consisting of no bending more than four times per hour; no lifting over ten pounds; no pushing/pulling over ten pounds of force; and alternate sitting/standing as needed. Dr. Copening referred him to a physiatrist.

Mr. Bales was seen by Dr. Eden Wheeler on September 27, 2007. Mr. Bales reported low back pain from the lower thoracic to the sacral region to which he rated at 8 out of 10. Mr. Bales' pain was constant and radiated to the right posterior thigh past his knee. Mr. Bales reported his pain was increased with standing, especially on concrete surfaces as well as prolonged sitting, lifting and bending. Dr. Wheeler reported Vicodin and the muscle relaxer had not improved his pain and Mr. Bales had been working modified duty but it exacerbated his pain. Dr. Wheeler noted Mr. Bales had a prior injury to his low back in 1993 when he fell thirty-four feet off of a bridge and was

treated by Dr. Lowry Jones. Although Mr. Bales reported he had suffered pain since that fall, Dr. Wheeler noted Mr. Bales had no treatment for his back until this current injury. Mr. Bales reported his pain level in his low back prior to this injury was a "slight dull" but did not have lower extremity involvement until the current injury.

Dr. Wheeler reported the MRI demonstrated disc desiccation at L5-S1 with a disc protrusion at L4-5 as well as signal change consistent for possible annular tear. She also felt there was evidence of bilateral stenosis from facet arthropathy of the L4-5 level as well as compression changes at the T-11 and T-12 vertebra. Dr. Wheeler noted Mr. Bales was initially referred to a spine specialist on September 14, 2007, which was changed to a psychiatry referral on September 17, 2007. Dr. Wheeler's impression was low back pain syndrome with clinical radicular symptoms despite preserved neurological assessment with MRI evidence of degenerative disc disease and prior history of lumbar trauma with remote T-11, T-12 vertebral compression fractures and secondary chronic pain. Dr. Wheeler recommended epidural injections and referred him to PainCare for same. In the interim, she felt he had a myofascial component to his pain and recommended physical therapy three times a week. She prescribed a Medrol Dosepak, Hydrocodone, and Neurontin. She ordered modified duties in the interim consisting of no lifting, bending, squatting, climbing, with standing or walking occasionally but not to exceed more than three hours daily and change of position at will. Dr. Wheeler reported Mr. Bales' prognosis was not favorable for symptom reduction.

Mr. Bales was seen by Dr. Kimber Eubanks of PainCare on October 11, 2007. Dr. Eubanks reported Mr. Bales rated his pain as an 8 out of 10 and his pain was exacerbated by activity. She noted he had been treated conservatively with physical therapy and a TENS unit without benefit. On physical examination, sensory exams showed decreased sensation to pinprick along the anterior right thigh and leg into the dorsum of his right foot. Dr. Eubanks noted the MRI of the lumbar spine demonstrated an L4-5 disc bulge with some bilateral recessed stenosis and a right-sided annular tear. Dr. Eubanks recommended a trial of right-sided L4-5 epidural steroid injections to provide him enough relief from his symptoms to get back to a normal level of activity and work hardening. Dr. Eubanks performed a lumbar epidural steroid injection at the L4-5 on the right side under fluoroscopic guidance. She diagnosed lumbar innervertebral disc displacement without myelopathy, lumbar spine stenosis, and back pain/lumbago. Mr. Bales returned on October 17, 2007, for a repeat epidural injection. On October 24, 2007, Dr. Eubanks noted Mr. Bales returned for his third epidural steroid injection. However, Mr. Bales had no change in his symptoms with his prior two epidural steroid injections, and therefore, she did not see an indication to perform a third injection. Dr. Eubanks noted Mr. Bales had some reproduction of his pain with pressure of his right posterosuperior iliac spine. Dr. Eubanks directed Mr. Bales to return to Dr. Wheeler for further treatment.

Mr. Bales returned to Dr. Wheeler on October 18, 2007. She noted Mr. Bales had no improvement of his back and right leg symptoms and he still reported a stabbing, burning, and aching pain in the midline spine with radiation in the right buttock and posterior thigh on a constant basis. Occasionally, Mr. Bales had radiating pain into his right foot. Dr. Wheeler reported that although she had recommended modified duties, Mr. Bales had missed three to four days since his last evaluation due to the pain. He also reported to her he was still lifting at work. Dr. Wheeler reported she discussed with Mr. Bales his compliance with the work restrictions and it was his responsibility to enforce them. She continued pain medications, work restrictions, and requested he

return in three weeks if his symptoms were persistent and at that time a surgical consultation would be requested. Dr. Wheeler did not feel that MMI status could be determined at that time.

Mr. Bales returned to Dr. Wheeler on November 8, 2007, and had not had any improvement in his symptoms. Dr. Wheeler ordered another two weeks of physical therapy but noted she did not feel additional pain management was appropriate. She recommended electrodiagnostic testing and a neurosurgical consultation because of the persistent symptoms. Dr. Wheeler noted she was somewhat concerned Mr. Bales reported no benefit with interventions to date. She did not feel prognosis was favorable for symptom resolution with either conservative or aggressive treatment. Mr. Bales returned to Dr. Wheeler on November 20, 2007, following the electrodiagnostic testing. The EMG study was normal. However, Dr. Wheeler continued to recommend a neurosurgical consultation as Mr. Bales had exhausted conservative treatment including medications, therapy and pain management intervention. She also ordered him to continue his temporary restrictions of no lifting, bending, squatting, climbing, with standing or walking occasionally but not to exceed more than three hours daily and change of position at will.

Unfortunately, despite Dr. Wheeler's repeated recommendation for a neurosurgical consultation, Mr. Bales' insurer never authorized the examination until May 8, 2009, when Mr. Bales saw Dr. Jonathan Chilton of Midwest Neurosurgery Associates, P.A. Dr. Chilton reported Mr. Bales' pain had gradually worsened over time and still suffered sharp, pinching pain in his central, mid-to-low back as well as pain radiating into his legs with the right worse than the left. Dr. Chilton's diagnosis was chronic low back pain and he recommended an MRI scan of the lumbar spine as well as flexion/extension x-rays. Mr. Bales returned to Dr. Chilton on May 29, 2009, for follow-up of his low back pain. Dr. Chilton noted Mr. Bales was taking Oxycontin, Vicodin, and Tylenol 3 for his low back pain. He also noted Mr. Bales was unable to return to work in any capacity due to his severe back pain. Dr. Chilton reviewed the MRI that was obtained on May 29, 2009, and felt it revealed left L5-S1 foraminal stenosis. His impression remained the same, chronic low back pain. Dr. Chilton recommended Mr. Bales discontinue narcotic analgesics and try home exercises, chiropractic therapy, or yoga to relieve his pain. Dr. Chilton felt surgery was not necessary nor would spine surgery provide significant relief of his back and leg complaints. Dr. Chilton felt a second opinion evaluation was appropriate if he had any further questions or concerns.

Prior to this injury, Mr. Bales suffered a fall of approximately thirty-four feet from a bridge on October 6, 1993, while working for Idecker Construction, performing construction work. CT scans performed on January 17, 1994, at Liberty Hospital revealed a central bulge at L3-4 and L4-5 as well as left paracentral soft disc herniation at L5-S1 with some impingement on the left S-1 nerve root. CT of the thoracic spine revealed a compression fracture deformity of the anterior aspect of the T-11 vertebral body. Mr. Bales treated with Dr. Lowry Jones for this injury.

Mr. Bales suffered a few exacerbations of his pain following his recovery in 1993. Mr. Bales was seen in the emergency room department of Excelsior Springs Medical Center on January 31, 2001, for low back pain. He was diagnosed with recurrent lumbar sprain and prescribed ibuprofen. Mr. Bales was seen in the emergency room department of Excelsior Springs Medical Center on October 25, 2002, after lifting a sawhorse and feeling pain in his low back. He was prescribed pain medications and received no further treatment.

Mr. Bales was also seen at the Liberty Hospital for an MRI of his lumbar spine on November 11, 2002. The MRI revealed a right-sided broadbased L4-5 disc herniation with right L-5 neurocompression in the lateral recess. It also revealed a left lateral disc protrusion at L5-S1 without significant stenosis or neurocompression. The MRI also revealed old compression fractures at T-11 and T-12. Mr. Bales also saw Dr. Tristen Cook and Dr. Carl Ledbetter on six separate occasions between November 11, 1998, and July 13, 2007. Only two of which were for low back pain.

Employee's Testimony

Mr. Bales testified he is a 53-year-old man who did not have any education following high school and has not worked in any positions other than that of a construction worker. He was initially self-employed from 1976-1983 before working for Clarkson Construction Company from 1984-1989. He performed a few winter jobs and then began working for Idecker Construction in 1990 through October 6, 1993, when he suffered a work-related injury. Mr. Bales took approximately two and a half years off work following his accident before returning to work at LG Barcus Construction in June 1996 through 2007. He returned to Clarkson Construction on August 16, 2007, where he worked eight to ten hours a day, five to six days per week.

While working for Clarkson Construction, Mr. Bales earned \$1,200.00 per week as a carpenter. His job required him to lift heavy items on a daily basis, including plywood, tools, equipment, rebar, and other materials typically found at a construction site.

Mr. Bales suffered an injury on September 7, 2007, while working for Clarkson Construction. Mr. Bales was walking when he slipped and fell on a wet piece of plywood that had oil on it. Mr. Bales testified he had immediate numbness down his legs and pain in his back. He attempted to return to work that day but his symptoms continued to progress. He reported the incident to his supervisor and was sent to Concentra Medical Centers where an MRI was ordered. Mr. Bales was initially referred to Dr. Lowry Jones. However, his employer sent him to Dr. Eden Wheeler. Dr. Wheeler prescribed pain medications such as a Medrol Dosepak, Relafin, Hydrocodone and Neurontin. She referred Mr. Bales to Dr. Eubanks for two epidural injections and prescribed physical therapy. Dr. Wheeler requested a referral from Mr. Bales' employer to a neurosurgeon on two occasions, but he was never seen by a neurosurgeon until 2009. The last time Mr. Bales saw Dr. Wheeler was November 20, 2007. He kept waiting to hear from his employer as to where he needed to go, but never received any direction. Mr. Bales testified he did not seek any further treatment on his own because he thought his employer would do what they said they would do and he believed they would take care of him. Additionally, Mr. Bales was unable to obtain medical care because he had no health insurance.

Mr. Bales was eventually seen by Dr. Jonathan Chilton, for an independent medical examination ordered by the judge in the companion Kansas case. Dr. Chilton did not believe Mr. Bales was a surgical candidate. As part of that Kansas award, Mr. Bales was awarded future medical care. However, Mr. Bales testified he had difficulty finding a doctor to treat him as most physicians do not want to be involved in workers' compensation cases. Mr. Bales was finally able to be seen by Dr. Ledbetter for treatment. Dr. Ledbetter referred Mr. Bales to a pain management physician, Dr. Duane Jones. Mr. Bales was waiting for an appointment with Dr. Jones at the time of trial. Mr. Bales understood the care that was to be provided by Dr. Jones was palliative care.

Mr. Bales currently suffers from significant pain in his back. He feels like he has a fire in his back that ranges in various degrees depending on what he is doing. However, the pain is constant and some days it is worse than others. Mr. Bales testified his pain radiates down both legs to his knees. Occasionally, the pain radiates to his heels and there is a dull pain that is always present. Additionally, Mr. Bales' legs go out from under him at least once a week. When this happens, he falls and has on occasion injured himself. He also limits his driving because of his pain and weakness in his legs. Whenever he drives, he becomes concerned about his legs. He is concerned that if his legs give out, it could cause an accident. What he is able to do varies based upon the kind of a day he is having. Generally, his walking is limited to approximately 12 blocks. He tries to walk twice a day but his gait is slow. Additionally, his sitting tolerance is 30-45 minutes on average. Mr. Bales testified it hurts to sit in a chair but he can suffer through the pain to do it. There is no set pattern of when the pain begins but it is dependent upon what type of chair he is sitting in. He alternates between sitting and standing to help relieve the pain. Unfortunately, his standing tolerance is limited depending upon what he is standing on. He can only stand on concrete for 5-10 minutes before he begins to suffer pain in his back but on terrain such as a yard, he is able to stand for 30-40 minutes. Mr. Bales' sleep is also interrupted because of the pain. He is only able to sleep two to three hours before waking up due to the pain in his back. To accommodate his pain, he places pillows all around him and lays on his side. Often, he moves to the recliner or couch to try to become more comfortable. Mr. Bales is also limited in his lifting tolerance. He limits his lifting to a gallon of milk and is limited in his pushing/pulling. He could lift 20-25 pounds on one occasion but he hurts significantly after doing such things.

For pain relief, Mr. Bales testified he only takes over the counter medications as he is concerned about addiction with narcotics. He has to lie down during the day, often unpredictably. He lies down from one to five times during the day, depending upon how he feels. He often takes hot showers and uses the massager in the shower to relieve the pain in his back. Additionally, he alternates positions as he believes this helps his pain. Mr. Bales testified he also has problems as a result of the depression and chronic pain including adjustment issues. Largely, this is based upon his feeling that he can't do anything now versus his capabilities prior to September 7, 2007. Mr. Bales testified he also has difficulty with his feelings of depression and increased problems with his temper due to his pain. Mr. Bales is much more short-fused than he has been in the past due to the increased pain. These issues also effect his concentration and leave him feeling that he wants to be by himself. He finds it hard to be around other people and feels withdrawn, particularly when compared to what he was like prior to September 7, 2007.

Mr. Bales testified he suffered an accident on October 6, 1993, when he fell approximately 20 feet from a bridge and landed on someone below. He had compression fractures at the T11-T12 vertebra for which he received conservative treatment from Dr. Buzzard and Dr. Lowry Jones. Mr. Bales testified he did not work for approximately one and a half years while he recovered from the accident but eventually returned to work in 1996. He settled his workers' compensation claim at the time for 29% of the body as a whole. Mr. Bales testified upon returning to work, he performed heavy highway work as a carpenter. This required him to saw, drill, lift forms, climb, and repair various highway construction items, including bridges. He was a working foreman during this time. However, he was required to work alongside the people he supervised. He was required to lift 100 pounds and constantly wore anywhere from 45-60 pounds in his tool apron on a daily basis. If he had to use a harness in order to get on a bridge, the weight of his tool apron that he carried around his body would be significantly more. Following the 1993 work injury, Mr. Bales worked 8 to 12

hours a day 5 to 6 days per week. Mr. Bales would sometimes be sore at the end of the day but this was common in the type of work he did. He had occasional back pain but never any leg pain. He characterized the back pain as being muscular as opposed to the type of pain that he has now which he characterizes as being in his spine. Mr. Bales testified he was careful in lifting objects, utilizing proper lifting mechanics after his first injury but was able to lift anything he needed to do for his job.

Prior to this injury, Mr. Bales engaged in numerous activities including riding a four-wheeler, swimming, golfing on almost a daily basis, hunting and playing sports. Following the work injury in 1993, Mr. Bales built his family's house complete from the ground up including all of the work that had to be done inside the house. He built the house in the evenings and on weekends, after he worked 8 to 10 hours a day. He was also able to perform any maintenance that was required on his car or his house. Unfortunately, he is no longer able to do those tasks. His pain now rates approximately a 7-8 on a daily basis and can go up to a 10. His pain is dependent upon his activity. Some days he is able to do more than others. However, if he over does it one day, he pays for it the next day. He has tried to go hunting but has found he is unable to do it. He also has difficulty fishing due to pain when trying to cast a rod. He also has difficulty walking on the uneven terrain and sitting to fish. He has also tried to golf on a couple of occasions, just to try to feel normal. However, he has been unable to golf due to the pain. He also has difficulty playing with his grandchild, which also increases his depression due to his inability to do the things he was able to do once before. Mr. Bales is able to do laundry but it takes him significantly longer time to do that task now compared to before. He is able to go grocery shopping but he hurts afterwards. He only has one room that is carpeted, limiting his requirement to vacuum. If his house needs a good cleaning, he has people that come over to help him do that task.

Mr. Bales testified he was given restrictions by Dr. Wheeler that consisted of: no bending, lifting, or climbing; occasional standing and walking; and position changes at will. Mr. Bales saw Dr. Wheeler beginning on September 27, 2007, and last saw her on November 20, 2007. At that time, Dr. Wheeler ordered him to continue his restrictions. Clarkson Construction gave him light-duty work which consisted of cutting forms which were three quarter inch plywood that required the use of a 17-18 pound saw. Mr. Bales testified there was no one there to help him lift the plywood, so he was frequently bending over to lift the plywood onto the sawhorses and he would also have to lift the saw, even if it was just a minimal distance, in order to navigate the saw to cut the forms. Mr. Bales testified his pain became so much, he was unable to continue to work in the light-duty capacity. He also missed several days due to the pain he was suffering from his work injury. Mr. Bales testified he was terminated due to not showing up for work. Mr. Bales testified he was physically unable to perform the job.

Mr. Bales was asked about a statement made as part of his employment records, certifying he had no prior workers' compensation injuries. Mr. Bales testified as he had recovered from his prior injury and had no residual work restrictions. He therefore did not believe he had any current workers' compensation claims or restrictions to report on that form. Mr. Bales testified while he had restrictions immediately following the work-related accident, he eventually worked himself up to the point he was able to perform all tasks without having to limit himself. Therefore, he did not consider himself to have any physical restrictions.

Expert Testimony of Dr. Brent Koprivica

Brent Koprivica, M.D. is an occupational medicine physician certified to practice medicine in Kansas and Missouri. Dr. Koprivica testified during his work history, he had occasion to treat workers' compensation employees with injuries such as Mr. Bales. He noted he saw Mr. Bales for a low back injury that had a psychological overlay as a component of a back injury, which was a fairly common presentation, in his opinion. Dr. Koprivica gave a history of Mr. Bales' prior work injury and noted he had a fall on October 7, 1993. This fall resulted in a compression fracture at T11 and T12 and a small central disk bulge at L4-5. Dr. Koprivica noted Mr. Bales did not work for over a year after recovering from that injury but subsequently returned to work performing the same type of construction work he performed prior to this injury. Dr. Koprivica testified Mr. Bales did not have any ongoing problems with chronic back pain. However, Dr. Koprivica noted Mr. Bales had temporary episodes of back pain in 2001 and 2002, resulting in an emergency room visit on January 31, 2001, for back pain, and an emergency room visit on October 25, 2002, for back pain as well as an MRI of the low spine in conjunction with treatment by his family physician. However, Mr. Bales did not have any further treatment following November 2002 for his low back until the injury of September 7, 2007. Mr. Bales reported to Dr. Koprivica he was capable of lifting 200 pounds to 250 pounds and performed that type of lifting throughout his employment as a carpenter without having problems, back pain or any limitations.

At the time of the evaluation, Mr. Bales reported he had constant back pain, the severity of which varied. At best, Mr. Bales' pain was a 7 to 8 on a scale of 1 to 10 and at its worst it was a 10. Mr. Bales reported severe postural limitations. His sitting tolerance was less than one hour at any one interval and his standing and walking tolerances were less than 10 to 15 minutes at any one interval. Mr. Bales estimated he was able to lift or carry less than 10 pounds and had difficulty even holding a gallon of milk for a few minutes.

Dr. Koprivica testified it was normal for someone to have increased pain with activity where they would have some good days and be able to do more than they can on others. Dr. Koprivica stated the disk structure itself was the source of pain so that from a biomechanical standpoint, when activity loads the spine, there is greater stress on the structure that he objectively injured which produces more pain. The posture limitations are included in that analysis and common from that type of injury.

Dr. Koprivica noted there was no instability in Mr. Bales' spine following the 1993 injury. Although there was some evidence of a disk bulge at the L4-5 level, there was no significant neurologic sequelae from the injury. Dr. Koprivica noted there was a physical structural problem in his back but the question became whether it was an industrial disability. Dr. Koprivica felt Mr. Bales was having structural problems with his low back in 2001 and 2002 when he received medical treatment. However, he noted Mr. Bales returned to work as a carpenter from 1995 through his work injury on September 7, 2007. Dr. Koprivica noted although he believed there was some disability in Mr. Bales' back, it was not so overwhelming that he could not do physical activities. Dr. Koprivica testified he believes Mr. Bales would have had some disability prior to the accident in 2007 that would have impacted his ability to work as a carpenter. However, if Mr. Bales was able to pick up 200 pounds, bend, lift, twist and do everything without limitations or pain and did not need to see a physician, then he was not totally disabled as a result of a combination of the prior back injury. Dr. Koprivica stated Mr. Bales would have to lift and carry items frequently or

constantly on a daily basis to work as a carpenter. Additionally, Mr. Bales was not accommodated in any way prior to 2007, nor was there any evidence his injury caused him to work differently or his employment was hindered in any way prior to September 7, 2007.

Dr. Koprivica testified the work injury of September 7, 2007, represented the direct proximate and prevailing factor in producing permanent injury in the lumbar region with development of diskogenic pain as a source of Mr. Bales' ongoing back pain. Dr. Koprivica testified Mr. Bales suffered an injury on September 7, 2007, that was identifiable by a single event when he slipped and fell and that injury was the prevailing factor in causing his medical condition, treatment and resulting disability. In addition to the low back injury, Dr. Koprivica felt Mr. Bales had a psychological dysfunction for which he recommended a formal psychological/psychiatric evaluation.

Dr. Koprivica explained there was objective evidence in the MRI to demonstrate a new injury. Dr. Koprivica specifically felt the annular changes in L4-5 demonstrated there had been an injury at that level that was new and distinct from what existed prior. Dr. Koprivica felt it was significant that Mr. Bales had a fall with immediate symptoms rather than a gradual onset of pain. Dr. Koprivica noted, due to the level of disability, Concentra Medical Centers recommended a referral to a spine specialist. However, he ended up being referred to Dr. Wheeler, a physiatrist, instead. He noted the EMG testing revealed there was not a disk herniation compressing the nerve, but he still had radicular symptoms that were diskogenic in nature and radiating down the leg.

Dr. Koprivica believed Mr. Bales was temporarily and totally disabled from the time he was let go from his modified duty tasks in October of 2007 and remained temporarily totally disabled until he was evaluated and determined not to be a surgical candidate by Dr. Chilton on May 29, 2009. As a result of his September 7, 2007 injury, Dr. Koprivica felt Mr. Bales had suffered a 25% permanent partial disability to the body as a whole. Dr. Koprivica believed Mr. Bales suffered a permanent partial disability of 29% of the body as a whole prior to September 7, 2007, consistent with his prior workers' compensation settlement.

As a result of Mr. Bales' symptomatic degenerative disk disease, he recommended Mr. Bales limit lifting and carrying activities to only occasional activities. He should not frequently or constantly lift or carry. Dr. Koprivica also recommended lifting in the light physical demand range of up to 20 pounds. He felt Mr. Bales should avoid frequent or constant bending at the waist, pushing, pulling, or twisting and should also avoid sustained or awkward postures of the lumbar spine. Dr. Koprivica recommended Mr. Bales avoid frequent or constant squatting, crawling, kneeling, or climbing. Posturally, he felt Mr. Bales should be capable of captive sitting, standing, or walking intervals of an hour but flexibility and changing more frequently would be ideal. Dr. Koprivica felt Mr. Bales was permanently and totally disabled due to a combination of his injuries in light of the significance of the structural impairment that predated Mr. Bales September 7, 2007, injury.

Dr. Koprivica authored two addendum reports dated April 11, 2010, and January 22, 2011, after reviewing the reports of Dr. Sheba Khalid, Dr. John Pro, Dr. Lowry Jones, and Terry Cordray. Dr. Koprivica felt the reports by Dr. Pro and Dr. Khalid supported his initial findings that there was a psychological overlay component of his pain. Dr. Koprivica felt it was important to note

Dr. Khalid validated Mr. Bales' presentation as being one that was of significant psychological or psychiatric dysfunction, not a mere attempt on Mr. Bales' part to lie or malingering. He initially recommended a vocational evaluation if there was a debate from the parties regarding Mr. Bales' employability. He explained this was because vocational experts look at issues beyond what he is physically looking at, and he is not an expert in the area of vocational rehabilitation. However, Mr. Cordray took into consideration these additional factors and opined Mr. Bales was permanently and totally disabled, and Dr. Koprivica confirmed this was supportive of what he believed as a physician. Dr. Koprivica noted it was typical for someone in Mr. Bales' type of pain to need to lie down unpredictably during the day. He testified part of that need is psychological and part of it was physical. He also noted Mr. Cordray referenced in his report Mr. Bales' concentration was poor secondary to pain and he had mood swings and stress because of the pain. Mr. Cordray also reported Mr. Bales was up and down at night because of back pain and occasionally woke up tired and in a fatigued fashion. Dr. Koprivica felt those reports by Mr. Bales to Mr. Cordray were consistent with his findings as a physician and consistent with the type of injury Mr. Bales suffered. After reviewing the expert reports, Dr. Koprivica opined Mr. Bales was permanently and totally disabled.

As a result of the injury, Dr. Koprivica felt Mr. Bales had future medical needs. He believed Mr. Bales needed ongoing chronic pain management from both a physical standpoint as well as a behavioral approach. Due to the complexity of the case, he believed the chronic pain management should be through a pain specialist on an ongoing basis that included a multi-disciplinary approach to pain management. Dr. Koprivica did not believe a primary care physician should monitor Mr. Bales' medication, but believed the type of pain management he needed should come from a specialist.

Expert Testimony of Dr. Sheba Khalid

Sheba Khalid, M.D. is board certified in psychiatry and is licensed to practice medicine in the states of Missouri and Kansas. Dr. Khalid performed a psychiatric evaluation of Mr. Bales on October 8, 2009. Dr. Khalid reviewed the medical records and took a history of Mr. Bales' injury. She noted Mr. Bales had poor energy and reported feelings of depression. Mr. Bales could not identify the exact onset of dysphoria and irritability but reported it began soon after the September 7, 2007 injury. Mr. Bales reported he began suffering chronic low back pain following the September 7, 2007 injury. Prior to September 7, 2007, Mr. Bales had not received any psychiatric treatment from a psychiatrist or a psychologist. He received one prescription of Effexor from his family physician for symptoms of depression. However, that treatment was not ongoing and he did not continually take medications. Dr. Khalid noted Mr. Bales had suffered an injury in 1993 but he continued to have long-term employment following that injury. Mr. Bales reported to Dr. Khalid he would like to go back to work if he did not have the current issues related to his September 7, 2007 injury. Dr. Khalid felt Mr. Bales was cooperative and forthcoming throughout the interview and provided a history which collaborated with his medical records. After completing her evaluation, Dr. Khalid's psychiatric diagnostic impression was:

Axis I: Adjustment disorder with mixed anxiety and depressive symptoms, chronic.
As a result of his injury of September 7, 2007, Mr. Bales developed chronic pain and its limitations, financial issues and a minimal support system. These stressors caused him to develop symptoms of anxiety and mood disturbance.

Axis II: No diagnosis.
Axis III: Chronic back pain.
Axis IV: Severe stressors.
Axis V: Current GAF: 65

Dr. Khalid believed Mr. Bales' September 7, 2007 injury was the prevailing factor in the development of his psychiatric symptoms. She felt chronic pain was the predominately limiting factor in preventing his employment. Dr. Khalid recommended counseling to help Mr. Bales develop appropriate healthy coping strategies for ongoing pain, frustration and anger.

Dr. Khalid reported the medical records revealed in April 2003, Mr. Bales' family physician had identified some symptoms of anxiety and depression and he was given a prescription of Effexor. There were no other notes in the records to indicate Mr. Bales was taking Effexor on an ongoing basis. Dr. Khalid noted she would not consider this treatment to be psychiatric, but it was a reference made to a symptom. Dr. Khalid felt it was common in her practice to see patients who go to their family physician, report stressors and immediately a prescription is generated. She did not feel it meant there was enough time taken to evaluate the symptoms in a primary care setting in a way a psychiatrist might evaluate a patient. Furthermore, she reported there was no follow-up with the family physician regarding any ongoing treatment due to depression or anxiety nor any multiple refills of a medication. There was also nothing in the medical records to reflect an ongoing symptomology of psychiatric symptoms prior to 2007.

Dr. Khalid believed Mr. Bales developed adjustment disorder with mixed anxiety and depressive symptoms that were chronic as a result of the September 7, 2007 injury. As a result of the injury, he developed chronic pain and his limitations with all the identified stressors. Dr. Khalid felt there was a specific tie between his physical pain and his psychiatric illness, as pain and depressive symptoms of any degree, including anxiety, run together. Dr. Khalid testified pain exacerbates psychiatric symptoms and psychiatric symptoms can make a person feel more pain, causing them to intertwine. Dr. Khalid also reviewed the independent medical evaluation of Dr. Pro dated October 8, 2010. Dr. Khalid noted Dr. Pro's impression was major depressive disorder, moderate intensity. Dr. Khalid believed Dr. Pro's diagnosis was consistent with her evaluation on October 8, 2009. Given Mr. Bales' condition and his lack of treatment, it was reasonable his symptoms were exacerbated and became more severe, causing it to reach a level of major depressive disorder.

Dr. Khalid was asked extensively about Mr. Bales' divorce and whether it played a role or contributed to his current psychiatric symptoms. From her standpoint, she did not see any part of his life that made a significant contribution to his depressive symptomology beyond the 2007 accident. Dr. Khalid was asked specifically to separate out the 2003 prescription visit with his family physician and the divorce proceedings and explain how they were not a significant contributing factor to her diagnosis. Dr. Khalid explained she spent two hours interviewing Mr. Bales and reviewed his medical records. Dr. Khalid did not take his word that he had no prior problems, but relied on her interview and the medical records to make that determination. She did not have any reason to believe Mr. Bales had suffered any significant impairment prior to September 7, 2007, as there were no reports to indicate: he was not functioning at that time, he had stopped going to work, he was socially isolating himself, reporting systematic complaints, had

frequent visits with his family care doctor or made any suicide gestures. In her clinical practice, these factors would indicate whether there was any impairment in social or occupational functioning which, in her opinion, was a significant element in determining whether a patient was just having something very situational going on that was transitory in nature or something that reached a point that affected their ability to function socially and occupationally. Based upon that information, she believed the work injury of September 7, 2007 was the prevailing factor in causing Mr. Bales' current medical condition and disability. As a result of his psychiatric and physical limitations, Dr. Khalid felt Mr. Bales was not employable in the open labor market. Dr. Khalid noted the chronic pain she evaluated and took into consideration was not present prior to September 7, 2007.

Dr. Khalid did not believe there was any evidence of malingering or secondary gain by Mr. Bales. She did not feel that he was in any way trying to embellish his symptoms or make his condition appear worse than what it was. Dr. Khalid felt Mr. Bales was credible and his reports were corroborated by the medical records she was provided.

As a direct result of the September 7, 2007 injury, Dr. Khalid recommended counseling with the use of an antidepressant, after at least six counseling sessions.

Expert Testimony of Dr. John D. Pro

John D. Pro, M.D. is a board certified psychiatrist who saw Mr. Bales for an independent psychiatric evaluation. This evaluation was court ordered by a judge in a companion Kansas workers' compensation case and was not retained by the employee or the employer. Dr. Pro reported Mr. Bales' psychiatric history was consistent with that of Dr. Khalid. With regards to any prior psychiatric history, Mr. Bales reported he felt drained and developed stress and anxiety while building a large house in 2003 and he complained of depression to his wife and to Dr. Ledbetter, who tried him on Effexor. Mr. Bales reported he discontinued the medication after one month as he improved. Depression never kept him from working prior to 2007. Dr. Pro reported Mr. Bales had obvious discomfort in his back and he observed Mr. Bales to move around several times in his chair. Dr. Pro also reported Mr. Bales was intermittently irritable and appeared depressed, although he wasn't severely depressed. Dr. Pro did not feel Mr. Bales' pain behaviors were exaggerated. After completing his evaluation and review of the medical records, Dr. Pro's psychiatric impression was:

Axis I: Major depressive disorder, moderate intensity

Axis II: None

Axis III:

1. Severe mid and low back pain with pain and numbness in both legs, right greater than left, secondary to slip and fall work injury.
2. Previous back injury secondary to another work related fall with chronic intermittent, low grade back pain.
3. Continued smoking.

Axis IV: Stress of dealing with severe, chronic back and lower extremity pain.
Stress of loss of self esteem, structure, financial and social support from not working.

Axis V: GAF = 51-52% (currently)
GAF = 51-52% (highest in past year)

Dr. Pro noted major depressive disorder is a psychiatric disorder characterized by a loss of interest or pleasure, depressed mood, irritability, poor sleep, loss of sexual function, social withdrawal and other symptoms. Dr. Pro felt, in his opinion, Mr. Bales' symptoms were consistent with major depressive disorder, moderately severe. Dr. Pro opined Mr. Bales' major depressive disorder was the direct result of his chronic, persistent, ongoing back pain and noted major depressive disorder is often a complication of severe back pain and other physical injuries. He did not believe Mr. Bales had a pain syndrome with medical and psychological factors because he did not regress psychologically and was trying to do the best he can with his pain. Dr. Pro reported Mr. Bales has a number of symptoms which were causing psychological impairment as he is irritable, unhappy, depressed, sleeps poorly and is less social. He also reported Mr. Bales is fatigued and unhappy and has poor concentration because of the pain and depression. Dr. Pro felt these symptoms were becoming chronic and untreated. Dr. Pro felt Mr. Bales suffered a 48% body as a whole permanent partial disability due to his psychiatric condition as a result of his September 7, 2007 injury. Dr. Pro felt Mr. Bales did not have any pre-existing psychological impairment. Without Mr. Bales' severe back pain, Dr. Pro felt Mr. Bales would not have become depressed. He did not feel Mr. Bales demonstrated any evidence of malingering, significant secondary gain, deliberate falsification of his symptoms or psychological overlay, or over dramatization of his symptoms.

Dr. Pro stated when Mr. Bales' orthopedic impairment and pain is combined with his psychological impairment; it was more likely than not he was unable to compete in the open labor market. Dr. Pro stated Mr. Bales is, therefore, permanently and totally disabled in his opinion. Dr. Pro recommended further treatment including a psychiatrist who could see him at least twice a month to regulate aggressive antidepressants that were beneficial in chronic pain situations. He also felt Mr. Bales would benefit from low doses of narcotics, at least temporarily, which would also require careful monitoring by a psychiatrist. Dr. Pro felt Mr. Bales would benefit from psychotherapy to help him cope with his chronic pain and his unemployment.

Dr. Pro reported that prior to September 7, 2007, the only psychiatric history Mr. Bales had was one visit to his family physician for which he was prescribed an anti-depressant for one month. Dr. Pro felt the medical records corroborated with what Mr. Bales reported to him as well as his examination. He did not believe Mr. Bales was malingering and felt he put a good effort on all the questions during the examination.

Dr. Pro believed Mr. Bales' chronic, persistent, ongoing back pain was a direct result of the September 7, 2007 injury and that injury was the prevailing factor in causing his major depressive disorder and the need for medical treatment and disability. Dr. Pro did not believe Mr. Bales suffered any pre-existing psychological impairment or disability prior to September 7, 2007. Dr. Pro testified Mr. Bales' one office visit to his family physician where he received one prescription for an anti-depressant, was in no way connected to his current psychological disability. Dr. Pro stated what is connected, is the pain that he has been suffering from his injury and the depression he now has. Dr. Pro testified that, without the severe back pain, Mr. Bales would not have become depressed.

Dr. Pro reviewed the report of Dr. Sheba Khalid, which was one year prior to Dr. Pro's examination. He felt her diagnosis was consistent with his findings. He also felt it was reasonable Mr. Bales' symptoms progressed in one year to reach the level that it became a major depressive

disorder. Dr. Pro felt when Mr. Bales' orthopedic impairments were combined with his pain impairment and his psychological impairment, he was permanently and totally disabled. He believed that permanent disability resulted solely from the September 7, 2007 accident.

Expert Testimony of Tystan Cook

Trystan Cook, D.O. is board certified in family medicine and saw Mr. Bales on one occasion while he was practicing at Kearney Family Medicine in Kearney, Missouri. He noted he saw Mr. Bales on July 13, 2007 for hip and back discomfort that was on the right side. Dr. Cook felt Mr. Bales was having some sciatica. Dr. Cook testified there were no other medical records from Kearney Family Medicine for back pain between November 6, 2002, and his encounter on July 13, 2007. Based on the medical records, there was no indication Mr. Bales had any chronic pain prior to September 7, 2007. Dr. Cook testified he did not have any information that Mr. Bales' intermittent back discomfort interfered with his ability to perform his job duties.

Expert Testimony of Dr. Carl D. Ledbetter

Carl D. Ledbetter, D.O. has been board certified in family medicine since 1981 and practices at the Kearny Family Medicine Clinic. Mr. Bales was a patient of Dr. Ledbetter beginning in November 1998. He last saw Mr. Bales on April 23, 2003, but saw another physician in his office on July 13, 2007. During the time in which Mr. Bales was a patient of Dr. Ledbetter's/Kearny Family Medicine Clinic, he only had 6 visits during 9 years. Dr. Ledbetter saw Mr. Bales on November 6, 2002 for back pain which had intensified a week or so prior to the examination. He reported to Dr. Ledbetter he had been doing a lot of lifting with his job which had intensified immediately before he saw Dr. Ledbetter. Mr. Bales had missed no work, however, for his back pain. Dr. Ledbetter's notes indicated he had a history of a fall in 1993 and an injury to his back at that time. Dr. Ledbetter felt the pain was a combination of musculoskeletal and in the vertebral process. Dr. Ledbetter testified that due to the spasm, which he felt was intensified or brought on by the increased lifting, Mr. Bales should rest and remain off work. However, Dr. Ledbetter understood Mr. Bales continued to work through the pain. Dr. Ledbetter testified he recommended epidural injections. Mr. Bales did not feel the injections helped and did not feel he needed to pursue surgery at that time.

Dr. Ledbetter testified he recommended Mr. Bales not work while he was waiting for the results of the MRI. However, he had no other restrictions for Mr. Bales with regards to his back. Dr. Ledbetter testified Mr. Bales worked in heavy construction. Prior to seeing him on November 6, 2002, Mr. Bales had been doing a lot of extra hard lifting and that acute event precipitated the visit. There was no indication he was suffering long-standing back pain that had been present for several years. Dr. Ledbetter did not quantify the long history of back pain on his November 2002 note. He believed it would wax and wane and was not constant, as Mr. Bales continued to work in a type of job that required a great deal of physical dexterity and was rather labor intensive. Dr. Ledbetter testified Mr. Bales never returned for another recommendation for an epidural injection, a referral to a neurosurgeon, or to refill pain medications.

Dr. Ledbetter also discussed the April 23, 2003 visit in which Mr. Bales was seen for stress. Dr. Ledbetter reported the contributing factors were the stress of his father's death and the divorce process. Dr. Ledbetter testified he prescribed Effexor on that visit but was unsure whether

Mr. Bales ever took the prescription. However, Dr. Ledbetter never refilled that medication for Mr. Bales. Dr. Ledbetter testified he classified Mr. Bales' April 23, 2003 visit as situational depression. There was no indication that depression was continual.

Vocational Evidence

Terry Cordray is a vocational rehabilitation counselor and has actively placed individuals in jobs for the past thirty-eight years. Mr. Cordray spent four hours with Mr. Bales and reviewed the medical records and reports. As part of his interview, Mr. Cordray took an educational history and noted Mr. Bales graduated from Lawson High School in 1976. Mr. Bales had no further educational or academic training in a classroom setting or any computer, keyboarding, or software training. Mr. Cordray noted Mr. Bales previously had a Missouri Real Estate License which had been inactive since 2001. Mr. Cordray felt Mr. Bales would be required to retest to activate the license and he no longer remembered the information. For vocational purposes, Mr. Cordray considered Mr. Bales to be a high school graduate. As Mr. Bales has been considered a high school graduate, he performed further vocational testing to determine his ability to be retrained. After completing vocational testing, Mr. Cordray concluded Mr. Bales was at the borderline range in reading and the low average range in spelling. Given Mr. Bales' vocational testing results in combination with his age of 51, Mr. Cordray did not believe he was appropriate for academic training and did not believe any vocational training would fall within his functional capacity.

Mr. Cordray also took a work history from Mr. Bales and noted he had been employed as a construction carpenter since 1976. Mr. Cordray noted Mr. Bales did not work for approximately two years following his back injury in 1993. However, he returned to the work force in 1995 and began working for LG Barcus Construction. He worked for LG Barcus Construction until he began working for Clarkson Construction in 2007. Mr. Cordray noted the job of a construction carpenter was defined as heavy in strength demand and skilled. The skills involved knowledge of the tools, methods, and materials associated with heavy residential, commercial and highway construction. Mr. Cordray felt these skills did not transfer to lighter sedentary jobs. He also reported that with building trades, carpentry work is frequently strenuous. It requires prolonged standing, climbing, bending, and kneeling. He reported carpenters utilize sharp tools and power equipment and work in situations where they may slip or fall. They also often work outdoors and are subject to variable weather conditions.

Mr. Bales reported to Mr. Cordray, he has difficulties with lifting and carrying as well as postural limitations. He is able to sit for 20-30 minutes before he must stand but he can only stand for 5-10 minutes before he must sit. Mr. Bales reported he typically has to go to a recliner to lie down after three hours of alternating between sitting and standing. Mr. Bales also reported he is up and down at night because of back pain and occasionally will wake up in a tired and fatigued fashion. Mr. Bales' concentration is also poor, secondary to pain, and he suffers from mood swings and stress because of pain.

Mr. Cordray concluded Mr. Bales has a vocational profile consistent with an individual who had a life-long career as a carpenter. Unfortunately, following the September 7, 2007 injury, Mr. Bales has been unable to return to work as a carpenter. Based upon the restrictions of Dr. Wheeler and Dr. Koprivica, Mr. Cordray felt Mr. Bales should be limited to sedentary sit/stand occupations. However, given the need to avoid standing for over an hour, Mr. Bales would not be capable of

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performing the more common positions of retail sales clerk. Additionally, Dr. Wheeler's restrictions of no lifting would further limit him to sedentary sit/stand jobs such as a cashier. Unfortunately, given his other vocational factors, Mr. Bales is unable to work at a job even as a cashier. When Mr. Cordray considered the psychological report of Dr. Pro, where he identified chronic pain, the recurrent depression, and a GAF of 51, he believed it would prevent Mr. Bales from getting even limited jobs such as a parking garage cashier.

Mr. Cordray noted Mr. Bales' GAF score of 51 significantly affected his employability. Mr. Cordray testified, in his experience, an individual with that type of score cannot get along with anyone. They are often depressed and irritable and have difficulties showing up for work. He noted it was considered a moderate impairment and borderline between serious impairment. Mr. Cordray testified a GAF score of 51 makes it difficult to employ an individual. He felt this was particularly true if you are a subordinate employee, where you have to take orders from other people or have to work alongside other people. Mr. Cordray felt it was probable Mr. Bales would not be hired as long as his impairment was at that level. Mr. Cordray stated not only would Mr. Bales be unable to get a job, but he would not be able to physically perform those jobs.

Mr. Cordray stated Mr. Bales never had any GAF of 51 prior to September 7, 2007 and never had any depression that he would consider disabling. Mr. Cordray was asked within the last five years prior to September 7, 2007 whether Mr. Bales had any physical or mental conditions that interfered with his employment. Mr. Cordray felt Mr. Bales had a significant injury that he recovered from and performed heavy, hard physical work. He stated Mr. Bales demonstrated over a number of years the ability to do hard physical work after the first injury. The first injury was significant but yet he was able to do road construction, which was heavy hard work. Mr. Bales was not accommodated; he was not limited; he did not seem to miss work and; he did not have any problems that prevented him from doing all aspects of his job prior to this injury.

Mr. Cordray further defined Mr. Bales' work requirements as being heavy work that was hard, physical and strenuous work. It requires a lot of standing, bending, kneeling, and climbing. It also requires individuals to lift and carry jackhammers weighing 90 pounds and cement weighing up to 100 pounds. Based upon the restrictions of Dr. Koprivica, Dr. Wheeler, Dr. Jones, and Dr. Pro, Mr. Bales would not be able to perform that type of work.

Mr. Cordray noted one of the important factors for getting a job, besides competing with other individuals, requires the ability to show up for work on a regular basis and perform at a certain level. However, based upon his evaluation and review of the records, he did not feel Mr. Bales would be able to show up for work consistently on a daily basis. He noted doctors described Mr. Bales as having chronic pain and depression related to that pain. Mr. Cordray stated he has no reason to believe a person with Mr. Bales' limitations requiring him to alternate sitting and standing, who does not sleep at night, who has chronic pain and depression, might be able to show up for work on time, every day, and not have at least two days of absenteeism a month, month in and month out. This type of absenteeism would also render him unemployable. Mr. Cordray noted the chronic pain was consistent throughout the reports of Dr. Jones, Dr. Wheeler, Dr. Koprivica, Dr. Khalid, and Dr. Pro.

Mr. Cordray also did not feel Mr. Bales is capable of obtaining a real estate license again. Even if he was able to obtain the license, he would not be able to show clients around the house or

consistently walk up and down the stairs or around the house as necessary. Additionally, Mr. Cordray testified, if Mr. Bales is required to lie down unpredictably during the day, this would further prevent him from being employable in the open labor market.

Mr. Cordray testified he would be unable to place Mr. Bales in any type of job. He is a 52-year-old individual who has done one thing all his life, being a carpenter. He cannot do the only job he has ever done since high school and has no skills or education for other jobs. He also has a history of work injuries; he is very physically limited and; he has chronic pain and depression. Mr. Cordray believed there was no reason to expect any employer, in the normal course of business, trying to earn a profit, hiring people to perform work as it should be done, would reasonably be expected to hire Mr. Bales. Simply put, Mr. Bales would be unable to get a job.

Mr. Cordray believed when one considered Mr. Bales' overall vocational profile of a 52-year-old man who has a history of work-related injuries to his back, with no skills and a history of ongoing chronic back pain and lacks education since 1976, he is not employable or placeable in the open labor market. This considered not only his physical capacity, education, and skill level, but the labor market surveys, the employer attitude towards people with disability, age and other conditions which would affect the person's actual ability to obtain and maintain employment. Mr. Cordray also opined the market has a high unemployment rate, which further adds to his inability to obtain employment. Mr. Cordray did not believe any employer in the ordinary course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ Mr. Bales for any job, given his current presentation. Mr. Bales is, therefore, totally disabled.

Testimony of Robert Lyons

Mr. Lyons testified he was a claims manager first for Total Risk Management, which is now Nova Pro Risk. As a claims manager, he is required to monitor the progress of a claim and coordinate all medical care. He was responsible for coordinating appointments and authorizing medical care for Clarkson Construction's employees. He had the authority by Clarkson Construction to make all decisions related to Mr. Bales' medical treatment. Mr. Lyons received all doctors' notes and restrictions and testified he always reported any restrictions to the employer within 24 hours. Mr. Lyons testified his office received the note from Concentra Medical Centers recommending treatment to a spine specialist. However, his office, instead, directed Concentra Medical Centers to send Mr. Bales to Dr. Eden Wheeler. Mr. Lyons testified he received the reports of Dr. Wheeler, requesting Mr. Bales be sent to a neurosurgeon for a consultation on two separate occasions, but never sent him for an evaluation. Mr. Lyons claimed he needed to see all the medical records from Mr. Bales' 1993 accident prior to authorizing such treatment. Although Mr. Lyons was aware on November 20, 2007 that Dr. Wheeler had recommended a neurosurgery consult, this still was not done prior to the Kansas workers' compensation court's order for an IME with Dr. Chilton, which took place on May 29, 2009. Mr. Lyons testified he would have been aware of Mr. Bales' restrictions at the time he last saw Dr. Wheeler and would have sent those restrictions to Clarkson Construction.

Testimony of Scott Luschen

Mr. Luschen testified he has been a superintendent for Clarkson Construction for 19 years. He hired Mr. Bales on August 16, 2011. He testified Mr. Bales would have to lift 30-60 pounds on the high end, but there were laborers or two people that could perform lifting task of more than 60 pounds. Mr. Luschen testified the type of light-duty work included cutting braces and pre-nailing braces. These would be two feet by four feet braces to be cut out of a two feet by eight feet piece of plywood. Mr. Luschen testified there were people around who could help Mr. Bales while he was performing light duty. However, he admitted nobody was stationed right beside him to continually do the work. He contended, however, Mr. Bales would be able to call out for help every time he needed someone to lift a piece of plywood. Mr. Luschen admitted the skill saw Mr. Bales was required to use weighed at least 15 pounds. However, he contended that merely using the saw did not constitute lifting and, therefore, did not violate the restrictions imposed by Dr. Wheeler. Mr. Luschen testified Mr. Bales had only been employed three weeks prior to his accident. However, during that time, Mr. Bales did not have any difficulty performing any of the work required of him. He had no difficulty standing, lifting, walking, or climbing.

RULINGS:

Causation

The employer and insurer did not challenge whether Mr. Bales suffered an accident in the course and scope of his employment but challenged whether his injuries were causally related to the accident.

The courts have held that when a condition is beyond the understanding of a lay person, expert testimony is required. "For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of the disability when the facts fall within the realm of lay understanding...An injury may be of such a nature (however) that expert opinion is essential to show that it was caused by the accident to which it is ascribed." (Citations omitted). Griggs v. A. B. Chance Company, 503 S.W.2d 697, 704 (Mo.App. 1974). The courts have further noted that, "medical causation not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." Selby v. Trans World Airlines, Inc., 831 S.W.2d 221, 222 (Mo.App. 1992). To disregard the opinion of the only medical expert in the case and fail to articulate any reasonable basis to ignore an uncontradicted expert medical opinion constitutes a substitution of personal opinion for causation. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo.App. 2010).

Dr. Koprivica was the only expert physician to give an opinion regarding causation of the low back condition. Dr. Koprivica testified the work injury of September 7, 2007 represented the direct proximate and prevailing factor in producing permanent injury in the lumbar region with development of diskogenic pain as a source of Mr. Bales' ongoing back pain. He further testified Mr. Bales suffered an injury on September 7, 2007 that was identifiable by a single event, when he slipped and fell, and that injury was the prevailing factor in causing his medical condition, treatment and resulting disability. In addition to the low back injury, Dr. Koprivica felt Mr. Bales had a

psychological dysfunction for which he recommended a formal psychological/psychiatric evaluation.

Dr. Koprivica explained there was objective evidence in the MRI to demonstrate a new injury. Dr. Koprivica specifically felt the annular changes in the L4-5 changes demonstrated there had been an injury at that level that was new and distinct from what existed prior. Dr. Koprivica felt it was significant that Mr. Bales have a fall with immediate symptoms rather than a gradual onset of pain. Dr. Koprivica noted due to the level of disability, Concentra Medical Centers recommended a referral to a spine specialist.

Dr. Pro, who was a court-ordered independent medical examiner, and Dr. Khalid, were the only experts to give an opinion regarding causation of Mr. Bales' psychiatric condition. Both experts opined Mr. Bales' work-related accident of September 7, 2007 was the prevailing factor in causing his psychiatric condition and disability. They also agreed Mr. Bales had never suffered any pre-existing psychiatric disability. He had been seen by his family physician one time and received one prescription for an anti-depressant. There was no evidence he suffered from the condition prior or that his psychiatric condition is related to anything other than his work injury of September 7, 2007.

I find the testimony of Dr. Koprivica, Dr. Pro and Dr. Khalid to be credible. Mr. Bales' work injury was the prevailing factor in causing his medical condition, including his low back injury and his psychiatric condition and his disability for these conditions. There was no evidence to the contrary.

Accordingly, I find Mr. Bales proved an accident occurred in the course and scope of his employment and his injuries to his low back and his resultant psychiatric condition were causally related to his accident on September 7, 2007.

Temporary and Total Disability and penalties pursuant to §287.560, RSMo., for failure to pay temporary total disability benefits.

Mr. Bales is seeking temporary total disability compensation for the period of October 26, 2007, through May 29, 2009. The employer and insurer stipulated they paid no temporary total disability benefits.

Section 287.270, RSMo, provides that an injured employee is to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7 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." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. Vinson v. Curators of Univ. of Missouri, 822 S.W. 2d 504 (Mo.App. 1991); Phelps v. Jeff Wolk Const. Co., 803 S.W.2d 641, 645 (Mo.App. 1991); and Williams v. Pillsbury Co., 694 S.W.2d 488 (Mo.App. 1985).

The employee has the burden of proving that he or she is unable to return to any employment. Such proof is made only by competent and substantial evidence. It may not rest on
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speculation. Griggs v. A.B. Chance Company, 503 S.W.2d 697, 703 (Mo.App. 1974). However, uncontradicted expert medical opinions cannot be ignored. Angus v. Second Injury Fund, 328 S.W.3d 294 (Mo.App. 2010). The employee's testimony alone can constitute substantial evidence to support an award of temporary total disability. Evidence of temporary disability given by the employee is not necessarily beyond the realm of understanding by lay persons. Riggs v. Daniel Intern, 771 S.W.2d 850, 851 (Mo.App. 1989).

Mr. Bales was given restrictions by Dr. Wheeler that consisted of: no bending, lifting, or climbing, occasional standing and walking and position changes at will. Mr. Bales saw Dr. Wheeler on October 18, 2007. Her records reflect Mr. Bales reported that, although she had recommended modified duties, he had missed three to four days since his last evaluation due to the pain. He also reported to her he was still lifting at work. Dr. Wheeler reported she discussed with Mr. Bales his compliance with the work restrictions and it was his responsibility to enforce them. She continued his work restrictions. Dr. Wheeler did not feel that MMI status could be determined at that time.

Mr. Bales returned to Dr. Wheeler on November 20, 2007 following the electrodiagnostic testing. Dr. Wheeler continued to recommend a neurosurgical consultation, as Mr. Bales had exhausted conservative treatment including medications, therapy and pain management intervention. She ordered him to continue his temporary restrictions of no lifting, bending, squatting, climbing, with standing or walking occasionally but not to exceed more than three hours daily and change of position at will.

Clarkson Construction gave Mr. Bales "light-duty" work which consisted of cutting forms that were three quarter inch plywood that required the use of a 17-18 pound saw. Mr. Bales testified there was no one there to help him lift the plywood, so he was frequently bending over to lift the plywood onto the sawhorses and he would also have to lift the saw, even if it was just a minimal distance, in order to navigate the saw to cut the forms. Mr. Bales testified his pain became so much, he was unable to continue to work in the light-duty capacity. He also missed several days due to the pain he was suffering from his work injury. Mr. Bales testified he was terminated due to not showing up for work. Mr. Bales testified he was physically unable to perform the job.

Mr. Luschen testified he was aware of Mr. Bales' restrictions by Dr. Wheeler and the type of light-duty work he assigned Mr. Bales included cutting braces and pre-nailing braces. These would be two feet by four feet braces to be cut out of a two feet by eight feet piece of plywood. Mr. Luschen testified there were people around who could help Mr. Bales while he was performing light duty. However, he admitted nobody was stationed right beside him to continually do the work. He contended, however, Mr. Bales would be able to call out for help every time he needed someone to lift a piece of plywood. Mr. Luschen admitted the skill saw Mr. Bales was required to use weighed at least 15 pounds. However, he contended that merely using the saw did not constitute lifting and, therefore, did not violate the restrictions imposed by Dr. Wheeler. I find Mr. Luschen's testimony not credible. I believe the work assigned by Clarkson Construction was not within Dr. Wheeler's ordered restrictions – restrictions Clarkson Construction was well aware of.

Mr. Bales testified he was physically unable to work. He testified he notified his supervisor of his inability to work. His supervisor did not find him a job within his work restrictions. His testimony is supported by the contemporaneous medical records of Dr. Wheeler, who reported

Mr. Bales was still lifting at work and had missed several days of work due to back pain. Dr. Wheeler stressed the importance of enforcing his restrictions and continued his restrictions.

Dr. Wheeler's last medical record stated Mr. Bales' restrictions were temporary. She referred him to a neurosurgeon for the second time during her course of treatment of Mr. Bales and stated she was unable to provide further treatment until he was seen by a neurosurgeon. Dr. Wheeler was the authorized treating physician, chosen by the employer and insurer who then willfully ignored her recommendations. The employer and insurer gave no reasonable explanation for not referring Mr. Bales to a neurosurgeon, beyond wanting to see Mr. Bales' prior medical records. During this time, the employer and insurer did not pay Mr. Bales any benefits. Mr. Bales did not receive any compensation or the recommended treatment for 83 weeks. Employers cannot ignore the recommendations of their own authorized physicians and then seek to penalize the employee for their inactions.

Mr. Bales' testimony supports his claim for temporary total disability compensation. Additionally, Mr. Bales' testimony and the corroborating medical records reveal Mr. Bales' inability to work from October 26, 2007, through May 29, 2009, when he was finally seen by Dr. Chilton. Further, Dr. Koprivica testified Mr. Bales did not reach maximum medical improvement until May 29, 2009, when he was finally authorized to see a neurosurgeon, Dr. Chilton. There is no evidence to the contrary.

Although the employer and insurer argued in their post-trial briefs that Mr. Bales was terminated for post-injury misconduct unrelated to his work injury, their argument must fail. The employer and insurer failed to make his termination an issue before this Court. This Court cannot address issues that were not properly before it at the time of the trial. However, even if this Court were to address the issue, there was no evidence that Mr. Bales was terminated for misconduct unrelated to his work injury. Section 287.170.4, states, "If the employee is terminated from post-injury employment based upon the employee's post-injury misconduct, neither temporary total disability nor temporary partial disability benefits under this section or section¹ 287.180 are payable. As used in this section, the phrase "post-injury misconduct" shall not include absence from the workplace due to an injury unless the employee is capable of working with restrictions, as certified by a physician." For the reasons articulated above, I believe Mr. Bales was physically incapable of work and his termination was not unrelated to his work injury.

I find Mr. Bales' testimony to be credible and he has met his burden of proof in his claim for temporary total disability compensation. Mr. Bales was temporarily totally disabled from October 26, 2007 through March 29, 2009. The employer and insurer shall pay Mr. Bales \$61,645.76, representing 83 weeks for the claimed time period in which Mr. Bales was temporarily totally disabled. I also find the employer and insurer willfully ignored the recommendations of their authorized treating physician. They were aware Mr. Bales was not at maximum medical improvement; they failed to offer him work within Dr. Wheeler's restrictions and; they failed to pay him any compensation during the time he was unable to work. I therefore find Mr. Bales is entitled to penalties against the employer and insurer pursuant to §287.560 RSMo. in the amount of \$15,411.44, representing 25% of the amount of temporary total disability due and owing. I also find this amount, as a penalty, is not subject to any credit as it is not compensation, but rather is a penalty.

Nature and Extent of Claimant's Disability

Mr. Bales has asserted a claim for permanent and total disability benefits, with the liability of such resting with either the employer and insurer or the Second Injury Fund.

Section 287.020.7, RSMo. provides, "The term "total disability" as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident." The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment." Kowaiski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001), overruled in part on other grounds by Hampton, 121 S.W.3d at 225; Reiner v. Treasurer of the State of Mo., 837 S.W.2d 363, 367 (Mo.App. 1992), overruled in part on other grounds by Hampton, 121 S.W.3d at 229; and Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789, 792 (Mo.App. 1992). The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo.App. 1990); Reiner at 367; and Kowalski at 922. See also Thornton v. Hass Bakery, 858 S.W.2d 831, 834 (Mo.App. 1993).

Section 287.220, RSMo, creates the Second Injury Fund and sets forth when and in what amounts compensation shall be paid from the fund in "[a]ll cases of permanent disability where there has been previous disability." In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. banc 2003), overruled in part on other grounds by Hampton, 121 S.W.3d at 224 (Mo banc 2003); Hughey v. Chrysler Corp., 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. Id. at 248.

The evidence demonstrates Mr. Bales was injured on September 7, 2007. Following the injury, he suffered a significant delay in medical treatment. He is currently under the medical care of Dr. Ledbetter and Dr. Duane Jones. As a result of the injury, Mr. Bales testified he suffers severe pain and physical restrictions. He takes medications to help control and decrease his pain. Further, Mr. Bales needs to lie down and change positions frequently and unpredictably to decrease the pain. Mr. Bales testified he has good days and bad days, but his condition consistently deteriorates from the beginning of the day through the end of the day. Dr. Koprivica, Dr. Pro, Dr. Jones and Dr. Khalid all stated Mr. Bales suffers from chronic pain. None of these physicians questioned his veracity or his level of pain.

After observing Mr. Bales throughout the course of the hearing and reviewing all of the evidence, I find Mr. Bales credible. Throughout the hearing, both the appearance of Mr. Bales and his observed behavior patterns support the conclusion that he is suffering from a significant level of

pain in his low back. During the course of the hearing, which began at 9:00 a.m., Mr. Bales was unable to sit comfortably, was changing positions and was alternating between sitting and standing in an effort to reduce his pain. He also requested to take a break due to his pain. This observed behavior is consistent with the testimony of Mr. Bales.

Dr. Koprivica, Dr. Pro, Dr. Khalid and Terry Cordray all opined Mr. Bales is permanently and totally disabled. There is no evidence to the contrary. There is a question as to whether the total disability is a result of the September 7, 2007 accident alone, or a result of the September 7, 2007 accident in combination with his prior low back condition.

Dr. Koprivica noted, although he believed there was some disability in Mr. Bales' back, it was not so overwhelming that he could not do physical activities. Dr. Koprivica testified he believes Mr. Bales would have had some disability prior to the accident in 2007 that would have impacted his ability to work as a carpenter. However, if Mr. Bales was able to pick up 200 pounds, bend, lift, twist and do everything without limitations or pain and did not need to see a physician, then he was not totally disabled as a result of a combination of the prior back injury. Dr. Koprivica stated Mr. Bales would have to lift and carry items frequently or constantly on a daily basis to work as a carpenter. Additionally, Mr. Bales was not accommodated in any way prior to 2007, nor was there any evidence his injury caused him to work differently or his employment was hindered in any way prior to September 7, 2007.

Dr. Koprivica reviewed the reports of Dr. Sheba Khalid, Dr. John Pro, Dr. Lowry Jones, and Terry Cordray. Dr. Koprivica felt the reports by Dr. Pro and Dr. Khalid supported his initial findings that there was a psychological overlay component of his pain. Dr. Koprivica felt it was important to note Dr. Khalid validated Mr. Bales' presentation as being one that was of significant psychological or psychiatric dysfunction, not a mere attempt on Mr. Bales' part to lie or malingering. He initially recommended a vocational evaluation, if there was a question by the parties as to Mr. Bales' employability, and explained this was because vocational experts look at issues beyond what he is physically looking at, and he is not an expert in the area of vocational rehabilitation. Mr. Cordray took into consideration these additional vocational factors and opined Mr. Bales was permanently and totally disabled, and Dr. Koprivica confirmed this was supportive of what he believed as a physician.

Dr. Koprivica noted it was typical for someone in Mr. Bales' type of pain to need to lie down unpredictably during the day. He testified part of that need is psychological and part of it was physical. He also noted Mr. Cordray referenced in his report Mr. Bales' concentration was poor secondary to pain and that he had mood swings and stress because of the pain. Mr. Cordray also reported Mr. Bales was up and down at night because of back pain and occasionally woke up tired and in a fatigued fashion. Dr. Koprivica felt those reports by Mr. Bales to Mr. Cordray were consistent with his findings as a physician and consistent with the type of injury Mr. Bales suffered. Dr. Koprivica opined Mr. Bales was permanently and totally disabled.

Dr. Khalid believed Mr. Bales developed adjustment disorder with mixed anxiety and depressive symptoms that were chronic as a result of the September 7, 2007 injury. As a result of the injury, he developed chronic pain and limitations with all the identified stressors. She believed the work injury of September 7, 2007 was the prevailing factor in causing Mr. Bales' current medical condition and disability. As a result of his psychiatric and physical limitations,

Dr. Khalid felt Mr. Bales was not employable in the open labor market. Dr. Khalid noted the chronic pain she evaluated and took into consideration was not present prior to September of 2007.

Dr. Pro believed Mr. Bales' chronic persistent ongoing back pain was a direct result of the September 7, 2007 injury and that injury was the prevailing factor in causing his major depressive disorder and the need for medical treatment and disability. Dr. Pro did not believe Mr. Bales suffered any pre-existing psychological impairment or disability prior to September 7, 2007. Dr. Pro felt when Mr. Bales' orthopedic impairments were combined with his pain impairment and his psychological impairment, he was permanently and totally disabled. He believed that permanent disability resulted solely from the September 7, 2007 accident.

Mr. Cordray stated Mr. Bales never had any GAF of 51 prior to September 7, 2007, and never had any depression that he would consider disabling. Mr. Cordray was asked within the last five years prior to September 7, 2007 whether Mr. Bales had any physical or mental conditions that interfered with his employment, Mr. Cordray felt Mr. Bales had a significant injury which he recovered from and performed heavy, hard physical work. He stated Mr. Bales demonstrated over a number of years the ability to do hard physical work after the first injury. Mr. Cordray further defined Mr. Bales' work duties to require a lot of standing, bending, kneeling, and climbing. It also required individuals to lift and carry jackhammers weighing 90 pounds and cement weighing up to 100 pounds. Mr. Cordray stated the first injury was significant, but yet he was able to do road construction, which was heavy, hard work. Mr. Bales was not accommodated; he was not limited; he did not seem to miss work and; he did not have anything that prevented him from doing all aspects of his job prior to this injury.

Mr. Cordray concluded Mr. Bales has a vocational profile consistent with an individual who has a life-long career as a carpenter. Unfortunately, following the September 7, 2007 injury, Mr. Bales has been unable to return to work as a carpenter. Based upon the restrictions of Dr. Wheeler and Dr. Koprivica, Mr. Cordray felt Mr. Bales should be limited to sedentary sit/stand occupations. However, given the need to avoid standing for over an hour, Mr. Bales would not be capable of performing the more common positions of retail sales clerk. Additionally, Dr. Wheeler's restrictions of no lifting would further limit him to sedentary sit/stand jobs such as a cashier. Unfortunately, given his other vocational factors, Mr. Bales is unable to work at a job even as a cashier. When he considered the psychological report of Dr. Pro, where he identified chronic pain, the recurrent depression, and a GAF of 51, he believed it would prevent Mr. Bales from getting even limited jobs such as a parking garage cashier.

“When expert opinions conflict, the Commission decides which to accept.” Lytle v. T-Mac, Inc., 931 S.W.2d 496, 502 (Mo.App. W.D. 1996). Further, the trier of fact is “free to disregard testimony of a witness even if no contradictory or impeaching evidence is introduced.” Cahill v. Cahill, 963 S.W.2d 368, 372 (Mo.App. E.D. 1998) emphasis added.

I find the testimony of Dr. Koprivica, Dr. Pro, Dr. Khalid and Terry Cordray to be credible. All of these experts opined Mr. Bales is permanently and totally disabled. There is no evidence to the contrary.

Based upon the evidence presented, I find Mr. Bales is permanently and totally disabled. I find that no employer could reasonably be expected to hire Mr. Bales in his current condition,

particularly when one considers the chronic pain Mr. Bales experiences, his physical and psychological limitations, and the requirement to lie down unpredictably throughout the day. I further find that the total disability is a result of his September 7, 2007, injury. Mr. Bales' testimony supports the experts' opinions in which he was able to perform all aspects of his job following his recovery from his 1993 injury. This was also substantiated by his supervisor at Clarkson Construction, Scott Luschen, who testified Mr. Bales was able to perform all aspects of his job prior to his September 7, 2007 injury. Although Mr. Bales suffered a significant injury, he recovered and returned to hard, physical work.

I also do not believe Mr. Bales suffered from any psychological disability prior to September 7, 2007. Two board certified psychiatrists testified Mr. Bales developed chronic pain following the September 7, 2007 injury and the injury was the prevailing factor in causing his psychological condition and resulting disability. Dr. Pro and Dr. Khalid both opined Mr. Bales was permanently and totally disabled due to the September 7, 2007 injury in isolation. I find it significant Dr. Pro was an independent medical examiner ordered by the Kansas workers' compensation court and not hired by any of the parties involved.

The evidence establishes Mr. Bales reached maximum medical improvement on May 29, 2009. The employer and insurer is therefore directed to pay Mr. Bales the sum of \$742.72 per week for permanent total disability commencing on May 29, 2009 and continuing for the remainder of Mr. Bales' life pursuant to Missouri Workers' Compensation laws.

Future Medical Care and Treatment

Mr. Bales seeks an award leaving open future medical care and treatment to relieve and cure him of the work related injuries he has suffered.

Section 287.140, RSMo. requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment...as may reasonably required...to cure and relieve [the employee] from the effects of the injury." Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo.App. 1996). The standard of proof for entitlement to an allowance for further medical treatment cannot be met simply by offering testimony that it is "possible" that the claimant will need further medical treatment. Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo.App. 1995). Employees are required to show by a reasonable probability that they will need future medical treatment. Sharp v. New Mac Elec. Co-op., 92 S.W.3d 351, 354 (Mo.App. 2003), overruled in part on other grounds by Hampton, 121 S.W.3d at 224; Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo.App. 1997), overruled in part on other grounds by Hampton, 121 S.W.3d at 227.

When the standards for awarding future medical aid are applied to the facts of this case, I find Mr. Bales has satisfied his burden of proof on this issue.

As a result of the injury, Dr. Koprivica felt Mr. Bales had future medical needs. He believed Mr. Bales needed ongoing chronic pain management from both a physical standpoint as well as a behavioral approach. Due to the complexity of the case, he believed the chronic pain management should be through a pain specialist on an ongoing basis that included a multi-disciplinary approach to pain management. Dr. Koprivica did not recommend a primary care physician monitor medication, but rather believed the type of pain management he needed should come from a

specialist.

Dr. Pro recommended further treatment including a psychiatrist who could see him at least twice a month to regulate aggressive antidepressants that were beneficial in chronic pain situations. He also felt Mr. Bales would benefit from low doses of narcotics at least temporarily which would also require careful monitoring by a psychiatrist, and recommended psychotherapy to help him cope with his chronic pain and his unemployment. As a direct result of the September 7, 2007 injury, Dr. Khalid recommended counseling with the use of an antidepressant after at least six counseling sessions.

Based on this evidence, the employer and insurer are directed to provide all additional medical treatment reasonable and necessary to cure and relieve Mr. Bales from the effects of his September 7, 2007 injury in accordance with the provisions of Section 287.140, RSMo. This requirement for future medical aid shall include any care and treatment that is causally related to Mr. Bales' September 7, 2007 accident.

Second Injury Fund Liability

The Second Injury Fund has no liability, as the permanent total disability is a result of Mr. Bales' September 7, 2007 accident alone.

Interest shall be provided as by law.

Made by: _____
Administrative Law Judge Mark Siedlik
Division of Workers' Compensation