

**FINAL AWARD ALLOWING COMPENSATION**

(Affirming Award and Decision of Administrative Law Judge  
with Correction)

Injury No.: 05-140300

Employee: Robert Bayer  
Employer: Suntrup Buick  
Insurer: Truck Insurance Exchange  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having heard oral argument, reviewed the evidence and briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of Administrative Law Judge Edwin J. Kohner dated October 14, 2010, as corrected below.

On page 2 of the administrative law judge's award under "21. Amount of compensation payable," the administrative law judge indicates that employee is awarded 11 weeks of temporary total disability benefits, or \$5,554.12, and **160 weeks** of permanent partial disability benefits, or **\$58,412.80**. It is clear from the body of the award that the administrative law judge's listing of 160 weeks of permanent partial disability benefits, or \$58,412.80 is incorrect. As a result of the primary injury, employee was actually awarded 30% permanent partial disability of the body as a whole, which amounts to **120 weeks** of permanent partial disability benefits, or **\$43,809.60** (= 120 weeks x \$365.08 permanent partial disability rate). Therefore, we find that the administrative law judge's award shall be corrected and employee is awarded 120 weeks of permanent partial disability benefits, or \$43,809.60.

Based upon the foregoing, the award and decision of Administrative Law Judge Edwin J. Kohner, issued October 14, 2010, is affirmed, as corrected herein, and is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

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

Given at Jefferson City, State of Missouri, this 20<sup>th</sup> day of July 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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CONCURRING OPINION FILED  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Robert Bayer

**CONCURRING OPINION**

I write separately to disclose the fact that I did not participate in the June 15, 2011, oral argument in this matter. I have reviewed the evidence, read the briefs of the parties, and considered the whole record. I concur with the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

## AWARD

Employee:	Robert Bayer	Injury No.:	05-140300
Dependents:	N/A		Before the
Employer:	Suntrup Buick		<b>Division of Workers'</b>
			<b>Compensation</b>
Additional Party:	Second Injury Fund		Department of Labor and Industrial
			Relations of Missouri
Insurer:	Truck Insurance Exchange		Jefferson City, Missouri
Hearing Date:	August 3, 2010	Checked by:	EJK/ch

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: September 30, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
Claimant had been working in the trunk of a car, with his legs hanging out, and then removed the back seat.  
By the time he finished reassembling everything, he complained of significant lower back pain.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low Back
14. Nature and extent of any permanent disability: 30% Permanent partial disability of the low back
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer: None

Employee: Robert Bayer

Injury No.: 05-140300

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$757.37
- 19. Weekly compensation rate: \$504.92/\$365.08
- 20. Method wages computation: By agreement

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

11 weeks of temporary total disability (or temporary partial disability)	\$ 5,554.12
160 weeks of permanent partial disability from Employer	\$58,412.80

22. Second Injury Fund liability: No

TOTAL: \$63,966.92

23. Future requirements awarded: None

Said payments to begin immediately 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: James J. Logan, Esq.

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

Employee: Robert Bayer

Injury No.: 05-140300

Dependents: N/A

Before the

Employer: Suntrup Buick

**Division of Workers'  
Compensation**

Additional Party: Second Injury Fund

Department of Labor and Industrial  
Relations of Missouri

Insurer: Truck Insurance Exchange

Jefferson City, Missouri  
Checked by: EJK/ch

This workers' compensation case raises several issues arising out of an alleged work related injury in which the claimant, an automotive mechanic, suffered a low back injury while repairing the rear speaker in an automobile. The issues for determination are (1) Accident arising out of and in the course of employment, (2) Medical causation, (3) Liability for Past Medical Expenses, (4) Future medical care, (5) Temporary Disability, (6) Permanent disability, and (7) Second Injury Fund liability. The evidence compels an award for the claimant for temporary total disability and permanent partial disability benefits.

At the hearing, the claimant testified in person and offered depositions of Robert P. Poetz, D.O., and Timothy G. Lalk, medical records from St. John's Mercy Medical Center, Matthew A. Beckerdite, M.D., Robert D. Yoon, M.D., James T. Merenda, M.D., and Daniel L. Kitchens, M.D., and a "lien" filed by GHP, the claimant's private health insurer, for \$46,532.76. The defense offered a deposition of Brett A. Taylor, M.D., and printouts from the claimant's web page.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident was alleged to have occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

### **SUMMARY OF FACTS**

Prior to this occurrence, the claimant had been off work for four weeks, recovering from a June 6, 2005, surgical repair of a previous, work-related incarcerated ventral hernia (settled on February 15, 2006), when he was released to return to work in July 2005. See Exhibit C. On his second day back, he felt a horrible tearing sensation in his stomach; he contacted the treating physician, who directed him to take two more weeks off work. After those two weeks were over, he felt he had fully healed from the hernia surgery, and was having no real problems.

After he returned to work, the claimant, an automotive mechanic, received tasks that required him to spend a lot of time bent over and/or twisted around. This aggravated his pre-existing back condition, causing increased soreness. In late September 2005, he had to crawl into a car trunk, with his legs hanging out, in order to fix a malfunctioning rear speaker, and then had

to remove the back seat. By the time he reassembled everything, he felt significant back pain. He told his supervisor that he could not do any more work that day and went home.

On October 3, 2005, he consulted Dr. Beckerdite, his primary care physician, because the claimant's preexisting "back pain worsened. The patient has had a recent flare, notes radiation, notes stiffness." See Exhibit C. Dr. Beckerdite ordered an MRI and physical therapy. After physical therapy made the symptoms worse, Dr. Beckerdite ordered a nerve conduction study and referred him to a neurosurgeon. After learning that he would have to wait nearly two months to see a neurosurgeon, the claimant went to Dr. Yoon.

Dr. Yoon ordered a second MRI, and opined that a facet was pinching a nerve. On November 1, 2005, Dr. Yoon performed a facetectomy. In December 2005, the claimant returned to work still stiff and sore, but otherwise fine. After roughly two weeks back at work, his right leg pain returned, and then he began to notice pain in his left leg. He returned to Dr. Yoon on several occasions. On January 30, 2006, Dr. Yoon opined:

MRI of the lumbar spine show some post operative changes from the right L4/5 facetectomy. He has relatively severe foraminal stenosis at the L4/5 which is essentially unchanged from the previous operation. I believe that the MRI is showing the culprit of the pain. See Exhibit C.

On April 7, 2006, the claimant filed his original Claim for Compensation. He testified that the employer arranged for the claimant to see a physician, but the claimant declined to attend the appointment.

On April 18, 2006, the claimant sought care with Dr. Merenda, who opined that he needed a three-level fusion but was reluctant to operate. Dr. Merenda referred him back to Dr. Yoon. Dr. Yoon told him there was nothing more to be done, gave him three months' of Percocet, and cleared him to return to work with no restrictions.

On October 2, 2006, Dr. Kitchens, the final treating physician, performed a two-level fusion at L4-5 and L5-S1. He referred Mr. Bayer for six weeks of physical therapy, which Mr. Bayer felt really helped him. On April 19, 2007, Dr. Kitchens reported, "We will give him permanent work restrictions in the medium duty category." See Exhibit C, page 210.

The claimant is now able to mow half of his yard, and can do laundry and light housework. He cannot sit or stand for long periods without changing positions. (A long period is one to one-and-one-quarter hours.) If he does something physical, such as mowing, he will have to lie down for a while afterward, and will "pay for it the next couple of days." Nearly every week, he has periods when he needs to lie down; the frequency of these spells varies, so he could not give an average. Before 2005, he went to hockey games and movies, went fishing, played roller hockey with his son, went camping and on float trips with his family. He can no longer do these things. Currently, he complains of constant lower back pain, and testified that the intensity varies with the weather and his activities. His pain is not improving, and he testified that it is slowly worsening. He is not currently receiving treatment, and testified that his condition now is stable. He has had no leg pain since the last surgery with Dr. Kitchens.

He has not worked since March 2006 and has not looked for a job since the injury in September 2005. However, he is licensed by the State of Missouri to do tattoos. He primarily tattoos family, but has also tattooed friends; the last time he tattooed a non-relative was a couple of weeks before the hearing. Friends will sometimes pay him a minimal amount for a tattoo. In a given month, he might tattoo one or two non-relatives. He has a tattoo studio in his home, which he set up a number of years ago. He is presently teaching Kenny Reynolds to tattoo, as an apprenticeship is required under the Missouri licensing system; Mr. Reynolds is not yet doing tattoos himself. Several years ago, his children set up a MySpace page for his tattoo studio. He thinks he last looked at the page five or six years ago; he does not know how to log into MySpace. He also has a similar page on Tattoodles.com, which he also has not checked in years. He limits his tattooing to one to one-and-one-half-hour sessions.

The claimant testified that his September 2005 injury was partly the culmination of a few weeks of jobs that required him to get into awkward positions, but also that the specific job he was doing that day was particularly difficult and pushed him over the edge.

Before September 2005, although Mr. Bayer did have ongoing lower back complaints related to his prior herniated discs at L4-5 and L5-S1, but said that his lower back pain and stiffness did not prevent him from working. However, he testified that he never worked overtime and always offered to leave early when there was not enough work to keep everyone busy, precisely to protect his back.

In prior years, the claimant had worked as a supervisor and owned his own shop in the 1980's. However, he has not looked for a job since the injury in September 2005.

Here is a summary of the claimant's medical treatment for the claimant's September 30, 2005 injury:

- 1) On October 3, 2005, he sought treatment from his primary care physician, Dr. Beckerdite, who ordered an MRI and physical therapy, and then referred him to a neurosurgeon;
- 2) After learning that he would have to wait six to eight weeks for an appointment with the neurosurgeon, unidentified friends recommended Dr. Yoon;
- 3) Dr. Yoon ordered a second MRI, and on November 1, 2005, he performed a right facetectomy at L4-5. Dr. Yoon's operative report noted a small disc protrusion, but no acute disc herniation, and significant facet degenerative changes;
- 4) When his symptoms returned, he went to Dr. Merenda on April 18, 2006. Dr. Merenda recommended a three-level lumbar fusion salvage operation;
- 5) Dr. Yoon released him to return to work with no restrictions;
- 6) On October 2, 2006, Dr. Kitchens performed a two-level fusion at L4-5 and L5-S1.

Dr. Poetz

Dr. Poetz examined the claimant on April 10, 2008, and diagnosed a herniated nucleus pulposus to the right with exacerbation of discogenic disease and exacerbation of depression as a result of the September 2005 accident at work. He opined that the claimant suffered a 40% permanent partial disability of his lumbar spine and a 15% permanent partial disability due to depression as a result of the September 2005 accident at work. He opined that “the injuries that occurred leading up to September of ’05 were a substantial and prevailing factor to the 40% permanent partial disability to the body as a whole as measured at the lumbar spine. Also, a 15% permanent partial disability to the body as a whole as a result of depression resulting from the injury.” See Dr. Poetz deposition, page 7.

He also testified that the claimant is permanently and totally disabled as a result of the September ’05 injury in addition to his prior diagnoses and that he will remain permanently and totally unemployable in the open labor market. Also, that if absent the prior injury and he only suffered from the September ’05 injury alone, he would still be permanently and totally disabled.” See Dr. Poetz deposition, page 8. He opined that the work injury of September 2005 would be sufficient to render the claimant totally disabled without regards to any other conditions he may have had. See Dr. Poetz deposition, page 9. He testified that Dr. Yoon’s “facetectomy was done as an encore. ... [H]ad it not been for the ruptured disc the facetectomy would not have been required in and of itself.” See Dr. Poetz deposition, page 11.

Dr. Taylor

Dr. Taylor examined the claimant on December 16, 2008, and took a medical history:

He had a fall eighteen to twenty years ago in which he “crushed the lower two discs.” He had surgery ... and reported that ... he had on again and off again problems with muscle spasms. He was treated by Dr. Beckerdite a couple of times per year for this problem, which he reports were due to his lower back. And he told me that he tried to take it easy at his job due to the known problems with his lower back, telling me whenever he could go home early, he would always take them up on that. See Dr. Taylor deposition, page 7.

Dr. Taylor diagnosed failed back syndrome with pre-existing degenerative condition that was worsened by a facetectomy resulting in instability requiring a lumbar decompression and fusion. See Dr. Taylor deposition, page 11. He opined that the claimant’s “current condition is not due to his work injury as opposed to his pre-existing conditions.” See Dr. Taylor deposition, page 12. “In my opinion, his condition is not due to his work-related event, it’s due to pre-existing pathology.” See Dr. Taylor deposition, page 12. “[H]is work-related event described to me is not the cause for his need for surgery and my rating of this individual is based on the surgeries he’s had.” See Dr. Taylor deposition, page 13. He opined that a facetectomy “would destabilize a degenerative spine.” See Dr. Taylor deposition, page 13. He opined that the facetectomy would precipitate the need for a spinal fusion. See Dr. Taylor deposition, page 21. Dr. Taylor opined that the claimant’s “impairment of the whole person would be ... twenty-three percent.” See Dr. Taylor deposition, page 12. He based this rating on the claimant’s overall back condition, and did not distinguish his pre-existing back condition from his work-related condition.

Dr. Taylor testified that he understood that at the time of the occurrence, the claimant was “working on an old Buick replacing leaf springs, and that he had to work on a three-quarter ton truck and felt like his belly was ripping open.” See Dr. Taylor deposition, page 17. He had no information about “complaining about pain and having to get in various positions in the trunk of a vehicle. See Dr. Taylor deposition, pages 17, 18.

#### Mr. Lalk

Mr. Lalk, a vocational rehabilitation counselor, interviewed the claimant on October 3, 2008, and reviewed exhaustive documents. Mr. Lalk opined:

Based on just the restrictions suggested by Dr. Kitchens it is possible Mr. Bayer could return to work as an automotive mechanic or in a similar position. If Dr. Kitchens meant that he could perform the full range of medium level exertion based on the Dictionary of Occupational Titles then Mr. Bayer could work in the occupation of auto mechanic which is classified in the Dictionary of Occupational Titles as an occupation with medium level physical exertion requirements. Mr. Bayer could also consider less physically demanding positions such as service writer or estimator and with his background he could also be considered for positions as a service manager. See Lalk deposition, Exhibit 2, page 11.

However, based on the claimant’s description of pain symptoms and the claimant’s need to lie down to relieve them, he assumed that the condition was “a chronic state of affairs.” See Lalk deposition, page 11. He concluded:

[C]onsidering the report of his increase in symptoms just by standing and walking for just short periods and that the only means that he had to relieve them was by lying down, it’s my conclusion that with that state of affairs, no employer would be able to accommodate him based upon his skills and experience, certainly not in a competitive labor market. My impression would be that he would not be able to fulfill the duties of any position within the expectations of an employer by repeatedly needing to stop work in order to control his symptoms by lying down. See Lalk deposition, pages 10, 11. ... Even if he could be trained to work in a sedentary position an employer is not going to ... tolerate his need to take frequent breaks during the day to rest in order to control symptoms. See Lalk deposition, page 12.

### **COMPENSABILITY**

“The claimant in a workers' compensation case has the burden to prove all essential elements of her claim, including a causal connection between the injury and the job.” Royal v. Advantica Rest. Group, Inc., 194 S.W.3d 371, 376 (Mo.App.W.D.2006) (citations and quotations omitted). “Determinations with regard to causation and work relatedness are questions of fact to be ruled upon by the Commission.” Id. (citing Bloss v. Plastic Enters., 32 S.W.3d 666, 671 (Mo.App.W.D.2000)). Under the statute, “[a]n injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.” § 287.020.2. On the other hand, “[a]n injury is not compensable merely because work was a triggering or precipitating factor.” Id. “Awards for injuries ‘triggered’ or ‘precipitated’ by work are

nonetheless proper *if* the employee shows the work is a 'substantial factor' in the cause of the injury." "Thus, in determining whether a given injury is compensable, a 'work related accident can be both a triggering event and a substantial factor.' Royal, 194 S.W.3d at 376 (quoting Bloss, 32 S.W.3d at 671).

The claimant bears the burden of proving that not only did an accident occur, but it resulted in injury to him. Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001); Silman v. William Montgomery & Associates, 891 S.W.2d 173, 175 (Mo.App. E.D. 1995); McGrath v. Satellite Sprinkler Systems, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). For an injury to be compensable, the evidence must establish a causal connection between the accident and the injury. Silman, supra. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature, cause, and extent of disability when the facts fall within the realm of lay understanding. Id. Medical causation, not within the 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. McGrath, supra. Where the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of preexisting disability and its extent, the proof of causation is not within the realm of lay understanding nor -- in the absence of expert opinion -- is the finding of causation within the competency of the administrative tribunal. Silman, supra at 175, 176. This requires claimant's medical expert to establish the probability claimant's injuries were caused by the work accident. McGrath, supra. The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. Id.

"[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence." Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, "logic and common sense," or an ALJ's personal views of what is "unnatural," cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) ("The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert."). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

The claimant testified that he had to crawl into a car trunk, with his legs hanging out, in order to fix a malfunctioning rear speaker, and then had to remove the back seat; by the time he reassembled everything, he felt significant back pain. The claimant also testified that his September 2005 injury was partly the culmination of a few weeks of jobs that required him to get into awkward positions, but also that the specific job he was doing that day was particularly difficult and pushed him over the edge.

The claimant has a complex condition involving a severely disabling low back condition and depression that has become much worse. The claimant had a prior low back surgery many years ago and had low back pain and depression for months before the date of injury. For instance, on February 17, 2005, Dr. Beckerdite treated the claimant for back pain with limitation of motion, stiffness, but without radiation. Dr. Beckerdite prescribed Valium and Darvocet. See

Exhibit C. On August 23, 2005, Dr. Beckerdite treated the claimant for depression and anxiety. See Exhibit C.

Has a history of depression, was treated with Prozac, Zoloft, in past, no real counseling. Has seen psychiatrist in past. The last two years has been worsening, now having trouble in relationships and work. Worse the last two weeks because of fighting at home. See Exhibit C.

Dr. Beckerdite diagnosed depression and prescribed Effexor and Lisinopril. See Exhibit C. On September 23, 2005, one week before the accident, the claimant consulted Dr. Beckerdite for low back pain that "has worsened. The patient notes a limitation of motion." See Exhibit C. Dr. Beckerdite again prescribed Valium and Darvocet. See Exhibit C.

Shortly after the accident, on October 3, 2005, Dr. Beckerdite took a history of depression that had improved and worsened back pain with radiation and stiffness. Dr. Beckerdite prescribed Effexor for the depression and Prednisone for the low back pain. See Exhibit C. An October 14, 2005, MRI revealed postoperative changes at L4-5 without any evidence of herniation or stenosis. See Exhibit C. An October 21, 2005, electrodiagnostic evaluation demonstrated a chronic lower extremity neuropathic process without evidence of an acute lumbosacral radiculopathy or plexopathy or of a lower extremity myopathy. See Exhibit C. Dr. Wice, the neurologist stated that clinical correlation is required. See Exhibit C.

The evidence suggests that the claimant had a rather sudden change in his low back pain at the time of the occurrence and that the condition changed to include an acute radiation of pain into his leg. This supports Dr. Poetz' finding that the occurrence was the prevailing factor causing the claimant's herniated disc and exacerbation of the preexisting low back condition. Dr. Taylor did not really address this issue for two reasons. First, he had no information about the occurrence that the claimant alleges was the prevailing factor causing the medical condition and disability. See Dr. Taylor deposition, pages 17, 18. Having no information about the occurrence, Dr. Taylor elected to not speculate about those facts and responded, "I was not provided with anything other than what I've mentioned in the report." See Dr. Taylor deposition, page 18. Secondly, Dr. Taylor addressed the claimant's "current condition" three years after the occurrence and did not opine whether the occurrence caused or could have caused any specific condition that afflicts the claimant. Thus, the two medical opinions are consistent that the occurrence was the prevailing factor causing the claimant's herniated nucleus pulposus to the right with exacerbation of discogenic disease, but other factors may have influenced the claimant's current condition and destabilized the claimant's low back condition.

Based on the entire record, the claimant sustained his burden of proving that the occurrence was the prevailing factor causing his herniated nucleus pulposus to the right with exacerbation of discogenic disease.

### **LIABILITY FOR PAST MEDICAL EXPENSES**

The statutory duty for the employer is to provide such medical, surgical, chiropractic, and hospital treatment ... as may be reasonably required after the injury. Section 287.140.1, RSMo 1994.

The intent of the statute is obvious. An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those against his employer. However, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the employer refuses or fails to provide the needed treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo.App. E.D. 1995).

The method of proving medical bills was set forth in Martin v. Mid-America Farmland, Inc., 769 S.W.2d 105 (Mo. banc 1989). In that case, the Missouri Supreme Court ordered that unpaid medical bills incurred by the claimant be paid by the employer where the claimant testified that her visits to the hospital and various doctors were the product of her fall and that the bills she received were the result of those visits.

We believe that when such testimony accompanies the bills, which the employee identifies as being related to and are the product of her injury, and when the bills relate to the professional services rendered as shown by the medical records and evidence, a sufficient, factual basis exists for the Commission to award compensation. The employer, may, of course, challenge the reasonableness or fairness of these bills or may show that the medical expenses incurred were not related to the injury in question. Id. at 111, 112.

The claimant submitted medical records and a billing statement from ACS Recovery Services for \$46,532.76 paid by Group Health Plan for medical services provided by Dr. Yoon, Dr. Merenda, Dr. Beckerdite, Dr. Kitchens, St. Johns Mercy Medical Center, West County Radiology, Western Anesthesia, and various other medical providers principally in connection with the surgery performed by Dr. Kitchens (October 2, 2006). See Exhibit D. The difficulty with this aspect of the claimant's case is that the claimant selected the medical providers and refused to meet with medical providers selected by the employer according to the claimant's testimony. He testified that the employer referred the claimant to a medical provider shortly after the claimant filed for workers' compensation. The claimant filed his claim for compensation on April 7, 2007. Almost all of the services on the schedule were performed after the claimant refused to consult medical providers offered by the employer, including Dr. Kitchens' surgical procedure.

Based on the evidence, the claimant appears to have elected to engage medical providers of his own choice at his own expense. The claimant for past medical expenses is denied.

### **FUTURE MEDICAL CARE**

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care “flow [s] from the accident.” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001) (quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (Claimant must present “evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible” for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

The claimant suffered from preexisting low back pain and depression that is well documented in the medical records. He received Valium, Darvocet, Prozac, Zoloft, Effexor, and Lisinopril, which are powerful prescription strength medications to treat his preexisting conditions. After the final surgery, Dr. Kitchens released the claimant to work with medium work restrictions and a prescription for Darvocet. See Exhibit C.

Dr. Poetz opined that the claimant requires an orthopedic surgeon to monitor the status of the hardware for the claimant’s current back condition and that Cymbalta should be prescribed in place of Effexor to reduce pain and help with depression. See Dr. Poetz deposition, medical report, page 6. With respect to the examination by an orthopedic surgeon, Dr. Taylor, a board certified orthopedic surgeon, examined the claimant eight months after Dr. Poetz’ examination and apparently found no additional surgical care or medical care necessary as a result of the accident at work. With respect to the recommendation for prescription medication, Dr. Poetz did not specify whether the medications were for the claimant’s preexisting low back pain and depression or the low back pain and depression after the accident. Without proving that the future medical care flows directly from the work related accident as opposed to the claimant’s preexisting condition, the claim for future medical care must be denied.

### **TEMPORARY DISABILITY**

When an employee is injured in an accident arising out of and in the course of his employment and is unable to work as a result of his or her injury, Section 287.170, RSMo 2000,

sets forth the TTD benefits an employer must provide to the injured employee. Section 287.020.7, RSMo 2000, defines the term "total disability" as used in workers' compensation matters as meaning the "inability to return to any employment and not merely mean[ing the] inability to return to the employment in which the employee was engaged at the time of the accident." The test for entitlement to TTD "is not whether an employee is able to do some work, but whether the employee is able to compete in the open labor market under his physical condition." Thorsen v. Sachs Electric Co., 52 S.W.3d 611, 621 (Mo.App. W.D. 2001). Thus, TTD benefits are intended to cover the employee's healing period from a work-related accident until he or she can find employment or his condition has reached a level of maximum medical improvement. Id. Once further medical progress is no longer expected, a temporary award is no longer warranted. Id. The claimant bears the burden of proving his entitlement to TTD benefits by a reasonable probability. Id.

The claimant testified that the accident occurred on September 30, 2005, and that he was unable to work until after the November 1, 2005, laminectomy that repaired the claimant's herniated disc. The claimant testified that he returned to work in December 2005. None of the parties provided a specific date that the claimant returned to work. December 16, 2005, is a logical date. The claimant worked until his degenerative low back condition took a turn for the worse with a decrease in stability with left side symptoms. On January 23, 2006, Dr. Yoon reflected that the claimant ...

did well initially with the right leg pain. He still has some residual pain but overall he has recovered well from surgery. However, for the past three weeks he has been experiencing pain especially on the left side without significant radiation. The back pain has been so severe that he had to leave work. The pain is particularly worse when he is bending over. It is worse when he is standing in an upright position. See Exhibit C.

The claimant appears to have developed further degeneration of his low back condition in January 2006. Based on the evidence, the claimant is awarded 11 weeks of temporary total disability benefits covering a period from October 1 to December 16, 2005.

### **PERMANENT DISABILITY**

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Total disability" is defined 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. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 (Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to

hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

Workers' compensation awards for permanent partial disability are authorized pursuant to section 287.190. "The reason for [an] award of permanent partial disability benefits is to compensate an injured party for lost earnings." Rana v. Landstar TLC, 46 S.W.3d 614, 626 (Mo. App. W.D. 2001). The amount of compensation to be awarded for a PPD is determined pursuant to the "SCHEDULE OF LOSSES" found in section 287.190.1. "Permanent partial disability" is defined in section 287.190.6 as being permanent in nature and partial in degree. Further, "[a]n actual loss of earnings is not an essential element of a claim for permanent partial disability." Id. A permanent partial disability can be awarded notwithstanding the fact the claimant returns to work, if the claimant's injury impairs his efficiency in the ordinary pursuits of life. Id. "[T]he Labor and Industrial Relations Commission has discretion as to the amount of the award and how it is to be calculated." Id. "It is the duty of the Commission to weigh that evidence as well as all the other testimony and reach its own conclusion as to the percentage of the disability suffered." Id. In a workers' compensation case in which an employee is seeking benefits for PPD, the employee has the burden of not only proving a work-related injury, but that the injury resulted in the disability claimed. Id.

In a workers' compensation case, in which the employee is seeking benefits for PPD, the employee has the burden of proving, inter alia, that his or her work-related injury caused the disability claimed. Rana, 46 S.W.3d at 629. As to the employee's burden of proof with respect to the cause of the disability in a case where there is evidence of a pre-existing condition, the employee can show entitlement to PPD benefits, without any reduction for the pre-existing condition, by showing that it was non-disabling and that the "injury cause[d] the condition to escalate to the level of [a] disability." Id. See also, Lawton v. Trans World Airlines, Inc., 885 S.W.2d 768, 771 (Mo. App. 1994) (holding that there is no apportionment for pre-existing non-disabling arthritic condition aggravated by work-related injury); Indelicato v. Mo. Baptist Hosp., 690 S.W.2d 183, 186-87 (Mo. App. 1985) (holding that there was no apportionment for pre-existing degenerative back condition, which was asymptomatic prior to the work-related accident and may never have been symptomatic except for the accident). To satisfy this burden, the employee must present substantial evidence from which the Commission can "determine that the claimant's preexisting condition did not constitute an impediment to performance of claimant's duties." Rana, 46 S.W.3d at 629. Thus, the law is, as the appellant contends, that a reduction in a PPD rating cannot be based on a finding of a pre-existing non-disabling condition, but requires a finding of a pre-existing disabling condition. Id. at 629, 630. The issue is the extent of the appellant's disability that was caused by such injuries. Id. at 630.

Dr. Taylor credibly describes the claimant's current condition (failed back syndrome). He contends that the claimant's work related occurrence was not the prevailing factor causing the claimant's current condition. Instead, he looked to the claimant's preexisting low back surgery, degenerative low back pain, and the subsequent surgeries as the important factors causing the claimant's failed back syndrome. However, Dr. Taylor has no information about the claimant's accident as reported by the claimant. Therefore, the weight and credibility of Dr. Taylor's opinion on this aspect of the case is limited. Nonetheless, Dr. Taylor pointed out that the claimant's low back is a result of multiple factors such as three surgical procedures and a degenerative condition.

Dr. Poetz opined that the accident at work was the prevailing factor causing the claimant's herniated disc and an exacerbation of his depression. Dr. Taylor did not specifically address these two parts of the picture individually, and Dr. Poetz did not address the claimant's overall condition except to opine that the disability caused by the claimant's September 2005 work related injury was so severe that it resulted in the claimant's total disability.

This is a complex case involving various conditions and various occurrences that lead to the claimant's current condition. The two experts addressed different aspects of the case. Based on the entire record, some conclusions can be stated. First, the claimant's work related September 2005 accident was the prevailing factor causing a herniated nucleus pulposus to the right with exacerbation of discogenic back pain and depression.

Second, the claimant suffered permanent partial disability from that occurrence. Dr. Poetz rated the claimant's permanent partial disability at 40% to the low back and 15% as a result of the depression. He opined that the claimant suffered a preexisting 25% permanent partial disability to the low back. Given the various preexisting conditions and post injury events, the claimant's work related injury in September 2005 caused a 30% permanent partial disability to his low back and a 12 ½% permanent partial disability from his depression.

Third, the claimant is unemployable in the open labor market and totally disabled based on his current failed back syndrome, because he credibly reports that he has to lie down at times during the day to relieve his pain. Assuming that the claimant has to lie down during the day to relieve his pain, the evidence is entirely consistent.

Fourth, Dr. Poetz is not credible when he relates the total disability entirely to the claimant's work related injury in September 2005. The causes of the total disability are far more numerous and overshadow the single occurrence. The claimant had a long history of back pain according to the medical records and consumed potent prescription pain relief medication before the occurrence. In addition, on November 1, 2005, Dr. Yoon performed a facetectomy and discectomy and diagnosed L4-5 foraminal stenosis and herniated disc on the right. Dr. Yoon and Dr. Taylor observed that the claimant's low back became less stable. The claimant developed radiating pain in both legs, not just the right. Dr. Merenda opined, "Indeed, he has degenerative disc disease post surgical at L4-5 and L5-S1. ... There is no evidence of stenosis or recurrent disc herniation." The logical conclusion is that the claimant's prior surgery, long history of low back pain, and subsequent surgeries addressing his degenerative disc disease were substantial factors impacting the claimant's employability. Dr. Taylor addressed the claimant's overall condition and opined that the claimant's condition resulted from a degenerative "spinal condition that has existed for a number of years by his statement that he had ... crushed the lower two discs and had surgery for that problem and had persistent problems even after that surgery." See Dr. Taylor deposition, pages 44, 45. He opined that "his work related back condition aggravated his preexisting back condition." See Dr. Taylor deposition, page 45.

Fifth, the claimant's work related event was the prevailing factor causing an aggravation of the claimant's low back condition and recurrent herniated disc. Both forensic medical experts opined that the event at work aggravated the claimant's preexisting condition. Dr. Poetz opined that the work related event was the prevailing factor causing the claimant's recurrent herniated

disc. The medical records support the conclusion with sudden increased low back pain radiating into the claimant's right leg.

Sixth, the claimant suffered a 30% permanent partial disability to his low back as a result of the work related occurrence from the aggravation of his preexisting condition and his herniated disc identified by Dr. Yoon less than five weeks after the occurrence and after medical records demonstrate a sudden increase in symptomology after the occurrence.

Seventh, Dr. Poetz opined that the September 2005 work related injury was the prevailing factor causing an exacerbation of the claimant's preexisting depression resulting in a 15% permanent partial disability. Based on the evidence, the claimant has a 15% permanent partial disability from his depression, but this condition is a very complex medical condition that clearly relates to the claimant's preexisting condition, his work related condition, and his subsequent failed back syndrome. The medical records seem to support that the claimant had a chronic episodic preexisting permanent partial disability from depression for which he received potent prescription medication for treatment. Dr. Poetz' election to not comment on that aspect of the condition or on the extent caused by the claimant's subsequent failed low back syndrome severely reduces the credibility and usefulness of the rating. Nonetheless, based on the entire record one can conclude that the preexisting condition, the September 2005 accident at work, and the claimant's failed back syndrome were all important and equal factors causing the claimant's depression. Dr. Poetz did not elaborate on how he arrived at his conclusion, any psychological or psychiatric tests that he conducted, or on the role of the other two factors. Therefore, no award of benefits can be entered.

Therefore, based on the entire record, the claimant is awarded a 30% permanent partial disability as a result of his September 2005 work related injury.

### **SECOND INJURY FUND**

To recover against the Second Injury Fund based upon two permanent partial disabilities, the claimant must prove the following:

1. The existence of a permanent partial disability preexisting the present injury of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed. Section 287.220.1, RSMo 1994; Leutzinger v. Treasurer, 895 S.W.2d 591, 593 (Mo.App. E.D. 1995).
2. The extent of the permanent partial disability existing before the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).
3. The extent of permanent partial disability resulting from the compensable injury. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

4. The extent of the overall permanent disability resulting from a combination of the two permanent partial disabilities. Kizior v. Trans World Airlines, 5 S.W.3d 195, 200 (Mo.App. W.D. 1999).

5. The disability caused by the combination of the two permanent partial disabilities is greater than that which would have resulted from the pre-existing disability plus the disability from the last injury, considered alone. Searcy v. McDonnell Douglas Aircraft, 894 S.W.2d 173, 177 (Mo.App. E.D. 1995).

6. In cases arising after August 27, 1993, the extent of both the preexisting permanent partial disability and the subsequent compensable injury must equal a minimum of fifty weeks of disability to "a body as a whole" or fifteen percent of a major extremity unless they combine to result in total and permanent disability. Section 287.220.1, RSMo 1994; Leutzinger, supra.

To analyze the impact of the 1993 amendment to the law, the courts have focused on the purposes and policies furthered by the statute:

The proper focus of the inquiry as to the nature of the prior disability is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition. That potential is what gives rise to prospective employers' incentive to discriminate. Thus, if the Second Injury Fund is to serve its acknowledged purpose, "previous disability" should be interpreted to mean a previously existing condition that a cautious employer could reasonably perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition. A condition satisfying this standard would, in the absence of a Second Injury Fund, constitute a hindrance or obstacle to employment or reemployment if the employee became unemployed. Wuebbeling v. West County Drywall, 898 S.W.2d 615, 620 (Mo.App. E.D. 1995).

Section 287.220.1 contains four distinct steps in calculating the compensation due an employee, and from what source, in cases involving permanent disability: (1) The employer's liability is considered in isolation - "the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability;" (2) Next, the degree or percentage of the employee's disability attributable to all injuries existing at the time of the accident is considered; (3) The degree or percentage of disability existing prior to the last injury, combined with the disability resulting from the last injury, considered alone, is deducted from the combined disability; and (4) The balance becomes the responsibility of the Second Injury Fund. Nance v. Treasurer of Missouri, 85 S.W.3d 767, 772 (Mo.App. W.D. 2002).

The evidence compels a finding that the claimant suffered permanent partial disability from the work related occurrence and that he suffered from at least one preexisting permanent partial disability. However, the Second Injury Fund has no liability in this case for several

reasons. First, there is no evidence that any of the claimant's disabilities from his work related injuries combined with the claimant's preexisting permanent partial disability. None of the forensic experts so opined. Second, the claimant apparently had no preexisting permanent partial disability from his preexisting depression, because none of the forensic experts so opined. Third, the claimant's preexisting permanent partial disability to his low back was not of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed according to his testimony at the hearing. Finally, the record as a whole compels a finding that the claimant's total disability resulted from deterioration in his preexisting low back condition.

For these reasons, the claim against the Second Injury Fund is denied.

Made by: /s/ EDWIN J. KOHNER  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

This award is dated and attested to this 14TH day of October, 2010.

/s/ NAOMI L. PEARSON  
*Naomi L. Pearson*  
*Division of Workers' Compensation*