

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

Injury No.: 98-057574

Employee: Charles W. Bock, deceased  
Dependent: Alice Bock, widow  
Employer: Broadway Ford Truck Sales, Inc.  
Insurer: Reliance Insurance Company  
c/o Illinois Insurance Guaranty Fund  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund  
Date of Accident: April 23, 1998

Preliminaries

On August 9, 2005, the Missouri Court of Appeals for the Eastern District issued an opinion vacating its September 11, 2001, opinion in the above-referenced matter to the extent it addressed any issue beyond the dismissal of employer/insurer's untimely appeal. *Bock v. Broadway Ford Truck Sales, Inc.*, ED84977/ED85042 (Mo. App. E.D., August 9, 2005) (Mandate issued August 31, 2005).

Pursuant to the Court's mandate reversing the August 6, 2004, award of the Labor and Industrial Relations Commission (Commission) with directions, we vacated and set aside the Commission awards issued August 6, 2004, and August 24, 2000, and the administrative law judge award issued November 3, 1999. We remanded this matter to the Division of Workers' Compensation (Division) for resolution of claimant's claims, as amended, in accordance with the Court's opinion delivered August 9, 2005.

On October 10, 2006, the administrative law judge issued an award and decision allowing compensation. On October 19, 2006, employee filed an Application for Review. We have reviewed the evidence, heard the arguments of the parties, and considered the whole record. Pursuant to section 286.090 RSMo, we modify the award and decision of the administrative law judge. The award and decision of Chief Administrative Law Judge Edwin Kohner, issued October 10, 2006, is attached and incorporated by this reference to the extent it is not inconsistent with our modifications herein.

At the most recent trial of this matter, claimant <sup>[1]</sup>, employer, and the Illinois Insurance Guaranty Fund stipulated, among other things:

1. On or about April 23, 1998, employee sustained an accident that arose out of and in the course of employment with employer;
2. On or about April 23, 1998, employee sustained an occupational disease as a result of performing heavy mechanical work for employer;
3. Employee incurred medical expenses of \$112,871.25 for treatment related to his back problems;
4. After employee signed a reimbursement agreement, his union Welfare Trust paid \$96,476.03 of these expenses;
5. On December 18, 2001, the Illinois Insurance Guaranty Fund (IIGF) assumed the liabilities of the insolvent workers' compensation insurer, Reliance Insurance Company;
6. Employee sustained a disability of 25% permanent partial disability of the body as a whole referable to his back as a result of the accident and occupational disease.

## Issues to be Decided

The issues to be decided in this matter are:

1. Was the treatment employee received for his back necessary to cure and relieve his work-related back condition?
2. Was employee's need for treatment medically causally related to his work injury?
3. Did employer refuse to provide treatment to employee such that employee was entitled to seek treatment on his own?
4. Are the IIGF and/or employer entitled to a reduction in liability for medical expenses due to write-offs by health care providers?
5. Is claimant entitled to payment from the IIGF for the medical expenses paid by the Welfare Trust?
6. Does the insolvency of insurer constitute a default on the part of insurer, within the meaning of § 287.300?
7. Does employer have a separate liability on the claim apart from the liability of the IIGF?
8. What is the extent of the temporary total disability benefits to which claimant is entitled?

## Discussion

*Was the treatment employee received for his back necessary to cure and relieve his work-related back condition? Was employee's need for treatment medically causally related to his work injury? (That is, did employee's need for treatment flow from the work accident or occupational disease?)*

The threshold issue to consider is whether the medical treatment for which claimant seeks compensation was reasonably required to cure and relieve employee of the effects of his work-related back injury. We preface our analysis by setting out the main competing theories regarding the causes of the symptoms and conditions giving rise to employee's two back surgeries.

Employer's expert, Dr. Michael Ralph, believes that the lower extremity complaints prompting employee to undergo the first surgery were caused by diabetic neuropathy. Dr. Ralph believes the right lower extremity complaints that gave rise to the second surgery, including the loss of quadriceps function, were caused by a traction injury suffered during the first surgery. Dr. Ralph steadfastly asserts that employee suffered no nerve root compression at L3 and that none of the diagnostic studies showed any compression.

Employee's expert, Dr. Arden Reynolds believes that employee's symptoms giving rise to the first surgery were caused by a foraminal disc herniation compressing the nerve root at L3. Dr. Thomas Musich concurs. Dr. Reynolds believes that employee's symptoms before the second surgery were also caused by the persistent disc herniation at L3-L4, as well as, a disc fragment compressing the nerve root at L3.

287.140. 1 RSMo provides:

In addition to all other compensation, 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. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

The administrative law judge recounted employee's medical treatment in detail. We concern ourselves with two main treatment events. On July 17, 1998, Dr. Bruce Vest performed a microdiscectomy at L3-L4. During surgery, Dr. Vest observed a large right foraminal disc herniation at L3-L4 compressing the right L3 nerve root. He believed employee's right thigh pain and numbness was caused by this compression.

In December 1999, Dr. Reynolds, a neurosurgeon, performed a second surgery on employee's back. During the surgery, Dr. Reynolds discovered an encapsulated disc fragment compressing the spinal nerve at L3. He removed the disc at L3-4 and performed a fusion.

Dr. Reynolds testified by deposition on behalf of claimant. Dr. Reynolds concluded that employee had a persistent right-sided L3-4 herniated disc with radiculopathy. Dr. Reynolds testified that the cause of employee's herniated disc with acute radiculopathy was the slip and fall on antifreeze on April 23, 1998. He assessed 25% permanent

partial disability based on AMA guidelines to account for loss of motion and radiculopathy. When asked if employee's symptoms before Dr. Vest's surgery were caused by diabetic neuropathy, Dr. Reynolds explained that diabetic neuropathy did not explain employee's atrophy, clinical findings, or weakness. He stated that diabetic neuropathy would not cause weakness in only one leg; both legs would be affected. Dr. Reynolds pointed out that diabetic neuropathy would not produce evidence of nerve compression at L3 on MRI. Diabetic neuropathy would dissipate within six to nine months. Employee's condition did not improve within six to nine months. Dr. Reynolds testified that the July 1998 surgery by Dr. Vest and the November 1999 surgery by Dr. Reynolds, as well as the other treatment he reviewed, were reasonable and necessary to cure and relieve employee of the effects of his April 23, 1998, work injury

Employer/insurer submitted the deposition testimony of Dr. Ralph, who also testified by deposition for the first hearing. He testified there was no evidence in the diagnostic studies that employee had nerve root compression at L3. He testified that neither back surgery was necessary. He stated that a traction injury during the first surgery caused employee further medical problems, including the loss of his quadriceps function. When questioned about Dr. Reynolds' description of finding a disc fragment compressing a nerve root, Dr. Ralph asserted that Dr. Reynolds was not truthful in his operative report. He did not believe that any of employee's disability was caused by his work.

Cross-examination revealed Dr. Ralph's unfamiliarity with employee's treatment, symptomatology, and condition. Although Dr. Ralph claimed to perform a thorough review of employee's medical records, he was mistaken about many matters. These mistakes led him to form a negative impression of employee and employee's decisions regarding his healthcare. These mistakes also led him to believe employee was exaggerating his symptoms. We highlight a few such instances:

Dr. Ralph believed employee was using a walker unnecessarily. At the urging of employee's counsel during cross-examination, he reviewed Dr. Selhorst's records in which Dr. Selhorst recommended employee use a walker. Dr. Ralph then conceded employee's use of a walker was reasonable.

Dr. Ralph believed employee exaggerated when he described his pain complaints as "severe" because employee only marked his pain at the level of "5" on Dr. Ralph's office intake form. Remarkably, Dr. Ralph was unaware that his own intake form asked patients to rate their pain on a scale of 1 to 5, with 5 being most severe.

Dr. Ralph concluded that employee went against medical advice by undergoing surgery by Dr. Vest. The medical records reveal that other doctors, including Drs. Reid and Taylor believed employee may have a surgical problem.

We find the opinions expressed by Dr. Reynolds more persuasive than those of Dr. Ralph. Dr. Ralph does not perform back surgeries. Dr. Reynolds does. Dr. Reynolds actually performed a back surgery on employee and saw the extent of employee's back condition during the surgery. Dr. Ralph based his conclusions about the condition of employee's back on diagnostic imaging, radiology reports, his flawed understanding of the medical records, and his misperception about employee's veracity. Dr. Ralph's accusation that Dr. Reynolds fabricated an operative report is simply unworthy of belief and further damages his credibility.

The most compelling reason to accept Dr. Reynolds opinions is because his opinions make the most sense in light of employee's post-surgical improvement. The medical reports and the testimony of Steven Lahey, employee's stepson, establish that the second surgery improved employee's mobility and overall functioning. The surgery would not have provided such relief if employee's quadriceps problem was due to surgically-induced nerve damage as Dr. Ralph urges. Based upon the success of employee's November 1999 surgery as detailed above – including Dr. Reynold's discovery of a disc fragment – it is clear that the earlier surgery by Dr. Vest was designed to cure an orthopedic back problem.

Mr. Lahey credibly testified that after the second surgery, employee walked more quickly and his mobility was better. He resumed regular maintenance on his stock car. Employee performed transmission jobs for family members and friends. Mr. Lahey explained that employee was starting to get in the same condition that he was prior to the work injury. He observed employee squatting, crawling, and getting under vehicles. Prior to the

second surgery, employee was unable to perform these activities. Steven Schwegel, employee's physical therapist, testified by deposition that employee significantly improved after the second surgery. <sup>[2]</sup>

Based upon the evidence presented on the whole record, we find that employee -- who was already suffering from occupationally-induced degenerative disc condition -- sustained a disc injury at L3-4 when he slipped and fell on April 23, 1998, resulting in acute radiculopathy. The April 23, 1998, fall was a substantial factor in causing employee's need for the surgeries performed by Drs. Vest and Reynolds. We find both surgeries were reasonable and necessary to cure employee of the effects of his work injuries.

*Did employer refuse to provide treatment to employee such that employee was entitled to seek treatment on his own?*

The intent of [§287.140 RSMo] 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 costs against his employer. Therefore, 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. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo. App. 1984).

*Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995).

There is no question employer had notice that employee needed treatment. Employee stopped working on May 5, 1998. Employee testified that on May 7, 1998, he informed Jim Newman the reason he was off work was due to slipping and falling on antifreeze and that he believed it was a workers' compensation claim. The Report of Injury filed May 19, 1998, is consistent with employee's testimony. Employee testified that a representative of insurer informed him that the insurer was not going to cover the claim. On June 5, 1998, Jeni del Castillo, insurer's adjuster, sent employee a letter denying the claim. Employee filed his claim on June 15, 1998. Employer/insurer filed an answer denying the claim on June 30, 1998 (general denial). Employee filed a request for hardship hearing on May 5, 1999, and the hearing commenced August 10, 1999. One of the issues for hearing was a request for medical treatment. Employer and insurer had notice that employee needed medical treatment and that employee thought employer was obligated to provide it.

As a general rule, the employer is given control over the selection of the employee's medical providers. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995). This principle, however, is subject to an important caveat. If the employer is on notice that the employee needs treatment and fails or refuses to provide it, the employee may select his or her own medical provider and hold the employer liable for the costs thereof. *Jones v. Dan D. Services, L.L.C.*, 91 S.W.3d 214, 220-21 (Mo. App. 2002); *Sheehan v. Springfield Seed and Floral, Inc.*, 733 S.W.2d 795, 798 (Mo. App. 1987); *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo. App. 1984).

*Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007).

We find that employer failed to provide treatment after being put on notice that employee needed treatment. Therefore, employee was entitled to seek treatment on his own. Further, under the facts of this case, employer is not relieved of liability for the expenses related to treatment before employer was put on notice. In the instant case, because he was already suffering from a symptomatic occupational disease of the back, employee was not immediately aware that the fall of April 23, 1998, caused a change in his back condition constituting a compensable injury.

Where an employee does not know at the time that he or she receives medical treatment that he or she has suffered a compensable injury, and the employee contracts for medical services without the employer's knowledge, the employer is not relieved from liability for necessary medical services.

*Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 798 (Mo. App. 1987).

*Are the IIGF and/or employer entitled to a reduction in liability for medical expenses due to write-offs by health care providers?*

“It is a defense of...employer, to establish that [employee] was not required to pay the billed amounts, that [his] liability for the disputed amounts was extinguished, and that the reason that [his] liability was extinguished does not otherwise fall within the provisions of section 287.270.” *Farmer-Cummings v. Pers. Pool of Platte County*, 110 S.W.3d 818, 823 (Mo. 2003). *Farmer-Cummings* makes clear it is employer and insurer’s burden to prove claimant will never be held accountable for the expenses. In the instant case, employer and IIGF did not put on evidence to establish that health care providers will not seek payment from claimant. Employer and IIGF are not entitled to a reduction in liability for medical expenses due to write-offs.

*Is claimant entitled to payment from the IIGF for the medical expenses paid by the Welfare Trust?*

The administrative law judge decided three matters involving the IIGF. First, relying on *Pierre v. Davis*, 520 N.E.2d 743 (Ill. App. 1987), the administrative law judge held that the IIGF does not have to pay past medical expenses to claimant to the extent those expenses were paid by the Welfare Trust. The administrative law judge concluded that to the extent the Welfare Trust paid medical expenses, the expenses are not “unpaid.” 215 ILCS § 5/534.3(a) provides in relevant part:

“Covered claim” means an unpaid claim for a loss arising out of and within the coverage of an insurance policy to which this Article applies and which is in force at the time of the occurrence giving rise to the unpaid claim...

An example highlights the flaw in the administrative law judge’s analysis. Suppose employee and claimant took out a home equity loan to pay for the medical treatment we have found compensable. Claimant does not owe the health care providers for medical expenses. Claimant owes a bank for the loan used to pay the medical expenses. While the medical expenses have been paid from the perspective of the health care providers, no reasonable person would suggest the medical expenses have been paid from claimant’s perspective. They are merely owed to a different creditor. Such is the case here. A portion of the medical expenses we have found compensable are owed not to the health care providers, but to the Welfare Trust. Claimant’s claim for medical expenses is “unpaid” as that word is used in the § 5/534.3(a).

*Pierre* is distinguishable. In *Pierre*, the asserted claim was paid by an insurer that issued a policy covering the claim. There is no evidence in this case that the Welfare Plan was legally obligated to cover the costs of employee’s injury. In *Pierre*, the employee was not obligated to reimburse the payor insurer for the amount paid. In the instant case, under the terms of the reimbursement agreement, employee is obligated to reimburse the full amount of the medical expenses (\$96,476.03) because we found the claim compensable.

Next, the administrative law judge concluded that the claim for medical expenses paid by the Welfare Trust is excluded from the definition of “covered claim” because those amounts are due a “solvent insurance entity.” 215 ILCS §5/534.3(b)(v) excludes from the definition of “covered claim,” “any claim for any amount due any reinsurer, insurer, insurance pool, or underwriting association as subrogated recoveries, reinsurance recoverables, contribution, indemnification or otherwise.”

The Welfare Trust is not seeking payment from the IIGF; claimant is. Employee’s arrangement with the Welfare Trust resulted in the medical expense debt being owed to the Welfare Trust instead of the health care providers but the arrangement did not alter the nature of the debt; that is, it was the debt of employee that was incurred due to a compensable injury. See the loan example above. The provisions of § 5/534.3(b) have no bearing on claimant’s entitlement to assert her claims against IIGF.

Further, there is no evidence in this case that the Welfare Trust was legally obligated to cover the cost of medical care for employee’s injury under a policy of insurance. “It is clear that the legislature did not want the assets of the Fund depleted to reimburse solvent insurance companies for payments made to claimants or their insured under policies for which they received a premium.” *Pierre*, 520 N.E.2d at 744 (emphasis added). In the instant

case, there is no evidence that the Welfare Trust received a premium to cover employee's work injuries. Thus, any amounts due to the Welfare Trust are not amounts due any, "reinsurer, insurer, insurance pool, or underwriting association."

The administrative law judge ruled the claim is invalid because the debt is due a "solvent insurance entity." The phrase "solvent insurance entity" does not appear in § 534.3(b) (v) but, to the extent the phrase is relevant to an analysis under that section, there is no evidence in the record that the Welfare Trust is an "insurance entity" or that the Welfare Trust is solvent.

The administrative law judge uses the "solvent insurer" concept in his final conclusion regarding the IIGA, as well. The administrative law judge asserts that the IIGA:

...provides that no claim held by a solvent insurer may be asserted in any legal action against a person insured under a policy issued by an insolvent company. 215 IICS §5/546(a). It is undisputed that employer Broadway Ford is a person insured under the workers' compensation policy issued to it by Reliance. It necessarily follows that claimant may not recover any amount of the employee's past medical expenses from employer... Such a recovery is prohibited by the express language of the Guaranty Fund Act. (Award p. 36).

The administrative law judge mischaracterizes 215 IICS § 5/546(a). That section does not set out a blanket proscription against the assertion of claims against an employer whose insurer is insolvent. Rather, it sets forth the circumstances under which the IIGF and an employer are entitled to a reduction of their liability on account of other insurance that covers the claim. We quote 215 IICS § 5/546(a) for clarity:

An insured or claimant shall be required first to exhaust all coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund. The Fund's obligation under Section 537.2 shall be reduced by the amount recovered or recoverable, whichever is greater, under such other insurance policy...To the extent that the Fund's obligation under Section 537.2 is reduced by application of this Section, the liability of the person insured by the insolvent insurer's policy for the claim shall be reduced in the same amount. (Emphasis added).

Illinois courts have described the operation and application of the quoted section thusly:

The rationale of nonduplication of recovery provisions such as section 546(a) has been explained as follows:

"The purpose of the exhaustion requirement \* \* \* is to render the Fund a source of last resort in the event of insolvency. The second sentence \* \* \* states a clear legislative policy that any recovery to which a claimant is contractually entitled under his own insurance policy shall be offset to reduce the liability of the Fund." *Vokey*, 409 N.E.2d at 786.

*Urban v. Loham*, 592 N.E.2d 292, 295 (Ill. App. Ct. 1992) (quoting *Vokey v. Massachusetts Insurers Insolvency Fund*, 409 N.E.2d 783 (Mass. 1980)).

The legislative intent of section 546(a) is to prevent a double recovery by a claimant; it was never the intent of the legislature to deprive a claimant of the full amount of the award to which he is entitled. The legislative intent is to bar both the claimant and the Fund from a "windfall."

*Lonigro v. Lockett*, 625 N.E.2d 265, 273 (Ill. App. Ct. 1993)

In the instant case, there is no evidence that employee was "contractually entitled" to recover any payments under an insurance policy issued by the Welfare Trust. <sup>[3]</sup> No documents or testimony establishing the terms of the Welfare Trust were offered into evidence. The IIGF failed to prove employee had a contractual entitlement to any

sum from the Welfare Trust for the payment of his medical expenses incurred to treat the work injury.

"The statutory purpose [of the Fund] is to place claimants in the same position that they would have been in if the liability insurer had not become insolvent." *Lucas v. Illinois Insurance Guaranty Insurance Guaranty Fund*, 52 Ill. App. 3d 237, 239, 367 N.E.2d 469, 471, 10 Ill. Dec. 81 (1977). The Fund is not a collateral or independent source of recovery; rather, it is a substitution when the expected coverage ceases to exist. *Lucas*, 52 Ill. App. 3d at 240, 367 N.E.2d at 471.

*Gines v. Ivy*, 832 N.E.2d 937, 938 (Ill. App. Ct. 2005)

In the instant case, claimant is the entity the IIGA intends to be made whole, not the health care provider. If we adopt the position urged by the IIGF, claimant will be in a far worse situation than if insurer had remained solvent contrary to the statutory purpose as set forth in *Gines*, supra. Further, the IIGF will receive a windfall contrary to the legislative intent as set forth in *Lonigro*, supra. We will not adopt a position that contravenes the statutory purposes of the IIGA.

The IIGF is not entitled to a reduction of the liability it owes under 215 IICS § 5/537.2, nor is employer entitled to any reduction under 215 IICS § 5/546(a).

*Does the insolvency of insurer constitute a default on the part of insurer, within the meaning of § 287.300?*

The administrative law judge concluded that "claimant is barred from recovering workers' compensation directly from the employer by way of an award from the Division of Workers' Compensation." The administrative law judge reached this conclusion after noting that § 287.300 does not state that the insolvency of a workers' compensation carrier constitutes a default on behalf of the insurer such that it renders an employer directly and primarily liable.

287.300 RSMo provides, in relevant part:

If the employer is not insured his liability hereunder shall be primary and direct. If he is insured his liability shall be secondary and indirect, and his insurer shall be primarily and directly liable hereunder to the injured employee, his dependents or other persons entitled to rights hereunder...Both the employer and his insurer shall be parties to all agreements or awards of compensation, but the same shall not be enforceable against the employer, except on motion and proof of default by the insurer.

It is true that § 287.300 does not state that insolvency constitutes a default. In general, insolvency, in and of itself, does not constitute a default. "Default" means, "the omission or failure to perform a legal or contractual duty; esp., the failure to pay a debt when due." BLACK'S LAW DICTIONARY 449 (8<sup>th</sup> ed. 2004). The default of the insurer is of no concern in the entry of the award. By the plain language of the statute, default is of concern during enforcement. Only a court can enforce an administrative award so neither we nor the Division need decide whether or when a default has occurred.

As regards to the entry of an award, § 287.300 is clear and unambiguous: "Both the employer and his insurer shall be parties to all...awards of compensation." Our duty is to award compensation against insurer (now IIGF) and employer.

*Does employer have a separate liability on the claim apart from the liability of the IIGF?*

The plain language of § 287.300 specifically states that employer has a liability separate and apart from its insurer's liability. The insurer's liability is "primary and direct." The employer's liability is "secondary and indirect."

The Honorable Jerry W. Venters, Bankruptcy Judge for the United States Bankruptcy Court for the Western District of Missouri, described the operation of § 287.300 in the context of an insurer insolvency.

If an employer is insured, the insurer is primarily and directly liable to the injured employee. If an insurer fails, the employer is secondarily liable for meeting the obligations it sought to have insured. In the event an insurer becomes insolvent, however, much, if not all, of the insolvent insurer's

obligations may be assumed by an insurance guaranty association, relieving the employer of having to bear both the burden of the workers' compensation insurance premium and the amount of the worker's claim.

...

Thus, when an insurer is insolvent, [guaranty association] is obligated to pay the insurer's workers' compensation claims. Should [guaranty association] fail to pay all claims, the employer is secondarily liable.

Judge Jerry W. Venters, *Calamity & Paucity--The Accord between Bankruptcy, Insolvency, and Missouri's Workers' Compensation Laws*, 61 J. Mo. B. 200, 205-206 (2005).

Applying Judge Venter's straightforward analysis, if both insurer and IIGF default, then claimant can enforce the award against employer. § 287.300 RSMo.

Because we find against employer and IIGF on each asserted defense, employer and IIGF are liable for the stipulated past medical expenses in the amount of \$112,871.25.

*What is the extent of the temporary total disability benefits to which claimant is entitled?*

The administrative law judge awarded temporary total disability benefits for the period May 5, 1998, through July 16, 1998. As detailed above, claimant has established that employee's July 1998, and November 1999 surgeries were necessitated by the April 1998 work fall. Accordingly, employer and IIGF are liable for temporary total disability benefits from May 5, 1998, through July 25, 2000.

Award

In addition to the compensation awarded by the administrative law judge (\$33,147.95), we award the following compensation from employer and IIGF to employee:

- Past medical expenses in the amount of \$112,871.25.
- Additional temporary total disability benefits in the amount of \$ 53,236.64 for the period July 16 1998, through July 25, 2000 (104 3/7 weeks X \$509.79).

Robert J. Lenze, Esq., Attorney at Law, is allowed a fee of 25% of the benefits awarded for necessary legal services rendered to employee, which shall constitute a lien on said compensation.

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

Given at Jefferson City, State of Missouri, this 29<sup>th</sup> day of October 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING  
\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

\_\_\_\_\_  
John J. Hickey, Member

Attest:

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Secretary

## AWARD

Employee: Charles Bock Injury No.: 98-057574

Dependents: Alice Bock Before the  
Division of Workers'

Employer: Broadway Ford Truck Sales, Inc.

Compensation  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (Open)

Insurer: Reliance Insurance Company in Receivership  
Illinois Insurance Guaranty Fund

Hearing Date: July 17, 2006 Checked by: EJK

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 23, 1998
5. State location where accident occurred or occupational disease was contracted: City of St. Louis, 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:  
The employee slipped and fell on wet antifreeze on the employer's premises.
12. Did accident or occupational disease cause death? No Date of death? September 27, 2000
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: 25% permanent partial disability to 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: Charles Bock Injury No.: 98-057574

- 17. Value necessary medical aid not furnished by employer/insurer? None
- 18. Employee's average weekly wages: \$763.27
- 19. Weekly compensation rate: \$508.79/\$278.42
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None

10 3/7 weeks of temporary total disability (or temporary partial disability) \$ 5,305.95

100 weeks of permanent partial disability from Employer \$27,842.00

22. Second Injury Fund liability: Open

TOTAL: \$33,147.95

23. Future requirements awarded: None

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Robert J. Lenze, Esq.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Charles Bock Injury No.: 98-057574

Dependents: Alice Bock Before the  
Division of Workers'

Employer: Broadway Ford Truck Sales, Inc.

Compensation

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Reliance Insurance Company in Receivership

Illinois Insurance Guaranty Fund

Checked by: EJK

This workers' compensation case raises several issues arising out of a work related injury in which, Charles Bock, the employee, an automobile mechanic, suffered a low back injury when he slipped and fell on anti-freeze. Mr. Bock filed a claim for compensation, and a hearing resulted in an award that he appealed to the Missouri Labor and Industrial Commission, who entered an award. The Commission's award went to the Missouri Court of Appeals, who reversed and remanded the Commission's decision. The Commission remanded the case to the Division for a hearing on remand. On September 27, 2000, employee Charles Bock died from causes unrelated to the April 23, 1998, accident and/or his occupational disease. Alice Bock was substituted as the claimant on the Claim for Compensation. She will be referred to as the claimant in this award. On October 3, 2001, Reliance Insurance Company was declared insolvent. Claimant Alice Bock did not file a claim with the receiver of Reliance Insurance Company. On December 18, 2001, the Illinois Insurance Guaranty Fund (hereinafter "Guaranty Fund"), assumed responsibility for the Claim for Compensation filed against employer Broadway Ford. On October 18, 2002, claimant Alice Bock filed an Amended Claim for Compensation. Therein, claimant alleged that employee sustained injury to his back and spine. As to how this injury occurred, claimant averred that on April 23, 1998, employee was performing work when he slipped and fell while working on the employer's premises, injuring his low back. Additionally, claimant asserted that several weeks prior to April 23, 1998, the employee was suffering low back pain as a direct and proximate result of his job duties, which led to a physical breakdown or a change in pathology of the employee's low back condition. Claimant alleged that this condition resulted in the employee becoming and remaining temporarily and totally disabled until he received surgical treatment from Dr. Reynolds and reached maximum medical improvement on July 25, 2000. Claimant requested reimbursement for medical expenses incurred through that date.

The issues for determination are whether the employee is entitled to an award for past medical expenses or temporary total disability benefits. The specific issues raised by the parties at the hearing are (1) nature and extent of temporary total disability-whether claimant is entitled to recover temporary total disability only from May 5, 1998, through July 16, 1998, or whether claimant may recover temporary total disability from May 5, 1998, through July 25, 2000; (2) whether employer or the Guaranty Fund is liable under the Workers' Compensation Act for the medical expenses that the employee incurred in treating his back condition; (3) whether the medical treatment employee Charles Bock underwent was medically casually related to and necessitated by the employee's work related injury and/or occupational disease; (4) whether claimant can recover the medical expenses paid by the Welfare Plan from either employer or the Guaranty Fund; (5) whether the medical expenses paid by the Welfare Plan constitute a "covered claim", which the Guaranty Fund is statutorily obligated to pay under the Guaranty Fund Act; (6) whether, in the event the Guaranty Fund is not obligated to pay the \$96,476.03 in past medical expenses under the Guaranty Fund Act, claimant may recover that amount directly from employer; (7) whether claimant may recover the entire \$112,871.25 in medical expenses incurred by the employee, or the \$96,476.03 paid by the Welfare Plan; (8) whether the insolvency of Reliance Insurance Company constitutes a failure to insure on behalf of Broadway Ford, within the meaning of Section 287.280.1, or a default on the part of Reliance Insurance Company, within the meaning of Section 287.300; and (9) whether employer Broadway Ford has a separate liability on the Amended Claim, apart from the liability of the Guaranty Fund.

The Second Injury Fund claim remains open pursuant to an agreement among the attorneys. The evidence compels an award for the claimant for permanent partial disability.

At the hearing, the parties agreed to most of the testimony and exhibits from the two previous hearings. At hearing on July 17, 2006, the claimant objected to Dr. Ralph's deposition, which was admitted into evidence during the original hearing in this matter and during the remand hearing. The objections are overruled. The challenges that claimant raises to Dr. Ralph's testimony primarily involve Dr. Ralph's reading of the medical records in evidence, and his conclusions based upon those medical records. These challenges go the weight, and not the

admissibility of Dr. Ralph's testimony. Alcorn v. Union Pacific R.R., 50 S.W.3d 226, 246 (Mo.banc.2001); Wadlow v. Lindner Homes, 722 S.W.2d 621, 627 (Mo.App.E.D.1986). Dr. Ralph's findings and conclusions were consistent with the medical records in evidence, as well as the diagnostic studies taken of the employee's lumbar spine.

All objections not previously sustained are overruled. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri.

### STIPULATED FACTS

On or about April 23, 1998, Broadway Ford Truck Sales Inc. (hereinafter "Broadway Ford" or "employer"), was a covered employer, operating under and subject to the provisions of the Missouri Workers' Compensation Act. Broadway Ford's workers' compensation liability was fully insured by Reliance Insurance Company. The policy issued to employer by Reliance Insurance Company was the only workers' compensation policy in effect for Broadway Ford's workers' compensation liability on April 23, 1998. Broadway Ford did not self-insure all or part of its workers' compensation liability on or about April 23, 1998. On April 23, 1998, Charles Bock was an employee at Broadway Ford and was working under the provisions of the Missouri Workers' Compensation Act. On or about April 23, 1998, Charles Bock sustained an accident that arose out of and in the course of his employment for Broadway Ford. On or about April 23, 1998, Charles Bock sustained an occupational disease as a result of performing heavy mechanical work for Broadway Ford. Broadway Ford had notice of Charles Bock's accident and/or occupational disease.

The employee's Claim for Compensation was filed within the time allowed by law. The employee's average weekly wage was \$763.27. The rate of compensation for the employee was \$508.79 per week for temporary total disability and permanent total disability and \$278.42 per week for permanent partial disability, per agreement of the parties. Neither employer nor the Illinois Insurance Guaranty Fund provided medical aid to the employee or paid medical expenses on behalf of the employee. Neither employer nor the Illinois Insurance Guaranty Fund paid temporary total disability benefits to the employee. As a result of his work related accident and/or occupational disease, the employee sustained a 25% permanent partial disability of the body as a whole, at the level of the lumbar spine.

On June 8, 1998, Charles Bock entered into an agreement to reimburse the District Number 9 I.A.M.A.W. Welfare Trust (hereinafter "Reimbursement Agreement"). Charles Bock incurred medical expenses in the amount of \$112,871.25 for treatment related to his back complaints. Pursuant to the Reimbursement Agreement it entered into with Charles Bock, the Welfare Trust paid \$96,476.03 for the employee's medical expenses. The difference between the total medical expenses incurred by the employee and paid by the Welfare Trust was \$16,395.22. Claimant Alice Bock entered into a Memorandum Agreement with the Second Injury Fund (hereinafter "SIF").

After Reliance Insurance Company became insolvent, neither employer Broadway Ford nor claimant Alice Bock filed a claim with the Guaranty Fund. The Guaranty Fund automatically assumed liability under the workers' compensation policy issued to employer Broadway Ford, once Reliance Insurance Company became insolvent, since employee Charles Bock was a resident of Illinois at the time of his work injury on April 23, 1998. The Guaranty Fund is a not-for-profit association created by the Illinois Legislature. (215 ILCS 5/535). Neither employee Charles Bock nor claimant Alice Bock filed a civil action against employer Broadway Ford, pursuant to Section 287.280.1 to recover damages for personal injury to the employee. The statutes at issue are Sections 534, 537.4 and 546(a) of the Illinois Insurance Guaranty Fund Act (hereinafter "Guaranty Fund Act"), 215 ILCS §§5/534, 5/537.4, 5/546(a); and Sections 287.120, 287.280 and 287.300, RSMo 2000.

### SUMMARY OF FACTS

Charles Bock was employed as a heavy truck mechanic at Broadway Ford from August 16, 1996, through May 5, 1998. (P.T.38). <sup>[4]</sup> His job duties included the removal, repair, replacement and reinstallation of various parts on large tractor trucks, including work on the brakes, clutch, transmission, and springs of trucks. Many of the parts were extremely heavy. (P.T.38-39).

## Preexisting Conditions

The employee had an extensive history of low back pain and medical treatment for the low back pain before the April 23, 1998, work related accident. These problems began in 1972, and continued intermittently through April 1998. (P.T.102). In 1972, the employee began seeing Dr. Gerald Bemis, a chiropractor, for back pain from an accident in which employee was rear ended by a tractor-trailer. (P.T.45, 102-103). During the 1970s, employee had periodic back pain or stiffness. On those occasions, he treated with Dr. Bemis. (P.T. 45). After having another motor vehicle accident in 1979, the employee treated with Dr. Bemis thirty-six times from June 22, 1979, through December 28, 1979. (P.T. 104).

In the early 1980's, the employee continued treating with Dr. Bemis for his back complaints. For example, in 1982, Dr. Bemis treated the employee for acute lumbosacral strain. The employee saw Dr. Bemis twelve times in 1983 and ten times in 1984. (P.T.104, 211). The employee also received treatment from Dr. Bemis in 1985 for low back pain, seeing the doctor twelve times into February 1986. (P.T.105). When the employee saw Dr. Bemis in June 1987, he reported that he was having pain in his back, both legs, and right arm. (P.T. 105).

From April 1988 to March 1990, the employee had back pain. Charles Bock received treatment from Dr. Bemis in 1988 for his neck and low back pain. In January 1989, the employee told Dr. Bemis that he had intermittent back pain, as well as pain into his legs. (P.T.98, 105-106). Again, in 1990, the employee reported neck pain and back pain that radiated into his legs. (P.T. 108).

In December 1991, the employee reported low back and neck pain on and off for the last few months. Dr. Bemis diagnosed a lumbar strain and probable L4-L5 disc bulge. (P.T.108, 194-196,199). X-rays revealed cervical and lumbar sUBLUXATION, complicated by cervical and lumbar disc disease and arthritis. (P.T.200). Throughout December 1991, the employee continued to experience back pain. (P.T.202). In December 1993, the employee again treated with Dr. Bemis and reported low back and neck pain. (P.T.108, 204-205).

In January 1997, the employee returned to Dr. Bemis with increased low back pain. (P.T.111-112). In July 1997, the employee complained of neck pain and low back pain, which he reported to be a recurrence of an old condition. (P.T.206, 208-209). Dr. Bemis took x-rays revealing degenerative disc disease and arthritis in the neck and low back. (P.T.113, 208). The employee continued treating intermittently with Dr. Bemis through 1997. Over the course of Dr. Bemis' treatment, Charles Bock received medical care for his neck, both upper extremities, his back, and pain in both legs. (P.T. 198-208).

In addition to treating with Dr. Bemis, Charles Bock treated with Dr. Green, his family physician, for diabetes, high blood pressure, and depression from July 25, 1983 through 1999. (P.T.46, 108-109,219-321). On August 20, 1988, Dr. Green noted a six to twelve month history of joint stiffness and diagnosed probable degenerative arthritis. (P.T.245). The employee was diagnosed with diabetes in 1988, when he went to Yellow Freight to take a medical exam for a mechanic's job. (P.T.46, 109). On November 3, 1988, Dr. Green diagnosed non-insulin diabetes mellitus and prescribed a diabetic diet and medication. (P.T.46, 109, 110-111, 245). During 1989, Dr. Green continued to monitor the employee's diabetes. (P.T.244-245). In 1990, the employee reported

numbness in both legs, and decreased reflexes. (P.T.110, 244-245). As of April 1990, the employee was not following his diabetic diet. On April 16, 1990, the employee complained of cold feet and lower extremities. Dr. Green opined that employee had some mild peripheral neuropathy, probably related to impaired glucose intolerance. (P.T. 242).

When the employee had an increase in his low back pain in January 1997, he reported it to Dr. Green. On January 7, 1997, the employee told Dr. Green that he had ongoing problems with low back pain and paresthesia or numbness in his right leg radiating from his right hip to his foot. (P.T.49, 111-112, 231). After a physical examination, Dr. Green diagnosed diabetes, intermittent right leg paresthesia-probable right leg radiculopathy-clinically inactive, and history of chronic low back-clinically inactive. (P.T.49, 112, 238).

In January and February 1997, the employee's blood sugar was elevated. On February 28, 1997, Dr. Green noted that the employee's blood sugar was "unacceptably high". Dr. Green changed the employee's medication and considered use of insulin. (P.T. 235-237). On April 21, 1997, Dr. Green found that the employee's diabetes was "not well controlled". (P.T. 233).

On September 16, 1997, the employee told Dr. Green that he had pain in his legs, a sensation of weakness and pain, radiating down the medial aspect of the legs, more so in the right leg, and sometimes in the right foot. While the employee did not have any difficulty walking, he experienced difficulty climbing stairs. When he bent over, the employee felt stiff and had low back discomfort. Dr. Green diagnosed leg pain, diabetes, and proximal myopathy. (P.T.232). Throughout 1997, and into 1998, the employee's blood sugar remained substantially elevated. (P.T.268, 282, 297, 298, 305, 310, 316-317, 319). Upon examining the employee on March 20, 1998, Dr. Green found that his diabetes was not well controlled. (P.T. 226).

On March 2, 1998, the employee reported that he had been taking 6 to 8 Aleve a day for pain in the left buttock, radiating into his left leg, which he had had for one month and had experienced low back pain on and off, for some time. (P.T.117, 223). While the employee had recently treated with his chiropractor, his symptoms had not improved. Dr. Green diagnosed left lumbar radiculopathy and diabetes. He recommended a CT scan of employee's lumbosacral spine and referred the employee to Dr. Bruce Reid. (P.T. 223-224, 50, 117).

Dr. Reid examined the employee on April 6, 1998, who reported a history of chronic back problems that had worsened in the last two to three months. (P.T. 117-118, 329). The employee's pain was in the lower part of his back, and radiated down the left leg into his thigh. These problems had started to become radicular down the right leg, where they remained. (P.T. 118, 329).

Dr. Reid diagnosed lumbar degeneration with mechanical low back pain and mild left lumbar referred pain. After reviewing films taken at Dr. Bemis' office, Dr. Reid concluded that the employee had moderate lumbar degeneration at the mid and upper lumbar levels, with mild degenerative listhesis. Dr. Reid prescribed anti-inflammatory medications and recommended that employee modify his activities to avoid provocative bending, stooping, and heavy lifting. (P.T.328-329). On April 22, 1998, an MRI demonstrated degenerative changes and bulging at multiple levels, especially at L4-L5, associated with mild multi-level facet arthritis, with severe degeneration of the disc at L1-L2; and increased signal intensity at T12-L1. (P.T.52, 119, 331-332). Based upon the results of the April 22, 1998, MRI, Dr. Reid ordered a CT biopsy of the employee's lumbar spine. (P.T. 120).

#### August 1998 Work-Related Accident

On April 23, 1998, the employee was walking across employer's garage area when he slipped and fell on spilled anti-freeze. When the employee slipped, he did not fall, hit, or twist his back. (P.T. 50-51, 120-122). Rather, the employee fell forward, landing on his hands and knees. To get out of the anti-freeze, employee rolled over on his buttocks. To stand up, employee rolled over again, back onto his hands and knees. (P.T. 50-51, 121). After getting up, the employee finished performing his work. He worked overtime. (P.T.51, 123). Upon falling, the employee did not have any pain in his legs, just a pulling sensation in his back that did not bother employee enough to pay attention to it. (P.T.51, 120-121,123).

On the day he fell, employee did not seek or receive medical treatment. The next day, the employee performed his regular work duties. He did not seek medical treatment. (P.T.123-124).

From April 23, 1998, to April 27, 1998, the employee worked full-time, performing his regular duties. He also worked overtime. (P.T. 124). On April 27, 1998, the employee underwent the CT biopsy of his lumbar spine, previously scheduled by Dr. Reid. (P.T. 120, 124). While at the hospital, the employee did not provide anyone with a history of his injury at work on April 23, 1998. (P.T.125, 360-361). During the biopsy procedure, material was removed from the employee's back with a needle. (P.T. 52, 125). The CT biopsy revealed a degeneration at the T12-L1 level. Following the biopsy, the employee returned to work, and resumed his regular, full-time duties. (P.T. 126, 361).

The day after the biopsy, the employee called Dr. Reid, with leg and in back pain, but did not report an injury at work. (P.T. 53, 125, 172, 192, 328).

On April 30, 1998, the employee followed up with Dr. Reid. (P.T.126). Charles Bock's back pain was getting worse. It had shifted to employee's right side, with his right leg and thigh aggravating him. (P.T.327). The employee did not provide Dr. Reid with any history of having sustained a work accident on April 23, 1998. Dr. Reid diagnosed persistent low back pain, with right leg sciatica and right upper referred flank pain. (P.T.127, 327-328). During the April 30, 1998, examination, Dr. Reid opined that the employee's pain resulted from degenerative changes in the back. Dr. Reid advised the employee that he did not have a disc herniation, and that he was not a surgical candidate. (P.T.127, 327-328).

As the employee admitted, as of April 30, 1998, he had not informed any doctor, or the employer, that he had sustained a work related accident. Moreover, the employee had not requested authorization from the employer for medical treatment, advised the employer that he was receiving medical treatment from Dr. Reid, or asked employer to send him to that physician. (P.T. 127-128).

Dr. Reid referred the employee to Dr. Platt for epidural steroid injections. (P.T.53). The employee provided Dr. Platt with a history of his back complaints. Specifically, employee reported that about four months before, he gradually began having low back pain that radiated down into the interior and posterior surfaces of his thigh particularly on the right leg. On occasion, employee's right leg became numb. The employee stated that he could hardly walk because of the pain. (P.T.408). However, employee did not inform Dr. Platt of any work accident or injury occurring on April 23, 1998. (P.T. 128, 411). The employee was specifically asked if he had a back injury. He responded "no" to this inquiry. (P.T.129). On May 4, 1998, Dr. Platt performed an epidural block at L4-L5, which did not provide employee with relief. (P.T. 53, 127, 401, 409). Dr. Platt took employee off work on May 5, 1998. (P.T. 129).

Dr. Reid referred the employee to Dr. Laws for EMG and nerve conduction tests. (P.T. 53, 980). When Dr. Laws examined the employee on May 7, 1998, he did not tell Dr. Laws that he slipped and fell at work. The employee advised Dr. Laws that his group health insurance would be responsible for paying the doctor's charges. (P.T. 130, 402, 980). During the 5/7/98 examination, Dr. Laws performed EMG studies of employee's lower extremities. These studies were consistent with a right L5 radiculopathy. (Tr. 480).

The employee also saw Dr. Reid on May 7, 1998. Once again, employee failed to provide Dr. Reid with a history of his work accident. (P.T. 130, 326). He informed Dr. Reid that the steroid injection Dr. Platt performed did not alleviate his back complaints. (P.T. 130, 321). Additionally, the employee reported that he had pain going down the right leg, and that it was radiating into his right foot. Dr. Reid observed that the employee's EMG studies were consistent with a right L5 radiculopathy. The MRI of the employee's lumbar spine showed no evidence of

canal encroachment from degenerative discs and multiple levels of mild disc bulging, but no thecal impaction or foraminal stenosis. (P.T.326). Based upon these studies and his examination, Dr. Reid diagnosed a right L5 radiculopathy, with low back pain. He did not see any surgical lesion. In Dr. Reid's opinion, the employee should continue anti-inflammatory medications and remain off of work. (P.T. 325).

Dr. Reid referred the employee to HealthSouth Physical Therapy, but the employee did not ask his employer to authorize his treatment at HealthSouth, or inform the employer that he was receiving physical therapy there. (P.T. 58, 131, 325).

On May 8, 1998, the employee went to HealthSouth and gave a history of slipping and falling on his knees two weeks ago while at work, stating that his symptoms had been worse since then. However, the employee also provided a history that his current round of symptoms started during Christmas 1997, with a gradual onset, and that they continued to get worse. Employee reported that he had a long history of back problems, since 1972, and had received chiropractic care in the past. Following May 8, 1998, the employee underwent a course of physical therapy. However, physical therapy did not improve the employee's back complaints. (P.T.58, 334-342).

Upon referral from a friend, the employee received treatment at the Galbreath Chiropractic Center. Charles Bock did not ask employer to authorize his treatment with Dr. Galbreath. Nor did he inform the employer that he was treating with the chiropractor. (P.T.132, 134, 454).

On May 13, 1998, the employee reported to Dr. Galbreath that he had a pinched nerve in his low back at the L5 level, with a gradual onset over the last three months and that he slipped on anti-freeze at work and injured his low back. (P.T.454). Dr. Galbreath diagnosed a lumbosacral spine sprain/strain injury. From May 15, 1998, through June 6, 1998, Dr. Galbreath treated the employee with spinal adjustments. (P.T.134, 457, 459-464).

On May 14, 1998, employee returned to Dr. Platt for a second epidural injection at the L5-S1 level. (P.T.277, 377-378, 421-422). On May 28, 1998, the employee followed up with Dr. Reid. During this visit, the employee gave no history of his April 23, 1998, work injury. After examining the employee, Dr. Reid diagnosed persistent right leg radiculopathy, with right L5 muscle weakness and sensory loss. He recommended that employee see Dr. Gornet for a surgical evaluation. (P.T. 325).

Instead of seeing Dr. Gornet, Charles Bock consulted with Dr. Mendelssohn, a neurosurgeon. (P.T.468). Employee did not request that employer authorize his treatment with Dr. Mendelssohn, or inform the employer that he was seeing that physician. No one from workers' compensation authorized the employee to treat with Dr. Mendelssohn. (P.T. 58, 135, 468).

When Dr. Mendelssohn examined the employee on June 10, 1998, the employee gave Dr. Mendelssohn a history of the work accident, but failed to provide any history of his prior back condition. (P.T. 58, 135, 468). The employee complained of pain in his right buttock, which radiated down his right thigh, and into his right knee and foot. (P.T. 59, 468). Dr. Mendelssohn found degenerative changes and bulging, but did not see a focal disc herniation. Concluding that the employee's symptoms were related to his right hip, Dr. Mendelssohn recommended a bone scan. (P.T. 58, 468-469). The bone scan revealed increased activity at the L1-L2 level, corresponding to an area of degenerative disc space seen on employee's April 27, 1998 CT scan and his April 22, 1998 MRI. (P.T.388). Dr. Mendelssohn did not recommend surgery and had no further recommendations for treatment. (P.T.467, 136).

On June 17, 1998, employee consulted with Dr. Taylor. The employee did not ask employer to authorize his treatment with Dr. Taylor or inform his employer that he was seeing that physician. (P.T. 59, 136, 474-475). While employee provided Dr. Taylor with a history of slipping on anti-freeze on June 23, 1998, he failed to provide any history of his diabetes or prior back problems. (P.T.136, 475). Dr. Taylor's impression was back pain and right radicular pain. He referred employee to Dr. Vest, an orthopedic surgeon. (P.T. 59, 136, 474). The employee did not request authorization from the employer to treat with Dr. Vest. Nor did the employee inform the employer that he was treating with Dr. Vest for his back complaints. (P.T. 136-137).

On June 23, 1998, Dr. Vest examined the employee. At that time, the employee related his April 23, 1998, work accident. Charles Bock reported that, prior to the fall, he had no problems with his back or right leg, but that following the fall, he had severe difficulty. (P.T.137, 494). Because of this incomplete medical history, Dr. Vest had no knowledge that the employee had previously experienced complaints in his back or legs. (P.T.138). Upon reviewing the April 22, 1998, MRI, Dr. Vest noted multi-level degenerative disc disease of the lumbar spine, most marked at L1-L2. Unlike the other physicians who previously examined the MRI, Dr. Vest concluded that there was a right forminal disc herniation at L3-L4. (P.T.494-495). Dr. Vest diagnosed lumbar pain, with right sciatica; a right forminal disc herniation at L3-L4; and degenerative disc disease of the lumbar spine. He recommended a repeat MRI. (P.T.60, 495).

On June 24, 1998, employee underwent an MRI at St. Anthony's. The radiologist interpreted the MRI as showing multi-level degenerative changes of the lumbar spine, with narrowing of the inferior portion of the right L3-L4 neural foramen, and a small central posterior herniation at L4-L5. (P.T.605-606). Dr. Vest asked the radiologist to review the report concerning the bulging at the L3-L4 level. The radiologist noted that the bulging "is prominently asymmetric and focal herniation and its inferior portion cannot be excluded". However, the radiologist opined that the clinical significance of this finding was not clear, since the fat plane around the right nerve root was preserved. (P.T.605-606). On June 23, 1998, additional lumbar films confirmed degenerative changes at the L1-L2, L3-L4, and L4-L5 levels. (P.T.607).

Dr. Vest concluded that the employee had a disc herniation at L3-L4 and that employee was a candidate for a lumbar microdiscectomy at that level, on the right. (P.T.496-497). Before recommending surgery and scheduling employee for surgery on July 16, 1998, Dr. Vest did not perform a myelogram. While Dr. Vest's records referenced employee's diabetic condition, they contained no mention of employee's history of peripheral neuropathy. (P.T. 60, 494-504).

On July 13, 1998, the employee complained to Dr. Vest of low back pain and severe right hip pain, which radiated into his right thigh and leg. (P.T.498). Three days later, on July 16, 1998, Dr. Vest performed a microscopic lumbar discectomy at L3-L4, on the right. In his operative note, Dr. Vest reported a "large right foraminal disc herniation compressing the right L3 nerve root". (P.T. 61, 140, 657-658).

While the employee's complaints improved for a short period following Dr. Vest's surgery, his symptoms then intensified. The employee developed numbness, pain, and a cold feeling in his right leg from his foot to his hip. (P.T.140-141). Also, the employee had pain across his hip and buttock, to the lower part of his back. While the employee had these symptoms prior to surgery, they increased after the operation. (P.T. 62-63). Approximately two weeks after surgery, employee began to notice weakness in his right leg. Because of these problems, employee was unable to straighten his right leg at the knee. (P.T. 63, 65).

On July 22, 1998, employee reported to Dr. Vest that he had pain in both legs and a cold sensation in his right leg. Likewise, on August 8, 1998, and August 18, 1998, employee related pain in his right hip and thigh, radiating down the leg, along with numbness and a cold feeling in the leg. (P.T.499-501). On September 1, 1998, employee returned to Dr. Vest, complaining of increased low back pain, radiating to both legs, with numbness of both thighs. Dr. Vest ordered an MRI and EMG of employee's lower extremities. (P.T.502).

On September 2, 1998, employee underwent an MRI. (P.T. 63, 503). It demonstrated a bony spur projecting on the right L1-L2 foramen, small disc herniations on the left at L3-L4 and L4-L5, and an enhancing lesion in the inferior aspect of the L1 vertebral body, not significantly changed since June 24, 1998. (P.T.632-633). EMG testing performed by Dr. Schreiber revealed abnormalities, including a high right lumbar radiculopathy involving the quadriceps, along with bilateral L5-S1 radiculopathy. In Dr. Schreiber's opinion, the quadriceps and L5 damage on the right appeared to have not only significant findings, but also ongoing persistent damage. (P.T. 633, 722).

After reviewing the September 2, 1998, MRI, Dr. Vest found that although there were numerous degenerative changes and multiple bulging discs, there did not appear to be any significant nerve compression at L4-L5 or L5-S1 that would correlate with the EMG report indicating bilateral L5-S1 radiculopathies. Dr. Vest

recommended that employee undergo a lumbar myelogram, followed by a CT scan. (P.T.503-504).

On September 14, 1998, employee followed up with Dr. Vest. The employee reported pain in his right thigh, radiating down the right leg into the right foot, and pain in the left leg. He complained of weakness in both legs, worse on the right, and difficulty in walking. (P.T. 141, 504).

When Dr. Green examined the employee on September 15, 1998, he reported that he slipped on some anti-freeze at work back in April or May, and was starting to have progressive low back discomfort and radicular pain. Charles Bock related that he had experienced progressive pain and weakness in his right leg, since Dr. Vest's surgery. Dr. Green concluded that employee either had a diabetic polyradiculopathy or continued difficulty with a mechanical disc problem. (P.T.222).

On September 21, 1998, the employee underwent a lumbar myelogram. (P.T. 64, 139, 141). Upon reviewing the myelogram and CT scan, Dr. Vest concluded there was no evidence of disc herniation or significant nerve root compression at L4-L5 or L5-S1. Dr. Vest opined that the myelogram findings did not explain employee's leg pain. (P.T.507). When employee returned to Dr. Vest on September 22, 1998, he complained of severe back pain and pain in both lower extremities, the right worse than the left. Additionally, the employee had weakness and intermittent tingling in both legs. During the week of September 22, 1998, Dr. Vest received a telephone call from Dr. Green, who informed Dr. Vest that the employee's blood sugars had been elevated and that the employee was a diabetic. Dr. Green advised Dr. Vest that there was a concern for peripheral neuropathy. (P.T.507).

Dr. Green examined the employee on September 25, 1998. The employee continued to complain of right leg pain and weakness. Upon reviewing the employee's myelogram, Dr. Green concluded that it showed no mechanical or structural abnormality that could be surgically treated. The employee's blood sugar was elevated. Dr. Green's diagnosis was diabetes, not well controlled, and a possible diabetic polyradiculopathy. (P.T.221).

Upon Dr. Green's referral, the employee saw Dr. Laws on October 15, 1998. Dr. Laws concluded that employee appeared to have weakness at more than one level and suspected that employee had a polyradiculopathy, secondary to his diabetes, or a mononeuritis multiplex. (P.T.64, 142, 485-487). The employee returned to Dr. Laws on October 28, 1998. Upon reviewing the employee's test results, Dr. Laws opined that it was most likely that the employee had a polyradiculopathy secondary to his diabetes, or a femoral neuropathy. (P.T.484).

When Dr. Vest examined the employee on November 10, 1998, he complained of pain and numbness in his right hip and thigh. (P.T.513). Dr. Vest's diagnoses were: 1) right lumbar radiculopathy involving the quadriceps, and bilateral L5-S1 radiculopathies; 2) status post lumbar microdiscectomy at L3-L4 on the right; diabetes mellitus, with presumed peripheral neuropathy; and degenerative disc disease of the lumbar spine, with central spurring at L1-L2. (P.T.513). Since his treatment had not improved the employee's complaints, Dr. Vest referred employee to Dr. Lenke. No one from the employer or its insurer authorized the employee to treat with Dr. Lenke. (P.T.64, 510-513). After examining the employee, Dr. Lenke opined that he had a disc herniation at L4-L5, causing a right L4 radiculopathy. On November 18, 1998, Dr. Lenke performed a nerve root block. (P.T.617-621, 623-624).

On November 24, 1998, employee reported to Dr. Vest that the nerve root block Dr. Lenke performed alleviated his pain for twelve hours, but the pain returned. Additionally, employee had pain in the right shoulder, and pain with elevating his right arm above his head. These complaints started after Dr. Vest's surgery. (P.T.515).

On December 1, 1998, Dr. Gold, a neurosurgeon, evaluated the employee. He noted that post-operatively, the employee's symptoms were getting worse. The employee complained of back pain, and pain in his right shoulder and arm, radiating into his elbow. Since Dr. Vest's surgery, employee was unable to raise his right leg and could barely walk on that leg. (P.T.143, 642-643). Dr. Gold recommended repeat EMG and nerve conduction studies. These studies, performed on December 2, 1998, demonstrated right femoral neuropathy and moderately

severe peripheral neuropathy. Based upon these test results, Dr. Gold referred the employee to Dr. Sherrill, a neurosurgeon. (P.T.66, 144, 626, 639-640, 643).

On January 20, 1999, Dr. Sherrill examined employee and reviewed his diagnostic studies. The employee informed Dr. Sherrill that his symptoms had gotten worse after Dr. Vest's surgery and that he had lost the use of his right thigh. (P.T. 144, 626). Also, employee reported that he was a diabetic and had been on oral hypoglycemics for seven years. (P.T. 627, 635).

Dr. Sherrill's initial impression as to the employee who was a diabetic, who had back pain since a minor fall, who had femoral neuropathy that was now fairly impressive involving the sensory dermatomes of L2, L3, L4, and parts of L5, with weakness in the quadriceps muscles that had gotten progressively worse since Dr. Vest's reduction of the disc bulge, was that of diabetic peripheral nerve disease. Dr. Sherrill opined that the employee had a right femoral nerve injury that was quite extensive, and an L5 radiculopathy, with ongoing injury. (P.T.627-628, 735-736). Dr. Sherrill informed the employee that his problems were related to his diabetes, and that he had a diabetic peripheral neuropathy. Moreover, he advised Charles Bock that he did not need further surgery. Dr. Sherrill referred the employee to Dr. Selhorst, a neurologist. (P.T.144-145, 736).

On January 27, 1999, Dr. Selhorst evaluated the employee. (P.T. 145, 732). Employee related that several weeks after Dr. Vest's surgery, he developed symptoms in his right shoulder similar to the pain he had in his right thigh. After examining employee and reviewing his medical records, Dr. Selhorst concluded that employee had a fairly classical form of diabetic amyotrophy, which was characterized by a painful proximal weakness of the lower extremities. (P.T. 145, 733). Dr. Selhorst opined that the employee's pain should be managed with an analgesic. Dr. Selhorst recommended that the employee use a walker or wheelchair. The employee used a walker until approximately two weeks prior to hearing. (P.T. 67-69, 145, 733).

On February 8, 1999, employee returned to Dr. Selhorst. At that time, Dr. Selhorst recommended that employee see Dr. Green for his diabetes. (P.T.145-146, 727, 730). The employee followed up with Dr. Green, who referred him to Alton Memorial Hospital for instruction on meal planning and use of a glucose meter. (P.T.740-749). When the employee met with the nurse at Alton Memorial Hospital, he advised her that he was having difficulty controlling his blood sugar level. (P.T.146, 743). Dr. Green also referred the employee to Alton Physical Therapy. Beginning in March 1999, the employee participated in physical therapy for several months. While the purpose of physical therapy was to increase the strength in employee's leg, it failed to do so. (P.T.270).

The employee returned to Dr. Mendelsohn on March 12, 1999. Upon examining the employee and reviewing additional medical records, Dr. Mendelsohn did not have an explanation for employee's symptoms. (P.T.147, 470-471). He recommended an additional MRI of employee's lumbar spine. Upon reviewing the MRI, Dr. Mendelsohn did not see any evidence of a surgical lesion, i.e., a nerve root impingement, or a herniated disc. (P.T.472). Dr. Mendelsohn informed the employee that he could not identify any problem in the employee's spine, which was responsible for his right leg weakness. Additionally, Dr. Mendelsohn told the employee that he did not have a surgical problem and that surgery would not help his condition. (P.T.147, 470-471,738).

The employee followed up with Dr. Selhorst on April 14, 1999. While Dr. Selhorst recommended that claimant be referred to Dr. Hyatt, the employee did not follow up with Dr. Hyatt at that time. (P.T.148, 150-151, 726).

Rather than following Dr. Selhorst's recommendations, the employee, on his own, consulted Dr. Reynolds on November 2, 1999. Employee reported that before surgery, he had pain in the right leg and was able to be up and around, but since surgery, he had weakness in the leg and progressive atrophy of the thigh. In addition to right leg pain, the employee had pain in his right arm and side. Upon examining the employee and reviewing his medical records, Dr. Reynolds' assessment was persistent right L3-L4 herniated disc with right L3-L4 radiculopathy. He recommended a lumbar MRI. (Tr.267-268).

Charles Bock returned to Dr. Reynolds on November 18, 1999. Upon reviewing the employee's diagnostic studies, Dr. Reynolds found that the employee had a foraminal fragment on the right at L3-L4, as well as multi-level degenerative disc disease from L1 down. Dr. Reynolds concluded that the employee required surgical correction at the L3-L4 level. Moreover, Dr. Reynolds opined that the employee's job as a heavy-duty truck mechanic, whereby he suffered repetitive trauma over the years, accounted for the severe degenerative changes throughout the employee's lumbar spine. Similarly, Dr. Reynolds concluded that the right lateral disc herniation with acute L3 radiculopathy was a consequence of the employee's April 23, 1998, slip and fall. The doctor's reason for recommending surgery at L3-L4 was his opinion that the original surgery performed by Dr. Vest did not achieve the stated goal of removing the foraminal fragment at L3-L4 on the right, and that the employee currently had instability at that level, which might or might not relate to his prior surgery at L3-L4. Dr. Reynolds' diagnoses, as of November 18, 1999, were persistent right L3-L4 lateral disc and instability at L3-L4. (Tr.264-265).

On December 8, 1999, Dr. Reynolds performed an L3-L4 lumbar interbody fusion with pedicle screws. (Tr.459-461). When employee returned to Dr. Reynolds on December 28, 1999, he showed improvement in right leg strength. The employee had bilateral reinnervation pain, worse on the left than the right. Dr. Reynolds recommended that employee begin a walking program. (Tr.263). On January 25, 2000, employee reported to Dr. Reynolds that he had had virtually no back pain since surgery. While employee had a dramatic increase of strength in his right leg, his iliopsoas were still weak at 3/5. X-rays showed excellent alignment of the instrumentation. (Tr.262). During his February 21, 2000, examination, the employee reported that he was still intolerant of stairs because of weakness in his legs. When he returned to Dr. Reynolds on April 4, 2000, the employee related a lot of achy pain in his groin and in the quads. He had been working very hard at physical therapy. While the employee's quads were 4+, he was still areflexic at both knees, and his iliopsoas were at 3/5. The employee was to return in two months. If his iliopsoas strength was not improved at that time, Dr. Reynolds would repeat the myelogram and post-myelogram CT. (Tr.260-261).

When the employee returned on May 30, 2000, his iliopsoas weakness had not improved. He remained at 3+/5 in the right iliopsoas. The quads were 4+. While it was Dr. Reynolds' belief that the employee had a persistent, rather than recurrent, disc at the L3-L4 level, Dr. Reynolds could not state this opinion at the level of reasonable medical probability. (Tr.259). Dr. Reynolds informed the employee that because of persistent weakness in the iliopsoas, he needed to undergo another myelogram and post-myelogram CT to make sure that the disc fragment had been fully removed and the nerve roots were free. (Tr.259-260).

Dr. Reynolds' review of the myelogram showed no evidence of either a recurrent or persistent L3-L4 disc. There now appeared to be a subluxation at L1-L2. Dr. Reynolds opined that the back pain that employee had might relate to the subluxation. Instrumentation was in good position. The fusion at L3-L4 appeared to be solid. Dr. Reynolds did not see any residual compression that would explain the employee's persistent iliopsoas and quad weakness. Employee returned to Dr. Reynolds on July 25, 2000, with the same subjective complaints. He reported difficulty, particularly with walking and getting up, when he had been sitting for a period. At that time, Dr. Reynolds' diagnoses were persistent right leg pain, healed L3-L4 fusion, and stable L1-L2 subluxation. (Tr.256-257). The claimant expired on September 27, 2000.

At the initial hearing in August 1999, the employee testified regarding that he was falling. If the employee was standing straight on his leg and not moving, his right leg would support his weight. However, if the employee took his right leg out of a locked position, or bent his knee, he would fall to the floor. He fell some two to three times per week. The only way that employee was able to walk was by locking his right knee in a straight position. (P.T.71). Moreover, employee was not able to stand for more than twenty or thirty minutes without having pain. He could walk two hundred feet. Also, the employee had problems going up and down steps. He used a railing for support and could only go up or come down one step at a time. (P.T. 72-73, 157).

Employee testified that, at no time since Dr. Vest's surgery, had he been pain free in his right leg. He had pain twenty-four hours a day. This pain was seldom less than a ten on a 1-10 scale. The employee had a tingling sensation in his right leg that went throughout the leg down into his foot. (P.T.63, 74). He was unable to sleep through the night, because pain in his arms, legs and back woke him up. (P.T. 79).

Even though the employee could not sit for a long period of time, he had no trouble driving his truck, since it had a lumbar support. While it did not hurt employee's back to drive, he did not have enough strength in his right foot to push down hard on the pedal. The employee rode with his hand on his right knee, so that he could push down the gas pedal. (P.T.74-75).

On an average day, employee went out into the garage after eating breakfast and reading the paper. While in the garage, employee cleaned up and worked on his racecar. He was able to change the oil on the car, grease it, and air the tires because he had a creeper that he could sit and roll around on while working. (P.T.76, 158). However, the employee had a problem getting off of the creeper. It took employee twice as long as it used to, to perform maintenance work on his racecar. (P.T.76-77, 158-159). Approximately two weeks prior to hearing, the employee performed a brake job on a Monte Carlo and a tune-up on a new van. Performing these jobs did not increase the employee's pain. (P.T.80, 159-161). At the time of the original hearing, the employee was not taking any pain medications. Nor was he using a walker or cane. (P.T.80, 164).

#### Dr. Ralph

Prior to offering his original testimony, Dr. Ralph examined the employee. (P.T.845). Based upon his examination, medical record and diagnostic study review, Dr. Ralph opined that the employee did not sustain any injury to his low back or lumbosacral spine as a result of the April 23, 1998 accident. (Tr.877, 911). Dr. Ralph opined that the employee had a diabetic neuropathy, poorly controlled diabetes, degenerative disc disease, and paralysis of his right quadriceps muscle secondary to back surgery. (P.T. 874-875, 877, 911, 927, 931). Dr. Ralph concluded that Charles Bock's employment did not cause, contribute to cause, aggravate, accelerate, or in any way affect these diagnoses. Dr. Ralph opined that the employee's condition was related to his diabetic neuropathy, which was totally unrelated to his work activity. Dr. Ralph opined that neither Charles Bock's employment, nor his April 23, 1998, accident, was a substantial factor in his ongoing complaints. (P.T.876-877).

Dr. Ralph opined that employee's work activities and/or work accident on 4/23/98 were not substantial factors in bringing about the surgery Dr. Vest performed. (P.T.871). Employee had a non-operative problem and went against medical advice in pursuing surgery with Dr. Vest. (P.T.804-805, 892, 936-937). Charles Bock was unnecessarily operated on and, as a result, lost quadriceps function on the right side. (P.T.860-861, 870, 893, 962). Dr. Ralph concluded that the employee had a 5% or 10% permanent partial disability of the back. (P.T.922-923).

Dr. Ralph's remand testimony was entirely consistent with his prior testimony on the Claim. (Tr.677-709). At the remand hearing, Dr. Ralph opined that the employee's right quadricep weakness resulted from traction placed on the nerve root at the time of Dr. Vest's surgery and that the employee did not require the surgical procedure performed by Dr. Vest. (Tr.683-685).

The November 1999 MRI was identical to the MRIs previously taken of employee's back. There was no evidence to suggest that employee had nerve root compression or impingement at L3-L4. (Tr.685-688). The employee's post-surgical studies showed no evidence of nerve root impingement or entrapment. Nor did his pre-operative studies. (Tr.685). Dr. Reynolds' operative report, stating that there was marked compression of the L3 nerve root, was not compatible with any of previous diagnostic studies. Dr. Ralph concluded that the employee did not have a persistent herniated disc pressing on the nerve root. (Tr.689-691).

Dr. Ralph opined that neither employee's repetitive work activities nor his April 23, 1998, accident was a substantial factor in the treatment and surgery Dr. Reynolds performed. (Tr.691, 693). He found no medical indication for Dr. Reynolds' surgery. He opined that any change in employee's condition following Dr. Ralph's initial evaluation was not brought about by the employee's work activities or the April 23, 1998, accident. (Tr.692, 696).

Dr. Ralph found that the employee had a forty percent loss of function at the level of the right knee, based upon the absence of his quadriceps. The employee's quadricep function did not significantly improve after Dr. Reynolds' surgery. As of July 2000, the employee still had persistent quadricep weakness. This loss of function

was not related to either employee's occupational disease or his April 23, 1998, accident. Instead, it was directly related to the unnecessary surgery performed by Dr. Vest. (Tr.675, 694, 703-705).

## ***Dr. Reynolds***

Beginning in 1999, Dr. Reynolds treated employee for his back and leg complaints. During Dr. Reynolds' initial examination, employee demonstrated severe weakness and moderate atrophy of the right quadriceps. (Tr.564, 575). Based upon Dr. Reynolds' diagnostic study review, his diagnosis was persistent right L3-L4 herniated disc, with right L3-L4 radiculopathy. (Tr.577-578). However, Dr. Reynolds was unable to render an opinion that employee was suffering from a persistent, rather than a recurrent herniated disc, within a reasonable degree of medical certainty. (Tr.598, 599, 600).

Dr. Reynolds ordered an MRI of employee's lumbar spine. <sup>[5]</sup> He diagnosed a persistent far lateral L3-L4 herniated disc and instability. Employee had degenerative changes at all levels of his lumbar spine. (Tr.580). Dr. Reynolds opined that the employee's job as a heavy duty mechanic accounted for the degenerative changes in his lumbar spine and the L3-L4 disc herniation was a consequence of employee's fall on April 23, 1998. (Tr.581).

In rendering his causation opinion, Dr. Reynolds was unaware of the employee's previous car accident, his prior back problems, and his ongoing treatment for that condition. Nor did Dr. Reynolds review any of employee's medical records regarding his diabetes. As a result, Dr. Reynolds had no knowledge that employee had previously been diagnosed with diabetic poly-radiculopathy, peripheral nerve disease, and diabetic amneotrophy. (Tr.592-596).

Dr. Reynolds performed an L3-L4 posterior fusion. During surgery, Dr. Reynolds found an encapsulated disc fragment. That the fragment was encapsulated meant that the herniation was more than six to eight weeks old. (Tr.582). Following surgery, Dr. Reynolds ordered physical therapy. While the employee's quadricep strength improved, his iliopsoas remained weak. (Tr.582, 584-586).

Dr. Reynolds last saw employee on July 25, 2000. At that time, the employee had difficulty walking, getting out of a sitting position, and weakness in his right leg. (Tr.587). If the employee's iliopsoas had recovered, Dr. Reynolds would have let employee return to work as a heavy auto mechanic. (Tr.597). But if employee had not recovered sufficiently to work in that capacity, Dr. Reynolds concluded that he could perform light duty work. (Tr.603).

## **Dr. Musich**

When Dr. Musich examined employee on May 11, 1999, he complained of constant numbness and pain from his low back down his entire right leg. (P.T.540). Additionally, employee reported that, following Dr. Vest's surgery, he experienced severe weakness and muscle wasting in his right leg. The treatment that employee received failed to produce any lasting relief for his low back and right lower extremity. (P.T.553). As to his past medical history, employee related that he had been treated by a chiropractor on an intermittent basis, between the mid 1970s and 1998. (P.T.547). Employee had been treated conservatively for sore muscles and stiffness in his back on an infrequent basis during the 10 years proceeding April 23, 1998. He denied any right-sided radicular complaints prior to that time. Other than soreness and stiffness, employee denied any significant low back pain before April 23, 1998. According to the history employee provided to Dr. Musich, before April 23, 1998, he had no complaints regarding his lower extremities and no significant back pain. (P.T.548, 572).

On physical examination, lumbar mobility was diminished. (P.T.555-556). Visual inspection disclosed a 2½ inch atrophy of the right quadriceps, as compared to the left. Employee's right quadriceps musculature was flaccid and employee was unable to tense or make a muscle with his right quadriceps. He had decreased sensation to light touch and pin prick over the anterior thigh, radiating into the right foot. (P.T.556-557). Moreover, employee was unable to perform a straight leg-raising test due, to severe weakness of his right lower extremity. His gait

was significantly unstable and there was decreased sensation in employee's right lower extremity. (P.T.557). Dr. Musich opined that the employee sustained an acute injury to his low back on April 23, 1998, while employed by Broadway Ford. Dr. Musich opined that the work injury was a substantial factor in employee's ongoing complaints, referable to his low back and right lower extremity. Similarly, Dr. Musich concluded that the April 23, 1998, work injury produced a right foraminal disc herniation at L3-L4, that required surgical intervention and that, post-operatively, employee continued to have ongoing right sciatic symptoms. (P.T.559). Dr. Musich opined that, before April 23, 1998, employee had degenerative disc disease of the lumbosacral spine and degenerative lumbar bulges at multiple levels. (P.T. 560, 562, 582).

In addition to degenerative disc disease, Dr. Musich diagnosed employee as having pre-existing diabetes. He found that employee had sensory neuropathy and a decreased Achilles reflex, consistent with diabetic neuropathy, since 1990. (P.T.584). Dr. Musich opined that employee had demonstrated symptoms consistent with diabetic amyotrophy, in the form of pain, numbness, tingling, and atrophy. Dr. Musich opined that the employee's diabetic amyotrophy should be a self-limiting condition, which should resolve and return to near normal within three to twelve months after his symptoms began. Dr. Musich opined that the longer employee's symptoms of atrophy and numbness in his right leg remained, the less likely it was that those symptoms were caused by his diabetic condition. (P.T.560, 588-590, 594).

Dr. Musich opined that the April 23, 1998, accident resulted in a lumbar disc herniation on the right at L3-L4, accompanied by sciatica and that employee's work as a heavy equipment mechanic resulted in early degenerative disc disease of the lumbosacral spine. Dr. Musich found that employee's work activities as a mechanic caused an increase in his low back complaints and necessitated his medical treatment, beginning in early 1998. (P.T.564).

Dr. Musich opined that employee's low back and right leg pain was primarily related to his disc disease. The disc pathology in employee's lumbar spine was the more likely cause for his ongoing complaints of low back pain and right leg discomfort. (P.T.586-587, 594). Dr. Musich testified that employee's diabetic condition could also produce similar types of complaints referable to the lower extremity. (P.T.587). Dr. Musich opined that employee's diabetic condition played a factor in the complaints referable to his right lower extremity and that the April 23, 1998, work injury was a substantial factor in employee's low back pain and right radiculopathy. (P.T.587).

One basis for Dr. Musich's opinion that the herniated disc on the right at L3-L4 and Dr. Vest's July 16, 1998, surgery were related to employee's work injury was his belief that employee did not have radicular complaints involving the right lower extremity prior to April 23, 1998. Dr. Musich testified that the history provided by employee was inconsistent with the medical records that Dr. Musich reviewed, and which demonstrated that employee had radicular complaints involving his right leg before the work accident. (P.T.572-573, 575). For example, when Dr. Green examined employee in September 1997, the employee had radiating pain and weakness in both legs, more on the right. Dr. Green's January 1998 report stated that employee complained of chronic low back pain and right leg paresthesia. Moreover, Dr. Green's March 30, 1998, report indicated that employee complained of left radicular pain and that, straight leg raising indicated nerve root impingement on the right side. (P.T.573-574).

The history employee provided to Dr. Musich was also inconsistent with the records of Dr. Reid. As Dr. Musich admitted, Dr. Reid's April 6, 1998, report stated that employee had chronic low back pain, which had been getting worse in the last 2-3 months, radiating pain into the left leg, and radicular pain into the right leg. (P.T.574-575). Dr. Musich testified that the medical records showed that employee did have radicular complaints involving his right leg before April 23, 1998. Moreover, Dr. Musich testified that the history employee provided-that he could not recall any back treatment prior to the time of the accident, other than chiropractic visits-was refuted by the medical records. These records demonstrated that employee had seen Dr. Green and Dr. Reid, and had undergone an MRI of his lumbar spine prior to his slip and fall at work. (P.T. 575, 576, 578).

Dr. Musich testified that employee's right leg pain, decreased sensation, and weakness could be related to

a polyradiculopathy, secondary to his diabetes. However, Dr. Musich also testified that these findings could be consistent with a disc herniation on the right. Dr. Musich testified that he did not know how much of employee's condition was directly related to lumbar disc disease versus diabetes. (P.T.585-586).

As to medical treatment, Dr. Musich opined that the care and treatment that employee received between April 30, 1998, and the time of Dr. Musich's deposition was reasonable and necessary to cure and relieve and/or diagnose employee's condition as a result of the April 23, 1998 accident and/or his work activities. Dr. Musich concluded that employee had not reached maximum medical improvement. (P.T.562, 565-566). If employee continued to demonstrate ongoing residual complaints referable to his low back and right lower extremity for another six months, Dr. Musich would recommend additional nerve conduction and myelogram studies. Also, employee would require additional evaluation and treatment, either in the form of pain management or neurosurgical care. Finally, Dr. Musich found that employee required constant, ongoing medical treatment for his diabetic condition. (P.T.560, 561, 563, 584, 585-586).

### 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.

At the original hearing, the employee offered bills in the amount of \$55,571.97. See Exhibit HH. The claimant later offered additional medical records and bills from Dr. Reynolds (\$15,441.65), Blessing Hospital (\$34,591.39), Alton Physical Therapy (\$3,340.00), and Alton Memorial Hospital (\$3,859.30). At the original hearing, the claimant testified that the medical bills incurred to that date were related to the occurrence. As the defense stated in its brief, "It is undisputed that the employee incurred \$112,871.25 in medical expenses related to treatment for his back and leg complaints." Defense Propose award, page 51.

The defense offered several defenses against liability for the medical expenses. First, the defense claims that the claimant contracted for medical services without making demand for services upon the employer or its insurer. The claimant argues that the employer knew of the claimant's medical requirements but elected not to provide same. Second, the defense looks to expert medical opinions that contend that the work related conditions were not a substantial factor causing the need for the medical services. The medical experts cited by the defense contend that the services were provided to treat the consequences of the claimant's preexisting condition, including his diabetic neuropathy. Third, the defense relies on the testimony of Dr. Ralph, who testified that the medical services provided were not only unnecessary but actually caused additional disability. Fourth, the defense contends that \$4600.50 of the medical expenses were rendered before the date of

the occurrence and are not the responsibility of the defense. Fifth, the Guaranty Fund contends that the provisions of Illinois Law that created the Fund provide that it has no liability for medical expenses covered by other insurance, including the \$96,476.03 paid by the employee's union welfare trust. Finally, the employer denied liability because the employer had insured itself against liability for Workers' Compensation benefits and the policy was valid as of the date of the occurrence based on Section 287.280, RSMo 2000.

#### Substantial Factor Test

Claimant may not recover the employee's past medical expenses, because the employee elected to procure his own services at his own expense without requesting the same from his employer. The past medical expenses that claimant seeks to recover include charges the employee incurred in treating with numerous physicians, including Dr. Reid, Dr. Platt, Dr. Laws, HealthSouth Physical Therapy, Dr. Galbreath/Galbreath [6] Chiropractic Center, Dr. Mendelsohn, Dr. Taylor, Dr. Vest, Dr. Lenke, Dr. Gold, Dr. Selhorst, and Dr. Reynolds. After April 23, 1998, the employee arranged for his own medical treatment. As the employee conceded during the original hearing on his Claim, the employer did not authorize the treatment he received following April 23, 1998, including his treatment with Dr. Reid, Dr. Platt, Dr. Laws, HealthSouth Physical Therapy, Dr. Galbreath, Dr. Mendelsohn, Dr. Taylor, Dr. Vest, Dr. Lenke, Dr. Gold, Dr. Selhorst, Dr. Sherill, or Dr. Reynolds. Nor did the employee request that the employer send him to these care providers for treatment of his back and leg complaints. (P.T.58-59, 64, 127-128, 129, 130-131, 132, 134-137, 325, 402, 468, 474-475, 510-513, 980).

In reviewing the first argument of the defense, the claimant may not recover the employee's past medical expenses, because the employee failed to put the employer on notice that he required treatment for his work related injury, demand such treatment from the employer, or request authorization from the employer to treat with these care providers, including Doctors Reid, Laws, Platt, Galbreath, Mendelsohn, Taylor, Vest, Lenke, Sherill, Selhorst and Reynolds. While the employee had the right to treat with these care providers at his own expense, that right did not carry with it an obligation on the part of either employer Broadway Ford or the Guaranty Fund to pay those care providers.

Looking to the relationship between the occurrence and the medical services provided, the defense is not liable for the employee's past medical expenses, because neither the April 23, 1998, accident nor his occupational disease were substantial factors requiring the medical treatment resulting in the medical expenses. The weight of the competent and substantial evidence in the record demonstrates that the medical expenses were neither reasonable nor necessary to cure or relieve from the effects of the work related injury. To the contrary, those medical expenses were incurred to treat the employee's pre-existing degenerative disc disease and his diabetic neuropathy, which were unrelated to his work.

The claimant offered medical opinion evidence from Dr. Reynolds, Steve Schwegel, and Dr Musich to support her position that the occurrence was a substantial factor compelling medical procedures and expenses. However, the forensic opinions are contrary to the great weight of the other evidence. Although Dr. Reynolds testified that the medical services were a result of the occurrence, Dr. Reynolds was unaware of the employee's pre-existing back problems and ongoing treatment for the employee's pre-existing diabetic condition and the fact that the employee had been diagnosed with diabetic polyradiculopathy and diabetic neuropathy on numerous occasions. (Tr.592-596). Since Dr. Reynolds rendered his opinions in the absence of this crucial medical history, his testimony was without a substantial basis in fact and does not constitute competent or substantial evidence to support an award of past medical expenses. Heisler v. Jetco Svc., 849 S.W. 2d 91, 95 (Mo.App.E.D.1993).

Nor can Mr. Schwegel's testimony support an award of past medical expenses. Mr. Schwegel's testimony was only included in the Transcript of the remand hearing as an offer of proof. The ALJ did not admit Mr. Schwegel's testimony into evidence. (Tr.31-34). Since ALJ Schwendemann did not admit Mr. Schwegel's testimony into evidence, that testimony cannot be considered in determining whether claimant may recover the employee's past medical expenses. Hartley v. Spring River Christian Village, 941 S.W.2d 4, 7 (Mo.App.S.D.1997). Moreover, as the records of Alton Physical Therapy demonstrate, Mr. Schwegel did not provide physical therapy directly to the employee on a routine or daily basis. Most of Mr. Schwegel's testimony was drawn from the records of Alton Physical Therapy, not his personal observation of or participation in the

employee's treatment. Since, Mr. Schwegel's testimony was drawn from the medical records, rather than his own personal observation and experience, it is without probative value.

Looking to Dr. Musich's findings, Dr. Musich opined that the April 23, 1998, slip and fall resulted in an acute injury to the employee's low back, which was a substantial factor in the employee's ongoing complaints referable to his low back and right lower extremity. Dr. Musich also opined that the April 23, 1998, work injury produced a right disc herniation at L3-L4, that required surgical intervention. (P.T.559). Dr. Musich concluded that the evaluation, care and treatment the employee received between April 23, 1998, and the time of Dr. Musich's deposition was reasonable and necessary to cure and relieve and/or diagnose the employee's condition resulting from the April 23, 1998 work injury and/or his work activities. (P.T.562, 566).

The defense contends that Dr. Musich's opinion was based on an incorrect medical history provided by the employee rather than other information contained in the employee's medical records of medical providers that rendered treatment for his preexisting conditions. Dr. Musich's opinion, linking the employee's work injury to the surgery performed by Dr. Vest, was premised upon the medical history that the employee provided. However, that medical history was incorrect and inconsistent with the history contained in the medical records. (P.T.575).

For example, one basis for Dr. Musich's opinion that the employee had a herniated disc on the right at L3-L4 necessitating Dr. Vest's surgery was Dr. Musich's understanding that the employee did not have radicular complaints in his right lower extremity before April 23, 1998. However, the history provided by the employee was inconsistent with the medical records of Dr. Reid and Dr. Green, revealing that the employee had radicular complaints involving his right leg prior to that work event. (P.T.572-574, 575-576). Moreover, Dr. Musich testified that the employee's diabetic condition played a factor in the employee's complaints referable to his right lower extremity. (P.T.586-587, 594). Dr. Musich could not distinguish between how much of the employee's condition was the result of his work injury, and how much of his condition resulted from diabetes. (P.T.585-586).

Since Dr. Musich relied upon the employee's incorrect and incomplete medical history as the basis for his opinion, Dr. Musich did not have a substantial basis in fact for that opinion. Harp v. Ill. Central R.R., 370 S.W.2d 387, 392 (Mo.1963); Schneider v. Ashburn/Schneider Painting, 849 S.W.2d 271, 274 (Mo.App.E.D.1993); Pippin v. St. Joe Minerals Corp., 799 S.W.2d 898, 904 (Mo.App.E.D.1990). Since Dr. Musich's opinion was based on materially incorrect or incomplete information, it does not constitute competent or substantial evidence to support a finding that the medical treatment the employee received from Dr. Vest, and other care providers, was reasonable or necessary to cure and relieve him from the effects of the April 23, 1998, accident or his occupational disease.

Looking to the other physicians, medical records show that Dr. Vest and Dr. Reynolds were the *only* physicians to recommend back surgery to the employee. For example, on April 30, 1998, Dr. Reid told the employee that his problems were caused by degenerative changes in his back, that the employee did not have a disc herniation, and that he was not a surgical candidate. (P.T.127, 327-328). Following EMG studies of the employee's lower extremities, Dr. Reid diagnosed a right L5 radiculopathy, with low back pain. However, Dr. Reid did not see any surgical lesion and did not recommend back surgery at the L3-L4 level in to the employee. (P.T.325).

In June 1998, Dr. Mendelsohn ordered a bone scan, which revealed an area of increased activity at L1 or L2, corresponding to an area of degenerative disc space seen on employee's April 27, 1998, CT scan and his April 22, 1998, MRI. After reviewing the employee's studies, Dr. Mendelsohn had no recommendations and did not recommend back surgery. (P.T.136, 338, 467). Likewise, Dr. Taylor did not make a surgical recommendation for the employee. (P.T.59, 136, 474-475). Neither Dr. Mendelsohn nor Dr. Taylor opined that the employee required surgery at L3-L4.

Apart from Dr. Reynolds, no physician who evaluated or treated the employee after Dr. Vest's surgery recommended an additional surgical procedure. Dr. Laws found that the employee had a polyradiculopathy,

secondary to his diabetes. (P.T.64, 142, 484-487). He did not suggest surgery for the employee's complaints. Dr. Lenke did not recommend surgical intervention. (P.T.617-621, 623-624). Dr. Gold did not recommend surgery. After reviewing the employee's EMG studies, he referred the employee to Dr. Sherrill. (P.T.66, 144, 626, 639-640, 643). Dr. Sherrill found that employee's problems were related to his diabetes and advised the employee that he did not need further surgery. (P.T.144-145, 736). Likewise, Dr. Selhorst found that employee's complaints were diabetic in nature. He did not recommend surgery. (P.T.67-69, 144-145, 727, 732-733). Upon re-examining the employee in March 1999 and ordering an MRI, Dr. Mendelsohn could find no evidence of a surgical lesion. He informed the employee that he did not have a surgical problem and that surgery would not improve his condition. (P.T.147, 470-472). Despite the fact that none of these physicians recommended additional surgery at L3-L4, the employee procured medical treatment from Dr. Reynolds, who performed fusion surgery at that disc level. (Tr.459-460).

As the medical evidence demonstrates, the physicians treating and evaluating the employee following Dr. Vest's surgery did not recommend additional surgical intervention for the employee related to his April 23, 1998, slip and fall or his occupational disease. Rather, the treatment recommended by these physicians was for the purpose of curing and relieving the effects of the employee's diabetic neuropathy. Doctors Sherrill, Selhorst, and Mendelsohn all found that the employee's complaints were related to his diabetes and his diabetic neuropathy. None of those physicians recommended additional surgical or orthopedic treatment for the employee's complaints.

Looking to Dr. Ralph, the defense forensic expert, Dr. Ralph appears to have reviewed the employee's pre-existing degenerative back condition and his pre-existing diabetes and related neuropathy. Dr. Ralph testified that the medical expenses the employee incurred related to his diabetic neuropathy, rather than to any work injury. During his original deposition, Dr. Ralph opined that while the employee may have suffered a fall at work on April 23, 1998, he did not sustain any type of acute injury to his low back or lumbosacral spine as a result of that work accident. In fact, Dr. Ralph testified that whatever may or may not have happened at work was irrelevant in terms of the employee's medical condition. (P.T.877, 911).

Dr. Ralph opined that the April 23, 1998, fall was not a substantial factor in bringing about the employee's need for surgery, that Dr. Vest's surgery was not medically indicated, and that the employee did not have a surgical problem. (P.T.871, 884-885, 892). Dr. Ralph opined that surgery was not necessary, because neither the April 22, 1998, MRI nor the June 24, 1998, MRI showed any nerve root compression. He opined that both MRIs demonstrated that there was an asymmetrical bulging disc at L3-L4 on the right, with no nerve root impingement. The MRIs showed that the fat planes around the nerve root were preserved, and that nerve root compression is not indicated with preservation of the fat plane surrounding that nerve root. (P.T.859, 860, 867-868).

Dr. Ralph opined that the employee went against medical advice in choosing to undergo surgery through Dr. Vest. Dr. Ralph opined that there were no activities that the employee did or could have done at work that would have exacerbated or exaggerated his back condition, so as to bring about the need for Dr. Vest's surgery. Rather, the only thing that the employee did to make his condition worse was his failure to control his diabetes. (P.T.871). Dr. Ralph opined that the employee's uncontrolled diabetes and his long-standing diabetic neuropathy were a cause of the employee's back and leg complaints, as was the employee's pre-existing degenerative disc disease. (P.T.874, 877, 906). Dr. Ralph testified that the employee's right quadriceps weakness resulted from traction placed on the nerve root at the time of Dr. Vest's surgery and that the employee did not require the surgical procedure performed by Dr. Vest. (Tr.683-685).

Looking to the second surgery, Dr. Ralph opined that neither the employee's repetitive work activities nor his April 23, 1998, accident was a substantial factor in the treatment and Dr. Reynolds' surgery, because there was no medical indication for Dr. Reynolds' surgery. (Tr.692, 696). He opined that the November 1999 MRI was identical to the 1998 MRIs. There was no evidence on the 1999 MRI to suggest that the employee had nerve root compression or impingement at L3-L4. He opined that the employee's post-surgical study did not show any evidence of nerve root impingement or entrapment. (Tr.685-688). He testified that Dr. Reynolds' operative report, stating that there was marked compression of the L3 nerve root, was not compatible with any of the employee's previous MRI studies. Dr. Ralph concluded that the employee did not have a persistent herniated disc, pressing

on the nerve root. (Tr.689-691). He opined that any change in the employee's condition following Dr. Ralph's initial evaluation was not brought about by the employee's work activities or the April 23, 1998, accident. (Tr.692, 696). Finally, Dr. Ralph opined that the loss of the employee's quadriceps function on the right was not related to either the employee's occupational disease or his work accident but was directly related to the unnecessary surgery that Dr. Vest performed. (Tr.675, 694, 703-705).

The weight of the evidence supports a finding that neither the employee's April 23, 1998, slip and fall nor his occupational disease was a substantial factor compelling the employee's medical treatment, including Dr. Vest's and Dr. Reynolds' surgical procedures. The record of evidence establishes substantial preexisting degenerative disc disease, for which he had received substantial medical treatment. (P.T.102, 104, 112, 113, 208). The employee had degenerative changes and bulging at multiple levels in his lumbar spine. Additionally, the employee had a long-standing, pre-existing diabetic condition that resulted in peripheral neuropathy in his both lower extremities. (P.T. 49, 109-110, 112, 119, 232, 238-239, 245, 331-332).

The medical records and Dr. Ralph's testimony create an implication that neither the April 23, 1998, accident nor the claimant's occupational disease were a substantial factor compelling the employee's medical and surgical treatment. Rather, that treatment resulted from and was necessitated by complaints related to the employee's diabetic condition. Accordingly, claimant is not entitled to recover any of the past medical expenses that the employee incurred in treating with Dr. Reynolds, including the costs related to the fusion surgery that Dr. Reynolds performed.

#### Write-Offs or Provider Discounts

To be recoverable, medical fees and charges must be fair and reasonable. Section 287.140.3, RSMo 2000; Farmer-Cummings v. Personnel Pool of Platte County, 110 S.W.3d 818, 821 (Mo.banc 2003). The medical fees and charges compensable under Section 287.140 refer only to an employee's *actual* expenses, those paid out of pocket by the employee, expenses for which the employee will actually be held responsible in the future, and fees for which a Medicaid or Medicare lien exist. Write-offs and adjustments that extinguish the liability of an injured employee are not "fees and charges", within the meaning of Section 287.140. Id.

The claimant argues that Section 287.270 precludes employer and the Guaranty Fund from taking advantage of write-offs or provider discounts taken against the employee's medical expenses. The Supreme Court rejected this very argument in Farmer-Cummings, 110 S.W.3d at 822. As does claimant here, the employee in Farmer-Cummings argued that Section 287.270 mandated that any such reduction could not be considered and that her workers' compensation recovery could not be diminished by that reduction. Id. Section 287.270 states:

"No savings or insurance of the injured employee, nor any benefits derived from any other source than the employer or the employer's insurer for liability under this chapter, shall be considered in determining the compensation due hereunder." Section 287.270, RSMo 2000.

As the Supreme Court observed, Section 287.270 was intended to allow an employee to benefit from any collateral source that he might have available, independent of the employer, whether purchased or not. Since the employer had not provided such a source, it had no right to claim benefits from it. Farmer-Cummings, 110 S.W.3d at 822.

In Farmer-Cummings, the employee argued that the term "savings", as used in Section 287.270, should encompass reductions made in her medical expenses by care providers. Id. The dictionary defined "saving" as "the act or instant of economizing" or as a "reduction in cost". Id. Although the write-offs and fee adjustments

made to the medical expenses at issue therein constituted a “reduction in cost”, this reduction was not effected by any act of the employee. Ms. Farmer-Cummings incurred no expense or effort; nor did she economize by foregoing any privilege. Id. Similarly, the write-offs and fee adjustments were not “benefits”, within the contemplation of Section 287.270. Rather, those amounts were often the product of a health care provider’s decision to balance its books in accordance with the actual amount received or a decision that an outstanding amount was not worth pursuing. Such write-offs and fee adjustments were neither “savings....of the injured employee” nor “benefits derived from any other source than the employer or the employer’s insurer for liability”, as those terms were used within Section 287.270. Id. To award an employee compensation for medical expenses for which he or she had no liability would result in a windfall, rather than compensation. Id.

However, the Farmer-Cummings case also stands for the proposition that the defense bears the burden to prove that the reductions in insurance benefits were actual write offs or discounts from the medical providers and that the employee bore no further responsibility for the reductions. In other cases, the burden has been met in various ways. In Mann v Varney Construction Co., 23 S.W.3d 231 (Mo.App. E.D. 2000), the state statutes establishing the Medicaid program proved conclusively that the medical providers could not maintain an action against the employee for the difference.

In this case, the claimant, the employee’s surviving spouse has not established that she has any liability for any of the employee’s debts and has produced no evidence showing intent to collect the provider discount. Given the time that has elapsed since the date of service, it is logical to assume that the claimant has no liability for any additional claim for medical services provided many years ago.

Given the ruling in Farmer-Cummings, claimant’s contention, that Section 287.270 precludes employer and the Guaranty Fund from reducing the compensation owed for past medical expenses by the amount of the write-offs and provider discounts made by the health insurer or care providers, is rejected.

The employee incurred \$112,871.25 in medical expenses related to treatment for his back and leg complaints. Of this amount, the Welfare Trust paid \$96,476.03, pursuant to the Reimbursement Agreement it entered into with the employee. The provider discounts taken against the total medical expenses equaled \$13,728.54. (Tr.924-940). Pursuant to the Supreme Court’s decision in Farmer-Cummings, claimant cannot recover the \$13,728.54 in provider discounts taken against the employee’s total medical expenses. Farm-Cummings, 110 S.W.3d at 821-822. These provider discounts, which extinguished the liability of the injured employee for the medical expenses discounted, do not constitute recoverable fees and charges, within the meaning of Section 287.140. Nor do those provider discounts constitute savings or insurance of the injured employee or benefits derived from another source, within the meaning of Section 287.270. Consequently, Section 287.270 does not bar either the employer or the Guaranty Fund from reducing any compensation owed for the employee’s past medical expenses by the \$13,728.54 in provider discounts. Claimant’s argument, that she can recover the \$13,728.54 in provider discounts taken against the total medical expenses incurred by the employee is denied.

#### Treatment Rendered or Ordered Before April 23, 1998

The claimant contends that the defense is liable for medical expenses incurred by the employee for treatment received before April 23, 1998, or for treatment ordered by the employee’s physicians prior to the time of the employee’s slip and fall and the date of injury of his occupational disease. These charges include \$352.00 in medical expenses incurred by the employee in treating with Dr. Green on February 4, 1998, and March 20, 1998; \$860.00 incurred in treating with Dr. Lutan on March 2, 1998; \$56.00 incurred in treating with Dr. Llorens on March 4, 1998; \$216.00 incurred in treating with Dr. Reid on April 6, 1998; \$1,257.00 incurred in treating with Midwest Radiological Association on April 27, 1998 (MRI); and \$1,859.50 incurred in treating with Alton Memorial Hospital on April 27, 1998 (CT biopsy). (Tr.924-940). The total amount of the charges incurred by the employee in treating with these care providers is \$4,600.50. Since the medical treatment rendered by these physicians and care providers either occurred before date of injury on April 23, 1998, or were ordered by physicians before that date, the claimant has the burden to show that the medical services were a result of the occurrence on April 23, 1998, as alleged in the claim for compensation. The claimant has not offered evidence to show that the medical services ordered or rendered before the occurrence are a result of the occurrence.

## Guaranty Fund Liability

The liability of the Guaranty Fund and the employer are affected by specific statutes. With respect to the Guaranty Fund, the employer secured a policy of workers' compensation insurance from Reliance. That policy was in effect on April 23, 1998. Reliance became insolvent on October 3, 2001. On December 18, 2001, the Guaranty Fund assumed Reliance's obligations on the employee's Claim. When Reliance became insolvent, the Guaranty Fund assumed its obligations, pursuant to the Illinois Insurance Guaranty Fund Act. The Guaranty Fund is a not-for-profit association, created by the Illinois Legislature to limit the impact on the public, claimants, and policy holders of losses arising out of insurer insolvencies. 215 ILCS §5/535. The statutory purpose of the Guaranty Fund is to place insureds and/or claimants in the same position that they would have been in if the insurer had not become insolvent. Lucas v. Ill. Ins. Guaranty Fund, 367 N.E.2d 469, 471 (Ill.App.1st1977); Claudy v. Commonwealth Edison Co., 626 N.E.2d 1088, 1100 (Ill.App.1<sup>st</sup> 1993). The Guaranty Fund is not a collateral or independent source of recovery. Rather, it is a substitution when the expected coverage ceases to exist. Lucas, 367 N.E.2d at 471; Claudy, 626 N.E.2d at 1100. The Guaranty Fund was devised to fill a void in insurance coverage when an insurance company that would otherwise be responsible for coverage becomes insolvent. Lucas, 367 NE2d at 471. In creating the Guaranty Fund, the Legislature did not intend that it would pay all judgments, but merely that it would pay "covered claims". Nianick v. Edgewater Beach Hotel, 328 N.E.2d 82, 84 (Ill.App.1st1975); In the Matter of Ideal Mutual Ins. Co., 578 N.E.2d 1235, 1238 (Ill.App.1st1991).

The purpose of the Fund:

"is to provide a mechanism for the payment of covered claims under certain insurance policies, to avoid excessive delay in payment, to avoid financial loss to claimants or policyholders because of the entry of an Order of Liquidation against an insolvent company, and to provide a fund to assess the cost of such protection among member companies." 215 ILCS 5/532.

As defined by the Guaranty Fund Act, a "covered claim" means:

"(a) ...an unpaid claim for a loss arising out of and within the coverage of an insurance policy to which this Article applies and which is in force at the time of the occurrence giving rise to the unpaid claim...made by a person insured under such policy or by a person suffering injury or damage for which a person insured under such policy is legally liable, and for unearned premium, if;

(i) the company issuing the policy becomes an insolvent company...after the effective date of this Article; and

(ii) the claimant or insured is a resident of this State at the time of the insured occurrence...the policy holder is a resident of this state at the time the policy was issued; provided, that for entities other than an individual, the residence of a claimant, insured, or policy holder is the state in which its principle place of business is located at the time of the insured event." 215 ILCS 5/534.3(a).

The statutory definition of "covered claim" does not include

"any claim for any amount due any reinsurer, insurer, insurance pool, or underwriting association as subrogated recoveries, reinsurance recoverables, contribution, indemnification or otherwise. No such claim held by a reinsurer, insurer, insurance pool, or underwriting association may be asserted in any legal action against a person insured under a policy issued by an insolvent company other than to the extent such claim exceeds the Fund's obligation limitations set forth in Section 537.2 of this code." 215 ILCS 5/534.3(b).

This provision of the Guaranty Fund Act codifies the Legislature's intent that the assets of the Guaranty Fund are not to be depleted to reimburse solvent insurance companies for payments made to claimants or their insurers under policies for which they received a premium. Cardiel, 548 N.E.2d at 1083.

Pursuant to 215 ILCS 5/537.4, the Guaranty Fund assumes the obligations of insolvent insurance companies:

“The Fund shall be deemed the insolvent company to the extent of the Fund’s obligation for covered claims and to such extent shall have all rights, duties, and obligations of the insolvent company, *subject to the limitations provided in this Article*, as if the company had not become insolvent, with the exception that the liquidator shall retain the sole right to recover any reinsurance proceeds.” 215 ILCS 5/537.4. [Emphasis added]. See also, Herriford v. Boyles, 550 N.E.2d 654, 656 (Ill.App.3rd1990).

The Guaranty Fund’s liability on a covered claim is not co-extensive with the obligations of the insolvent insurer under its policy. Haseman v. White, 686 N.E.2d 571, 573 (Ill.1997). Rather, the Guaranty Fund’s obligations are only those established by its enabling statute. Id. Because all insurers must contribute to the Guaranty Fund, it is the philosophy of the Fund to have all potential claims against the Guaranty Fund’s assets reduced by an insolvent insurer, and not the Fund, whenever possible. Harrell, 631 N.E.2d at 297; Pierre v. Davis, 520 N.E.2d 743, 744 (Ill.App.1st1987). To this end, the Guaranty Fund Act provides that:

“an insured or claimant shall be required first to exhaust all coverage provided by any other insurance policy, regardless of whether or not such other insurance policy was written by a member company, if the claim under such other policy arises from the same facts, injury, or loss that gave rise to the covered claim against the Fund. The Fund’s obligation under Section 537.2 shall be reduced by the amount recovered or recoverable, which ever is greater, under such other insurance policy...To the extent that the Fund’s obligation under Section 537.2 is reduced by application of this Section, the liability of the person insured by the insolvent insurer’s policy for the claim shall be reduced in the same amount.” 215 ILCS 5/546(a).

The rationale of the non-duplication of recovery provision is to render the Guaranty Fund a source of last resort in the event of insurer insolvency. Urban v. Loham, 592 N.E.2d 292, 295 (Ill.App.1st1992); Burton v. Ramos, 792 N.E.2d 362, 365 (Ill.App.1st 2003).

The non-duplication of recovery provision codified in 215 ILCS 5/546 is not limited to uninsured motorist coverage. In Norberg v. Centex Homes Corp., 616 N.E.2d 1342, 1349 (Ill.App.1st1993), a developer was required to exhaust its claim against its liability insurer before recovering from the Guaranty Fund pursuant to a contribution claim against an injured worker’s employer, whose insurer had become insolvent.

In Pierre v. Davis, 520 N.E.2d at 744-745, a worker injured in the course of his employment while making a delivery to the restaurant of a third-party filed an action against the third-party. An intervening petition was filed by the worker’s employer, for benefit of its workers’ compensation carrier, to recover amounts paid to the injured employee. After the third-party’s insurer became insolvent, the Guaranty Fund undertook the defense of the third-party. Judgment was entered in favor of the injured worker and against the third-party, in the sum of \$6,000.00. The third-party filed a post-trial motion, asserting that the judgment was deemed satisfied under the “covered claim” and “non-duplication of recovery” provisions of the Guaranty Act. When the trial court denied the motion, the third-party appealed. The Illinois Court of Appeals reversed. Id. Looking to the Guaranty Fund Act, the court found that the Guaranty Fund limited its obligations only to those claims falling within the statutory definition of a “covered claim” and that a “covered claim” did not include any claim for any amount due any insurer, as subrogated recoveries or otherwise. Pierre, 520 N.E.2d at 744. It was clear that the Legislature did not want the assets of the Guaranty Fund depleted to reimburse solvent insurance companies for payments made to a claimant or their insured under policies for which they received a premium. It was also clear that the Legislature intended to protect individual insureds of an insolvent insurer from claims for reimbursement by the solvent insurer. Therefore, it would counteract the purposes of the Guaranty Fund to allow an insolvent insurer to be reimbursed by proceeds from the Guaranty Fund. Pierre, 520 N.E.2d at 744. The workers’ compensation carrier had a lien on the judgment for the entire \$6,983.56 in workers’ compensation payments it made to the injured employee. Because of this lien, the entire \$6,000.00 judgment entered against the third-party defendant was an amount due an insurer as a subrogated recovery or otherwise, within the meaning of the Guaranty Act. Not only was the injured worker precluded from recovering the judgment from the Guaranty Fund, he could not assert a claim for the judgment

against the insured defendant, since it was a “person insured” under a policy issued by an insolvent insurance company. However, if the judgment against the third-party defendant exceeded the amount of the workers’ compensation lien of \$6,983.56, the plaintiff would be entitled to recover the excess from the Fund. Pierre, 520 N.E.2d at 545.

In this case, Charles Bock incurred medical expenses in the amount of \$112,871.25. After April 23, 1998, the employee entered into the Reimbursement Agreement with the Welfare Trust, in which the Welfare Trust agreed to pay the employee’s medical expenses and the employee agreed to reimburse for Welfare Trust for its payment of those expenses, in the event he recovered workers’ compensation benefits. Pursuant to the contract it entered into with Charles Bock, the Welfare Trust paid \$96,476.03 for the employee’s medical expenses. To the extent that the employee’s medical expenses were paid by the Welfare Trust, those medical expenses are not unpaid, and therefore, do not constitute a “covered claim” for which the Guaranty Fund is responsible. 215 ILCS 5/534.3(a). Thus, the Guaranty Fund has no obligation to reimburse claimant for the \$96,476.03 in past medical expenses paid on the employee’s behalf by the Welfare Trust. Id.

Nor does the Guaranty Fund have any obligation to reimburse the Welfare Trust for the \$96,476.03 it paid for Charles Bock’s medical expenses. Those expenses are an amount due to a solvent insurance entity and, therefore, do not constitute a “covered claim”, as defined by the Guaranty Fund Act. 215 ILCS 5/534.3(b); Pierre, 520 N.E.2d at 744.

The Illinois Insurance Guaranty Act created new rights and liabilities that did not exist under common law, as did the Missouri Workers’ Compensation Act. Where a statute creates a new right or liability that did not exist at common law or under prior statutes, and provides a specific remedy for the enforcement thereof, such remedy is generally exclusive and operates as a negation of, and excludes, any other remedy. Cales v. Weldon, 282 S.W.2d 522, 529 (Mo.1955); Wear v. Walker, 800 S.W.2d 99, 103 (Mo.App.S.D.1990). When a statute gives a right of action, provides a remedy, and imposes conditions as to the exercise of that remedy, the conditions imposed modify and qualify the right of recovery and form a part of the right itself, upon which its exercise depends. Slibowski v. Kimberlin, 504 S.W.2d 237, 240 (Mo.App.W.D.1973).

The primary rule of statutory interpretation and construction is to ascertain the intent of the legislature by giving the words used in the statute their plain and ordinary meaning. Davis v. Byram, 31 S.W.3d 148, 151 (Mo.App.E.D.2000); State v. Harney, 51 S.W.3d 519, 532 (Mo.App.W.D.2001). If the statutory language is clear, unambiguous, and admits of only one meaning, there is no room for construction and the legislature is presumed to have intended what the statute says. Davis, 31 S.W.3d at 151. Statutes dealing with the same subject matter must be construed together and harmonized and force must be given to the provisions of each statute. Davis, 31 S.W.3d at 151; State ex rel Director of Revenue v. Gaertner, 32 S.W.3d 564, 566 (Mo.banc.2000). However, when one statute deals with a subject matter in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them, the definite statute prevails over the general. State ex rel Director of Revenue, 32 S.W.3d at 566; State ex rel Fort Zumwalt S.D. v. Dickherber, 576 S.W.2d 532, 536-537 (Mo.banc.1979). Missouri Courts hold that the provisions of insurance insolvency statutes prevail over any general statutes or common law because the legislature has set forth both the substantive law and the procedures to be followed. Viacom v. Transit Casualty Co., 138 S.W.3d 723, 725 (Mo.banc.2004). Thus, the remedies provided to employee/claimant by the Illinois Guaranty Fund Act and the Missouri Workers’ Compensation Act are the exclusive remedies by which claimant can recover for the employee’s work related injury. To the extent of any conflict between the Guaranty Fund Act and the Missouri Workers’ Compensation Act, the Guaranty Fund Act will prevail.

The Missouri Workers’ Compensation Act contemplates that an employer required to pay an employee’s past medical expenses will be obligated to reimburse a group health insurer that has paid some or all of an injured employee’s medical expenses. Section 287.140.1, RSMo 2000; Farmer-Cummings, 110 S.W.3d at 821. If Reliance had remained solvent, it would have been obligated to reimburse the Welfare Trust for the \$96,476.03 that it paid for the employee’s medical expenses, in the event the ALJ concluded that the employer was statutorily obligated under Section 287.140 to pay those expenses. Id. However, Reliance is insolvent and the Guaranty Fund has assumed its obligations. Under the Guaranty Fund Act, claimant cannot recover the amount paid by the

Welfare Trust for Charles Bock's medical expenses. Nor can the Welfare Trust recover this sum from the Guaranty Fund. That amount is not a "covered claim", as defined by the Guaranty Fund Act, and for which the Guaranty Fund is statutorily obligated. 215 ILCS 5/534.3. In this instance, the Guaranty Fund Act will prevail over the Missouri Workers' Compensation Act, limiting the Guaranty Fund's obligation for Charles Bock's past medical expenses to any medical expenses incurred by the employee to treat his work related injury that remain unpaid, and that the employer is statutorily obligated to pay under Section 287.140. Therefore, the claimant cannot recover past medical expenses from the Illinois Insurance Guaranty Fund.

Turning to the liability of the employer independent from its insurer or the Guaranty Fund, the Guaranty Fund Act provides that no claim held by a solvent insurer may be asserted in *any* legal action against a person insured under a policy issued by an insolvent company. 215 ILCS §5/546(a). It is undisputed that employer Broadway Ford is a person insured under the workers' compensation policy issued to it by Reliance. It necessarily follows that claimant may not recover any amount of the employee's past medical expenses from employer Broadway Ford. Id.; Pierre, 520 N.E.2d 744-745. Such a recovery is prohibited by the express language of the Guaranty Fund Act. Id.

The Missouri Workers Compensation Law also bars the claimant from recovering directly against the employer, because the employer faces direct liability for workers' compensation benefits only if the employer fails or neglects to insure its entire workers compensation liability or qualifies as a self-insurer. Sections 287.030, 287.280, and 287.300, RSMo 2000. In this case, the employer insured its risk of liability for workers compensation liability through a solvent authorized insurance company authorized to do business in Missouri, as of the date of the occurrence. Where it has been admitted that a workers' compensation insurer issued a policy that was in force on the date of the accident or injury, which covered the employer's liability under the Workers' Compensation Act, and that employer has not qualified to carry any portion of its risk as a self-insurer, the Division or Industrial Commission has no recourse but to find that the employer's liability for workers' compensation was fully covered by that policy. Allen v. Rafferty, 174 S.W.2d 345, 351 (Mo.App.E.D.1943).

Sections 287.280 and 287.300, RSMo 2000, address the liability of an employer and its workers' compensation insurer, respectively. Under Section 287.280.1, every employer subject to the provisions of the Workers' Compensation Act shall, either on an individual or group basis, insure its entire liability under the Act with an insurance carrier authorized to insure workers' compensation liability in the State of Missouri. Section 287.280.1, RSMo 2000. If an employer fails to comply with the mandate of Section 287.280.1,

"an injured employee or his dependents may elect after the injury either to bring an action against such an employer or group of employers to recover damages for personal injury or death and it shall not be a defense that the injury or death was caused by the negligence of a fellow servant, or that the employee had assumed the risk of the injury or death, or that the injury or death was caused to any degree by the negligence of the employee; or to recover under this chapter with compensation payments commuted and immediately payable; or, if the employee elects to do so, he or she may file a request with the division for payment to be made for medical expenses out of the second injury fund as provided in subsection 5 of Section 287.220." Section 287.280.1, RSMo 2000.

As used in Section 287.280, the word "fail" carries with it the idea of fault, negligence, or refusal. Walker v. Sheffield Steel, 27 S.W.2d 44, 48 (Mo.App.W.D.1930). Section 287.300 states that if an employer is not insured, its workers' compensation liability shall be primary and direct. If the employer is insured, its liability shall be secondary and indirect, and its insurer shall be primarily and directly liable to any injured employee, or his dependents. Section 287.300, RSMo 2000. Where it has been admitted that a workers' compensation insurer issued a policy that was in force on the date of the accident or injury, which covered the employer's liability under the Workers' Compensation Act, and that employer has not qualified to carry any portion of its risk as a self-insurer, the Division or Industrial Commission has no recourse but to find that the employer's liability for workers' compensation was fully covered by that policy. Allen v. Rafferty, 174 S.W.2d 345, 351 (Mo.App.E.D.1943).

In the event that an employer's workers' compensation liability is not insured, Section 287.280 permits an injured worker to select from two remedies for his injury. The employee may elect to bring a personal injury action

in Circuit Court against the employer for damages or pursue a remedy for compensation under the Workers' Compensation Act, with payments commuted and immediately payable. The Division or Industrial Commission can make an award directly against an employer in the circumstances where that employer fails to secure insurance or the insurer has defaulted, within the meaning of Section 287.300. Brashear v. Brand-Dunwoody Milling Co., 21 S.W.2d 191, 193 (Mo.App.S.D.1929).

It is undisputed that Broadway Ford purchased a workers' compensation policy from Reliance to cover its entire workers' compensation liability. That policy was in effect on April 23, 1998, the date of the occurrence. It necessarily follows that Broadway Ford did not fail to insure its workers' compensation liability, within the meaning of Section 287.280 or Section 287.300. Neither Section 287.280 nor Section 287.300 states that the insolvency of a workers' compensation carrier, which has issued a policy of workers' compensation insurance to an employer covered by the Act, constitutes a failure by an employer to insure or a default on behalf of the insurer, rendering an employer directly and primarily liable. Based on the above, the claimant is barred from recovering workers' compensation directly from the employer by way of an award from the Division of Workers' Compensation.

#### 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 parties seem to agree that the employee was temporarily totally disabled from the occurrence from May 5, 1998, through July 16, 1998, a period of 10 3/7 weeks. This period started from the claimant's last date of work for this employer and ended on the date of Dr. Vest's surgery to repair a herniated disk. The controversy in this case results from the claimant's contention that the claimant is entitled to temporary total disability benefits from July 17, 1998, to July 25, 2000, a period of 105 4/7 weeks. Neither Dr. Ralph nor Dr. Reynolds offered an opinion regarding whether the employee was temporarily and totally disabled from July 16, 1998, when Dr. Vest performed a lumbar discectomy at L3-L4, to July 25, 2000, when Dr. Reynolds found that the employee reached maximum medical improvement following the fusion he performed. However, as discussed above, the treatment rendered by Dr. Vest and Dr. Reynolds, including the surgical procedures were not reasonable or necessary to cure or relieve the employee from the injury resulting from the April 23, 1998, slip and fall and/or his occupational disease. The treatment was a result of the claimant's preexisting conditions. Temporary total disability is to be awarded during the healing period from a *work related injury*. Phelps, 803 S.W.2d at 646. Since Dr. Vest's and Dr. Reynolds' medical treatment, including surgery, was not necessitated by the April 23, 1998, accident or the employee's occupational disease, the claimant is not entitled to recover temporary total disability benefits during the two year period when the employee was treating with these physicians and convalescing from the surgeries they provided. Consequently, claimant's request for temporary total disability from July 16, 1998, to July 25, 2000, is denied.

The evidence is also shallow regarding the level of the employee's disability during the contested period. While the employee may have been unable to work as a heavy truck mechanic during this interval, the employee testified that he could use a telephone, handle financial matters, and that he previously had his own business, involving estimating jobs, and ordering parts. (P.T.152). However, the medical records suggest that the employee received advice from various medical providers not to return to work due to persistent low back pain. Based on the above, the claimant is awarded 10 3/7 weeks of temporary total disability benefits.

Date: \_\_\_\_\_

Made by:

\_\_\_\_\_  
EDWIN J. KOHNER  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Patricia "Pat" Secret  
Director  
Division of Workers' Compensation

Employee: Charles Bock      Injury No.: 98-057574

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[1] Employee died on September 27, 2000. His surviving spouse, Alice Bock, was substituted as the claimant in this matter.

[2] The administrative law judge on remand (Judge Kohner) erroneously concluded that Mr. Schwegel's testimony was not admitted into evidence. The administrative law judge at trial (Judge Schwendemann) admitted Mr. Schwegel's October 8, 2003, deposition at the beginning of the hearing on October 23, 2003.

[3] A common theme in the cases cited by the administrative law judge is that the claim for which reimbursement was sought from the guaranty fund was a claim entitled to payment under the other insurance policy. Such is not proven to be the case here.

[4] Matters referred to herein that are contained in the Transcript of the 1999 hearing shall be designated as (P.T.\_\_\_\_). Matters referred to herein that are contained in the Transcript of the Remand hearing shall be designated as (Tr.\_\_\_\_).

[5] This MRI demonstrated a disc bulge at L3-L4, with no evidence of nerve root impingement. X-rays ordered by Dr. Reynolds demonstrated degenerative disc and joint disease with no evidence of acute pathology. (Tr.275-276).

[6] For a complete list of the individual care providers who treated the employee, and their medical charges, see Exhibit 26. (Tr.926-940).