

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

Injury No.: 01-114961

Employee: Tomislav Bosnjak
Employer: Kirchner Block & Brick, Inc.
Insurer: TIG Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: May 11, 2001
Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated October 17, 2005. The award and decision of Administrative Law Judge John Howard Percy, issued October 17, 2005, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 19th day of June 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING
William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Tomislav Bosnjak Injury No.: 01-114961

Dependents: N/A Before the
Division of Workers'
Employer: Kirchner Block & Brick, Inc. **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: TIG Insurance Company
Hearing Date: March 29, April 18, June 14 and Checked by: JHP;jj
September 12, 2005

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: May 11, 2001
 5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
 6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
 7. Did employer receive proper notice? Yes
 8. Did accident or occupational disease arise out of and in the course of the employment? Yes
 9. Was claim for compensation filed within time required by Law? Yes
 10. Was employer insured by above insurer? Yes
 11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Rotating and cleaning heavy molds
 12. Did accident or occupational disease cause death? No Date of death? N/A
 13. Part(s) of body injured by accident or occupational disease: Low back
 14. Nature and extent of any permanent disability: 17 ½% permanent partial disability of the body referable to the low back
 15. Compensation paid to-date for temporary disability: \$1,286.08
 16. Value necessary medical aid paid to date by employer/insurer? \$7,586.00
- Employee: Tomislav Bosnjak Injury No.: 01-114961
17. Value necessary medical aid not furnished by employer/insurer? \$18,010.44
 18. Employee's average weekly wages: \$522.47
 19. Weekly compensation rate: \$348.31 TTD/\$314.26 PPD
 20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:
Unpaid medical expenses: \$18,010.44
temporary total disability (due to underpayment) \$ 405.50

70 weeks of permanent partial disability from Employer \$21,998.20

credit for advance payment on 4/19/05 <\$21,998.20>

22. Second Injury Fund liability: Denied

TOTAL: \$18,415.94

23. Future requirements awarded: See findings

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

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

Ray A. Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Tomislav Bosnjak	Injury No. 01-114961
Dependents:	N/A	Before the
	Division of Workers'	
Employer:	Kirchner Block & Brick, Inc..	Compensation
		Department of Labor and Industrial
Additional Party:	Second Injury Fund	Relations of Missouri
		Jefferson City, Missouri
Insurer:	TIG Insurance Company	Checked by: JHP

A hearing in this proceeding along with Injury No 02-022819 was held on March 29, April 8, June 14 and September 12, 2005. Additional evidence was admitted on August 1 pursuant to motions filed by Employee. Employee also filed a Motion for Sanctions on April 18, 2005. All parties submitted proposed awards, the last of which was received on May 11, 2005.

STIPULATIONS

The parties stipulated that on or about May 11, 2001:

1.the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;

- 2.the employer's liability was insured by TIG Insurance Company;
- 3.the employee's average weekly wage was \$522.47;
- 4.the rate of compensation for temporary total disability was \$348.31 and the rate of compensation for permanent partial disability was \$314.26; and
- 5.the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

- 1.the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
- 2.compensation has been paid in the amount of \$1,206.08 representing 4-4/7 weeks of benefits; and
- 3.employer/insurer owe the employee \$405.50 in back temporary total disability compensation due to an underpayment;
- 4.employer/insurer have paid \$7,586.00 in medical expenses; and
- 5.the employee sustained 17-1/2% permanent partial disability of the body referable to the low back as a result of the work-related accident.

ISSUES

The issues to be resolved in this proceeding are:

- 1.whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the work-related injury;
- 2.whether employee should be provided with any future medical treatment for the work-related injury;
- 3.the nature and extent of any permanent disability sustained by employee as a result of the work-related injury;
4. whether employee is entitled to costs under Section 287.560 Mo. Rev. Stat. (2000); and
- 5.whether and to what extent employee has sustained any additional permanent partial disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disability with the primary injury.

REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement in this proceeding and in Injury No 02-022819 for bills incurred for medical treatment for his low back by Dr. Anthony H. Guarino and Barnes-Jewish West County Hospital Pain Management Center, from February 11, 2003 through July 22, 2005 and for prescription medications purchased at Walgreen Drug Stores from September 27, 2002 through July 22, 2005. The bills are included in Claimant's Exhibits F, G, J, K, L, M, O, and Q. [\[1\]](#)

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

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 [the employee] 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.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

If, on the other hand, the employee selects his or her own treating doctor without notifying his or her employer of the need for treatment of a work-related injury or requesting that employer provide treatment, then the employee is not entitled to reimbursement of such expenses. Hawkins v. Emerson Elec. Co., 676 S.W.2d 872 (Mo. App. 1984); Anderson v. Parrish,

472 S.W.2d 452 (Mo. App. 1971). The court of appeals in Sheehan v. Springfield Seed & Floral, *supra*, indicated that the foregoing rule assumes that the employee realizes that he or she has sustained a work-related injury or disability. "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." *Id.* at 798.

If a claimant declines to accept treatment from physicians selected by the employer and seeks treatment from a physician of his or her own choice, then the employer will not be liable for the cost of such treatment, unless it is shown that the treatment is being furnished "in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, ..." Stawizynski v. J.S. Alberici Const. Co., 936 S.W.2d 159, 164 (Mo. App. 1996); Roberts v. Consumers Market, 725 S.W.2d 652, 653 (Mo. App. 1987); Hawkins v. Emerson Elec. Co. at 880. If, after the treating physician selected by the employer has provided medical treatment and released the employee to return to work, the employee seeks additional treatment without notifying the employer that further treatment is needed, then the employee and not the employer is liable for the cost of such treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo. App. 1995).

If the employer/insurer discontinue treatment even though the employee needs further treatment to cure and relieve the effects of his or her injury, then the employer/insurer will be liable for the entire cost of such additional treatment to the extent the treatment is proved by the employee to be reasonably necessary to cure employee of the effects of the work-related injury. Emert v. Ford Motor Company, 863 S.W.2d 629 (Mo. App. 1993); Wood v. Dierbergs Market, 843 S.W.2d 396 (Mo. App. 1992); see Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. 1995).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District, 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Employment and Primary Injury

Tomislav Bosnjak, claimant herein, was born on November 6, 1952 in Yugoslavia. He immigrated to the United States on January 22, 1998. From June 1998 to May 1999 he worked for Wilson Trophy Company in the factory as a machine operator. On May 17, 1999 he began working for Kirchner Block & Brick, Inc., employer herein, in the mold room. He cleaned, turned, rotated large cement blocks and moved heavy pieces of steel. (Claimant's Testimony)

On May 11, 2001 while rotating and cleaning very heavy molds for concrete, he felt a sudden pain in his low back. Over the course of several days the pain radiated down his left leg. (Claimant's Testimony)

While claimant testified that he had occasional pain in his low back prior to the May 11, 2001 accident, he never missed any time from work due to that pain or sought any medical treatment for his back pain. (Claimant's Testimony)

Medical Treatment

Mr. Bosnjak was examined at the SSM Corporate Health Services clinic on May 14, 2001. X-rays taken of the lumbar spine showed mild-to-moderate loss of the disk space and degenerative facet changes at L5-S1. Dr. Alvin Nayan diagnosed claimant with a lumbar sprain. He was released to return to light duty work and prescribed Flexeril and ibuprofen. He was told to avoid repetitive bending and twisting of his back and lifting objects weighing more than 10 pounds. (Claimant's Exhibit E, Pages 18-20) On May 21 when he returned to the clinic his back was much improved. He was released to return to work without any restrictions. (Claimant's Exhibit E, Pages 16-17) However, on May 30, 2001 claimant complained of worsening symptoms. Celebrex and physical therapy were prescribed. (Claimant's Exhibit E, Page 15)

Dr. Mary Ann Hollman examined claimant on June 12, 2001. Employee reported that the medications had provided some relief. He stated that he had back pain whenever he coughed. He reported that he had been experiencing bilateral leg paresthesia in a stocking distribution prior to the May 11 injury. On examination he had a right foot drop and tenderness to

palpation in the right lumbar spine. He was told to continue physical therapy and scheduled for an MRI. (Claimant's Exhibit E, Pages 10-11)

An MRI of employee's lumbar spine was performed on June 20, 2001. It showed a posterolateral herniation of the L4-5 disk to the left with an extruded fragment extending into the anterolateral recess and marked degenerative thinning and diffuse posterolateral bulge of the L5-S1 disk which narrowed the L5-S1 foramina bilaterally. (Claimant's Exhibit E, Page 9)

Claimant was referred to Dr. David Lange who examined claimant on July 17, 2001. Dr. Lange recommended epidural steroid injections for control of chronic pain.^[2] (Claimant's Exhibits A, depo ex C, p. 2 and E, Page 7)

Dr. Hollman reexamined claimant on July 23, 2001 for right low back pain and right foot drop. He also reported occasional sharp pain in the left lateral thigh with associated paresthesias. Dr. Hollman noted that Dr. Lange recommended epidural steroid injections. She referred claimant to a pain specialist for evaluation and treatment. (Claimant's Exhibit E, Page 7)

Dr. Sandra L. Tate, a specialist in physical medicine and rehabilitation, examined Mr. Bosnjak on August 16, 2001 for chronic low back pain. On examination his straight leg raising was positive in the left leg and he had decreased sensation in the left L5 nerve root distribution. She recommended lumbar epidural steroid injections and physical therapy. Dr. Tate indicated that he could work with a restriction of no lifting greater than 30 pounds. (Employer/TIG's Exhibit 1, depo ex 1, pp 15-16)

Mr. Bosnjak returned to Dr. Tate on September 6, 2001. According to Dr. Tate claimant had not received the lumbar epidural injection because he was feeling better.^[3] He told her that his leg pain had resolved and that he felt that he could return to his regular job. His clinical examination was within normal limits. Dr. Tate concluded that his low back pain had significantly improved. She told him to continue taking Vioxx and released him to return to work without restrictions. (Employer/TIG's Exhibit 1, depo ex 1, p. 12) Dr. Tate reexamined Mr. Bosnjak on September 24, 2001. Dr. Tate opined that he was a maximum medical improvement and that he required only maintenance medication and home therapy. (Employer/TIG's Exhibit 1, depo ex 1, p. 10)

Claimant's low back pain did not completely resolve following his last examination by Dr. Tate. Mr. Bosnjak continued taking Vioxx during the ensuing months. (Claimant's Testimony)

Subsequent Work-Related Injury

On January 7, 2002 while employee was holding a piece of sheet metal, which was being cut by a co-worker, his back was pulled down and jerked when the co-worker finished cutting the sheet.^[4] Mr. Bosnjak experienced intense pain in his low back, which was a little higher than the pain which he experienced following the May 11, 2001 accident. (Claimant's Testimony)

Medical Treatment

Mr. Bosnjak was examined at the SSM Corporate Health Services clinic on January 9, 2002. On physical examination claimant was able to bend forward 25 to 30 degrees and could raise his left leg to only 45 degrees. Dr. Christine Jones injected claimant with Toradol, an analgesic, and prescribed Toradol. She referred him to Dr. Tate. (Employer/Insurer's Exhibit 1, depo ex 1, p. 6)

Dr. Tate reexamined claimant on January 14, 2002. Claimant told her that the incident of January 9 aggravated his symptoms. Prior to the incident he was having stiffness, but not severe pain. He reported that most of his pain was in the low back with some pain in the left lateral thigh. Apart from a significant loss of range of motion in his low back, his physical examination was fairly normal. His gait and coordination were within normal limits. Dr. Tate diagnosed claimant with an aggravation of his preexisting degenerative disk disease and at the L4-5 disk protrusion. She recommended that claimant undergo lumbar epidural injections. She released him to return to work with a lifting restrictions of 10 pounds. (Employer/Insurer's Exhibit 1, depo ex 1, pp 7-8)

Employee was reexamined by Dr. Tate on January 29, 2002. On examination employee had bilateral hamstring tightness, slightly decreased sensation in the left lateral thigh, forward flexion of the back to 60 degrees, and some muscle tightness in the low back. Dr. Tate diagnosed claimant with an aggravation of his back pain and again recommended that he undergo epidural steroid injections. She released him to return to work with a lifting restrictions of 50 pounds.

(Employer/Insurer's Exhibit 1, depo ex 1, pp 4-6)

Claimant did not receive the steroid injections due to the failure of the insurance company to approve them. (Employer/TIG's Exhibit 1, depo ex 2, p. 1) Claimant was without treatment for four months. (Claimant's Testimony)

Dr. David Robson examined Mr. Bosnjak on May 23, 2002. Claimant told him about the May 11, 2001 and January 7, 2002 incidents. He also mentioned an exacerbation on May 7, 2002 while moving bricks.^[5] On examination he was able to bend forward 75 degrees and his straight leg raise was slightly positive on the left at about 75 degrees. Dr. Robson recommended temporary restrictions of no lifting of more than 20 pounds and no repetitive bending, stooping, and twisting and brief position changes every hour. He also recommended a lumbar steroid injection at the L4-5 level. (Employer/General Casualty's Exhibit II, depo ex 2, pp 6-9)

Dr. Patricia Hurford administered a left central lumbar epidural steroid injection under fluoroscopy on May 28, 2002. (Claimant's Exhibit D, Page 24) It gave employee a couple of days relief, but no long-term relief. He complained to Dr. Robson on June 19 of continued significant low back pain with increased activity and left leg radiating pain. On examination his straight leg raise was positive on the left at about 75 degrees. Dr. Robson excused him from working and scheduled a CT myelogram. (Employer/General Casualty's Exhibit II, depo ex 2, p. 5)

Mr. Bosnjak underwent a myelogram and post-myelogram CT scan of the lumbar spine on June 27, 2002 at Missouri Baptist Hospital. The radiologist noted degenerative changes at L4-5 and L5-S1 with diffuse degenerative disk bulges without significant focal lateralization and mild spinal stenosis at both the L4-5 and L5-S1 levels and stenosis affecting the lateral recesses at both levels, mildly worse at L5-S1. (Claimant's Exhibit D, Pages 7-8)

Dr. Robson reexamined employee on July 9. He compared the CT myelogram films with the 2001 MRI films. He thought that the disk herniation was slightly smaller than it was in 2001. He opined that the degenerative changes at L5-S1 were causing foraminal stenosis at that level and seemed to be causing the majority of his problem. He thought that the combination would produce L5 nerve root pain. He recommended a selective nerve root block at the L5-S1 level to block the L5 root in the foramina. (Employer/General Casualty's Exhibit II, depo ex 2, p. 3)

Claimant apparently received a second lumbar steroid injection which provided only a couple of hours of relief.^[6] Dr. Robson reexamined claimant on August 8, 2002. He told claimant that he had exhausted conservative treatment and that his options were to live with his condition or to undergo surgery. When claimant decided against surgery, Dr. Robson ordered a functional capacity evaluation. (Employer/General Casualty's Exhibit II, Page 12)

Claimant apparently underwent a functional capacity evaluation at the Work Center on August 19, 2002.^[7] According to Dr. Robson, Mr. Bosnjak functioned in the moderate work range. Dr. Robson reevaluated claimant on August 28, 2002. He had nothing further to offer him. Dr. Robson opined that claimant had reached maximum medical improvement from his January 7, 2002 injury and gave him permanent restrictions of no lifting of more than 50 pounds and no repetitive bending, stooping or twisting. (Employer/General Casualty's Exhibit II, depo ex 2, p. 2)

Claimant sought a second opinion from Dr. K. Yoon at St. John's Mercy Medical Center, who showed him a model of the spine and the surgery proposed by Dr. Robson. After the consultation Mr. Bosnjak decided to postpone any surgery as long as possible. (Claimant's Testimony) Dr. Yoon prescribed Hydrocodone. Claimant paid for prescriptions on September 27 and October 25. (Claimant's Exhibit F)

Dr. Bruce Schlafly, an orthopedic surgeon, examined claimant on November 19, 2002.^[8] He also prescribed Hydrocodone. Dr. Schlafly indicated that he agreed with Dr. Robson's proposed fusion surgery. He also agreed that claimant had the option of living with his condition. He recommended that claimant lift no more than 20 pounds. (Claimant's Exhibit C, p. 4) Claimant paid for this prescription on November 20, 2002. (Claimant's Exhibit F)

Claimant sought treatment from Dr. Anthony H. Guarino at the Barnes-Jewish West County Hospital Pain Management Center, who examined him on February 11, 2003. Claimant described the event of May of 2001. He told Dr. Guarino that he was having recurrent episodes of low back pain; it was not radiating into his legs. On examination Dr. Guarino noted lumbar paravertebral muscle spasms. Back forward flexion was 40 degrees. Dr. Guarino reviewed the various radiographic scans. He diagnosed claimant with lumbar spondylosis and degenerative disk disease. He opined that his pathology most likely predated the May of 2001 incident, but it was exacerbated by that incident causing a pain state. He prescribed Ultram (Tramadol) to help his chronic pain. (Claimant's Exhibit C, depo ex B) Dr. Guarino reexamined claimant on August 26, 2003. As claimant indicated that he was not getting adequate relief from his pain medication, Dr. Guarino

recommended a lumbar epidural steroid injection. (Claimant's Exhibit C, depo ex E) He administered the injection under fluoroscopy on September 26, 2003. Claimant noted some relief immediately after the injection. (Claimant's Exhibit C, Page 25)

Dr. Guarino administered a second lumbar epidural steroid injection on October 21, 2003. It did not appear to give employee much benefit. (Claimant's Exhibit B, Page 6 & depo ex B) Claimant received minimal benefit from a third epidural steroid injection administered by Dr. Guarino on November 13, 2003. He prescribed 6 weeks of physical therapy. (Claimant's Exhibit B, Page 6 & depo ex C) He also prescribed Hydrocodone. (Claimant's Exhibit F) Claimant attended 10 sessions of physical therapy. (Claimant's Testimony)

Mr. Bosnjak was reexamined by Dr. Guarino on January 4, 2004. There was no significant change. He was using hydrocodone for breakthrough pain. Dr. Guarino added Bextra. (Claimant's Exhibit B, Page 7) Dr. Guarino reexamined claimant on March 30, 2004 who noted that employee's pain was greatly impairing him. Dr. Guarino added Oxycontin to the Hydrocodone and Bextra. (Claimant's Exhibit B, depo ex E) Claimant was reexamined by Dr. Guarino on July 8, 2004. (Claimant's Exhibit B, Page 7 and F)

Health insurance claimant forms show that claimant was examined by Dr. Guarino on September 30, November 16, and December 2, 2004 and March 18, 2005.^[9] (Claimant's Exhibit M) Claimant received lumbar epidural steroid injections on November 16 and December 2, 2004 and March 18, 2005.^[10] (Claimant's Testimony and Exhibit M) Dr. Guarino noted on June 17, 2005 that claimant had intractable back pain, but was able to work 10 hours per day. Medications helped control his symptoms. (Claimant's Exhibit N)

Subsequent Work-Related Injury

On Friday, July 23, 2005 claimant developed sudden, sharp pain in his low back while using a crowbar at Kirchner Block & Brick, Inc. Because employee was experiencing significant pain, his supervisor allowed him to go home. On Monday claimant requested medical treatment from employer. He was told to see Dr. Guarino. This incident is the subject of a separate claim for compensation, Injury No. 05-073829. (Employer/TIG's Exhibit 2)

Medical Treatment

Dr. Guarino reexamined claimant on July 26, 2005. Though employee complained that his legs were not functioning normally, Dr. Guarino found that he had a normal neurologic examination. Dr. Guarino prescribed Toradol and Valium and excused him from work until August 1. (Claimant's Exhibit AA) Dr. Guarino reexamined claimant on August 2. Claimant continued to experience intractable back pain. He continued his medications and excused him from work. (Claimant's Exhibit BB) On August 17, 2005 employee told Dr. Guarino that he was unable to work due to the level of pain he was experiencing at home from daily activities. Dr. Guarino recommended that employee undergo an MRI of his low back. He excused claimant from work for another week. (Claimant's Exhibits X and CC) Dr. Guarino reexamined Mr. Bosnjak on August 24. Claimant told him that he could sit for only 60 minutes after which he had to be on his feet for 15-20 minutes. Dr. Guarino placed claimant on indefinite leave from work. (Claimant's Exhibit DD)

Medical Opinions

Dr. Robson testified by deposition on behalf of employer/General Casualty on September 16, 2004. He opined, following his final evaluation of claimant on May 23, 2002, that claimant sustained the herniated disk at L4-5 in the course of his employment on May 11, 2001, which was partially treated, that he continued to be symptomatic, and that the subsequent exacerbations were related to the initial injury and not to any new injury. (Employer/General Casualty's Exhibit II, depo ex 2, p 9) On cross examination he opined that the May 11, 2001 injury was "the significant injury which accounted for his herniated disc." He indicated that the subsequent injuries were simple exacerbations. (Employer/General Casualty's Exhibit II, Pages 19-20)

On cross examination Dr. Robson disagreed with the proposition that years of heavy lifting activities are more likely to cause degenerative changes in the spine than years of sitting at a desk being a lawyer. Dr. Robson testified that he was not aware of any scientific study which had been performed which supported that proposition. (Employer/General Casualty's Exhibit II, Pages 29-30)

On cross examination Dr. Robson opined that claimant had L5 nerve root pain. He indicated that the L4-5 disk herniation impinged on the L5 nerve root. At the L5-S1 level claimant had foraminal stenosis where the L5 nerve root exited the spine. He stated that both problems could be contributing to his pain. Dr. Robson added that had he examined claimant

after the June 20, 2001 MRI, he would have restricted Mr. Bosnjak from work at that time. He indicated that the disk herniation would have been the causative factor for any work restrictions. (Employer/General Casualty's Exhibit II, Pages 17-18)

Dr. Robson was not asked to review Dr. Guarino's treatment records and opine on the reasonableness or necessity for that treatment.

Dr. Bruce Schlafly testified by deposition on behalf of employee on October 16, 2003. He examined claimant on November 19, 2002. Mr. Bosnjak described his work at Kirchner Bock & Brick as including a lot of heavy lifting of items weighing up to 65 pounds. He told Dr. Schlafly that he injured his back on May 11, 2002 following some heavy lifting at work. Dr. Schlafly reviewed the medical records. Claimant described a second injury on January 7, 2002 when his back was jerked as he was bent over. Dr. Schlafly reviewed additional treating records. Dr. Schlafly also reviewed the June 27, 2002 myelogram and CT scan of the lumbar spine. (Claimant's Exhibit A, depo ex C, pp 1-2)

Claimant told Dr. Schlafly that he was having difficulty performing his job because of the heavy lifting involved and was continuing to experience severe low back pain. He told him that he was taking Vioxx and narcotic pain medication to control his symptoms. On examination claimant had 50% of normal forward flexion of the lumbosacral spine and 75% of normal lumbosacral extension and lateral flexion on each side. Straight leg raising was negative bilaterally. (Claimant's Exhibit A, depo ex C, p. 3)

Dr. Schlafly opined that claimant sustained injury to his low back in the work-related accidents of May 11, 2001 and January 7, 2002. He stated that employee's job required heavy lifting. Dr. Schlafly opined that employee's work at Kirchner Block & Brick was "the substantial factor in the cause of his painful low back condition, and in the need for treatment of it." He opined that claimant had painful bulging disks in his back with a possible element of nerve root compression. (Claimant's Exhibit A, depo ex C, pp 3-4) On cross examination Dr. Schlafly stated that claimant could aggravate the disk problem and experience a recurrence of disk pain while from additional lifting and he could also experience muscular pain from additional lifting. (Claimant's Exhibit A, Page 26)

Dr. Schlafly indicated that he agreed with Dr. Robson's proposed fusion surgery. He explained that the purpose of the surgery would be to relieve claimant's pain. He also agreed that claimant has the option of living with his condition. He recommended that claimant lift no more than 20 pounds. Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Page 6 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that as an alternative to surgery, he would recommend "supportive care with access to a pain clinic" and prescription medications, injections, and intermittent physical therapy as needed. (Claimant's Exhibit A, Pages 12-13 & 28)

Dr. Tate testified by deposition on behalf of Employer/TIG Insurance on August 11, 2004. She treated Mr. Bosnjak following the May 11, 2001 injury from August 16 to September 24, 2001. He was noted to have a disk herniation at the L4-5 level and radiculopathy. She opined that claimant reached maximum medical improvement on September 24, 2001 and did not require any further treatment for the May 11, 2001 injury. (Employer/TIG's Exhibit 1, Pages 9-10 & 22, depo ex 2, p. 3) Following the January 7, 2002 injury Dr. Tate reexamined employee on January 14 and 29, 2002. She diagnosed claimant with an aggravation of his preexisting degenerative disk protrusion at L4-5 and of his back pain and recommended epidural steroid injections. (Employer/TIG's Exhibit 1, depo ex 2, pp 5 & 8) Employer apparently failed to schedule the recommended treatment. (Employer/TIG's Exhibit 1, depo ex 2, p.1)

Dr. Tate reexamined claimant on January 8, 2004. He reported that his symptoms had never completely resolved. He described the treatment which he received from Drs. Robson and Guarino subsequent to May of 2002. She noted that employee had undergone five epidural steroid injections with improvement of his lower extremity symptoms. Mr. Bosnjak told Dr. Tate that he had been working light duty with no lifting greater than 20 pounds and that he was taking Bextra and Vicodin for pain. (Employer/TIG's Exhibit 1, Page 33 & depo ex 2, pp 1-2)

Dr. Tate opined that employee's back complaints were primarily and directly related to the work injury of May 11, 2001. (Employer/TIG's Exhibit 1, depo ex 2, p. 3) On cross examination Dr. Tate agreed that claimant had been doing fine for three months prior to the January 7, 2002 incident. (Employer/TIG's Exhibit 1, Page 20) She testified that she knew of no specific scientific evidence which establishes that degenerative changes in the lumbar spine are related to trauma outside of fractures. She was aware of some literature which suggested that those who perform very heavy work or frequently lift greater than 100 pounds may be more susceptible to wear and tear changes.^[11] She stated that below 100 pounds there is no difference with someone who is sedentary. (Employer/TIG's Exhibit 1, Pages 20-22)

Dr. Tate was not asked to review Dr. Guarino's treatment records and opine on the reasonableness or necessity for

that treatment.

Dr. Guarino testified by deposition on behalf of claimant on October 8, 2003. In response to a hypothetical question which asked him to assume that claimant had engaged in heavy lifting activities at Kirchner Block & Brick from 1999 through May 11, 2001, Dr. Guarino opined that such activities contributed to cause the degenerative process in his low back. He also opined that the May 11, 2001 incident contributed to cause and probably aggravated the disk pathology in employee's back. He further opined that the disability in claimant's back was the result of his work and the incidents of May 11, 2001 and January 7, 2002. (Claimant's Exhibit C, Pages 7-8) On cross examination he explained that lifting of heavy weights poses a stress on the spine and most likely contributed to the degeneration in employee's back. He also opined that while most of the degenerative process preexisted the May 11 accident, that incident exacerbated the underlying problem and precipitated claimant's pain. (Claimant's Exhibit C, Page 20) He added on redirect examination that heavy labor work can increase the normal attrition of the spine. (Claimant's Exhibit C, Page 29) On June 14, 2004 Dr. Guarino retestified that claimant's condition would mostly likely continue to progress based on his age, genetic state, and the activity exerted on his back. (Claimant's Exhibit B, Page 10)

Dr. Guarino opined that the work which claimant had performed at Kirchner Block & Brick since 1999 and the accidents which he sustained contributed to cause the need for the treatment which Dr. Guarino provided during 2003 and that such treatment was reasonable and necessary for the injuries which employee sustained at work. (Claimant's Exhibit C, Pages 12-13) On cross examination Dr. Guarino admitted that he could not state which one of the events caused the need for claimant's medical treatment. He opined that they all had contributed; but the May 11, 2001 event was the one which "most likely started the cascade of events and would be the mostly likely culprit" (Claimant's Exhibit C, Page 22)

Dr. Guarino opined on October 8, 2003 that it was not unreasonable for claimant to decline to undergo the fusion surgery proposed by Dr. Robson. He noted that claimant had a normal neurologic examination (i.e. the degenerative changes in his low back were not compromising his function). He noted that employee's main problem was pain, the locus of which could be from several different things suggested by the radiographs. There was no guarantee that medications, injection or surgery would help his pain. However, surgery carried much higher risks. (Claimant's Exhibit C, Page 10)

Dr. Guarino opined that claimant testified that a patient can be at maximum medical improvement but nevertheless require additional treatment to help manage his symptoms so that he has a better quality of life.^[12] (Claimant's Exhibit C, Page 35)

Dr. Guarino testified that he sees patients based on the level of dysfunction which they have in relation to their pain. He typically sees patients, who are working and require narcotics to help control their pain, every three or four months. (Claimant's Exhibit C, Pages 13-14) He opined that if Mr. Bosnjak continued as he was in late 2003, employee would need to see a physician two or three times per year for the rest of his life for guidance, medical management, and injections. (Claimant's Exhibit C, Pages 15-16) On cross examination he stated that steroid injections should be limited to three during a six-month period in order to avoid adrenal hypertrophy. He indicated that the injections help calm down episodes of aggravation of pain in someone who has chronic pain. (Claimant's Exhibit C, Pages 23-24) On June 14, 2004 Dr. Guarino indicated that he would consider further epidural injections for claimant only if he had a marked increase of his pain due to an excessive activity which could not be calmed down with oral medications. (Claimant's Exhibit B, Pages 13 & 17)

On June 14, 2004 Dr. Guarino retestified that claimant still had intractable pain, that the injections had not had a significant effect on his pain, and that medications do help him. Dr. Guarino recommended that claimant continue with medications. (Claimant's Exhibit B, Page 9) Dr. Guarino testified that he prescribed Oxycontin, an extended form of Oxycodone, a narcotic, for his pain. He stated that because there is always a potential addiction problem, claimant needs to be evaluated by a physician on a regular basis. He prescribed Bextra for the inflammatory component of claimant's problems. (Claimant's Exhibit B, Pages 10-12) He again opined that claimant was going to need someone trained in pain management to help claimant manage his pain and medication for the rest of his life. (Claimant's Exhibit B, Page 12) Dr. Guarino thought that he would need to see a physician three or four times per year. He indicated that the medications could change depending on a number of circumstances, such as the development of intolerance for a medication or sensitivity to a component of a medication. (Claimant's Exhibit B, Pages 14-15)

Dr. Schlafly retestified on November 18, 2004. He reexamined Mr. Bosnjak on September 28, 2004. Claimant told him that he had continued to receive treatment for his low back subsequent to Dr. Schlafly's November 19, 2002 examination. Dr. Schlafly reviewed the additional treating records. Employee was taking Bextra and Oxycontin. Though he was not having much in the way of leg pain, he reported constant low back pain. On examination Dr. Schlafly noted that employee had 50% of normal forward flexion, backward extension, and lateral flexion of the low back. His left straight leg raising produced low back pain at 45 degrees. (Claimant's Exhibit A-1, Pages 23-24 depo ex A, pp 1-3)

Based on his reexamination of employee on September 28, 2004 and his review of the medical records, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr. Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

On cross examination Dr. Schlafly opined that the L5 and S1 nerve roots were the primary nerve roots involved with employee's low back problem. (Claimant's Exhibit A-1, Page 15)

Additional Findings

I previously found that on August 28, 2002 Dr. Robson found employee to have reached maximum medical improvement and discharged him from treatment. All of the medical bills for which claimant is seeking reimbursement were for treatment provided to claimant after he was discharged from treatment by Dr. Robson.

I previously found that claimant subsequently incurred prescription bills at Walgreen Drug Stores for Oxycodone prescribed by Drs. Yoon and Schlafly.

I previously found that on February 11, 2003 Mr. Bosnjak sought treatment from Dr. Guarino at the Washington University Pain Management Center. That treatment continued through July 22, 2005. Dr. Guarino prescribed Toradol, Hydrocodone, Bextra, Celebrex, and Oxycontin.

Having reviewed all of the prescription bills, I find that claimant incurred prescription bills for pain medication prescribed by Drs. Tate, Yoon, Schlafly, and Guarino as follows: \$261.11^[13] (Claimant's Exhibit F), \$586.79 (Claimant's Exhibit J), \$25.00 (Claimant's Exhibit K), \$4,842.54^[14] (Claimant's Exhibit O), and \$25.00 (Claimant's Exhibit Q) for a total of \$5,750.44.

Having reviewed all of the pain management bills and the corresponding medical records,^[15] I find that the claimant incurred bills for treatment by Dr. Guarino as follows: \$401.00 on February 11, 2003 (Claimant's Exhibit F), \$127.00 on August 26, 2003 (Claimant's Exhibit F), \$600.00 on September 26, 2003 (Claimant's Exhibit F), \$840.00 on October 21, 2003 (Claimant's Exhibit F), \$840.00 on November 13, 2003 (Claimant's Exhibit F), \$191.00 on January 6, 2004 (Claimant's Exhibit F), \$191.00 on March 30, 2004 (Claimant's Exhibit F), \$191.00 on July 8, 2004 (Claimant's Exhibit F), \$191.00 on September 30, 2004 (Claimant's Exhibit M), \$840.00 on November 16, 2004 (Claimant's Exhibit M), \$840.00 on December 2, 2004 (Claimant's Exhibit M), and \$840.00 on March 18, 2005 (Claimant's Exhibit M) for a total of \$6,092.00.^[16]

Barnes-Jewish West County Hospital billed for its pain management services and physical therapy prescribed by Dr. Guarino. The pain management bills correspond to the dates on which Dr. Guarino rendered treatment. The physical therapy bills are for the period immediately after Dr. Guarino's prescription on November 23, 2003. Claimant was sent bills from Barnes-Jewish West County Hospital as follows: \$134.00 on February 11, 2003 of which claimant paid \$100.50 (Claimant's Exhibit F), \$208.00 on November 28, 2003 for physical therapy, \$865.00 for physical therapy, from December 1, through December 30, 2003, \$572.00 on March 30, 2004 for pain management, \$122.00 on July 8, 2004 for pain management, \$1,202.00 on November 3, 2004 for an epidural steroid injection, \$1,202.00 on November 16, 2004 for an epidural steroid injection, \$544.00 on December 2, 2004 for an epidural steroid injection, \$122.00 on December 23, 2004 for pain management (Claimant's Exhibit Substitute Exhibit I) \$1,069.00 on March 18, 2005 for an epidural steroid injection (Claimant's Exhibit L), and \$128.00 on June 17, 2005 for pain management (Claimant's Exhibit P) for a total of \$6,168.00.^[17]

Neither Drs. Robson or Tate reviewed any of the foregoing bills or opined on whether the treatment provided by Dr. Guarino was reasonable and necessary to treat the May 11, 2001 and January 7, 2002 work-related injuries.

Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Page 6 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that as an alternative to surgery, he would recommend "supportive care with access to a pain clinic" and prescription medications, injections, and intermittent physical therapy as needed. (Claimant's Exhibit A, Pages 12-13 & 28) Based on his reexamination of employee on September 28, 2004 and his review of the medical records of Dr. Guarino, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr.

Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

Dr. Guarino opined that the work which claimant had performed at Kirchner Block & Brick since 1999 and the accidents which he sustained contributed to cause the need for the treatment which Dr. Guarino provided during 2003 and that such treatment was reasonable and necessary for the injuries which employee sustained at work. (Claimant's Exhibit C, Pages 12-13) On cross examination Dr. Guarino admitted that he could not state which one of the events caused the need for claimant's medical treatment. He opined that they all had contributed; but the May 11, 2001 event was the one which "most likely started the cascade of events and would be the mostly likely culprit" (Claimant's Exhibit C, Page 22)

Based on the credible testimony of Drs. Schlafly and Guarino, I find that all of the pain management treatment provided by Dr. Guarino from February 11, 2003 through July 22, 2005 was reasonable and necessary to treat claimant's back condition. I further find that all of the prescriptions medications which claimant purchased at Walgreen Drug Stores from September 27, 2002 through July 22, 2005 were reasonable and necessary to treat claimant's back condition. I further find that the physical therapy and pain management services provided by Barnes-Jewish Hospital provided from February 11, 2003 through June 17, 2005 were reasonable and necessary to treat claimant's back condition.

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

Though Mr. Bosnjak had underlying degenerative changes in his lumbar spine, he was for the most part asymptomatic prior to the low back injury on May 11, 2001. In addition to significant low back pain claimant also developed symptoms in his left leg. An MRI of the lumbar spine performed on June 20, 2001 showed a herniated disk at L4-5 and a disk bulge at L5-S1 with bilateral foraminal narrowing. Dr. Tate recommended lumbar epidural steroid injections. While waiting for the insurer to authorize the injections, claimant's left leg pain subsided. Dr. Tate determined that claimant had reached maximum medical improvement with regard to the May 11, 2001 injury as of September 24, 2001. Employee continued to take pain medication for his low back during the subsequent three months.

Following claimant's second injury on January 7, 2002 injury, Dr. Tate again recommended lumbar epidural steroid injections for left leg symptoms, including a foot drop. Employer again failed to authorize the lumbar epidural steroid injections recommended by Dr. Tate. Claimant was untreated for almost four months. In May employee came under the care of Dr. Robson, an orthopedic surgeon, who ordered a post-myelogram CT scan of the lumbar spine. He thought that the prior L4-5 herniation looked a little smaller. He diagnosed claimant with L5 nerve root pain. Claimant was given two lumbar epidural steroid injections which provided limited relief. On August 8, 2002 Dr. Robson recommended a fusion surgery. Claimant decided to postpone any surgery. Claimant was discharged from treatment by Dr. Robson on August 28, 2002 following a functional capacity evaluation which placed him in the moderate work range.

Claimant sought treatment recommendations from Drs. Yoon and Schlafly, both orthopedists. They prescribed pain medication. On February 11, 2003 claimant sought treatment from Dr. Anthony Guarino at the Barnes-Jewish West County Hospital Pain Management Center. Dr. Guarino has prescribed narcotic pain medication and administered three lumbar epidural steroid injections in the fall of 2003 and three injections in the winter of 2004. Dr. Guarino examines claimant every two or three months.

There is no dispute that claimant sustained a significant low back injury on May 11, 2001. I find that the treatment records demonstrate that claimant also suffered a worsening of his symptoms following the January 7, 2002 injury. Surgery was first recommended after the January 7, 2002 injury. He received two epidural steroid injections after that injury. At the conclusion of Dr. Robson's treatment claimant had not returned to his pre-January 7, 2002 symptom level. He continued taking stronger pain medications following the conclusion of treatment by Dr. Robson than he was taking during the period between his discharge from treatment following the first injury and January 7, 2002. Though he was advised not to lift greater than 50 pounds by both Drs. Tate and Robson, claimant was also advised by Dr. Robson to avoid repetitive bending, stooping, and twisting after the second injury. By January of 2004 Dr. Tate recommended that claimant avoid lifting greater

than 20 pounds. Dr. Schlafly concurred with that recommendation.

All of the physicians agree that the May 11, 2001 injury was a significant factor in causing claimant's low back and leg symptoms. Dr. Robson felt that the subsequent exacerbations were related to the May 11 injury and not to any new injury. Dr. Schlafly opined that claimant years of heavy lifting activities at Kirchner Block & Brick as well as the two lifting incidents caused employee's severe low back pain and the need for treatment by Dr. Guarino. Though Dr. Tate opined that employee's back complaints were primarily related to the work injury of May 11, 2001, she diagnosed him with an aggravation of his preexisting condition following the January 7, 2002 injury. Dr. Guarino thought that both accidents aggravated his preexisting disk pathology and caused the need for treatment.

Taking into account all of the evidence and the medical opinions, I find that while the May 11, 2001 accident caused the L4-5 disk herniation, I also find that the January 7, 2002 accident was a substantial factor in causing a permanent worsening of employee's low back and left leg symptoms. Accordingly, I find that employer and both insurers are jointly and severally liable for the reimbursement of claimant's medical bills.

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant testified that he received the treatment shown on the bills. Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's back condition. Employer/insurer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$18,010.44 for prescriptions, Dr. Guarino's treatment, and Barnes-Jewish Hospital services were fair and reasonable. Accordingly, I find employer/insurer are liable for the foregoing medical and hospital expenses totaling \$18,010.44. [\[18\]](#)

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his low back.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation,

897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment “must flow from the accident before the employer is to be held responsible.” Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. At 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Employee's Testimony

Claimant testified that he wanted to postpone back surgery as long as possible. Until he had no other alternative. Claimant requested that he be awarded future medical treatment with Dr. Guarino. He indicated that the treatment provided by Dr. Guarino has been better than the other physicians. He trusts Dr. Guarino.

Medical Opinions

Dr. Schlafly testified on October 16, 2003 that he agreed with Dr. Robson's proposed fusion surgery. Dr. Schlafly indicated that a lot of patients who undergo spinal fusions end up needing more surgery. He also agreed that claimant has the option of living with his condition. He recommended that claimant lift no more than 20 pounds. Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Pages 6 & 29 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that he would recommend “supportive care with access to a pain clinic” and prescription medications, injections, and intermittent physical therapy as needed as an alternative to surgery. (Claimant's Exhibit A, Pages 12-13 & 28) While Dr. Schlafly doubted that injections would provide Mr. Bosnjak long-term benefit, he opined that they would provide short-term benefit (i.e. a month or less). He opined that the administration of injections two to three times per year might be reasonable. (Claimant's Exhibit A, Pages 23-25& 34-35)

Dr. Robson opined on August 28, 2002 that claimant had reached maximum medical improvement from his injury of January 7, 2002. He gave employee permanent restrictions of no lifting of more than 50 pounds and no repetitive bending, stooping or twisting. (Employer/General Casualty's Exhibit II, Page 20 & depo ex 2, p. 2) In changing the lifting restrictions from 20 pounds on May 27, 2002 to 50 pounds on August 28, 2002, Dr. Robson explained that claimant had just had an exacerbation on May 7, 2002 for which Dr. Robson treated him during the interval and claimant had undergone a functional capacity evaluation on August 19, 2002. (Employer/General Casualty's Exhibit II, Page 21 & depo ex 2, p. 2)

On cross examination Dr. Robson testified that claimant, having exhausted conservative treatment (i.e. physical therapy, injections and medication), had two options: (1) undergoing a laminectomy and discectomy at L4-5, laminectomy at L5-S1, and fusion from L4 to S1 with instrumentation, and (2) living with his back pain. He indicated that there was no guarantee that a laminectomy would absolutely help Mr. Bosnjak. (Employer/General Casualty's Exhibit II, Pages 27-28)

On reexamination of employee on January 8, 2004 Dr. Tate noted some paravertebral muscle tightness and lumbosacral forward flexion to 70 degrees. His straight leg raise tests were negative and his gait was normal. (Employer/TIG's Exhibit 1, depo ex 2, pp 2-3) Dr. Tate agreed that employee should avoid back surgery if at all possible. She stated that due to his diffuse degenerative changes, the procedure would be a fusion with instrumentation. She thought that he was a maximum medical improvement. (Employer/TIG's Exhibit 1, depo ex 2, p. 3)

On cross examination Dr. Tate agreed that it was reasonable for employee to be taking maintenance medication. (Employer/TIG's Exhibit 1, Page 26) She did not make any treatment recommendations for him as of January 8, 2004. (Employer/TIG's Exhibit 1, Page 34)

On cross examination Dr. Tate testified that the risk of a recurrent herniation in someone with a torn anulus fibrosus is about 15% greater than in the general population without disk herniations. She agreed that Mr. Bosnjak is slightly more susceptible to a future herniation at the same disk level. (Employer/TIG's Exhibit 1, Pages 29-31)

Dr. Schlafly retestified on November 18, 2004. Based on his reexamination of employee on September 28, 2004 and his review of the medical records, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr. Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and

January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

Dr. Schlafly agreed with the work restrictions recommended by Dr. Tate of no lifting greater than 20 pounds and no excessive bending or twisting at the waist. (Claimant's Exhibit A-1, Pages 8 & 22 & depo ex A, p. 3) With respect to the increased weight restrictions, Dr. Schlafly pointed out that both he and Dr. Tate had examined claimant more recently than Dr. Robson. He opined that the overall condition of claimant's low back on reexamination was quite similar to its condition on November 19, 2002. (Claimant's Exhibit A-1, Pages 9 & 16)

Dr. Guarino retestified on June 14, 2004 that claimant still had intractable pain, that the injections had not had a significant effect on his pain, and that medications do help him. Dr. Guarino recommended that claimant continue with medications. (Claimant's Exhibit B, Page 9) Dr. Guarino testified that he prescribed Oxycontin, an extended form of Oxycodone, a narcotic, for his pain. He stated that because there is always a potential addiction problem, claimant needs to be evaluated by a physician on a regular basis. He prescribed Bextra for the inflammatory component of claimant's problems. (Claimant's Exhibit B, Pages 10-12) He again opined that claimant was going to need someone trained in pain management to help claimant manage his pain and medication for the rest of his life. (Claimant's Exhibit B, Page 12) Dr. Guarino thought that he would need to see a physician three or four times per year. He indicated that the medications could change depending on a number of circumstances, such as the development of intolerance for a medication or sensitivity to a component of a medication. (Claimant's Exhibit B, Pages 14-15)

Additional Findings

As Dr. Robson has not examined claimant since August 28, 2002, his opinion on future medical treatment fails to take into consideration all of the additional pain management treatment provided by Dr. Guarino. Dr. Tate agreed that it was reasonable for employee to be taking maintenance medications.

Dr. Tate agreed that claimant should avoid surgery if at all possible. Drs. Schlafly and Guarino indicated that it is reasonable for claimant to undergo conservative medical management and postpone surgery as long as possible. They both recommended regular evaluations by a pain management specialist.

Based on the credible medical opinions of Drs. Schlafly and Guarino, I find that it is reasonable for claimant to undergo conservative medical management of his low back and left leg symptoms in order that he may avoid surgery as long as possible. Surgery carries many risks, including death. There is no guarantee that claimant will improve with surgery. I find that claimant's desires about his future treatment are reasonable.

Based on the opinions of Drs. Schlafly and Guarino, I find that claimant will continue for the foreseeable future to require medical management by a pain management specialist of his chronic low back and left leg pain. As I have previously found that both accidents were substantial factors in causing claimant's current medical condition, I find that employer and both insurers are jointly and severally liable for claimant's future medical treatment of his low back condition. I further find that employer, by failing to provide any medical treatment to claimant for three years, has waived its right to select the treatment provider. Employer/insurer are hereby ordered to provide such pain management treatment for claimant's low back and left leg as may reasonably be required ... to cure and relieve [the employee] from the effects of the work-related injury. Employer/insurer are further ordered to provide and pay for surgery on claimant's low back at such time as he elects to undergo it.

PERMANENT PARTIAL DISABILITY

The parties stipulated that Mr. Bosnjak sustained 17-1/2% permanent partial disability of body referable to the low back as a result of the work-related injury. In accordance with the stipulation of the parties, I find that employee sustained 17-1/2% permanent partial disability of body referable to the low back as a result of the work-related injury.

RECOVERY OF COSTS

On April 18, 2005 claimant filed a Motion for Sanctions and requested assessment of costs under Sections 287.560 Mo. Rev. Stat. (2000). The motion was heard on June 14, 2005.

Section 287.560 provides in part:

Any party shall be entitled ... at his own cost to take and use depositions in like manner as in civil cases in the

circuit court. ... [T] hat if the Division or the Commission determines any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted, or defended them.

Employee alleged that he and employer/insurer entered into a settlement on the question of permanent partial disability and that employer/insurer agreed to make an advance payment of 17.5% permanent partial disability of the body.

The hearing of this case commenced on March 29, 2005. The parties stipulated that claimant sustained 17.5% permanent partial disability of the body as a result of the work-related injury. Claimant alleged that the insurer agreed to pay the appropriate sum of money immediately.

TIG Insurance Company issued a check in the amount of \$21,998.20 on April 19, 2005 payable to employee and his attorney. The check was received by employee's attorney on April 22, 2005.

The parties did not execute a written agreement. The evidence was conflicting as to when the checks were to be delivered to claimant's attorney.

Since the agreement was for the entire amount of permanent disability, I find that employer/insurer had no legal obligation to pay the agreed upon sum until after the parties stipulated on March 29, 2005 to the amount of permanent disability. I further find that the issuance of a check on April 19, 2005 for the full amount of the stipulated permanent disability was timely. The request for sanctions is denied.

SECOND INJURY FUND LIABILITY

Having settled his claim against employer, employee is seeking an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a preexisting permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

Disability from Primary Injury

I previously found that claimant sustained 17.5% permanent partial disability of the body referable to the low back as a result of the May 11, 2001 work-related accident.

Disability from Prior Injuries or Conditions

The employee must next prove that he or she had a permanent partial disability or disabilities preexisting the present injury and the amount thereof which existed at the time of the compensable injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). It is not necessary that the "previous disability" be due to an injury. Section 287.220.1 was amended in 1993 to define the nature of the preexisting disability as "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed" The appellate courts have held that the portion of the 1993 amendment to Section 287.220.1 which modified the definition of preexisting disability was applicable to all pending cases without regard to the date of injury. Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); Lane v. Schreiber Foods, Inc., 903 S.W.2d 616 (Mo. App. 1995); Faulkner v. St. Luke's Hospital, 903 S.W.2d 588 (Mo. App. 1996). In Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995), the court of appeals stated in dicta that "a previously existing condition that a cautious employer could perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition" would constitute a hindrance or obstacle to employment or reemployment. Id. at 620. that test was adopted in Garibay v. Treasurer of Missouri, 930 S.W.2d 57, 60 (Mo. App. 1997). Being able to work, though in pain, following a previous injury is not incompatible with that injury being treated as a preexisting permanent partial disability.

Hedrick v. Chrysler Corp., 900 S.W.2d 233, 236 (Mo. App. 1995).

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, *supra*; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); *see also* Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

Employee claims that the following conditions constitute "previous disabilities" under Section 287.220.1: low back arthritis.

Findings with Respect to Preexisting disabilities

While claimant testified that he had occasional pain in his low back prior to the May 11, 2001 accident, he never missed any time from work due to that pain or sought any medical treatment.

No physician assigned any preexisting permanent disability to claimant's low back.

Based on all of the evidence, I find that claimant failed to prove that he had any permanent partial disability in his low back prior to May 11, 2201. Accordingly, the claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Ray A. Gerritzen, for necessary legal services rendered to the employee.

Date: _____ Made by: _____

JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secret
*Director
Division of Workers' Compensation*

Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

Injury No.: 02-022819

Employee: Tomislav Bosnjak

Employer: Kirchner Block & Brick, Inc.

Insurer: General Casualty Company of Wisconsin

3. 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
6. Date of accident or onset of occupational disease: January 7, 2002
7. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
10. 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:
While holding a piece of sheet metal being cut by a co-worker, employee's back was pulled down and jerked when co-worker finished cutting.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
15. Nature and extent of any permanent disability: 15% permanent partial disability of the body referable to the low back
15. Compensation paid to-date for temporary disability: \$4,331.92
16. Value necessary medical aid paid to date by employer/insurer? \$7,983.39

Employee: Tomislav Bosnjak Injury No.: 02-022819

17. Value necessary medical aid not furnished by employer/insurer? \$18,010.44
19. Employee's average weekly wages: \$538.41
19. Weekly compensation rate: \$358.94 TTD/\$329.42 PPD
20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$18,010.44
60 weeks of permanent partial disability from Employer	\$19,765.20
credit for advance payment on 4/15/05	<\$19,765.20>
TOTAL:	\$18,010.44

23. Future requirements awarded: See Findings

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

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

Ray A. Gerritzen

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Tomislav Bosnjak Injury No. 02-022819
Dependents: N/A Before the
Division of Workers'
Employer: Kirchner Block & Brick, Inc. . **Compensation**
Department of Labor and Industrial
Additional Party: Second Injury Fund Relations of Missouri
Jefferson City, Missouri
Insurer: General Casualty Company of Wisconsin Checked by: JHP

A hearing in this proceeding along with Injury No. 01-114961 was held on March 29, April 8, June 14 and September 12, 2005. Additional Evidence was admitted on August 1 pursuant to motions filed by Employee. Employee also filed a Motion for Sanctions on April 18, 2005. All parties submitted proposed awards, the last of which was received on May 11, 2005.

STIPULATIONS

The parties stipulated that on or about January 7, 2002:

- 1.the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
- 2.the employer's liability was insured by General Casualty Company of Wisconsin;
- 3.the employee's average weekly wage was \$538.41;
- 4.the rate of compensation for temporary total disability was \$358.94 and the rate of compensation for permanent partial disability was \$329.42; and
- 5.the employee sustained an injury by accident arising out of and in the course of employee's employment occurring in St. Louis County, Missouri.

The parties further stipulated that:

- 1.the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
- 2.compensation has been paid in the amount of \$4,331.92 representing approximately 12 weeks of benefits covering the period from May 18, 2002 to September 1, 2002;
- 3.employer/insurer have paid \$7,983.39 in medical expenses; and
- 4.the employee sustained 15% permanent partial disability of the body referable to the low back as a result of the work-related accident.

ISSUES

The issues to be resolved in this proceeding are:

1. whether employee is entitled pursuant to Section 287.140 Mo. Rev. Stat. (2000) to be reimbursed for any medical expenses, which he may have incurred in obtaining treatment for the work-related injury;
2. whether employee should be provided with any future medical treatment for the work-related injury;
3. the nature and extent of any permanent disability sustained by employee as a result of the work-related injury;
4. whether employee is entitled to costs under Section 287.560 Mo. Rev. Stat. (2000); and
5. whether and to what extent employee has sustained any additional permanent partial disability for which the Second Injury Fund would be liable as a result of the combination of any preexisting disability with the primary injury.

REIMBURSEMENT FOR MEDICAL EXPENSES

Employee is seeking reimbursement in this proceeding and in Injury No 01-114961 for bills incurred for medical treatment for his low back by Dr. Anthony H. Guarino and Barnes-Jewish West County Hospital Pain Management Center, from February 11, 2003 through July 22, 2005 and for prescription medications purchased at Walgreen Drug Stores from September 27, 2002 through July 22, 2005. The bills are included in Claimant's Exhibits F, G, J, K, L, M, O, and Q. ^[19]

Section 287.140.1 Mo. Rev. Stat. (2000) provides in part:

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 [the employee] 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.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992); Sheehan v. Springfield Seed & Floral, 733 S.W.2d 795 (Mo. App. 1987); Wiedower v. ACF Industries, Inc., 657 S.W.2d 71 (Mo. App. 1983); Hendricks v. Motor Freight Corp., 570 S.W.2d 702 (Mo. App. 1978). While an employer initially has the right to select the medical care provider, the employer may waive that right, by failing, neglecting or refusing to provide medical treatment after receiving notice of an injury. Under such circumstances the employee may make his or her own selection, procure the necessary treatment and have the reasonable costs thereof assessed against the employer. Wiedower at 74; Hendricks at 709. The employer may also consent affirmatively to the selection of a health care provider by the employee or consent inferentially by failing to object to the employee's selection after having knowledge of that selection. Hendricks at 709-710.

If, on the other hand, the employee selects his or her own treating doctor without notifying his or her employer of the need for treatment of a work-related injury or requesting that employer provide treatment, then the employee is not entitled to reimbursement of such expenses. Hawkins v. Emerson Elec. Co., 676 S.W.2d 872 (Mo. App. 1984); Anderson v. Parrish, 472 S.W.2d 452 (Mo. App. 1971). The court of appeals in Sheehan v. Springfield Seed & Floral, *supra*, indicated that the foregoing rule assumes that the employee realizes that he or she has sustained a work-related injury or disability. "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." Id. at 798.

If a claimant declines to accept treatment from physicians selected by the employer and seeks treatment from a physician of his or her own choice, then the employer will not be liable for the cost of such treatment, unless it is shown that the treatment is being furnished "in such manner that there is reasonable ground for believing that the life, health, or recovery of the employee is endangered thereby, ..." Stawizynski v. J.S. Alberici Const. Co., 936 S.W.2d 159, 164 (Mo. App. 1996); Roberts v. Consumers Market, 725 S.W.2d 652, 653 (Mo. App. 1987); Hawkins v. Emerson Elec. Co. at 880. If, after the treating physician selected by the employer has provided medical treatment and released the employee to return to work, the employee seeks additional treatment without notifying the employer that further treatment is needed, then the employee and not the employer is liable for the cost of such treatment. Blackwell v. Puritan-Bennett Corp., 901 S.W.2d 81, 85 (Mo. App. 1995).

If the employer/insurer discontinue treatment even though the employee needs further treatment to cure and relieve the effects of his or her injury, then the employer/insurer will be liable for the entire cost of such additional treatment to the extent the treatment is proved by the employee to be reasonably necessary to cure employee of the effects of the work-related injury. Emert v. Ford Motor Company, 863 S.W.2d 629 (Mo. App. 1993); Wood v. Dierbergs Market, 843 S.W.2d 396 (Mo. App. 1992); see Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. 1995).

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. Chambliss v. Lutheran Medical Center, 822 S.W.2d 926 (Mo. App. 1991); Jones v. Jefferson City School District 801 S.W.2d 484 (Mo. App. 1990); Roberts v. Consumers Market, 725 S.W.2d 652 (Mo. App. 1987); Brueggemann v. Permaneer Door Corp., 527 S.W.2d 718 (Mo. App. 1975).

Findings of Fact

Based on my observations of claimant's demeanor during his testimony, I find that he is a credible witness and that his testimony is generally credible. Based on the credible testimony of claimant and on the medical records, I make the following findings of fact.

Description of Employment and Preexisting Injury

Tomislav Bosnjak, claimant herein, was born on November 6, 1952 in Yugoslavia. He immigrated to the United States on January 22, 1998. From June 1998 to May 1999 he worked for Wilson Trophy Company in the factory as a machine operator. On May 17, 1999 he began working for Kirchner Block & Brick, Inc., employer herein, in the mold room. He cleaned, turned, rotated large cement blocks and moved heavy pieces of steel. (Claimant's Testimony)

On May 11, 2001 while rotating and cleaning very heavy molds for concrete, he felt a sudden pain in his low back. Over the course of several days the pain radiated down his left leg. (Claimant's Testimony)

While claimant testified that he had occasional pain in his low back prior to the May 11, 2001 accident, he never missed any time from work due to that pain or sought any medical treatment for his back pain. (Claimant's Testimony)

Medical Treatment

Mr. Bosnjak was examined at the SSM Corporate Health Services clinic on May 14, 2001. X-rays taken of the lumbar spine showed mild-to-moderate loss of the disk space and degenerative facet changes at L5-S1. Dr. Alvin Nayan diagnosed claimant with a lumbar sprain. He was released to return to light duty work and prescribed Flexeril and ibuprofen. He was told to avoid repetitive bending and twisting of his back and lifting objects weighing more than 10 pounds. (Claimant's Exhibit E, Pages 18-20) On May 21 when he returned to the clinic his back was much improved. He was released to return to work without any restrictions. (Claimant's Exhibit E, Pages 16-17) However, on May 30, 2001 claimant complained of worsening symptoms. Celebrex and physical therapy were prescribed. (Claimant's Exhibit E, Page 15)

Dr. Mary Ann Hollman examined claimant on June 12, 2001. Employee reported that the medications had provided some relief. He stated that he had back pain whenever he coughed. He reported that he had been experiencing bilateral leg paresthesia in a stocking distribution prior to the May 11 injury. On examination he had a right foot drop and tenderness to palpation in the right lumbar spine. He was told to continue physical therapy and scheduled for an MRI. (Claimant's Exhibit E, Pages 10-11)

An MRI of employee's lumbar spine was performed on June 20, 2001. It showed a posterolateral herniation of the L4-5 disk to the left with an extruded fragment extending into the anterolateral recess and marked degenerative thinning and diffuse posterolateral bulge of the L5-S1 disk which narrowed the L5-S1 foramina bilaterally. (Claimant's Exhibit E, Page 9)

Claimant was referred to Dr. David Lange who examined claimant on July 17, 2001. Dr. Lange recommended epidural steroid injections for control of chronic pain.^[20] (Claimant's Exhibits A, depo ex C, p. 2 and E, Page 7)

Dr. Hollman reexamined claimant on July 23, 2001 for right low back pain and right foot drop. He also reported occasional sharp pain in the left lateral thigh with associated paresthesias. Dr. Hollman noted that Dr. Lange recommended epidural steroid injections. She referred claimant to a pain specialist for evaluation and treatment. (Claimant's Exhibit E, Page 7)

Dr. Sandra L. Tate, a specialist in physical medicine and rehabilitation, examined Mr. Bosnjak on August 16, 2001 for chronic low back pain. On examination his straight leg raising was positive in the left leg and he had decreased sensation in the left L5 nerve root distribution. She recommended lumbar epidural steroid injections and physical therapy. Dr. Tate indicated that he could work with a restriction of no lifting greater than 30 pounds. (Employer/TIG's Exhibit 1, depo ex 1, pp 15-16)

Mr. Bosnjak returned to Dr. Tate on September 6, 2001. According to Dr. Tate claimant had not received the lumbar epidural injection because he was feeling better.^[21] He told her that his leg pain had resolved and that he felt that he could return to his regular job. His clinical examination was within normal limits. Dr. Tate concluded that his low back pain had significantly improved. She told him to continue taking Vioxx and released him to return to work without restrictions. (Employer/TIG's Exhibit 1, depo ex 1, p. 12) Dr. Tate reexamined Mr. Bosnjak on September 24, 2001. Dr. Tate opined that he was a maximum medical improvement and that he required only maintenance medication and home therapy. (Employer/TIG's Exhibit 1, depo ex 1, p. 10)

Claimant's low back pain did not completely resolve following his last examination by Dr. Tate. Mr. Bosnjak continued taking Vioxx during the ensuing months. (Claimant's Testimony)

Primary Injury

On January 7, 2002 while employee was holding a piece of sheet metal, which was being cut by a co-worker, his back was pulled down and jerked when the co-worker finished cutting the sheet.^[22] Mr. Bosnjak experienced intense pain in his low back, which was a little higher than the pain which he experienced following the May 11, 2001 accident. (Claimant's Testimony)

Medical Treatment

Mr. Bosnjak was examined at the SSM Corporate Health Services clinic on January 9, 2002. On physical examination claimant was able to bend forward 25 to 30 degrees and could raise his left leg to only 45 degrees. Dr. Christine Jones injected claimant with Toradol, an analgesic, and prescribed Toradol. She referred him to Dr. Tate. (Employer/Insurer's Exhibit 1, depo ex 1, p. 6)

Dr. Tate reexamined claimant on January 14, 2002. Claimant told her that the incident of January 9 aggravated his symptoms. Prior to the incident he was having stiffness, but not severe pain. He reported that most of his pain was in the low back with some pain in the left lateral thigh. Apart from a significant loss of range of motion in his low back, his physical examination was fairly normal. His gait and coordination were within normal limits. Dr. Tate diagnosed claimant with an aggravation of his preexisting degenerative disk disease and at the L4-5 disk protrusion. She recommended that claimant undergo lumbar epidural injections. She released him to return to work with a lifting restrictions of 10 pounds. (Employer/Insurer's Exhibit 1, depo ex 1, pp 7-8)

Employee was reexamined by Dr. Tate on January 29, 2002. On examination employee had bilateral hamstring tightness, slightly decreased sensation in the left lateral thigh, forward flexion of the back to 60 degrees, and some muscle tightness in the low back. Dr. Tate diagnosed claimant with an aggravation of his back pain and again recommended that he undergo epidural steroid injections. She released him to return to work with a lifting restrictions of 50 pounds. (Employer/Insurer's Exhibit 1, depo ex 1, pp 4-6)

Claimant did not receive the steroid injections due to the failure of the insurance company to approve them. (Employer/TIG's Exhibit 1, depo ex 2, p. 1) Claimant was without treatment for four months. (Claimant's Testimony)

Dr. David Robson examined Mr. Bosnjak on May 23, 2002. Claimant told him about the May 11, 2001 and January 7, 2002 incidents. He also mentioned an exacerbation on May 7, 2002 while moving bricks.^[23] On examination he was able to bend forward 75 degrees and his straight leg raise was slightly positive on the left at about 75 degrees. Dr. Robson recommended temporary restrictions of no lifting of more than 20 pounds and no repetitive bending, stooping, and twisting and brief position changes every hour. He also recommended a lumbar steroid injection at the L4-5 level. (Employer/General Casualty's Exhibit II, depo ex 2, pp 6-9)

Dr. Patricia Hurford administered a left central lumbar epidural steroid injection under fluoroscopy on May 28, 2002. (Claimant's Exhibit D, Page 24) It gave employee a couple of days relief, but no long-term relief. He complained to Dr. Robson on June 19 of continued significant low back pain with increased activity and left leg radiating pain. On examination

his straight leg raise was positive on the left at about 75 degrees. Dr. Robson excused him from working and scheduled a CT myelogram. (Employer/General Casualty's Exhibit II, depo ex 2, p. 5)

Mr. Bosnjak underwent a myelogram and post-myelogram CT scan of the lumbar spine on June 27, 2002 at Missouri Baptist Hospital. The radiologist noted degenerative changes at L4-5 and L5-S1 with diffuse degenerative disk bulges without significant focal lateralization and mild spinal stenosis at both the L4-5 and L5-S1 levels and stenosis affecting the lateral recesses at both levels, mildly worse at L5-S1. (Claimant's Exhibit D, Pages 7-8)

Dr. Robson reexamined employee on July 9. He compared the CT myelogram films with the 2001 MRI films. He thought that the disk herniation was slightly smaller than it was in 2001. He opined that the degenerative changes at L5-S1 were causing foraminal stenosis at that level and seemed to be causing the majority of his problem. He thought that the combination would produce L5 nerve root pain. He recommended a selective nerve root block at the L5-S1 level to block the L5 root in the foramina. (Employer/General Casualty's Exhibit II, depo ex 2, p. 3)

Claimant apparently received a second lumbar steroid injection which provided only a couple of hours of relief.^[24] Dr. Robson reexamined claimant on August 8, 2002. He told claimant that he had exhausted conservative treatment and that his options were to live with his condition or to undergo surgery. When claimant decided against surgery, Dr. Robson ordered a functional capacity evaluation. (Employer/General Casualty's Exhibit II, Page 12)

Claimant apparently underwent a functional capacity evaluation at the Work Center on August 19, 2002.^[25] According to Dr. Robson, Mr. Bosnjak functioned in the moderate work range. Dr. Robson reevaluated claimant on August 28, 2002. He had nothing further to offer him. Dr. Robson opined that claimant had reached maximum medical improvement from his January 7, 2002 injury and gave him permanent restrictions of no lifting of more than 50 pounds and no repetitive bending, stooping or twisting. (Employer/General Casualty's Exhibit II, depo ex 2, p. 2)

Claimant sought a second opinion from Dr. K. Yoon at St. John's Mercy Medical Center, who showed him a model of the spine and the surgery proposed by Dr. Robson. After the consultation Mr. Bosnjak decided to postpone any surgery as long as possible. (Claimant's Testimony) Dr. Yoon prescribed Hydrocodone. Claimant paid for prescriptions on September 27 and October 25. (Claimant's Exhibit F)

Dr. Bruce Schlafly, an orthopedic surgeon, examined claimant on November 19, 2002.^[26] He also prescribed Hydrocodone. Dr. Schlafly indicated that he agreed with Dr. Robson's proposed fusion surgery. He also agreed that claimant had the option of living with his condition. He recommended that claimant lift no more than 20 pounds. (Claimant's Exhibit C, p. 4) Claimant paid for this prescription on November 20, 2002. (Claimant's Exhibit F)

Claimant sought treatment from Dr. Anthony H. Guarino at the Barnes-Jewish West County Hospital Pain Management Center, who examined him on February 11, 2003. Claimant described the event of May of 2001. He told Dr. Guarino that he was having recurrent episodes of low back pain; it was not radiating into his legs. On examination Dr. Guarino noted lumbar paravertebral muscle spasms. Back forward flexion was 40 degrees. Dr. Guarino reviewed the various radiographic scans. He diagnosed claimant with lumbar spondylosis and degenerative disk disease. He opined that his pathology most likely predated the May of 2001 incident, but it was exacerbated by that incident causing a pain state. He prescribed Ultram (Tramadol) to help his chronic pain. (Claimant's Exhibit C, depo ex B) Dr. Guarino reexamined claimant on August 26, 2003. As claimant indicated that he was not getting adequate relief from his pain medication, Dr. Guarino recommended a lumbar epidural steroid injection. (Claimant's Exhibit C, depo ex E) He administered the injection under fluoroscopy on September 26, 2003. Claimant noted some relief immediately after the injection. (Claimant's Exhibit C, Page 25)

Dr. Guarino administered a second lumbar epidural steroid injection on October 21, 2003. It did not appear to give employee much benefit. (Claimant's Exhibit B, Page 6 & depo ex B) Claimant received minimal benefit from a third epidural steroid injection administered by Dr. Guarino on November 13, 2003. He prescribed 6 weeks of physical therapy. (Claimant's Exhibit B, Page 6 & depo ex C) He also prescribed Hydrocodone. (Claimant's Exhibit F) Claimant attended 10 sessions of physical therapy. (Claimant's Testimony)

Mr. Bosnjak was reexamined by Dr. Guarino on January 4, 2004. There was no significant change. He was using hydrocodone for breakthrough pain. Dr. Guarino added Bextra. (Claimant's Exhibit B, Page 7) Dr. Guarino reexamined claimant on March 30, 2004 who noted that employee's pain was greatly impairing him. Dr. Guarino added Oxycontin to the Hydrocodone and Bextra. (Claimant's Exhibit B, depo ex E) Claimant was reexamined by Dr. Guarino on July 8, 2004. (Claimant's Exhibit B, Page 7 and F)

Health insurance claimant forms show that claimant was examined by Dr. Guarino on September 30, November 16, and December 2, 2004 and March 18, 2005.^[27] (Claimant's Exhibit M) Claimant received lumbar epidural steroid injections on November 16 and December 2, 2004 and March 18, 2005.^[28] (Claimant's Testimony and Exhibit M) Dr. Guarino noted on June 17, 2005 that claimant had intractable back pain, but was able to work 10 hours per day. Medications helped control his symptoms. (Claimant's Exhibit N)

Subsequent Work-Related Injury

On Friday, July 23, 2005 claimant developed sudden, sharp pain in his low back while using a crowbar at Kirchner Block & Brick, Inc. Because employee was experiencing significant pain, his supervisor allowed him to go home. On Monday claimant requested medical treatment from employer. He was told to see Dr. Guarino. This incident is the subject of a separate claim for compensation, Injury No. 05-073829. (Employer/TIG's Exhibit 2)

Medical Treatment

Dr. Guarino reexamined claimant on July 26, 2005. Though employee complained that his legs were not functioning normally, Dr. Guarino found that he had a normal neurologic examination. Dr. Guarino prescribed Toradol and Valium and excused him from work until August 1. (Claimant's Exhibit AA) Dr. Guarino reexamined claimant on August 2. Claimant continued to experience intractable back pain. He continued his medications and excused him from work. (Claimant's Exhibit BB) On August 17, 2005 employee told Dr. Guarino that he was unable to work due to the level of pain he was experiencing at home from daily activities. Dr. Guarino recommended that employee undergo an MRI of his low back. He excused claimant from work for another week. (Claimant's Exhibits X and CC) Dr. Guarino reexamined Mr. Bosnjak on August 24. Claimant told him that he could sit for only 60 minutes after which he had to be on his feet for 15-20 minutes. Dr. Guarino placed claimant on indefinite leave from work. (Claimant's Exhibit DD)

Medical Opinions

Dr. Robson testified by deposition on behalf of employer/General Casualty on September 16, 2004. He opined, following his final evaluation of claimant on May 23, 2002, that claimant sustained the herniated disk at L4-5 in the course of his employment on May 11, 2001, which was partially treated, that he continued to be symptomatic, and that the subsequent exacerbations were related to the initial injury and not to any new injury. (Employer/General Casualty's Exhibit II, depo ex 2, p 9) On cross examination he opined that the May 11, 2001 injury was "the significant injury which accounted for his herniated disc." He indicated that the subsequent injuries were simple exacerbations. (Employer/General Casualty's Exhibit II, Pages 19-20)

On cross examination Dr. Robson disagreed with the proposition that years of heavy lifting activities are more likely to cause degenerative changes in the spine than years of sitting at a desk being a lawyer. Dr. Robson testified that he was not aware of any scientific study which had been performed which supported that proposition. (Employer/General Casualty's Exhibit II, Pages 29-30)

On cross examination Dr. Robson opined that claimant had L5 nerve root pain. He indicated that the L4-5 disk herniation impinged on the L5 nerve root. At the L5-S1 level claimant had foraminal stenosis where the L5 nerve root exited the spine. He stated that both problems could be contributing to his pain. Dr. Robson added that had he examined claimant after the June 20, 2001 MRI, he would have restricted Mr. Bosnjak from work at that time. He indicated that the disk herniation would have been the causative factor for any work restrictions. (Employer/General Casualty's Exhibit II, Pages 17-18)

Dr. Robson was not asked to review Dr. Guarino's treatment records and opine on the reasonableness or necessity for that treatment.

Dr. Bruce Schlafly testified by deposition on behalf of employee on October 16, 2003. He examined claimant on November 19, 2002. Mr. Bosnjak described his work at Kirchner Block & Brick as including a lot of heavy lifting of items weighing up to 65 pounds. He told Dr. Schlafly that he injured his back on May 11, 2002 following some heavy lifting at work. Dr. Schlafly reviewed the medical records. Claimant described a second injury on January 7, 2002 when his back was jerked as he was bent over. Dr. Schlafly reviewed additional treating records. Dr. Schlafly also reviewed the June 27, 2002 myelogram and CT scan of the lumbar spine. (Claimant's Exhibit A, depo ex C, pp 1-2)

Claimant told Dr. Schlafly that he was having difficulty performing his job because of the heavy lifting involved and was continuing to experience severe low back pain. He told him that he was taking Vioxx and narcotic pain medication to

control his symptoms. On examination claimant had 50% of normal forward flexion of the lumbosacral spine and 75% of normal lumbosacral extension and lateral flexion on each side. Straight leg raising was negative bilaterally. (Claimant's Exhibit A, depo ex C, p. 3)

Dr. Schlafly opined that claimant sustained injury to his low back in the work-related accidents of May 11, 2001 and January 7, 2002. He stated that employee's job required heavy lifting. Dr. Schlafly opined that employee's work at Kirchner Block & Brick was "the substantial factor in the cause of his painful low back condition, and in the need for treatment of it." He opined that claimant had painful bulging disks in his back with a possible element of nerve root compression. (Claimant's Exhibit A, depo ex C, pp 3-4) On cross examination Dr. Schlafly stated that claimant could aggravate the disk problem and experience a recurrence of disk pain while from additional lifting and he could also experience muscular pain from additional lifting. (Claimant's Exhibit A, Page 26)

Dr. Schlafly indicated that he agreed with Dr. Robson's proposed fusion surgery. He explained that the purpose of the surgery would be to relieve claimant's pain. He also agreed that claimant has the option of living with his condition. He recommended that claimant lift no more than 20 pounds. Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Page 6 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that as an alternative to surgery, he would recommend "supportive care with access to a pain clinic" and prescription medications, injections, and intermittent physical therapy as needed. (Claimant's Exhibit A, Pages 12-13 & 28)

Dr. Tate testified by deposition on behalf of Employer/TIG Insurance on August 11, 2004. She treated Mr. Bosnjak following the May 11, 2001 injury from August 16 to September 24, 2001. He was noted to have a disk herniation at the L4-5 level and radiculopathy. She opined that claimant reached maximum medical improvement on September 24, 2001 and did not require any further treatment for the May 11, 2001 injury. (Employer/TIG's Exhibit 1, Pages 9-10 & 22, depo ex 2, p. 3) Following the January 7, 2002 injury Dr. Tate reexamined employee on January 14 and 29, 2002. She diagnosed claimant with an aggravation of his preexisting degenerative disk protrusion at L4-5 and of his back pain and recommended epidural steroid injections. (Employer/TIG's Exhibit 1, depo ex 2, pp 5 & 8) Employer apparently failed to schedule the recommended treatment. (Employer/TIG's Exhibit 1, depo ex 2, p.1)

Dr. Tate reexamined claimant on January 8, 2004. He reported that his symptoms had never completely resolved. He described the treatment which he received from Drs. Robson and Guarino subsequent to May of 2002. She noted that employee had undergone five epidural steroid injections with improvement of his lower extremity symptoms. Mr. Bosnjak told Dr. Tate that he had been working light duty with no lifting greater than 20 pounds and that he was taking Bextra and Vicodin for pain. (Employer/TIG's Exhibit 1, Page 33 & depo ex 2, pp 1-2)

Dr. Tate opined that employee's back complaints were primarily and directly related to the work injury of May 11, 2001. (Employer/TIG's Exhibit 1, depo ex 2, p. 3) On cross examination Dr. Tate agreed that claimant had been doing fine for three months prior to the January 7, 2002 incident. (Employer/TIG's Exhibit 1, Page 20) She testified that she knew of no specific scientific evidence which establishes that degenerative changes in the lumbar spine are related to trauma outside of fractures. She was aware of some literature which suggested that those who perform very heavy work or frequently lift greater than 100 pounds may be more susceptible to wear and tear changes.^[29] She stated that below 100 pounds there is no difference with someone who is sedentary. (Employer/TIG's Exhibit 1, Pages 20-22)

Dr. Tate was not asked to review Dr. Guarino's treatment records and opine on the reasonableness or necessity for that treatment.

Dr. Guarino testified by deposition on behalf of claimant on October 8, 2003. In response to a hypothetical question which asked him to assume that claimant had engaged in heavy lifting activities at Kirchner Block & Brick from 1999 through May 11, 2001, Dr. Guarino opined that such activities contributed to cause the degenerative process in his low back. He also opined that the May 11, 2001 incident contributed to cause and probably aggravated the disk pathology in employee's back. He further opined that the disability in claimant's back was the result of his work and the incidents of May 11, 2001 and January 7, 2002. (Claimant's Exhibit C, Pages 7-8) On cross examination he explained that lifting of heavy weights poses a stress on the spine and most likely contributed to the degeneration in employee's back. He also opined that while most of the degenerative process preexisted the May 11 accident, that incident exacerbated the underlying problem and precipitated claimant's pain. (Claimant's Exhibit C, Page 20) He added on redirect examination that heavy labor work can increase the normal attrition of the spine. (Claimant's Exhibit C, Page 29) On June 14, 2004 Dr. Guarino retestified that claimant's condition would mostly likely continue to progress based on his age, genetic state, and the activity exerted on his back. (Claimant's Exhibit B, Page 10)

Dr. Guarino opined that the work which claimant had performed at Kirchner Block & Brick since 1999 and the

accidents which he sustained contributed to cause the need for the treatment which Dr. Guarino provided during 2003 and that such treatment was reasonable and necessary for the injuries which employee sustained at work. (Claimant's Exhibit C, Pages 12-13) On cross examination Dr. Guarino admitted that he could not state which one of the events caused the need for claimant's medical treatment. He opined that they all had contributed; but the May 11, 2001 event was the one which "most likely started the cascade of events and would be the mostly likely culprit ..." (Claimant's Exhibit C, Page 22)

Dr. Guarino opined on October 8, 2003 that it was not unreasonable for claimant to decline to undergo the fusion surgery proposed by Dr. Robson. He noted that claimant had a normal neurologic examination (i.e. the degenerative changes in his low back were not compromising his function). He noted that employee's main problem was pain, the locus of which could be from several different things suggested by the radiographs. There was no guarantee that medications, injection or surgery would help his pain. However, surgery carried much higher risks. (Claimant's Exhibit C, Page 10)

Dr. Guarino opined that claimant testified that a patient can be at maximum medical improvement but nevertheless require additional treatment to help manage his symptoms so that he has a better quality of life.^[30] (Claimant's Exhibit C, Page 35)

Dr. Guarino testified that he sees patients based on the level of dysfunction which they have in relation to their pain. He typically sees patients, who are working and require narcotics to help control their pain, every three or four months. (Claimant's Exhibit C, Pages 13-14) He opined that if Mr. Bosnjak continued as he was in late 2003, employee would need to see a physician two or three times per year for the rest of his life for guidance, medical management, and injections. (Claimant's Exhibit C, Pages 15-16) On cross examination he stated that steroid injections should be limited to three during a six-month period in order to avoid adrenal hypertrophy. He indicated that the injections help calm down episodes of aggravation of pain in someone who has chronic pain. (Claimant's Exhibit C, Pages 23-24) On June 14, 2004 Dr. Guarino indicated that he would consider further epidural injections for claimant only if he had a marked increase of his pain due to an excessive activity which could not be calmed down with oral medications. (Claimant's Exhibit B, Pages 13 & 17)

On June 14, 2004 Dr. Guarino retestified that claimant still had intractable pain, that the injections had not had a significant effect on his pain, and that medications do help him. Dr. Guarino recommended that claimant continue with medications. (Claimant's Exhibit B, Page 9) Dr. Guarino testified that he prescribed Oxycontin, an extended form of Oxycodone, a narcotic, for his pain. He stated that because there is always a potential addiction problem, claimant needs to be evaluated by a physician on a regular basis. He prescribed Bextra for the inflammatory component of claimant's problems. (Claimant's Exhibit B, Pages 10-12) He again opined that claimant was going to need someone trained in pain management to help claimant manage his pain and medication for the rest of his life. (Claimant's Exhibit B, Page 12) Dr. Guarino thought that he would need to see a physician three or four times per year. He indicated that the medications could change depending on a number of circumstances, such as the development of intolerance for a medication or sensitivity to a component of a medication. (Claimant's Exhibit B, Pages 14-15)

Dr. Schlafly retestified on November 18, 2004. He reexamined Mr. Bosnjak on September 28, 2004. Claimant told him that he had continued to receive treatment for his low back subsequent to Dr. Schlafly's November 19, 2002 examination. Dr. Schlafly reviewed the additional treating records. Employee was taking Bextra and Oxycontin. Though he was not having much in the way of leg pain, he reported constant low back pain. On examination Dr. Schlafly noted that employee had 50% of normal forward flexion, backward extension, and lateral flexion of the low back. His left straight leg raising produced low back pain at 45 degrees. (Claimant's Exhibit A-1, Pages 23-24 depo ex A, pp 1-3)

Based on his reexamination of employee on September 28, 2004 and his review of the medical records, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr. Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

On cross examination Dr. Schlafly opined that the L5 and S1 nerve roots were the primary nerve roots involved with employee's low back problem. (Claimant's Exhibit A-1, Page 15)

Additional Findings

I previously found that on August 28, 2002 Dr. Robson found employee to have reached maximum medical improvement and discharged him from treatment. All of the medical bills for which claimant is seeking reimbursement were for treatment provided to claimant after he was discharged from treatment by Dr. Robson.

I previously found that claimant subsequently incurred prescription bills at Walgreen Drug Stores for Oxycodone prescribed by Drs. Yoon and Schlafly.

I previously found that on February 11, 2003 Mr. Bosnjak sought treatment from Dr. Guarino at the Washington University Pain Management Center. That treatment continued through July 22, 2005. Dr. Guarino prescribed Toradol, Hydrocodone, Bextra, Celebrex, and Oxycontin.

Having reviewed all of the prescription bills, I find that claimant incurred prescription bills for pain medication prescribed by Drs. Tate, Yoon, Schlafly, and Guarino as follows: \$261.11^[31] (Claimant's Exhibit F), \$586.79 (Claimant's Exhibit J), \$25.00 (Claimant's Exhibit K), \$4,842.54^[32] (Claimant's Exhibit O), and \$25.00 (Claimant's Exhibit Q) for a total of \$5,750.44.

Having reviewed all of the pain management bills and the corresponding medical records,^[33] I find that the claimant incurred bills for treatment by Dr. Guarino as follows: \$401.00 on February 11, 2003 (Claimant's Exhibit F), \$127.00 on August 26, 2003 (Claimant's Exhibit F), \$600.00 on September 26, 2003 (Claimant's Exhibit F), \$840.00 on October 21, 2003 (Claimant's Exhibit F), \$840.00 on November 13, 2003 (Claimant's Exhibit F), \$191.00 on January 6, 2004 (Claimant's Exhibit F), \$191.00 on March 30, 2004 (Claimant's Exhibit F), \$191.00 on July 8, 2004 (Claimant's Exhibit F), \$191.00 on September 30, 2004 (Claimant's Exhibit M), \$840.00 on November 16, 2004 (Claimant's Exhibit M), \$840.00 on December 2, 2004 (Claimant's Exhibit M), and \$840.00 on March 18, 2005 (Claimant's Exhibit M) for a total of \$6,092.00.^[34]

Barnes-Jewish West County Hospital billed for its pain management services and physical therapy prescribed by Dr. Guarino. The pain management bills correspond to the dates on which Dr. Guarino rendered treatment. The physical therapy bills are for the period immediately after Dr. Guarino's prescription on November 23, 2003. Claimant was sent bills from Barnes-Jewish West County Hospital as follows: \$134.00 on February 11, 2003 of which claimant paid \$100.50 (Claimant's Exhibit F), \$208.00 on November 28, 2003 for physical therapy, \$865.00 for physical therapy, from December 1, through December 30, 2003, \$572.00 on March 30, 2004 for pain management, \$122.00 on July 8, 2004 for pain management, \$1,202.00 on November 3, 2004 for an epidural steroid injection, \$1,202.00 on November 16, 2004 for an epidural steroid injection, \$544.00 on December 2, 2004 for an epidural steroid injection, \$122.00 on December 23, 2004 for pain management (Claimant's Exhibit Substitute Exhibit I) \$1,069.00 on March 18, 2005 for an epidural steroid injection (Claimant's Exhibit L), and \$128.00 on June 17, 2005 for pain management (Claimant's Exhibit P) for a total of \$6,168.00.^[35]

Neither Drs. Robson or Tate reviewed any of the foregoing bills or opined on whether the treatment provided by Dr. Guarino was reasonable and necessary to treat the May 11, 2001 and January 7, 2002 work-related injuries.

Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Page 6 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that as an alternative to surgery, he would recommend "supportive care with access to a pain clinic" and prescription medications, injections, and intermittent physical therapy as needed. (Claimant's Exhibit A, Pages 12-13 & 28) Based on his reexamination of employee on September 28, 2004 and his review of the medical records of Dr. Guarino, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr. Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

Dr. Guarino opined that the work which claimant had performed at Kirchner Block & Brick since 1999 and the accidents which he sustained contributed to cause the need for the treatment which Dr. Guarino provided during 2003 and that such treatment was reasonable and necessary for the injuries which employee sustained at work. (Claimant's Exhibit C, Pages 12-13) On cross examination Dr. Guarino admitted that he could not state which one of the events caused the need for claimant's medical treatment. He opined that they all had contributed; but the May 11, 2001 event was the one which "most likely started the cascade of events and would be the mostly likely culprit" (Claimant's Exhibit C, Page 22)

Based on the credible testimony of Drs. Schlafly and Guarino, I find that all of the pain management treatment provided by Dr. Guarino from February 11, 2003 through July 22, 2005 was reasonable and necessary to treat claimant's back condition. I further find that all of the prescriptions medications which claimant purchased at Walgreen Drug Stores from September 27, 2002 through July 22, 2005 were reasonable and necessary to treat claimant's back condition. I further find that the physical therapy and pain management services provided by Barnes-Jewish Hospital provided from February 11, 2003 through June 17, 2005 were reasonable and necessary to treat claimant's back condition.

Employee must establish the causal relationship between the bills for medical services and the treatment provided. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989). It is not necessary to have testimony on the medical-causal relationship of each individual expense where the causal relationship can reasonably be inferred. Lenzini v. Columbia Foods, 829 S.W.2d 482, 484 (Mo. App. 1992). Employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence which relate to the services provided. Idem.; Wood v. Dierbergs Market, 843 S.W.2d 396, 399 (Mo. App. 1992); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). In the absence of such proof, medical bills may be excluded. Cahall v. Riddle Trucking, Inc., 956 S.W.2d 315, 322 (Mo. App. 1997); Meyer v. Superior Insulating Tape, 882 S.W.2d 735, 738 (Mo. App. 1994). Bills showing only a balance due may be excluded for lack of adequate foundation. Hamby v. Ray Webbe Corp., 877 S.W.2d 190 (Mo. App. 1994).

Though Mr. Bosnjak had underlying degenerative changes in his lumbar spine, he was for the most part asymptomatic prior to the low back injury on May 11, 2001. In addition to significant low back pain claimant also developed symptoms in his left leg. An MRI of the lumbar spine performed on June 20, 2001 showed a herniated disk at L4-5 and a disk bulge at L5-S1 with bilateral foraminal narrowing. Dr. Tate recommended lumbar epidural steroid injections. While waiting for the insurer to authorize the injections, claimant's left leg pain subsided. Dr. Tate determined that claimant had reached maximum medical improvement with regard to the May 11, 2001 injury as of September 24, 2001. Employee continued to take pain medication for his low back during the subsequent three months.

Following claimant's second injury on January 7, 2002 injury, Dr. Tate again recommended lumbar epidural steroid injections for left leg symptoms, including a foot drop. Employer again failed to authorize the lumbar epidural steroid injections recommended by Dr. Tate. Claimant was untreated for almost four months. In May employee came under the care of Dr. Robson, an orthopedic surgeon, who ordered a post-myelogram CT scan of the lumbar spine. He thought that the prior L4-5 herniation looked a little smaller. He diagnosed claimant with L5 nerve root pain. Claimant was given two lumbar epidural steroid injections which provided limited relief. On August 8, 2002 Dr. Robson recommended a fusion surgery. Claimant decided to postpone any surgery. Claimant was discharged from treatment by Dr. Robson on August 28, 2002 following a functional capacity evaluation which placed him in the moderate work range.

Claimant sought treatment recommendations from Drs. Yoon and Schlafly, both orthopedists. They prescribed pain medication. On February 11, 2003 claimant sought treatment from Dr. Anthony Guarino at the Barnes-Jewish West County Hospital Pain Management Center. Dr. Guarino has prescribed narcotic pain medication and administered three lumbar epidural steroid injections in the fall of 2003 and three injections in the winter of 2004. Dr. Guarino examines claimant every two or three months.

There is no dispute that claimant sustained a significant low back injury on May 11, 2001. I find that the treatment records demonstrate that claimant also suffered a worsening of his symptoms following the January 7, 2002 injury. Surgery was first recommended after the January 7, 2002 injury. He received two epidural steroid injections after that injury. At the conclusion of Dr. Robson's treatment claimant had not returned to his pre-January 7, 2002 symptom level. He continued taking stronger pain medications following the conclusion of treatment by Dr. Robson than he was taking during the period between his discharge from treatment following the first injury and January 7, 2002. Though he was advised not to lift greater than 50 pounds by both Drs. Tate and Robson, claimant was also advised by Dr. Robson to avoid repetitive bending, stooping, and twisting after the second injury. By January of 2004 Dr. Tate recommended that claimant avoid lifting greater than 20 pounds. Dr. Schlafly concurred with that recommendation.

All of the physicians agree that the May 11, 2001 injury was a significant factor in causing claimant's low back and leg symptoms. Dr. Robson felt that the subsequent exacerbations were related to the May 11 injury and not to any new injury. Dr. Schlafly opined that claimant years of heavy lifting activities at Kirchner Block & Brick as well as the two lifting incidents caused employee's severe low back pain and the need for treatment by Dr. Guarino. Though Dr. Tate opined that employee's back complaints were primarily related to the work injury of May 11, 2001, she diagnosed him with an aggravation of his preexisting condition following the January 7, 2002 injury. Dr. Guarino thought that both accidents aggravated his preexisting disk pathology and caused the need for treatment.

Taking into account all of the evidence and the medical opinions, I find that while the May 11, 2001 accident caused the L4-5 disk herniation, I also find that the January 7, 2002 accident was a substantial factor in causing a permanent worsening of employee's low back and left leg symptoms. Accordingly, I find that employer and both insurers are jointly and severally liable for the reimbursement of claimant's medical bills.

Proof of the fairness and reasonableness of the bills may be made by the testimony of the claimant alone. Identification of treatment covered by a bill and the relationship of the treatment to the employee's injury is sufficient. Proof

of payment is not required. It is then up to the employer to show that the bills are not fair and reasonable. Martin v. Mid-America Farm Lines, Inc., 769 S.W.2d 105 (Mo. 1989); Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. 1992).

Claimant testified that he received the treatment shown on the bills. Each item on the bills corresponds to an entry in the provider's medical records indicating that treatment was for claimant's back condition. Employer/insurer introduced no evidence that the charges were not fair or reasonable. I have examined the specific charges and they appear to be fair and reasonable.

I further find that the charges totaling \$18,010.44 for prescriptions, Dr. Guarino's treatment, and Barnes-Jewish Hospital services were fair and reasonable. Accordingly, I find employer/insurer are liable for the foregoing medical and hospital expenses totaling \$18,010.44.^[36]

FUTURE MEDICAL CARE

Employee is requesting an award of future medical care for his low back.

Section 287.140 Mo. Rev. Stat. (2000) requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. The employee must prove beyond speculation and by competent and substantial evidence that his or her work-related injury is in need of treatment. Williams v. A.B. Chance Co., 676 S.W.2d 1 (Mo. App. 1984). Conclusive evidence is not required. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." Tate v. Southwestern Bell Telephone Co., 715 S.W.2d 326, 329 (Mo. App. 1986); Sifferman at 828.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; Talley v. Runny Meade Estates, Ltd., 831 S.W.2d 692, 695 (Mo. App. 1992); Bradshaw v. Brown Shoe Co., 660 S.W.2d 390, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. At 694. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. Hall v. Spot Martin, 304 S.W.2d 844, 854-55 (Mo. 1957). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

Employee's Testimony

Claimant testified that he wanted to postpone back surgery as long as possible. Until he had no other alternative. Claimant requested that he be awarded future medical treatment with Dr. Guarino. He indicated that the treatment provided by Dr. Guarino has been better than the other physicians. He trusts Dr. Guarino.

Medical Opinions

Dr. Schlafly testified on October 16, 2003 that he agreed with Dr. Robson's proposed fusion surgery. Dr. Schlafly indicated that a lot of patients who undergo spinal fusions end up needing more surgery. He also agreed that claimant has the option of living with his condition. He recommended that claimant lift no more than 20 pounds. Dr. Schlafly testified that an alternative to surgery would be prolonged medical management. (Claimant's Exhibit A, Pages 6 & 29 & depo ex C, p. 4) On cross examination Dr. Schlafly testified that he would recommend "supportive care with access to a pain clinic" and prescription medications, injections, and intermittent physical therapy as needed as an alternative to surgery. (Claimant's Exhibit A, Pages 12-13 & 28) While Dr. Schlafly doubted that injections would provide Mr. Bosnjak long-term benefit, he opined that they would provide short-term benefit (i.e. a month or less). He opined that the administration of injections two to three times per year might be reasonable. (Claimant's Exhibit A, Pages 23-25& 34-35)

Dr. Robson opined on August 28, 2002 that claimant had reached maximum medical improvement from his injury of January 7, 2002. He gave employee permanent restrictions of no lifting of more than 50 pounds and no repetitive bending, stooping or twisting. (Employer/General Casualty's Exhibit II, Page 20 & depo ex 2, p. 2) In changing the lifting restrictions from 20 pounds on May 27, 2002 to 50 pounds on August 28, 2002, Dr. Robson explained that claimant had just had an exacerbation on May 7, 2002 for which Dr. Robson treated him during the interval and claimant had undergone a functional capacity evaluation on August 19, 2002. (Employer/General Casualty's Exhibit II, Page 21 & depo ex 2, p. 2)

On cross examination Dr. Robson testified that claimant, having exhausted conservative treatment (i.e. physical therapy, injections and medication), had two options: (1) undergoing a laminectomy and discectomy at L4-5, laminectomy at L5-S1, and fusion from L4 to S1 with instrumentation, and (2) living with his back pain. He indicated that there was no guarantee that a laminectomy would absolutely help Mr. Bosnjak. (Employer/General Casualty's Exhibit II, Pages 27-28)

On reexamination of employee on January 8, 2004 Dr. Tate noted some paravertebral muscle tightness and lumbosacral forward flexion to 70 degrees. His straight leg raise tests were negative and his gait was normal. (Employer/TIG's Exhibit 1, depo ex 2, pp 2-3) Dr. Tate agreed that employee should avoid back surgery if at all possible. She stated that due to his diffuse degenerative changes, the procedure would be a fusion with instrumentation. She thought that he was a maximum medical improvement. (Employer/TIG's Exhibit 1, depo ex 2, p. 3)

On cross examination Dr. Tate agreed that it was reasonable for employee to be taking maintenance medication. (Employer/TIG's Exhibit 1, Page 26) She did not make any treatment recommendations for him as of January 8, 2004. (Employer/TIG's Exhibit 1, Page 34)

On cross examination Dr. Tate testified that the risk of a recurrent herniation in someone with a torn anulus fibrosus is about 15% greater than in the general population without disk herniations. She agreed that Mr. Bosnjak is slightly more susceptible to a future herniation at the same disk level. (Employer/TIG's Exhibit 1, Pages 29-31)

Dr. Schlafly retestified on November 18, 2004. Based on his reexamination of employee on September 28, 2004 and his review of the medical records, Dr. Schlafly opined that employee should remain under the care of Dr. Guarino for medical management of his chronic low back pain, unless he wishes to undergo the surgery recommended by Dr. Robson. He stated that it was not unreasonable for claimant to obtain as much relief as possible from conservative treatment before electing to undergo surgery. Dr. Schlafly opined that the continued care resulted from his work injuries of May 11, 2001 and January 7, 2002. (Claimant's Exhibit A-1, Pages 20, 23 & 25-26 & depo ex A, p. 3)

Dr. Schlafly agreed with the work restrictions recommended by Dr. Tate of no lifting greater than 20 pounds and no excessive bending or twisting at the waist. (Claimant's Exhibit A-1, Pages 8 & 22 & depo ex A, p. 3) With respect to the increased weight restrictions, Dr. Schlafly pointed out that both he and Dr. Tate had examined claimant more recently than Dr. Robson. He opined that the overall condition of claimant's low back on reexamination was quite similar to its condition on November 19, 2002. (Claimant's Exhibit A-1, Pages 9 & 16)

Dr. Guarino retestified on June 14, 2004 that claimant still had intractable pain, that the injections had not had a significant effect on his pain, and that medications do help him. Dr. Guarino recommended that claimant continue with medications. (Claimant's Exhibit B, Page 9) Dr. Guarino testified that he prescribed Oxycontin, an extended form of Oxycodone, a narcotic, for his pain. He stated that because there is always a potential addiction problem, claimant needs to be evaluated by a physician on a regular basis. He prescribed Bextra for the inflammatory component of claimant's problems. (Claimant's Exhibit B, Pages 10-12) He again opined that claimant was going to need someone trained in pain management to help claimant manage his pain and medication for the rest of his life. (Claimant's Exhibit B, Page 12) Dr. Guarino thought that he would need to see a physician three or four times per year. He indicated that the medications could change depending on a number of circumstances, such as the development of intolerance for a medication or sensitivity to a

component of a medication. (Claimant's Exhibit B, Pages 14-15)

Additional Findings

As Dr. Robson has not examined claimant since August 28, 2002, his opinion on future medical treatment fails to take into consideration all of the additional pain management treatment provided by Dr. Guarino. Dr. Tate agreed that it was reasonable for employee to be taking maintenance medications.

Dr. Tate agreed that claimant should avoid surgery if at all possible. Drs. Schlafly and Guarino indicated that it is reasonable for claimant to undergo conservative medical management and postpone surgery as long as possible. They both recommended regular evaluations by a pain management specialist.

Based on the credible medical opinions of Drs. Schlafly and Guarino, I find that it is reasonable for claimant to undergo conservative medical management of his low back and left leg symptoms in order that he may avoid surgery as long as possible. Surgery carries many risks, including death. There is no guarantee that claimant will improve with surgery. I find that claimant's desires about his future treatment are reasonable.

Based on the opinions of Drs. Schlafly and Guarino, I find that claimant will continue for the foreseeable future to require medical management by a pain management specialist of his chronic low back and left leg pain. As I have previously found that both accidents were substantial factors in causing claimant's current medical condition, I find that employer and both insurers are jointly and severally liable for claimant's future medical treatment of his low back condition. I further find that employer, by failing to provide any medical treatment to claimant for three years, has waived its right to select the treatment provider. Employer/insurer are hereby ordered to provide such pain management treatment for claimant's low back and left leg as may reasonably be required ... to cure and relieve [the employee] from the effects of the work-related injury. Employer/insurer are further ordered to provide and pay for surgery on claimant's low back at such time as he elects to undergo it.

PERMANENT PARTIAL DISABILITY

The parties stipulated that Mr. Bosnjak sustained 15% permanent partial disability of body referable to the low back as a result of the work-related injury. In accordance with the stipulation of the parties, I find that employee sustained 15% permanent partial disability of body referable to the low back as a result of the work-related injury.

RECOVERY OF COSTS

On April 18, 2005 claimant filed a Motion for Sanctions and requested assessment of costs under Sections 287.560 Mo. Rev. Stat. (2000). The motion was heard on June 14, 2005.

Section 287.560 provides in part:

Any party shall be entitled ... at his own cost to take and use depositions in like manner as in civil cases in the circuit court. ... [T] hat if the Division or the Commission determines any proceedings have been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted, or defended them.

Employee alleged that he and employer/insurer entered into a settlement on the question of permanent partial disability and that employer/insurer agreed to make an advance payment of 15% permanent partial disability of the body.

The hearing of this case commenced on March 29, 2005. The parties stipulated that claimant sustained 15% permanent partial disability of the body as a result of the work-related injury. Claimant alleged that the insurer agreed to pay the appropriate sum money immediately.

General Casualty Company of Wisconsin issued a check in the amount of \$19,765.20 on April 15, 2005 payable to employee and his attorney. The check was received by employee's attorney on April 21, 2005.

The parties did not execute a written agreement. The evidence was conflicting as to when the checks were to be delivered to claimant's attorney.

Since the agreement was for the entire amount of permanent disability, I find that employer/insurer had no legal obligation to pay the agreed upon sum until after the parties stipulated on March 29, 2005 to the amount of permanent disability. I further find that the issuance of a check on April 15, 2005 for the full amount of the stipulated permanent disability was timely. The request for sanctions is denied.

SECOND INJURY FUND LIABILITY

Having settled his claim against employer, employee is seeking an award of additional permanent partial disability from the Second Injury Fund pursuant to Section 287.220.1 Mo. Rev. Stat. (2000). Under that Section an employee who has a preexisting permanent partial disability and who subsequently sustains a compensable injury may recover from the Second Injury Fund any additional permanent disability caused by the combination of the preexisting disability and the disability from the subsequent injury. The employer is liable only for the disability caused by the work-related accident. The Second Injury Fund is liable for the difference between the sum of the two disabilities considered separately and independently and the disability resulting from their combination. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985). In order to recover from the Second Injury Fund the employee must prove a prior permanent partial disability, whether from a compensable injury or not, a subsequent compensable injury, and a synergistic combination of the preexisting and subsequent disabilities.

Disability from Primary Injury

I previously found that claimant sustained 15% permanent partial disability of the body referable to the low back as a result of the January 7, 2002 work-related accident.

Disability from Prior Injuries or Conditions

The employee must next prove that he or she had a permanent partial disability or disabilities preexisting the present injury and the amount thereof which existed at the time of the compensable injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). It is not necessary that the "previous disability" be due to an injury. Section 287.220.1 was amended in 1993 to define the nature of the preexisting disability as "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed" The appellate courts have held that the portion of the 1993 amendment to Section 287.220.1 which modified the definition of preexisting disability was applicable to all pending cases without regard to the date of injury. Leutzinger v. Treasurer, 895 S.W.2d 591 (Mo. App. 1995); Lane v. Schreiber Foods, Inc., 903 S.W.2d 616 (Mo. App. 1995); Faulkner v. St. Luke's Hospital, 903 S.W.2d 588 (Mo. App. 1996). In Wuebbeling v. West County Drywall, 898 S.W.2d 615 (Mo. App. 1995), the court of appeals stated in dicta that "a previously existing condition that a cautious employer could perceive as having the potential to combine with a work related injury so as to produce a greater degree of disability than would occur in the absence of such condition" would constitute a hindrance or obstacle to employment or reemployment. Id. at 620. that test was adopted in Garibay v. Treasurer of Missouri, 930 S.W.2d 57, 60 (Mo. App. 1997). Being able to work, though in pain, following a previous injury is not incompatible with that injury being treated as a preexisting permanent partial disability. Hedrick v. Chrysler Corp., 900 S.W.2d 233, 236 (Mo. App. 1995).

The nature and extent of the preexisting disabilities are determined as of date of the primary injury. Garcia v. St. Louis County, 916 S.W.2d 263, 267 (Mo. App. 1995); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 366 (Mo. App. 1992); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 577 (Mo. App. 1985). The Second Injury Fund is not liable for any post-accident worsening of an employee's preexisting disabilities which are not caused or aggravated by the last work-related injury or for any conditions which arise after the last work-related injury. Garcia v. St. Louis County, *supra*; Frazier v. Treasurer of Missouri, 869 S.W.2d 152 (Mo. App. 1994); Lawrence v. Joplin R-VIII School Dist., 834 S.W.2d 789 (Mo. App. 1992); *see also* Wilhite v. Hurd, 411 S.W.2d 72 (Mo. 1967).

Employee claims that the following conditions constitute "previous disabilities" under Section 287.220.1: low back injury on May 11, 2001.

Findings with Respect to Preexisting disabilities

I found in Injury No. 01-114961, also decided today, that claimant sustained 17.5% permanent partial disability of the body referable to the low back as a result of the May 11, 2001 work-related accident.

Under Section 287.190.6 Mo. Rev. Stat. (2000) the amount of disability determined in a prior award or approved settlement is presumed to continue undiminished if the same member or same part of the body is reinjured and results in permanent partial disability for which compensation may be due. The employee is barred from offering evidence that the amount of disability has decreased since the prior determination. Helm v. SCE, Inc., 761 S.W.2d 199, 200 (Mo. App. 1988).

Findings with Respect to Preexisting disabilities

Based on my findings in the awards in Injury Nos. 01-114961, I find that employee had 17.5% permanent partial disability of the body referable to the low back immediately prior to the January 7, 2002 injury to his low back and that such disability was "of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed"

Thresholds

The 1993 amendment to Section 287.220.1 also established minimum threshold requirements with respect to both the preexisting disability and the subsequent compensable injury of 50 weeks for a body as a whole injury or 15% of a major extremity. The appellate courts have held that these requirements are not to be applied retroactively. Smart v. Missouri State Treasurer, 916 Mo. App. 367 (Mo. App. 1996); Fletcher v. Treasurer, 922 S.W.2d 402 (Mo. App. 1996); Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Suarez v. Treasurer of Mo., 924 S.W.2d 602, 604 (Mo. App. 1996); Faulkner v. Chrysler Corporation, 924 S.W.2d 866 (Mo. App. 1996).

Based on my prior findings, I find that employee meets the threshold requirements with respect to both his preexisting disability and primary injury.

Combination Of Preexisting And Primary Disabilities

The employee must next prove a combination effect. The 1993 amendment also added the word "substantially" in describing the greater overall disability. The employee must show that his or her present compensable injury combines with the preexisting permanent partial disability to cause a substantially greater overall disability than the sum of the disabilities considered independently. Cartwright v. Wells Fargo Armored Serv., 921 S.W.2d 165, 167 (Mo. App. 1996); Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995); Brown v. Treasurer of Missouri, 795 S.W.2d 479, 482 (Mo. App. 1990); Anderson v. Emerson Elec. Co., 698 S.W.2d 574, 576-77 (Mo. App. 1985).

As a general rule, where the first and second injuries are to the same part of the body the second injury supplements the first rather than combining to create a greater disability than the sum of the two. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 178 (Mo. App. 1995)

No evidence was adduced with respect to the combination of the disability from the May 11, 2000 low back injury with the January 7, 2002 low back injury.

Dr. Bruce Schlafly opined that claimant has 40% permanent partial disability of the body referable to the low back. He attributed 20% permanent partial disability of the body to the May 11, 2001 injury and 20% permanent partial disability of the body to the January 7, 2002 injury. (Claimant's Exhibits A, Pages 31-33 and A-1, depo ex A, p. 3) There is no language in Dr. Schlafly's report suggesting a greater degree of disability or of "synergistic enhancement". Dr. Schlafly's testimony does not provide any suggestion that there is any greater disability than the simple sum. (Claimant's Exhibit A, Page 6)

Claimant contends that the decision in Uhlir v. Farmer, 94 S.W.3d 441 (Mo. App. 2003) justifies an award against the Second Injury Fund when the primary and preexisting injuries are to the same parts of the body. However, the appellate court in Uhlir carefully distinguished that case from Searcy in that Uhlir had a medical expert specifically stating that the combination of his back disabilities was significantly greater than their simple sum. Uhlir at 443. Such is not the case here. Like the claimant in Searcy, Mr. Bosnjak's medical expert simply added together the low back disabilities - there is no finding of synergy.

Based on all of the evidence, I find that claimant failed to prove that there was any additional disability caused by the combination of the preexisting disability in his low back with the disability in his low back from the primary injury. Accordingly, the claim against the Second Injury Fund is denied.

ATTORNEY'S FEES

This award is subject to a lien in the amount of 25% of the additional payments hereunder in favor of the employee's attorney, Ray A. Gerritzen, for necessary legal services rendered to the employee.

Date: _____ Made by: _____
JOHN HOWARD PERCY

*Administrative Law Judge
Division of Workers' Compensation*

A true copy: Attest:

Patricia "Pat" Secret
*Director
Division of Workers' Compensation*

[1] Additional bills were submitted for treatment rendered after July 22, 2005. (Claimant's Exhibit's R, T, U, V, and W) Those bills will not be considered in this proceeding because claimant sustained another work-related injury on July 23, 2005 at Kirchner Bock & Brick, Inc. and has filed another claim for compensation. The records of Dr. Guarino, who is treating employee, suggest that employee is being treated for the new injury. See findings on Page 10 infra.

Claimant's Motion to Accept Additional Evidence filed on September 20, 2005 is denied as the additional medical records and bills are for services rendered after July 22, 2005.

[2] Dr. Lange's records were not introduced into evidence.

[3] Claimant testified that he did not undergo the injection because the procedure was cancelled by the insurance company.

[4] This incident is the subject of Injury No. 02-022819. Employer's workers' compensation liability was as of January 7, 2002 insured by General Casualty Company of Wisconsin.

[5] No additional claim was filed for this incident. Claimant did not testify about this incident at the hearing.

[6] This record was not in evidence.

[7] The report of this evaluation was not in evidence.

[8] Dr. Schlafly's opinions and recommendations are discussed on Page 11 infra.

[9] There were no medical records in evidence for those dates.

[10] The medical records documenting these injections were not in evidence. As the charges and billing codes on Exhibit M are identical to the charges and billing codes for the 2003 epidural steroid injections in Exhibit F, it is reasonable to infer that the charges on Exhibit M are for epidural steroid injections.

[11] Dr. Tate also stated that she was unaware of any specific data in the scientific literature which would show that degenerative changes occur "greater" in someone who does the kind of work that Mr. Bosnjak performs as compared to the general population. It is not clear whether she meant with greater frequency or greater severity. (Employer/TIG's Exhibit 1, Page 21)

[12] In his second deposition on June 14, 2004, Dr. Guarino seemed to opine on cross examination that claimant had reached maximum medical improvement in January of 2004, though his reference to the functional capacity evaluation (performed on August 28, 2002) was confusing. (Claimant's Exhibit B, Page 16) Perhaps he was referring to Dr. Tate's examination of employee on January 8, 2004. (Employer/TIG's Exhibit 1, depo ex 2)

[13] This bill was reduced \$10.00 by excluding a prescription for Cephalexin, an antibiotic, filled on February 28, 2002. Nothing in evidence suggests that this prescription was for a work-related back injury. I included a bill in the amount of \$20.00 for Ultracet on January 23, 2002 prescribed by Dr. Tate. Claimant should not have been charged for this prescription.

[14] A bill for \$989.60 for a Lidoderm Patch was not included in the total as it was not for Mr. Bosnjak.

[15] The exhibits corresponding to the bills are set forth on page 9 supra.

[16] Claimant's Exhibit G consists of copies of checks which claimant wrote to Washington University Pain Control (Dr. Guarino) and Barnes Jewish West County Hospital. Five of the checks are for bills for Dr. Guarino's services. They are noted on his bills.

[17] Claimant's Exhibit G consists of copies of checks which claimant wrote to Washington University Pain Control (Dr. Guarino) and Barnes Jewish West County Hospital. Seven of the checks which total \$900.88 are for Barnes Jewish Hospital. It is not possible to match these checks to any of the bills and determine what services were being paid. No reimbursement of these items is awarded at this time. Claimant should go to Barnes Jewish Hospital and obtain a complete billing statement.

Claimant's Exhibit F includes a collection letter from Nicholas G. Higgins on behalf of Barnes Jewish West County Hospital for \$1,073.00. As

no bill was attached to the letter, it is impossible to determine whether it should be included. It is possible that this letter represents the two physical therapy bills in Claimant's Substitute Exhibit I which total \$1,073.00.

[18] The specific bills are discussed on Pages 15 and 16 supra.

[19] Additional bills were submitted for treatment rendered after July 22, 2005. (Claimant's Exhibit's R, T, U, V, and W) Those bills will not be considered in this proceeding because claimant sustained another work-related injury on July 23, 2005 at Kirchner Bock & Brick, Inc. and has filed another claim for compensation. The records of Dr. Guarino, who is treating employee, suggest that employee is being treated for the new injury. See findings on Page 10 infra.

Claimant's Motion to Accept Additional Evidence filed on September 20, 2005 is denied as the additional medical records and bills are for services rendered after July 22, 2005.

[20] Dr. Lange's records were not introduced into evidence.

[21] Claimant testified that he did not undergo the injection because the procedure was cancelled by the insurance company.

[22] This incident is the subject of Injury No. 02-022819. Employer's workers' compensation liability was as of January 7, 2002 insured by General Casualty Company of Wisconsin.

[23] No additional claim was filed for this incident. Claimant did not testify about this incident at the hearing.

[24] This record was not in evidence.

[25] The report of this evaluation was not in evidence.

[26] Dr. Schlafly's opinions and recommendations are discussed on Page 11 infra.

[27] There were no medical records in evidence for those dates.

[28] The medical records documenting these injections were not in evidence. As the charges and billing codes on Exhibit M are identical to the charges and billing codes for the 2003 epidural steroid injections in Exhibit F, it is reasonable to infer that the charges on Exhibit M are for epidural steroid injections.

[29] Dr. Tate also stated that she was unaware of any specific data in the scientific literature which would show that degenerative changes occur "greater" in someone who does the kind of work that Mr. Bosnjak performs as compared to the general population. It is not clear whether she meant with greater frequency or greater severity. (Employer/TIG's Exhibit 1, Page 21)

[30] In his second deposition on June 14, 2004, Dr. Guarino seemed to opine on cross examination that claimant had reached maximum medical improvement in January of 2004, though his reference to the functional capacity evaluation (performed on August 28, 2002) was confusing. (Claimant's Exhibit B, Page 16) Perhaps he was referring to Dr. Tate's examination of employee on January 8, 2004. (Employer/TIG's Exhibit 1, depo ex 2)

[31] This bill was reduced \$10.00 by excluding a prescription for Cephalexin, an antibiotic, filled on February 28, 2002. Nothing in evidence suggests that this prescription was for a work-related back injury. I included a bill in the amount of \$20.00 for Ultracet on January 23, 2002 prescribed by Dr. Tate. Claimant should not have been charged for this prescription.

[32] A bill for \$989.60 for a Lidoderm Patch was not included in the total as it was not for Mr. Bosnjak.

[33] The exhibits corresponding to the bills are set forth on page 9 supra.

[34] Claimant's Exhibit G consists of copies of checks which claimant wrote to Washington University Pain Control (Dr. Guarino) and Barnes Jewish West County Hospital. Five of the checks are for bills for Dr. Guarino's services. They are noted on his bills.

[35] Claimant's Exhibit G consists of copies of checks which claimant wrote to Washington University Pain Control (Dr. Guarino) and Barnes Jewish West County Hospital. Seven of the checks which total \$900.88 are for Barnes Jewish Hospital. It is not possible to match these checks to any of the bills and determine what services were being paid. No reimbursement of these items is awarded at this time. Claimant should go to Barnes Jewish Hospital and obtain a complete billing statement.

Claimant's Exhibit F includes a collection letter from Nicholas G. Higgins on behalf of Barnes Jewish West County Hospital for \$1,073.00. As no bill was attached to the letter, it is impossible to determine whether it should be included. It is possible that this letter represents the two physical therapy bills in Claimant's Substitute Exhibit I which total \$1,073.00.

[36] The specific bills are discussed on Pages 15 and 16 supra.