

**TEMPORARY AWARD ALLOWING COMPENSATION**  
(Modifying Award and Decision of Administrative Law Judge  
by Separate Opinion)

Injury No.: 08-058245

Employee: Edward Burkman

Employer: Marquand Pallet Stock, Inc.

Insurer: Missouri Wood Industry Insurance Trust c/o CCMSI

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.<sup>1</sup> We have reviewed the evidence and briefs, heard oral argument and considered the whole record. Pursuant to § 286.090 RSMo, we issue this temporary award modifying the March 28, 2011, temporary or partial award of the administrative law judge (ALJ). We adopt the findings, conclusions, decision and award of the ALJ to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

We agree with the ALJ's conclusion that employee established through the medical opinions of Dr. Vaught and Dr. Hogan that he is in need of additional medical treatment to cure and relieve him from the effects of his June 9, 2008, work-related injury. However, we find that the ALJ erred in finding that employer has waived its right to direct employee's medical treatment and ordering that said treatment be provided by a specific doctor.

First of all, we find that employee failed to prove under § 287.140.2 RSMo that his health and recovery has been endangered by the medical treatment provided by employer. Further, even if employee met this burden, the only relief provided under § 287.140.2 RSMo is that "the [D]ivision or the [C]ommission may order a **change** in the physician, surgeon, hospital or other requirement." (Emphasis added). Section 287.140.2 RSMo does not authorize the Division or the Commission to **appoint** a specific doctor to provide the employee's medical treatment. For the foregoing reasons, we find that the ALJ erred in ordering employee's additional medical treatment be provided specifically by Dr. Vaught.

We conclude that employee has established he is entitled to additional medical treatment to cure and relieve him of the effects of his work-related injury and we order employer to provide the same. Employer has not waived its right to select the physician to provide said treatment.

The award and decision of Administrative Law Judge Maureen Tilley issued March 28, 2011, is attached hereto and incorporated herein to the extent it is not inconsistent with this temporary award.

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

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<sup>1</sup> Statutory references are to the Revised Statutes of Missouri 2007 unless otherwise indicated.

Employee: Edward Burkman

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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 30<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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Curtis E. Chick, Jr., Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**TEMPORARY OR PARTIAL AWARD**

Employee: Edward Burkman Injury No. 08-058245  
Injury Date: 6/9/08  
Employer: Marquand Pallet Stock, Inc.  
Insurer: Missouri Wood Industry Insurance Trust c/o CCMSI  
Hearing Date: 1/27/11 Checked by: MT/rf

**SUMMARY OF FINDINGS**

1. Are benefits awarded herein? Yes.
2. Was the injury compensable under Chapter 287? Yes.
3. Was there an accident under the Law? Yes.
4. Date of Accident: June 9, 2008.
5. Was Employee employed by Employer on the date of accident? Yes.
6. Location where accident occurred: Madison County, Missouri.
7. Did Employee receive proper Notice? Yes.
8. Did accident arise out of and in the course of employment? Yes.
9. Was Claim For Compensation filed within the time allowed by law? Yes.
10. Was Employer insured by above Insurer? Yes.
11. Describe what Employee was doing and how accident happened: Employee was cutting timber and stepped into a hole and fell.
12. Did accident cause death? No.
13. Part(s) of body injured in accident: Back, left lower extremity, body as a whole.

14. Compensation paid to date for Temporary Total Disability and/or Temporary Partial Disability: None.
15. Value necessary medical aid paid to date by Employer/Insurer: \$1,052.47
16. Value necessary medical aid not paid to date by Employer/Insurer: None.
17. Employee's Average Weekly Wage: \$368.03
18. Weekly compensation rate: \$245.35
19. Method wages computed: See findings.
20. Compensation payable: See findings.

This award is only temporary and partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

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

## **FINDINGS OF FACT AND RULINGS OF LAW**

On January 27, 2011, Edward Burkman appeared in person and with his attorney, Boyd Green, for a hearing for Temporary Award. The Employer/Insurer was represented at the hearing by its attorney, Paul Huck. At the time of the hearing, the parties agreed on certain undisputed facts, and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the Findings of Fact and Rulings of Law, are set forth below as follows:

### **UNDISPUTED FACTS:**

1. On or about 6/9/08, Marquand Pallet Stock, Inc. was a covered Employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and its liability was fully covered by Missouri Wood Industry Insurance Trust.
2. Employer/Insurer received timely and proper notice of Employee's accident.
3. Employee's claim was filed within the time allowed by law.
4. Employer/Insurer has paid medical expenses to date in the amount of \$1,052.47.
5. Employer/Insurer has paid no Temporary Total Disability to date.

### **ISSUES:**

1. Covered Employee.
2. Accident.
3. Average Weekly Wage and rate.
4. Medical causation.
5. Claim for additional or future medical aid.
6. Claim for past due TTD. Employee seeks TTD for a total of 136 and 6/7 weeks, for the time period of 6/13/08 through the date of hearing (1/27/11), in the amount of \$35,533.29, and ongoing TTD benefits past the date of hearing until medically capable of returning to work.

### **EXHIBITS:**

The following exhibits were offered into evidence:

#### Employee's Exhibits

- A. Medical Records packet, with subsections as follows:
  1. Wills Chiropractic Center
  2. Cross Trails Medical Center (Dr. Doyle)
  3. Clinical Neurology, Inc. (Dr. Hogan)
  4. Cardinal Neurosurgery & Spine, Inc. (Dr. Kitchens)
  5. Brain & Neurospine Clinic of Missouri (Dr. Vaught)
  6. St. Francis Medical Center (1998 MVA)
  7. Jefferson Memorial Hospital (2003)

- B. Dr. Vaught deposition with attachments
- C. Photocopies of paystubs of Employee Edward Burkman
- D. Wage rate calculation sheet

Employer's Exhibits

- 1. Form 1- Report of Injury dated 7/7/08
- 2. Marquand Pallet Stock, Inc. payroll summary dated 3/9/08 to 6/8/08
- 3. IRS Notice of Levy on Wages for period ending 12/31/03 for \$9,976.19
- 4. Medical records-St. Francis Medical Center 8/5/98-8/7/98
- 5. Medical records-Jefferson Memorial Hospital 6/6/03-8/5/03
- 6. Medical records-Wills Chiropractic Center 6/10/08-6/20/08
- 7. Medical records-Dr. Doyle/Cross Trails Medical Center 6/19/08-9/10/09
- 8. Medical records-Dr. Patrick Hogan 11/2/09-11/23/09
- 9. Medical records-Hampton Open MRI 11/12/09
- 10. Deposition of Dr. Daniel Kitchens with attachments
- 11. Tree count calculation sheet
- 12. Affidavit of Dwayne Gipson

All exhibits were admitted without objection.

**FINDINGS OF FACT:**

**Employee Testimony**

Edward Burkman, the employee is a resident of Lowndes, Missouri. He is 42 years old. He lives with his fiancé Carmen Foster. He has five children. He pays child support for two of his daughters. He is not currently employed as he has not been physically able to work since his work injury of 6/9/08.

The employee grew up in the Zalma, Missouri area. He graduated from Zalma High School. After high school he entered the work force. Most of his work career has been spent in the logger/timber cutting trade. His first job after school was with Central Pallet Mills Inc. in Wappapello, Missouri. Following that job, he spent some time as a journeyman painter. He then returned to logging and worked for Tim Burchett in Marble Hill, Missouri for several years. He then spent some time as a sheet metal worker through the union in Poplar Bluff and later in St. Louis. He wearied of city life and returned to Southeast Missouri and the logging trade. He worked for Jones Logging in Puxico, Missouri for a year or two. After that he hired on with Marquand Pallet Stock, Inc.

The employee was hired by Marquand Pallet Stock in June 2007. He interviewed with the owner, Dwayne Gipson, about hiring on as a log cutter. Mr. Gipson and the employee discussed the terms of employment, including job duties and amount and calculation of wages. The employee testified he was hired on as a full-time employee. His wages were calculated based on production, at the rate of \$2.75 per tree cut. The owner Dwayne Gipson was to supply

all the necessary tools and materials necessary for the job. At the time of hire, the employee was furnished with a company-owned chainsaw and tool packet for saw maintenance.

The employee was paid his employee wages weekly, each Friday. The employee stated that when he was hired, the owner, Dwayne Gipson, explained that the total weekly compensation was based on the amount of trees cut per the piecemeal rate. However, it was the company's policy to divide the total amount in half, and issue two separate checks. One check was deemed the payroll check, and the other check was designated as reimbursement of expenses. Since it was a straight 50/50 division of the overall amount, each of the two weekly checks was for the same amount (within a penny occasionally). The check deemed as payroll wages had withholdings deducted weekly, consisting of Social Security withholdings, Medicare withholdings, state of Missouri tax withholdings, and child support withholdings. The second check, deemed reimbursement of expenses, included no withholdings (Employee's Exhibit C). The employee testified that he had no choice in this arrangement, that this was the company's policy. The employee testified that this arrangement, characterizing one half of each week's pay as "expense reimbursement", was purely a fiction created by the Employer, since the actual amount of incurred expenses each week was much less. The employee testified that on average, his incurred weekly expenses were about \$30 per week. These actually incurred expenses usually consisted of expenses for chainsaw gasoline, chainsaw files, bar oil, and also purchasing replacement saw chains every couple weeks. To demonstrate the fact that the expense arrangement was a fiction, the employee testified that the skidder driver, Lonnie Frymire, also had his weekly wages divided in half, with half designated as expense reimbursement, even though, since his only duty was to operate the skidder, he had no actual expenses at all on a weekly basis.

The employee's job was to cut down trees. The usual operation involved a two to three man team. The employee testified that he typically worked with a co-employee named Lonnie Frymire, who operated the log skidder. In addition to the chainsaw used by the employee, there was other, large equipment used for the log-cutting operation. One large vehicle was called a log skidder, which was a large tractor-like vehicle that was used to go through the woods and pull the cut trees out of the woods and up to a landing. Another piece of equipment called a loader, then picked up the cut logs with a long arm and pulled the logs into a slasher that cut the logs into links. The cut links are then loaded onto a log truck, a large 18 wheeled truck, which is loaded full to transport the cut logs to the mill. The company owner, Dwayne Gipson, often ran both the loader and the log truck.

The employee testified that all of this equipment, from the chainsaw he used, to the log skidder, loader, and log truck, was owned by the company. The employee did not supply any of his own equipment during his employment with Employer. In addition to the logging vehicles, Marquand Pallet Stock supplied company pickup trucks for the employees to drive to and from work. The one main company pickup truck had recently been wrecked by the skidder operator Lonnie Frymire. Prior to that time, the truck was used to drive Lonnie and the other employees to and from the woods each day. The vehicles were marked with the company logo of Marquand Pallet Stock.

The employee testified about the specifics of the logging operation of Marquand Pallet Stock, Inc. He stated that the company owner, Dwayne Gipson, was responsible for procuring the jobs. Mr. Gipson would solicit landowners in the area and contract with them to harvest timber off their properties. This task, soliciting the jobs, was under Mr. Gipson's exclusive control; the employee and Mr. Frymire had no involvement in arranging contracts or setting up the harvesting jobs. Once Mr. Gipson procured a job to harvest timber off a landowner's property, Mr. Gipson directed and oversaw the activities on the jobsite. The employee testified that he never knew from one job to the next where his crew would be cutting.

The employee testified that he did not have the discretion or ability to refuse to cut where Mr. Gipson instructed him to. If he had refused to cut a tract as instructed, he would have been terminated from employment. The employee also testified that he did not have discretion to cut logs for anyone other than Marquand Pallet Stock, Inc. If he had gone and cut logs for anyone else, he would have been terminated from employment.

### **Prior medical history**

The employee testified about a couple of prior injuries in his lifetime that pre-dated the present work injury. In 1998, the employee was involved in a motor vehicle accident on a county road in Bollinger County, Missouri. He received treatment from St. Francis Medical Center (Employee's Exhibit A-6). The employee testified that his injuries from that accident included a laceration to his left lower leg, a left clavicle fracture, and assorted abrasions and facial lacerations. This is consistent with the medical records in evidence. Of note, the records do not indicate any injury to the employee's lumbar spine, and there is no treatment for same. *Id.*

In 2003, the employee had an accident while cutting trees. He suffered a head injury and an injury to his right leg. He obtained treatment at Jefferson Memorial Hospital, and those medical records are in evidence (Employee's Exhibit A-7). This accident did not involve any injury to his lumbar spine or left leg. *Id.*

The employee also testified to another occasion while logging where he suffered a non-displaced fracture to his right leg just above the ankle. He testified that he wore a boot on the foot for about four weeks but then returned to work with no limitations.

The employee also testified about a congenital abnormality involving his right hip. He had a right hip replacement as an infant and a second right hip replacement at age 13. He thinks he will eventually need a third hip replacement involving his right hip. This problem is only with his right hip, he has no abnormality regarding his left hip.

The employee testified that he had never had low back problems prior to the work accident of 6/9/08. He had never before had to treat with any physician, chiropractor, or other provider for any kind of low back complaints. He had never had diagnostic films taken of his low back prior to this injury.

**Work accident of 6/9/08**

The employee testified regarding the work accident of 6/9/08. He was working with skidder operator Lonnie Frymire. They were cutting trees on a fairly steep hill that had quite a bit of brush on it. He testified that was trimming a tree. He was moving down a hill with his chainsaw in his hand when his left leg stepped into a hole that was hidden under some brush. His leg went down into the hole up to his knee. He twisted his back and fell over on to his left side, landing onto his buttocks. He was able to get up and tried to resume trimming. However, he had an immediate stabbing sensation in his low back. He had to set down his saw and sit down on a stump. The employee stated that Mr. Frymire asked what happened and the employee told him how he stepped in the hole and hurt his back. Mr. Frymire sat with him for a few minutes. The employee attempted again to resume work, but when he bent over to yank-start his chainsaw he again had severe back pain. The employee stated that Mr. Frymire took the saw from him and finished trimming the trees.

The employee stated that typically, when heading back up to the landing, the employee would climb up into the skidder with Mr. Frymire and ride up, but at that point the employee was unable to climb up into the skidder. The employee stated that he had to walk slowly up the hill, grabbing at saplings to help him up. By this time the employee was having excruciating pain shooting from his low back down to his left leg. The employee stated that they had to shut down cutting for the day, and the employee drove himself home.

Once home, the employee applied a heating pad to his back, took a couple of Tylenol, and lied down in a reclining chair. He was in great pain throughout the evening. He called Mr. Frymire and told him he was still hurting. The employee stated that Mr. Frymire then called and reported the employee's injury to owner Dwayne Gipson.

The next day, the employee drove to the mill in the morning and spoke in person with Dwayne Gipson. They discussed his injury and Mr. Gipson told the employee to go see a chiropractor. Mr. Gipson had a chiropractor that he had used in the past and Mr. Gipson told him to see him. The employee stated that Mr. Gipson told the employee he would pay the chiropractic bills. Mr. Gipson told him that if there was anything wrong with him, Mr. Gipson would pay for the bills. Mr. Gipson said he didn't want to turn the injury into Workers' Compensation because his rates would go up.

The records from Wills Chiropractic Center reflect the first visit on June 10, 2008, the day after the injury. That note reflects the history of injury after stepping into a hole while working. The employee was noted to have pain in the low back and left leg. Physical exam was deferred due to the amount of pain the employee was in (Employee's Exhibit A-1, p. 2).

The employee saw Dr. Wills again the next day, June 11<sup>th</sup>. The note indicates "the lumbar/leg syndrome has remained the same since the last visit." He was to be seen again in two days (Employee's Exhibit A-1, p. 2).

On June 13<sup>th</sup> he saw the chiropractor again. The doctor noted that the lumbar/leg syndrome had improved since the last visit, presumably because the employee had taken some pain medication. He was to be seen again in three days (Employee's Exhibit A-1, p. 2).

The employee testified that the treatment by Dr. Wills was not working. The employee said he was in a great amount of pain and talked to Dwayne Gipson again. This time, the employee said he needed to be seen by a medical doctor rather than a chiropractor. Mr. Gipson gave him the name of a doctor in Fredericktown and told the employee to make an appointment to be seen. The employee attempted to schedule in with this doctor but was not able to be seen due to the doctor not taking new patients at the time.

In the meantime, the employee saw the chiropractor one last time, on June 16<sup>th</sup>. It was noted that the lumbar/leg syndrome had remained the same since the last visit (Employee's Exhibit A-1, p. 2).

The employee testified that once he was told he couldn't be seen by the Fredericktown doctor, he went to Dwayne Gipson and told him that he had arranged to be seen by Dr. Doyle at Crosstrails Medical Center in Marble Hill, Missouri. Mr. Gipson said that was okay and to tell Dr. Doyle to send any bills to him.

The first visit with Dr. Doyle was on 6/19/08. That note reflects the history of injury by stepping in a hole and falling backwards at work about 10 days prior. Complaints were of back pain with pain radiating down the left leg. A body pain diagram shows left-sided back pain with left leg radicular symptoms. His symptoms were noted to be exacerbated by prolonged bending, sitting, standing, or movement. Physical exam noted active muscle spasms in the left paravertebral spine. There was a notation of a positive straight leg raise at 30 degrees. Clinical impression was acute myofascial strain, lumbar, with low back pain. Recommendations were for heat, ice, and stretching. Pain medication and muscle relaxers were prescribed. The note finally suggested that if no improvement by next visit, consideration would be for an MRI scan (Employee's Exhibit A-2, pp. 1-3).

The return visit to Dr. Doyle was on 6/26/09. That note reflects complaints of continued back pain along with pain radiating down the back of the left leg. Physical exam revealed continued muscle spasms in the lumbar spine and continued positive straight leg raises, invoking pain at 45 degrees on the right and 20 degrees on the left. Range of motion was noted to be decreased. Impression was acute myofascial pain in the lumbosacral spine. Dr. Doyle at that point recommended a lumbar MRI (Employee's Exhibit A-2, pp. 4-5).

The employee testified that he took the MRI recommendation to Dwayne Gipson. Mr. Gipson said that an MRI would be too expensive and that he couldn't pay for that. Mr. Gipson said he would try to get him in to see a doctor that he knew, but that if an MRI was going to be required he would have to turn the claim into workers' compensation as he wouldn't pay for that out of pocket.

The employee testified that Mr. Gipson never followed through on his promise to provide further care. The employee had been physically unable to work since the accident, and his pain was getting worse. The employee retained an attorney and a claim was filed. The Claim Form on file with the Division shows that the Claim was signed on 7/14/08 and stamped as received by the Division on 7/16/08.

Employer/Insurer arranged for a medical examination on 11/2/09 with neurologist Dr. Patrick Hogan in St. Louis. Dr. Patrick Hogan examined the employee on 11/2/09. The history of injury on 6/9/08 by stepping in a hole and falling was noted, along with persistent back and left leg pain since. The employee indicated if he moved quickly, coughed, or sneezed, it produced a pain down the back of the left leg into the foot. He also noted weakness of the left leg. His pain was averaging 4-5 on a 1 to 10 scale. Upon physical examination, Dr. Hogan noted a positive straight leg raise on the left. He also noted zero or absent ankle reflex in the left ankle, as well as diminished pinprick sensation on the lateral border and the lateral sole of the left foot. The employee was noted to walk with a limp favoring the left. He had weakness in plantar flexion of the left foot, as well as left low back pain and radiating left leg pain with standing toe touch. Dr. Hogan's assessment was that the employee had signs and symptoms compatible with a L5-S1 radiculopathy and suggested further treatment, starting with an MRI scan (Employee's Exhibit A-3, pp. 1-3).

The lumbar MRI was obtained at Hampton Open MRI on 11/12/09. It was done without contrast. The radiologist's findings included a disc bulge at L5-S1 to the left side with severe left sided stenosis (Employee's Exhibit A-3, pp. 4-5).

On 11/23/09, Dr. Hogan reviewed the MRI results. He believed there was a disc herniation at L5-S1 to the left, filling the left foramina of S1. He noted that the MRI film was of suboptimal quality. Even with the low quality scan, he was strongly suspicious of a disc herniation at that level (Employee Exhibit A-3, p. 6). The Employer/Insurer did not authorize further treatment with Dr. Hogan after this diagnosis.

The employer/insurer sent the employee to Dr. Kitchens examined the employee on 3/3/10. Dr. Kitchens noted the history of injury as "trimming a felled tree, going down hill, stepped into unseen hole with left foot. Went to the ground to the left side landing on butt." The employee reported that since the injury he has experienced pain in his back and down behind his left knee occasionally. He also reports numbness in his left foot, in the lateral aspect. His back pain becomes sharp and intense with prolonged sitting, standing, or walking. He gets relief by lying down in a recliner with a heating pad. He noted that he had been unable to work since the June 2008 accident. He reported the interim treatment history, beginning with the initial chiropractic care, then Dr. Doyle, and the prior evaluation with Dr. Hogan.

Dr. Kitchens states that the medical records confirm the diagnosis of degenerative disc disease with intermittent need for medical attention/treatment. The medical records do not support the diagnosis of an acute disc herniation in June 2008 which led to an acute lumbar radiculopathy requiring constant treatment until his MRI was obtained in November 2009. Dr.

Kitchens stated that the employee does have degenerative disc disease and degenerative disc bulging but no frank disc herniation.

On physical examination, the employee reported diminished pin prick in the lateral aspect and sole of the left foot. Motor exam did not identify evidence of nerve damage, impingement or injury. There was no pain to palpation of the lumbar spine. Straight leg raise did not produce any signs of acute nerve irritation. Dr. Kitchens stated that the absent left Achilles reflex identified by Dr. Hogan over a year post injury was not necessarily an indication of radiculopathy and could be a normal variant.

As a result of his evaluation, Dr. Kitchens' assessment was a diagnosis of degenerative disc disease at L3-4, L4-5, and L5-S1 with degenerative disc bulging at L4-5 and L5-S1. He opined that the employee did not require any additional treatment based on the work injury of 6/9/08. He felt the work injury was not the prevailing factor in his current medical condition of chronic lower back pain, left leg pain, or subjective numbness in his left foot. He felt that the employee was capable of working, and he gave no restrictions from the work injury (Employee's Exhibit A-4, pp. 1-8).

The employee testified that following the evaluation by Dr. Kitchens, his requests for further treatment were denied by Employer/Insurer. Employer/Insurer indicated to the employee and his counsel that they were relying on the opinions of Dr. Kitchens and would be offering no further care.

As a result, the employee sought out neurosurgeon Kevin Vaught of Brain & Neurospine Clinic of Missouri in Cape Girardeau, Missouri for an Independent Medical Evaluation. The evaluation with Dr. Vaught took place on 5/25/10. The employee presented on that date with the chief complaints of low back pain and left foot paresthesias. The history of injury was reported as cutting trees, walking downhill, stepping into a hole with his left foot and landing on his buttocks. The employee advised Dr. Vaught that his low back pain was aggravated by prolonged standing, bending, or walking. He was most comfortable when lying down. He suffered from persistent numbness/paresthesias in the left foot, as well as noticeable left foot weakness.

Dr. Vaught performed a physical examination of the employee. There were several positive findings on physical exam which correlated with a suspected L5-S1 radiculopathy. First, Dr. Vaught noted weakness of the left hamstring and left calf muscle. In addition, there was decreased pinprick sensation, in a S1 dermatomal pattern, in the left leg. Further, Dr. Vaught noted the complete lack of a left Achilles reflex. Finally, Dr. Vaught noted tenderness to palpation over the lower lumbar facets at L-S1.

Dr. Vaught reviewed all relevant medical records regarding the employee and his care since the work injury. Included in these records was the 11/12/09 lumbar MRI. Mr. Vaught testified in deposition that he reviewed actual film rather than simply a radiology report. Regarding this MRI, Dr. Vaught noted that the study was suboptimal, with artifact on the majority of the imaging. Even so, he noted the findings of probable disc protrusion at L4-5 centrally and at L5-S1, which produced compression of the thecal sac, increasing the central canal stenosis as well as displacing the exiting nerve roots.

As a result of his overall evaluation, Dr. Vaught diagnosed:

- Low back pain, and
- Left leg pain and paresthesias suggestive of an S1 radiculopathy.

Dr. Vaught opined that the work injury of 6/9/08 was the prevailing factor in these diagnoses. He did not feel that the employee was at maximum medical improvement. He stated that the employee needed additional medical care, starting first with a repeat MRI of better diagnostic quality, followed by a repeat neurosurgical evaluation, and noted that the patient may require surgical decompression. Dr. Vaught did not believe that the medical treatment received to-date was adequate to address his current complaints and problems. Finally, Dr. Vaught noted that the patient was not cleared from a neurosurgical standpoint to return to work (Employee's Exhibit A-5).

The employee testified that his current complaints are the same as they have been since the date of injury. His left low back pain was greater than his right low back pain. He also has left leg weakness, and left leg and foot numbness. He states that at the present time his left foot is numb virtually all the time. He loses his balance easily due to no feeling in the foot. He has not been physically able to work a 40 hour work week since the 6/9/08 injury. He has sporadically done some odd jobs of short duration as his physical condition allows, including chopping some firewood and hauling scrap metal. These odd jobs have been very sporadic in nature, on average a few hours per month. He cannot sustain any prolonged physical activity due to his back and leg condition. He spends a typical day at home, where most of his time is spent in a recliner chair with a heating pad. He has not had any ongoing treatment for his condition since getting Dr. Vaught's recommendations for further care.

The employee stated that he periodically goes to Dr. Doyle at Crosstrails Medical Center for prescription of pain medication. He takes his prescribed pain medicine daily as directed by Dr. Doyle. The employee testified he would like Dr. Vaught to take over control of his medical care and to follow through with the recommendations he has given.

## **RULINGS OF LAW:**

### ***Issue 1. Covered Employee***

Section RSMO 287.020.1 defines an employee as "every person in the service of any employer, as defined in this chapter, under any contract of hire, express or implied, oral or written, or under any appointment or election, including executive officers of corporations".

To determine whether an employment relationship exists, Missouri courts first apply a two factor test sometimes referred to as the "controllable services test." *Lynn v. Lloyd A. Lynn, Inc.*, 493 S.W.2d 363 (Mo.App.1973).

Under the controllable services test, the worker must first be found to have been "in the service of" the alleged employer, and second, the services of the worker must be controllable by the alleged employer. The employment relationship contemplated by the workers' compensation

law is peculiarly characterized by the right vested in the employer to control the employee. To be considered an employee, a worker must be subject to the alleged employer's control with respect to the worker's physical conduct and their performance of the service in question. The right in question is the right to control the manner and means of the employee's service, as distinguished from the right to control the ultimate result of that service. *Howard v. Winebrenner*, 499 S.W.2d, 389 (Mo.App.1973).

Missouri courts typically apply the "right to control" test to determine whether a worker is an employee or independent contractor. The employer must have the right to control the means and the manner of the service, not just the ultimate result of the service. The courts consider eight factors when making the determination: (1) the extent of control, (2) the actual exercise of control, (3) the duration of the employment, (4) the right to discharge, (5) the method of payment, (6) the degree to which the alleged employer furnished equipment, (7) the extent to which the alleged employment is the regular business of the employer, and (8) the employment contract". *Nunn v. C.C. Midwest*, 151 S.W.3d 388, 400 (Mo. App. W.D. 2004).

The actual exercise of control, the extent of control, the duration of employment, method of payment for services, the furnishing of equipment to the worker by the employer, the relationship of the services to the regular business of the employer, and the contract of employment are all relevant factors to be considered when attempting to ascertain the existence or the right of control. *Hutchison v. St. Louis Altenheim*, 858 S.W.2d 304 (Mo.App.1993).

Even though each case must be decided on the basis of its particular facts, no singular finding is more conclusive of the existence of an employment relationship than the existence of the employer's unrestricted right to end the service of the worker whenever it chooses to do so, without regard to the final result of the work itself. *Maltz v. Jackoway – Katz Cap Company*, 82 S.W.2d 909 (Mo.App.1935).

The right of an employer to fire an employee without incurring breach of contractual liability is an indication of the existence of an employment relationship. *Cope v. House of Maret*, 729 S.W.2d 641 (Mo.App.1987).

### **1. Extent of control and 2. The actual exercise of control**

Employer exercised control over the details of the log cutting operation. The employee testified that Mr. Gipson was in charge of contacting the landowners and striking the deal for his company to harvest timber off their land. He would go to the saw mill each morning. From there they would be given their assignment and location for the day.

The employee also testified that at the beginning of each log cutting job, Mr. Gipson would travel out to the woods with the employee and Mr. Frymire, and issue detailed instructions for each particular job. Mr. Gipson would tell the employee were to cut and how to cut.

### **3. The duration of the employment**

The employee testified that his was steady, continuous work for Employer, interrupted only by switching job sites, equipment problems, or delays cause by the weather or elements. This is confirmed by the history of paystubs submitted in evidence showing steady work over a period exceeding two years (Employee's Exhibit C).

### **4. The right to discharge**

The employee testified that he did not have the discretion or ability to refuse to cut where Mr. Gipson instructed him to. If he had refused to cut a tract as instructed, he would have been terminated from employment. The employee also testified that he did not have discretion to cut logs for anyone other than Marquand Pallet Stock, Inc. If he had gone and cut logs for anyone else, he would have been terminated from employment.

### **5. The method of payment**

The employee was added to the company payroll upon hire in June 2007. He was paid every week on Friday by payroll check (and accompanying expense check). On the payroll check, he is clearly identified as "Employee". In addition, the Employer withheld a portion of each week's pay for federal and state taxes, Social Security, Medicare, and child support withholdings (Employee's Exhibit C).

### **6. The degree to which the alleged employer furnished equipment**

The evidence establishes that Marquand Pallet Stock, Inc. owned and supplied virtually all the necessary tools required for the cutting of timber. These tools included:

1. Log skidder truck (used to pull felled trees out of the woods);
2. Loader (used to pick up felled trees and carry them to the slasher);
3. Slasher (used to cut the felled trees into links);
4. Log truck (used to transport cut links to the mill);
5. Company pickup truck (used to transport employees to and from woods);
6. Chainsaw (used to cut trees); and
7. Tool belt (contained tools for saw maintenance).

The employee did not bring any of his own tools into his employment with Marquand Pallet Stock. The employee testified that the several pieces of heavy equipment such as the log skidder, loader, and log truck were items that cost hundreds of thousands of dollar. During his employment, he was responsible for occasionally acquiring replacement supplies, such as chainsaw gasoline, saw chains, bar oil and files.

**7. The extent to which the alleged employment is the regular business of the employer.**

As a logger, Employee was working in the general field of wood harvesting and production. Marquand Pallet Stock, as its name implies, produced wooden pallets. Thus Employee's services and labor fell under the same general umbrella of wood processing as did his Employer.

**8. The employment contract**

There was no evidence presented regarding an employment contract. Based on the evidence presented, it is evident that the employer could fire the employee without a breach of contract.

Based on the evidence presented, I find that the employee was in the service of the alleged employer and that the employer exercised control over the employee.

It is clear under the "Controllable Services Test" that Mr. Burkman was an employee of Marquand Pallet Stock, Inc. The courts have noted that when employment is proven via the "Controllable Services Test", the issue is conclusively decided, without need for any further analysis. Based on all of the evidence presented, I find that Mr. Burkman was an employee of Marquand Pallet Stock, Inc.

***Issue 2. Accident***

The employee's testimony regarding stepping into a hole, falling to the left side, and landing on his buttock, is corroborated by the treatment records of Wills Chiropractic Center. The first note from Wills Chiropractic Center is dated the day after the accident, June 10<sup>th</sup>. This is consistent with the employee's chronology. It contains the history of stepping into the hole at work. All of the subsequent medical records contain a consistent history of accident in the woods on 6/9/08. The Report of Injury on file with the Division also contains a consistent recitation of injury by stepping in a hole on 6/9/08.

Based on all of the evidence presented, I find that the employee was a credible witness. Furthermore, based on all of the evidence presented, I find that on 6/9/08, the employee sustained an accident arising out of and in the course of his employment.

***Issue 3. Average Weekly Wage and Rate***

The calculation of an employee's average weekly wage is governed by Section 287.250 (1) RSMo. Subsection (4) therein states, in part, "If the wages were fixed by the...output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than thirteen weeks, by the number of calendar weeks, or any portion of a week, during

which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered as absence for the calendar week. If the employee commenced employment on a day other than the beginning of a calendar week, such a calendar week and the wages earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision”

Section 287.250 (1) RSMo. Subsection (7) states “In computing the average weekly wage pursuant to subsection (1) to (6) of this subsection, an employee shall be considered to have been actually employed for only those weeks in which labor is actually performed by the employee for the employer and wages are actually paid by the employer as compensation for such labor.

Section 287.250 (3) RSMo. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee’s average weekly wage.

Employer’s Exhibit 2, a payroll summary, simply calculates the employee’s net pay prior to the employee’s injury. It does not indicate how many days a week the employee actually worked. Therefore, it is impossible to determine what days the employee actually worked during this time period. Employer’s Exhibit 11 shows the tree count and price per tree leading up to the accident. Once again, this does indicate what days the employee actually worked during this time period.

Employee’s Exhibit D, AWW and TTD calculation sheet, and Exhibit C, paystub packet, do not state what days the employee actually worked. Furthermore, there are inconsistencies between the exhibits. Exhibit D gives a tree count for 5-25-08 through 5-31-08 and 5-18-08 through 5-24-08, while Exhibit C does not contain a pay stub for these time periods.

Furthermore, the employee testified that he missed two or three weeks of work during the last 13 weeks of employment before the accident. Therefore, the employee’s testimony did not clarify the exact days or weeks that the employee worked.

Based on the evidence presented, the only way the average weekly wage can fairly be determined is to use 287.250 (3) RSMo, the “catchall”.

Based on Employee’s Exhibit C, I clearly know what the employee made on the last 10 weeks of paystubs that were submitted.

Furthermore, the paystubs all show the employee’s pay checks and the employee’s reimbursements. The employee’s check for reimbursement was always the exact amount of his pay check. It is clear that the employee’s testimony regarding the minimal amount of money he actually spent on his job was credible. Based on this evidence, the calculation for average weekly wage will be:

- The last 10 weeks of pay checks,
- Plus the last 10 weeks of reimbursement for expenses,
- Minus 30 dollars a week,
- Divided by 10.

Week

1/13/08 through 1/19/08	\$252.75 * (2) = \$505.50- \$30 = \$475.50
1/20/08 through 1/26/08	\$45.38 * (2) = \$90.76-\$30 = \$60.76
1/27/08 through 03/01/08	NOT SUBMITTED
3/2/08 through 3/8/08	\$185.62* (2) = \$371.24-\$30 = \$341.24
3/9/08 through 3/15/08	NOT SUBMITTED
3/16/08 through 3/22/08	\$137.50* (2) = \$275.00-\$30 = \$245.00
3/23/08 through 3/29/08	\$265.75* (2) = \$531.50-\$30 = \$501.50
3/30/08 through 4/5/08	\$311.87* (2) = \$623.74-\$30 = \$593.74
4/6/08 through 4/12/08	\$293.75* (2) = \$587.50-\$30 = \$557.50
4/13/08 through 4/19/08	NO PAY STUB SUBMITTED
4/20/08 through 4/26/08	NO PAY STUB SUBMITTED
4/27/08 through 5/3/08	\$137.50* (2) = \$275.00-\$30 = \$245.00
5/4/08 through 5/10/08	\$243.13* (2) = \$486.26-\$30 = \$456.26
5/18/08 through 5/24/08	NO PAY STUB SUBMITTED
5/25/08 through 5/31/08	NO PAY STUB SUBMITTED
6/1/08 through 6/7/08	\$116.88* (2) = \$233.76-\$30 = \$203.76
Total for last 10 weeks =	\$3,680.26
Total divided by 10 weeks =	\$368.03 per week

I find that the Average Weekly Wage is \$368.03. I further find that the temporary total disability is \$245.35 per week.

***Issue 4. Medical Causation and Issue 5. Claim for Additional Medical Aid***

The employee has the burden of proving that he not only sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and injury and the medical treatment he is seeking. Griggs v. A.B. Chance Company, 503 S.W.2d 697 (Mo. App. 1973).

In essence, the argument boils down to a disagreement as to whether or not Mr. Burkman's current complaints of left-sided low back pain, with associated numbness going down the back of the left leg to the left foot, is the result of an acute lumbar disc injury causing nerve root impingement and radiculopathy, or rather the result of pre-existing degenerative disc disease. Employee's expert, Dr. Vaught, opines that Mr. Burkman has a probable S1 radiculopathy caused by nerve root impingement in the lumbar spine, and that this condition was the result of the 6/9/08 work accident. Employer/Insurer's expert, Dr. Kitchens, has stated he

believes the current complaints are caused by degenerative disc disease, and that the accident of 6/9/08 is not the prevailing factor in his need for treatment.

The employee has had some pre-existing injuries. However, the record is completely void of any evidence regarding low back or left leg radicular symptoms prior to the work accident. The only records in evidence that predate the work injury are the 1998 St. Francis records and the 2003 Jefferson Memorial records. The 1998 St. Francis records relate to a motor vehicle accident Mr. Burkman had, in which he sustained injuries and received treatment. The "Discharge Summary" prepared upon completion of the inpatient stay references the following discharge diagnoses: left clavicle fracture, laceration of left eyelid and eyebrow, left nasal laceration, left lower leg laceration (Employee's Exhibit A-6, p. 13). There is no mention of any injury to the lumbar spine, nor any recording of any left leg radicular symptoms.

The 2003 Jefferson Memorial records relate to a tree-cutting accident where a limb under tension broke free and struck Mr. Burkman in the head, right leg and right arm. He briefly lost consciousness. The clinical impression was head and right thigh contusion, and concussion. Again, there was no involvement at all to the lumbar spine, and no mention of left leg radicular symptoms.

There is nothing in evidence to suggest that Mr. Burkman had ever had to obtain medical or chiropractic care for low back pain prior to this accident. There is no evidence that Mr. Burkman had ever previously missed work due to low back problems. Mr. Burkman had never had diagnostic films of his low back taken before this work accident. To the extent his current imaging studies show evidence of degenerative changes that have occurred over the years, there is no evidence that he was ever symptomatic from same.

Dr. Hogan was selected as an authorized examiner by the Employer/Insurer. Dr. Hogan conducted a physical examination which was notable for positive left straight leg raise, completely absent left ankle reflex, diminished pinprick sensation along the lateral border and the lateral sole of the left foot (the S1 dermatome), weakness of the left foot, and radiating left posterior leg pain with standing toe touch.

Dr. Hogan diagnosed a suspected L5-S1 radiculopathy and ordered an MRI. After Dr. Hogan reviewed the MRI, he confirmed a diagnosis of a herniated L5-S1 disc. In spite of Dr. Hogan being selected by Employer/Insurer, once he diagnosed the pathologic disc his services were discontinued and the Employer/Insurer instead routed Mr. Burkman to Dr. Kitchens.

Dr. Kitchens stated that the medical records confirm the diagnosis of degenerative disc disease with intermittent need for medical attention/treatment. He also stated that the medical records do not support the diagnosis of an acute disc herniation in June 2008 which led to an acute lumbar radiculopathy requiring constant treatment until his MRI was obtained in November 2009. Dr. Kitchens stated that the employee does have degenerative disc disease and degenerative disc bulging but no frank disc herniation.

On physical examination, the employee reported diminished pin prick in the lateral aspect and sole of the left foot. Motor exam did not identify evidence of nerve damage, impingement or injury. There was no pain to palpation of the lumbar spine. Straight leg raise did not produce any signs of acute nerve irritation. Dr. Kitchens stated that the absent left Achilles reflex identified by Dr. Hogan over a year post injury was not necessarily an indication of radiculopathy and could be a normal variant.

Dr. Kitchens' assessment was a diagnosis of degenerative disc disease at L3-4, L4-5, and L5-S1 with degenerative disc bulging at L4-5 and L5-S1. He opined that the employee did not require any additional treatment based on the work injury of 6/9/08. He felt the work injury was not the prevailing factor in his current medical condition of chronic lower back pain, left leg pain, or subjective numbness in his left foot. He felt that the employee was capable of working, and he gave no restrictions from the work injury.

The employee was eventually sent to Dr. Vaught by his attorney for an independent medical evaluation. Dr. Vaught diagnosed low back pain and left leg pain and paresthesias suggestive of an S1 radiculopathy. Dr. Vaught opined that the work injury of 6/9/08 was the prevailing factor in these diagnoses.

The opinions of Dr. Vaught are similar to Dr. Hogan. They both found absent ankle reflex, diminished sensation along the S1 dermatome and leg weakness. Dr. Vaught agreed with Dr. Hogan that the history of injury, the presentation of symptoms, the clinical findings on physical exam, and the MRI imaging was all suggestive of a lumbar disc radiculopathy stemming from the L5-S1 level. Dr. Vaught agreed with Dr. Hogan that the current MRI, while useful, was of subpar quality.

Based on all of the evidence presented, I find that the opinion of Dr. Vaught and Dr. Hogan regarding medical causation are more credible than the opinion of Dr. Kitchens on this issue. I find that Mr. Burkman has met his burden of proof on the issue of medical causation. I find that the employee's current complaints (low back pain on the left side with associated numbness going down the back of the left leg to the left foot) are medically causally related to the work accident and injury of 6/9/08. I further find that the work injury of 6/9/08 was the prevailing factor in causing the employee's work accident and current complaints.

The employee is requesting additional medical treatment. Dr. Vaught has opined that the employee is not at maximum medical improvement and has made recommendations for further care that the Court finds appropriate. Dr. Vaught stated that the employee needed additional medical care, starting first with a repeat MRI of better diagnostic quality, followed by a repeat neurosurgical evaluation, and noted that the patient may require surgical decompression. Dr. Vaught did not believe that the medical treatment received to-date was adequate to address his current complaints and problems. Finally, Dr. Vaught noted that the patient was not cleared from a neurosurgical standpoint to return to work.

Dr. Kitchens did not believe that the employee's current complaints were medically causally related to the accident and he therefore has not recommended that the employer-insurer

provide additional medical treatment. Therefore, based on the previous findings, I find that Dr. Vaught's opinion regarding additional medical care is more credible than Dr. Kitchens' opinion on this issue.

The evidence clearly supports a finding that Employer/Insurer, after notice of the employee's need for additional treatment, has continuously refused and neglected to provide appropriate treatment, and has therefore waived its right to select the authorized treating physician.

Based on all of the evidence that has been presented, I find that the treatment recommended by Dr. Vaught is necessary to "cure and relieve" the employee from the effects of the injury. I further find that the employee has been deprived of completing the reasonable treatment necessary to cure and relieve him from the effects of his work injury. Based on the evidence and my rulings outlined herein, I find that under Section 287.140.2, there are reasonable grounds to believe that the health and recovery of Mr. Burkman has been endangered. As such, the Division is authorized to order a change in the treating physician.

Employer/Insurer is therefore ordered to provide additional medical treatment in accordance with Section 287.140, and the provisions of this Award. Based on the finding of a waiver and the necessity for an order to change the treating physician, the employer/insurer is directed to provide additional medical treatment with Dr. Kevin Vaught as the authorized treating physician. If Dr. Vaught is not available or refuses to accept the position, the employee's treatment may be transferred to another mutually agreeable neurosurgeon or specialist.

#### ***Issue 6. Claim for Past Due TTD benefits***

Mr. Burkman seeks Temporary Total Disability for a total of 136 and 6/7 weeks, for the time period of 6/13/08 through the date of hearing (1/27/11).

Under the Missouri Workers' Compensation Act, the test for whether or not an employee is temporarily and totally disabled is whether, given the employee's situation and condition, the employee is competent to compete for employment in the "open labor market". Kinyon v. Kinyon et al., 71 S.W.2d 78 (Mo. App. 1934); Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App. W.D. 1996). The type of employment for which an employee must be competent to compete for is any reasonable or normal employment or occupation. Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823 (Mo. App. S.D. 1995).

The employee testified that he has been physically unable to maintain regular employment since the 6/9/08 work injury. Given his low back and left leg problems, there is no way he can physically resume his prior employment with Marquand Pallet Stock as a log cutter. The Court finds this testimony credible and consistent with the medical evidence.

The employee testified that since the injury, he has from time to time engaged in some sporadic, short term jobs. However, none of the above activities rise to the level commensurate with full-time work in the "open labor market".

The fact that an Employee can do *some* work during a period of temporary disability is not controlling on whether an Employee is temporarily totally disabled. *Brookman v. Henry Transp.*, 924 S.W.2d 286 (Mo. App. E.D. 1996). “Total disability” does not require that an employee be completely inactive or inert.” *Reiner v. Treasurer of Mo.*, 837 S.W.2d 363 (Mo. App. E.D. 1992), *Brown v. Treasurer of Mo.*, 795 S.W.2d 479, 483 (Mo.App.E.D. 1990).

Dr. Vaught has opined that the employee has received inadequate care to date and is not at maximum medical improvement. He opined that the employee is not capable of working due to his current complaints and deficits.

Dr. Kitchens believed that the employee was capable of working. Furthermore, he did not give the employee any work restrictions. Based on all of the evidence presented and the previous rulings, I find that Dr. Vaught’s opinion on the employee’s ability to work is more credible than Dr. Kitchen’s opinion on this issue.

I find that based on all of the evidence presented, the employee is totally disabled. The employee has requested temporary and total disability from 6-13-08 through 1-27-2011 (136 6/7 weeks). The employee’s temporary total disability rate is \$245.35. Therefore, the employer is directed to pay the employee \$33,577.90 for past due temporary total disability.

**ATTORNEY’S FEE:**

Boyd Green, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein

**INTEREST:**

Interest on all sums awarded hereunder shall be paid as provided by law.

As previously indicated this is a temporary or partial award. The award is therefore subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

Employee: Edward Burkman

Injury No. 08-058245

Date: \_\_\_\_\_ Made by:

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*