

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

Injury No.: 00-046333

Employee: John Connors
Employer: Arnold Muffler, Inc.
Insurer: MIGA (formerly Superior National Insurance Group)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: April 25, 2000
Place and County of Accident: Jefferson 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 December 27, 2004. The award and decision of Administrative Law Judge Leslie E. H. Brown, issued December 27, 2004, 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 23rd day of November 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

CONCURRING OPINION FILED

John J. Hickey, Member

Attest:

Secretary

CONCURRING OPINION

I join my fellow commissioners in awarding compensation in this claim. However, I must respectfully dissent from the portion of the award and decision of the majority of the Commission denying permanent total disability benefits and future medical care to employee. Based on my review of the evidence as well as my consideration of the

relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to award to employee permanent total disability benefits.

[T]he term "total disability" is "defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident." "It does not require that the claimant be completely inactive or inert."

"To determine if claimant is totally disabled, the central question is whether, in the ordinary course of business, any employer would reasonably be expected to hire claimant in his present physical condition."

Pavia v. Smitty's Supermarket, 118 S.W.3d 228, 234 (Mo. App. 2003)(citations omitted).

The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. Total disability means the "inability to return to any reasonable or normal employment."

Gordon v. Tri-State Motor Transit Co., 908 S.W.2d 849, 853 (Mo. App. 1995)(citations omitted).

The evidence in the instant case clearly establishes that employee is not able to return to any normal employment. Physicians have recommended that employee observe restrictions on most categories of physical activity implicated in employment. Considering such restrictions, Dr. Volarich credibly testified that he does not believe employee is able to engage in any substantial gainful activity.

Employee does not believe he can offer an employer a full day's work. Much is made of employee's work at the church café but his work at the café was not *normal* employment. Employee sought work at the church café when he was economically strapped. The church was aware of employee's medical condition and accommodated his condition. Employee testified the church would not have allowed him to work at the café with his many restrictions if employee were not a church member. Notwithstanding the many accommodations made by the church, employee left the café job because he could not meet the physical demands of the job.

The administrative law judge concludes that employee's job at the café was competitive because someone did employee's café duties before he worked at the café and someone did the duties after he left. The administrative law judge's reliance on this fact is misplaced for two reasons. First, before and after employee's employment at the café, some of employee's duties were performed by people working in the church office. The church's existing staff could and did perform the duties except for the period during which the duties were shifted to employee to provide him with work. Contrary to the administrative law judge's determination, this fact supports a finding that the café job was not competitive. Secondly, and more importantly, employee could not physically perform the job.

Mr. Lalk, the only vocational expert to offer testimony, testified unequivocally that employee cannot compete in the open labor market. Mr. Lalk concluded that employee's position at the church café was not a competitive position, and, thus, was not employment on the open labor market. Mr. Lalk illustrated this point by contrasting what an employee would be expected to do in a normal food service environment with what employee was required to do. For example, an employee would normally be expected to do some lifting and stocking. At the church café, employee did not have to perform stocking and only lifted very light items.

The administrative law judge rejected the uncontradicted opinions of both Dr. Volarich and Mr. Lalk that employee is not employable. The administrative law judge erred. I find the testimony of employee, Dr. Volarich, and Mr. Lalk credible and persuasive. I do not believe an employer in the ordinary course of business would reasonably be expected to hire employee in his present physical condition. I conclude that employee is permanently and totally disabled as a result of his primary injury combined with his pre-existing disabilities.

As to future medical care, the administrative law judge denied future medical care because it is not clear if Dr. Volarich recommended the treatment solely as a result of the primary injury or as a result of the combination of the primary injury and prior injuries. The administrative law judge misapplied the law. The employee's job is to prove that the recommended treatment would cure and/or relief him from the effect of his work-related injury. He has

done so through the testimony of Dr. Volarich. Employee was not required to prove that the treatment would not relieve other symptoms. See *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 269 (Mo. App. 2004). I would award future medical care.

Based upon the foregoing, I conclude that the award should be modified to award permanent total disability against the Second Injury Fund and future medical care against employer. I respectfully dissent from the portion of the decision of the majority of the Commission denying permanent total disability benefits and future medical care.

John J. Hickey, Member

AWARD

Employee: John Connors

Injury No. 00-046333

Dependents:

Employer: Arnold Muffler Inc.

Additional Party:

Insurer: MIGA (formerly Superior Naational Insurance Group)

Hearing Date: August 20, 2004 (finally submitted 9/21/04) Checked by: LEHB/bfb

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and
Industrial Relations of Missouri
State Treasurer, as custodian of Second Injury Fund
Jefferson City, Missouri

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 25, 2000
5. State location where accident occurred or occupational disease was contracted: Jefferson 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:
Employee bent over and was picking up a pallet of mufflers.
12. Did accident or occupational disease cause death? No Date of death? ----

- 13. Part(s) of body injured by accident or occupational disease: low back
- 14. Nature and extent of any permanent disability: 30% permanent partial disability of the body as a whole referable to the low back
- 15. Compensation paid to-date for temporary disability: \$18,489.12
- 16. Value necessary medical aid paid to date by employer/insurer? \$14,127.06
- 17. Value necessary medical aid not furnished by employer/insurer? \$0.00
- 18. Employee's average weekly wages: \$430.00
- 19. Weekly compensation rate: \$286.68/\$286.68
- 20. Method wages computation: by agreement of the parties

COMPENSATION PAYABLE

21. Amount of compensation payable: ----

Unpaid medical expenses: ----

---- weeks of temporary total disability (or temporary partial disability)

30% permanent partial disability from Employer, or 120 weeks \$34,401.60

---- weeks of disfigurement from Employer

----Permanent total disability benefits from Employer beginning , for Claimant's lifetime

22. Second Injury Fund liability: Yes No Open (See Award),. \$11,467.20

TOTAL: \$45,868.80

23. Future requirements awarded: None

Said payments to begin as of the date of this Award and to be payable and be subject to modification and review as provided by law.

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

Robert Sihhold, Attorney for Claimant

FINDINGS OF FACT and RULINGS OF LAW:

Employee: John Connors

Injury No: 00-046333

Before the
DIVISION OF WORKERS'
COMPENSATION
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Dependents:

Employer: Arnold Muffler Inc.

Additional Party State Treasurer, as custodian of Second Injury Fund

Insurer: MIGA (formerly Superior National Insurance Group)

Checked by: LEHB/bfb

This is a hearing in Injury No. 00-046333. The claimant, John Connors, appeared in person and by counsel, Attorney Bob Sihnhold. The employer/insurer, Arnold Muffler Incorporated/ Superior National Insurance Group and now MIGA, appeared by and through counsel, Attorney Michael C. Margherio. The Second Injury Fund appeared by and through Assistant Attorney General Laura Wagener.

The parties entered into certain stipulations, and agreement as to the complex issues and evidence to be presented in this hearing.

STIPULATIONS:

On or about April 25, 2000: a. the claimant while in the employment of Arnold Muffler Incorporated sustained an injury by accident arising out of and in the course of his employment occurring in Jefferson County, Missouri; b. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law; c. the employer's liability was originally insured by Superior National Insurance Group which went into bankruptcy and the employer's liability is now protected by MIGA; d. The employee's average weekly wage was \$430.00, the rate being \$286.68 over \$286.68.

e. The employer had notice of the injury. f. A Claim for compensation was filed within the time prescribed by law. g. Temporary total disability benefits have been paid to the employee in the total amount of \$18,489.22; those payments represent 64 4/7 weeks of benefits covering a period from May 6, 2000 through August 1, 2001. h. Medical aid has been provided in the amount of \$44,127.06.

ISSUES:

1. Future medical care
2. Nature and extent of permanent disability
3. Liability of the Second Injury Fund

EXHIBITS:

The following exhibits were admitted into evidence:

Claimant's Exhibits:

- No. A: Deposition transcript of Dr. David Volarich, D.O. taken on behalf of the claimant on April 21, 2004
- No. B: Deposition transcript of Mr. Timothy Lalk, of England & Company taken on behalf of the claimant on April 21, 2004
- No. C: Certified records of BarnesCare
- No. D: Certified report of an Open MRI of May 30th, 2000
- No. E: Certified records of Spine Care Alliance
- No. F: Records of Spine Care Alliance (re: restrictions)
- No. G: Certified records of Missouri Baptist Hospital
- No. H: Records of the Division of Workers' Compensation for Injury No. 97-037831
- No. I: Certified records of Barnes/Jewish Pain Management

Employer/Insurer's Exhibits:

- No. 1: NOT ADMITTED (Reports by Dr. John Graham, M.D., Pain Treatment Center) (**Ruling:** Claimant's objection on grounds of – hearsay, not medical records but rather evaluation reports done in contemplation litigation and denies the claimant the right to cross examination – is sustained.)
- No. 2: Functional Capacity Evaluation, dated July 26, 2001

Second Injury Fund Exhibits:

The Second Injury Fund offered no exhibits.

FINDINGS OF FACTS AND RULINGS OF LAW^[1]

ISSUES: Nature and extent of permanent disability; Liability of the Second Injury Fund

The undisputed evidence in this case is that on or about April 25, 2000 while working for Arnold Muffler, the claimant, Connors, sustained a work related injury to his low back that required surgery on October 31, 2000 performed by Dr. David S. Raskas. The claimant is alleging that he is permanently and totally disabled; that he has not been able to work since May 3, 2000 after the April 25, 2000 work related low back injury.

The claimant, who was found to be a credible witness though at times forgetful or prone to slight exaggeration, testified about working in his church's café subsequent to the April 25, 2000 work related accident. He stated that the church café served such things as hamburgers, hot dogs and cheeseburgers; it was like a cafe you might see in a food court at a mall, he said. The Café was open to the public, he said, and operated basically for lunch Monday through Friday. In support of his position that this was basically a "make-work" job given to him by the church where he was a member, the claimant testified that the church extended themselves quite a bit for him; he was able to leave work when he desired and there were times when he would not report for work or leave work because of his medical condition. In his Memorandum of Law, the claimant also argued that after the 4/25/00 work related injury he has never been able to be in sustained gainful employment on the open labor market. The claimant wrote:

(Connors) has worked since the accident for the Life Center established by his church. This was part time; he had help with all lifting and carrying and was unable to continue the activity. The employment consisted of managing a café, which had previously been managed by the general manager of the Life Center as part of the general manager's overall duties. When Mr. Connors quit, they did not replace him. The general manager resumed the duties of the café manager. This employment was not full time, Mr. Connors missed work as a result of his medical condition and he was free to come and go as he pleased. This is not nor could it be considered employment on the open labor market or a determination that the person could compete on the open labor market. The open labor market is defined as the ability to be able to perform the services for a prospective employer with the employer reasonably being able to expect the prospective employee to reasonably fulfill the duties and responsibilities of the employment on a continuing and sustaining basis. *Grgic v. P & G Const.* (App. E.D 1995) 904 S.W.2d 464; *Story v. Southern Roofing Co.* (App. S.D. 1994) 875 S.W.2d 228.

The Court in *Grgic v. P & G Const*, 904 S.W.2d 464, 466-467 (Mo.App. E.D. 1995) noted the following:

“The legal test for determining whether the injured party is permanently and totally disabled is set forth in *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.E.D.1990):

The test for permanent total disability is whether, given the claimant's situation and condition, he is competent to compete in the open labor market.... The central question is whether in the ordinary course of business, an employer would reasonably be expected to hire the claimant in his present physical condition reasonably expecting him to perform the work for which he is hired.

All reasonable doubts as to an employee's right to compensation should be resolved in favor of the employee.

Wolfgeher v. Wagner Cartage Service, Inc., 646 S.W.2d 781, 783 (Mo. banc 1983).

The commission's findings, under the above legal standards, do not support its denial of the total permanent award. The commission found that vocational counselor Kutchback's testimony supported the conclusion that ‘claimant's employment prospects are poor.’ The commission found Kutchback's testimony ‘credible and probative on the issue of the nature and extent of the claimant's disability.’ Furthermore, it found that the ‘physicians, vocational experts, and the claimant himself agree he is only able to work very limited hours at rudimentary tasks.’

In our view, a claimant who is found by the commission to be ‘only able to work very limited hours at rudimentary tasks’ is a totally disabled worker. ‘Total disability means the inability to return to any reasonable or normal employment, it does not require that the employee be completely inactive or inert.’ *Brown*, 795 S.W.2d at 483. We do not consider working very limited hours at rudimentary tasks to be reasonable or normal employment. The commission found it significant that ‘he *sometimes* is able to work a few hours a day although he quickly becomes tired.’ (Our emphasis). This limited activity does not mitigate against a finding of total disability. The fact that claimant *sometimes* can work a few hours a day serves only to highlight his inability to work a regular schedule, which is a hallmark of “odd-lot” total disability. See Larson, *1C Law of Workmen's Compensation* § 57.51(a), p. 10-283 *et seq.* (1994).....

No employer on the open labor market would employ a man with the severely limited physical, mental, and communicative abilities which the commission ascribes to Mr. Grgic. According to the commission, Mr. Grgic can only do rudimentary tasks with reduced coordination for limited periods, possesses only borderline intelligence, and has significant problems communicating. In short, taking the commission's findings as true, claimant has lost all of his marketable skills. Consequently, the facts found by the commission do not support the award, and it erred in not granting Mr. Grgic the total disability award to which he is entitled by law. Section 287.495.1(3) RSMo 1994.”

The court in *Story v. Southern Roofing Co.*, 875 S.W.2d 228, 232 -234 (Mo.App. S.D. 1994) noted the following:

“The Commission's final award included citations to two cases that explain the standard to be used in determining if a person is permanently and totally disabled. The first case, *Patchin v. National Super Markets, Inc.*, 738 S.W.2d 166 (Mo.App.1987), states the general test--whether the person is able to compete on the open job market. The second case, *Crum v. Sachs Elec.*, 769 S.W.2d 131 (Mo.App.1989), specifies the key question to be answered--whether an employer, in the usual course of business, would reasonably be expected to employ the person in his present physical condition. These two cases express the approved legal standard for permanent total disability. *Hines v. Conston of Missouri No. 852*, 857 S.W.2d 546, 547 (Mo.App.1993).....

Keith Morelock explicitly addressed the issue of whether Appellant can compete in the open job market. At the beginning of his written evaluation, after first noting that Appellant was currently employed by his brother, Morelock stated: ‘It is this consultant's opinion that Mr. Story would be employable in other work settings should he elect to pursue this.’ Later, he made a similar statement: ‘Mr. Story has good potential to continue participation in the open labor market.’ Morelock listed several job options available to Appellant, including automotive starter repairer, janitor, service station attendant, automobile detailer, cashier, and sales clerk.....

Taken as a whole, Morelock's written evaluation and testimony plainly addressed the issue of Appellant's ability to compete for employment in the open labor market--and not merely whether he could perform some work activity. Consequently, Morelock alone provided substantial evidence upon which the Commission could and did base its determination. [FN6] Moreover, as Morelock's written evaluation illustrates, his opinion about Appellant's employment chances was based on precisely the sorts of criteria Appellant claims were ignored: education, academic record, and work history, for example.....

FN6. We note that Appellant's own testimony also provides substantial evidence that, if he chose to do so, he could compete in the open labor market.

Finally, Appellant attempts to use the case of *Kinyon v. Kinyon*, 230 Mo.App. 623, 71 S.W.2d 78 (1934), to argue that he, like the employee-claimant in that case, should be declared permanently and totally disabled. His effort is in vain. In *Kinyon*, the claimant suffered an injury to the right side of his brain, which resulted in paralysis of the entire

left side of his body, partial loss of vision, and severe headaches. The Workmen's Compensation Commission found him to be permanently and totally disabled. Neither party appealed that decision. Approximately three years later, however, the claimant obtained employment with the City of Kirkwood, answering telephone calls. At a subsequent rehearing, the Commission changed the claimant's status to that of permanent partial disability. The court of appeals reversed this decision, reinstating the claimant as totally disabled.

At least three factors distinguish *Kinyon* from the instant case. First, the claimant in *Kinyon* was originally found to be permanently and totally disabled, and his condition never changed. Appellant's condition has also never changed, but he has never been found to be permanently and totally disabled. Second, the job the claimant in *Kinyon* acquired was clearly an honorary position. His uncle, the mayor of Kirkwood, obtained the job for him, and other city employees helped him with his duties. Here, Appellant performs meaningful and useful duties for his brother and could do the same for other employers. Third, the *Kinyon* claimant's disability was significantly more severe. He was completely paralyzed on one side of his body, had severe headaches, and had substantial vision problems. Appellant, by contrast, retains considerable use of his body. Consequently, an employer could reasonably be expected to hire him in his present condition."

In this case the claimant offered additional evidence, in support of his allegation that the café job was an honorary position, in the form of vocational expert opinion by Timothy Lalk^[2] who testified about his opinion of Connors' work in the cafe:

"Based upon the information that I received, I would not consider that a competitive employment. It would fall into a category of this was a job that was available through a friend or acquaintance or an organization that is well acquainted with him that were making efforts to provide assistance for an individual by offering that individual a job. It doesn't meet the criteria of being competitive, insofar as there were a number of people that were considered for the job and the most efficient or the most qualified to be chosen." (Lalk Dp. pp. 17-18)

Lalk, however, on cross examination stated that Connors did not describe the job at his church as a make-work job. "I don't think he – he didn't explain it in terms as a make-work, that the job wasn't created specifically for him." (Lalk Dp. pg. 30) Lalk admitted that he did not know if there was someone else doing the job before Connors did it. Additionally, in his testimony about the café job, the claimant stated that he was the manager of about six people. He stated that he ran the cash register. I had someone to clean up the tables after people left, the claimant said, but periodically I would clean the table. I prepared some of the food and did some of the cooking as well, the claimant said. Connors testified that he worked about 4 to 5 hours a day when he worked at the cafe, and, when asked if he worked every day of the week – responded – When I could do it, yes. The claimant stated that most of the time he was able to leave work when he desired, but there would be an occasion or two where there just wasn't anybody to take his spot so he just had to stick it out. Connors testified that he was paid about \$7.50 per hour. Lalk stated the following in his discussion of what Connors' relayed to him about the church café work:

Mr. Connors reported that he attempted to work at the information desk at his church. This was on a volunteer basis and he was able to sit and stand as needed. Eventually in November 2001 after his worker's compensation ended, Mr. Connors was offered a job at the cafeteria at his church. He told me that he works 3-4 hours each day. He mainly works the cash register and occasionally works at the soda fountain. He can also occasionally work on the grill and help make salads. The church serves lunch during the school year and during summer camp. He earns \$7.00 per hour. He is not required to do any stocking or lifting. He is also able to sit and stand as necessary during the 3-4 hours he is present at the cafeteria. He told me that he earns less than \$730.00 per month so that this will not interfere with his Social Security disability benefits.

He told me that he might be able to work more than 3-4 hours per day on some days, but on other days he is having difficulty just working three hours.

Connors testified at the hearing that he started working in the church café in about 2002, and testified that he worked there for about eight months. As noted by the Second Injury Fund in its Memorandum of Law, the evidence reveals that Connors told Lalk that he began working in the café in November 2001, and was continuing to work there at the time of Lalk's evaluation, which was on August 13, 2002; this evidence indicates that the claimant worked at the church café at least nine months. Additional evidence is the claimant's testimony that the person who was managing the café, they put him under her authority as manager of the cafe and she did some other things as well. Connors stated that when he left the job the church did not look for somebody outside of the church to replace him; they had a person that kind of went to that position but they never hired anybody else, I was just kind of the extra, he said. He agreed that they still have people running the café.

It is found that this case herein is distinguished from *Grgic*. It is found that the evidence in this case establishes that the claimant, Connors, was able to work four to five hours per day on a sufficiently consistent basis for at least nine months after his work related injury performing more than rudimentary tasks in his job as manager of the cafe such that his employer

continued to allow him to work; the claimant testified that he voluntarily quit. Connors, it is found, is distinguished from the claimant in *Kinyon* (cited in *Story*) in that the evidence is that Connors had his own work duties that other employees of the café did not do for him. It is found that the claimant's duties at the café were in line with those of the claimant in *Story*; both performed meaningful and useful duties rather than being in an honorary position. It is found that Connors' job at the café was more than a humanitarian position in that he admitted someone was performing his duties before he took the position, and his duties were again taken over by another person when he left. The evidence indicates, it is found, the job Connors was performing was indeed competitive in that it was being performed by a present employee of the church before and after he performed the duties. It is found that Lalk's opinion that this was not a competitive position is not controlling, as it is found that Lalk had insufficient information upon which to base his opinion as he admitted he did not know if there was someone else doing the job before Connors did it. It is found that an employer (the claimant's church), in the usual course of business, employed the claimant reasonably expecting him to perform the duties for which he was hired in his present physical condition. Consequently, it is found that the claimant does not meet the test criteria for permanent total disability under Missouri Workers' Compensation law.

It should further be noted that the only medical opinion on the degree of disability for the claimant was offered by Dr. Volarich. Dr. Volarich's testimony/written opinion in his June 13, 2002 evaluation report was:

It is my opinion that Mr. Connors is unable to engage in any substantial gainful activity, nor can he be expected to perform on an ongoing working capacity in the future. It is my opinion that he cannot be reasonably expected to perform on an ongoing basis 8 hours a day, 5 days a week throughout the work year. It is also my opinion that he is unable to continue in his line of employment that he last held as a truck driver for the Arnold Muffler, Inc., nor can he be expected to work on a full-time basis in a similar job. I note that he is currently working part time light duty functioning as a manager and a cook at a church working less than 24 hours a week and performing no lifting duties. He tells me he is able to tolerate this work activity since he doesn't have any lifting requirements and can rest whenever needed.

Based on my medical assessment alone, it is my opinion that Mr. Connors is permanently and totally disabled and unable to work as a truck driver/laborer as a result of the work accident of 04/25/00 in combination with his pre-existing back, neck, and left shoulder injuries.

In its Memorandum of Law, the Second Injury Fund argued the following:

"Furthermore, the expert testimony upon which Claimant relies is faulty in that the standards upon which both claimant's medical expert and vocational expert rely in order to define the competitive open labor market are nowhere stated in the statute or case law. There is no bright line rule in either the statute or the case law as to what constitutes the competitive open labor market. The Social Security Administration has a specific definition as to when an individual meets the standard of 'substantial gainful employment.' Such definition involves that amount of money that an individual brings in each week. There is no such definition of the competitive open labor market in Workers' Compensation law. However, when Claimant's counsel asked his questions, he used certain assumptions regarding the definition of the competitive open labor market.

Claimant's used the following assumptions when obtaining the opinions of his vocational expert:

Mr. Lalk, assuming the legal tests under workers' compensation as to whether or not a person can compete on the open labor market is as follows: would a reasonable employer seeking employees be reasonably expected to hire Mr. Connors and be able to reasonably expect Mr. Connors to be able to perform the functions of the employment on a continual and constant, namely eight hours a day, 52 weeks a year, assuming then further that the information you obtained, your examination and the definition of the open labor market as I've just provided to you, do you have an opinion, based upon a reasonable degree of vocational certainty, whether or not Mr. Connors can compete on the open labor market? (Exhibit B, p 16).

All of the questions presented by Claimant's counsel regarding whether or not Claimant was employable in the open labor market were presented given the above definition, (Exhibit B, p 16-18). As stated above, there is no explicit standard defining the competitive open labor market in Missouri Workers' Compensation Law. However, the definition posed by Claimant's counsel has a number of problems from both a practical and public policy standpoint which make it an unworkable definition. First, from a practical standpoint, Claimant's counsel did not state in his assumptions how many days per week this 'continual and constant' work was to be performed. Second, few, if any individuals, work 52 weeks per year without any respite. Most individuals take sick or personal leave each year. However, we would not assume that an individual who takes some sick or vacation time provided by his

or her employer is, without other factors involved, unemployable in the open labor market. From a public policy standpoint, this definition is also unworkable. It does not take into account an individual who might work 'part-time' hours and yet makes enough per hour that he or she feels no need to work a full-time shift. Nurses are an example of this. Some nurses only work two or three shifts over a weekend, but since they make so much additional income due to the fact that they are willing to work such shifts, they do not work the rest of the week. One would not look at such individuals and determine them to be unemployable on the competitive open labor market."

Considering Dr. Volarich's opinion that "Mr. Connors is unable to engage in any substantial gainful activity, nor can he be expected to perform on an ongoing working capacity in the future" while also noting that Connors "is currently working part time light duty functioning as a manager and a cook at a church working less than 24 hours a week and performing no lifting duties" (or working with restrictions and accommodations), it is found that this opinion does not meet the test for permanent total disability.

"Section 287.020.7 provides that "The term 'total disability' as used in this chapter shall mean inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident." The pivotal question in determining whether a workers' compensation claimant is permanently and totally disabled is whether an employer can reasonably be expected to hire this claimant, given his present physical condition, and reasonably expect him to successfully perform the work. *Sutton*, 37 S.W.3d at 811." See, *Minies v. Meadowbrook Manor*, 105 S.W.3d 529, 538 (Mo.App. E.D. 2003).

* * *

"Undisputed facts support a finding that Claimant cannot return to his former employment or any job requiring heavy labor. However, the test for permanent-total disability is whether he is able to competently compete in the open labor market given his condition and situation. *Reiner v. Treasurer of State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. E.D.1992). Specifically, the pivotal question is whether an employer can reasonably be expected to hire this employee, given his present physical condition, and reasonably expect him to successfully perform the work. *Gordon v. Tri-State Motor Transit Co.*, 908 S.W.2d 849, 853 (Mo.App. S.D.1995). Thus, our inquiry into permanent-total disability is a factual one: whether Claimant is employable." *Messex v. Sachs Elec. Co.* 989 S.W.2d 206, 210 (Mo.App. E.D. 1999).

The test for permanent total disability, it is found, does not take into consideration whether or not the claimant is relegated to full-time or part-time work subsequent to a work related injury, but rather whether an employer can reasonably be expected to hire the claimant, given the claimant's present physical condition, and reasonably expect the claimant to successfully perform the work; and the consideration for competitive open labor market work is whether or not the claimant is performing meaningful and useful duties and is not in an honorary position where other employees are actually performing the claimant's duties (See, *Story*, 875 S.W.2d at 233), or whether the claimant is working more than very limited hours at rudimentary tasks (See, *Grgic*, 904 S.W.2d at 466). It has previously been determined in this Award that the substantial weight of the evidence did not support the claimant's allegation that his work at the church café was not a competitive position; rather, it was found that the substantial weight of the evidence established that the claimant performed meaningful and useful duties in his job at the café, and performed duties that someone else was performing when he took the position, and again performed after the claimant left the job. The evidence in this case is that there is no dispute in the evidence that the claimant, subsequent to his work related injury, was hired at \$7.00 to \$7.50 per hour to work in his church's café and worked at least eight months; the claimant admitted at the hearing and to his experts that he worked 3-5 hours a day up to 24 hours a week, that he was the manager of about six people and he ran the cash register, and that he had someone to clean up the tables after people left but periodically he would clean tables and prepared some of the food and did some of the cooking as well. Thus, it is found that Dr. Volarich's opinion is found not to be controlling on the issue of whether or not the claimant is permanently and totally disabled in light of the standard/test set for permanent total disability. Additionally, it should be noted that Dr. Volarich's testimony that "Mr. Connors is permanently and totally disabled and unable to work as a truck driver/laborer as a result of the work accident of 04/25/00 in combination with his pre-existing back, neck, and left shoulder injuries" does not meet the standard of total disability, which is "an inability to return to any employment and not merely mean(s) inability to return to the employment in which the employee was engaged at the time of the accident". Section 287.020.7 RSMo.

It is found that there is substantial, competent evidence establishing that the claimant suffered permanent partial disability as a result of the April 25, 2000 work related injury which required surgery of a L4-5 laminotomy and microdissection. The claimant testified about ongoing problems as a result of the work related low back injury; he distinguished his symptoms from prior problems, stating that prior to the work injury his symptoms were on the right side, but as a result of the work injury he now experiences constant pain in his left hip, buttocks down to his left foot. The

claimant talked about his physical limitations as a result of the April 25, 2000 work injury which includes limitations with walking, sitting, driving, cessation of some hobbies and activities, such as coaching children's basketball, and physical limitation such as in lifting. Dr. Volarich offered the only medical opinion on whether or not the claimant had sustained any permanent partial disability as a result of the April 25, 2000 work related injury; the doctor opined that as a result of the April 25, 2000 work related injury, the claimant had sustained 35% of the body as a whole rated at the lumbosacral spine due to the disk herniation at L4-5 to the left that required discectomy and laminotomy with loss of motion, low back pain, and persistent left leg radiculopathy consistent with failed back syndrome. Considering all of the evidence, it is found that it supports an award of 30% permanent partial disability of the body as a whole at the lumbar spine as a result of the April 25, 2000 work related injury. This would be: $400 \text{ weeks} \times 30\% = 120 \text{ weeks}$; $120 \text{ weeks} \times \$286.68/\text{week} = \$34,401.60$.

It has been determined in this Award that the substantial weight of the evidence does not support a finding of permanent total disability for the claimant; it was found that the substantial weight of the competent evidence established a permanent partial disability for the claimant as a result of the April 25, 2000 work related injury. There is evidence, also, of a preexisting disability for the claimant prior to the April 25, 2000 work related injury herein: a. the claimant testified about a prior injury to his left shoulder/neck area, and stated that this injury resulted in continuing problems of limitation in range of motion the shoulder area and affected his ability to perform his work duties in that he had to change the way or be more careful in how he got up onto his truck and that his employer provided help to him in loading the truck; b. a Stipulation for Compromise Settlement was entered into evidence without objection and reflected that on May 19, 1998 the claimant, pro se, and the employer/insurer entered into a settlement of a May 5, 1997 work related injury for 5% permanent partial disability of the cervical and upper thoracic spine. Additionally, the claimant testified about suffering a prior low back injury for which he had surgery, and another procedure for his back of a chymopapin injection performed in Canada; the claimant testified about continuing problems as a result of these injuries and the treatment, stating that he was no longer able to do construction work, and had limitation in his movement which required him to move differently and prevented him from picking things up while working. No medical records of treatment for the claimant prior to the April 25, 2000 work related injury herein were offered into evidence, however, the medical records offered into evidence by the claimant indicated post operative changes at L4-L5 (i.e. May 30, 2000 MRI report in the BarnesCare record). Dr. Volarich assessed permanent partial disability for the claimant's alleged preexisting injuries and conditions: a. additional disability in the low back preexisting the April 25, 2000 work injury of 35% of the body as a whole rated at the lumbosacral spine due to the disk herniation at L4-5 to the right that required surgical repair, and resulted in the loss of motion and recurrent back pain leading up to 04/25/00; b. 12.5% of the body as a whole rated at the cervical spine due to the chronic cervical syndrome causing ongoing neck pain and loss of motion; and c. 20% of the left upper extremity rated at the shoulder due to the impingement syndrome causing loss of motion, pain, and weakness in the dominant arm. Dr. Volarich, though, admitted that he was not able to see any medical treatment records concerning treatment of Connors' back prior to April 25, 2000, including the records from the claimant's prior back surgery or the chymopapain injections. Dr. Volarich agreed that Connors did not relay that a physician had placed on him any restrictions because of his neck or because of his left shoulder prior to April 25, 2000, and agreed that he did not see any medical records showing any physical restrictions placed on Connors for the neck or left shoulder by a treating physician before April 25, 2000. The doctor agreed that Connors had described to him some of his job duties, and that they included some heavy lifting such as lifting up to 100 pounds at times, jobs where he spent half of the day driving, he worked approximately ten-hour days, and worked full-time employment; Dr. Volarich agreed that Connors did not relay that he was missing work because of his back, neck or shoulder before the April 25, 2000 injury.

In this case there is evidence of permanent partial disability from a compensable work injury as well as evidence of preexisting permanent partial disability, and Second Injury Fund liability was put in issue. Section 287.220.1 RSMo sets forth the parameters for Second Injury Fund liability and states, in pertinent part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the

employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for.

It is found, considering all of the evidence in this case, that the substantial weight of the evidence supports a finding of 5% permanent partial disability of the cervical spine preexisting the April 25, 2000 work injury for the claimant; it is found that this preexisting disability is below threshold set per statute for consideration of Second Injury Fund Liability of this preexisting disability in combination with any disability from the subsequent work injury. Section 287.020.1. It is found that the substantial weight of the evidence does not support Dr. Volarich's opinion of disability in the left shoulder; medical records in evidence were those of the treating doctor, Dr. Kennedy, whose diagnosis throughout his record was consistently – cervical spondylosis. Dr. Kennedy assessed a rating of 3 % permanent partial disability. A Stipulation for Compromise Settlement form was in evidence and indicated that on May 19, 1998 Connors, pro se, and the employer/insurer entered into a settlement for a May 5, 1997 work related injury of 5% permanent partial disability of the cervical and upper thoracic spine. With this evidence, it is found that Dr. Volarich's opinion of preexisting disability for the claimant's left shoulder is speculative and thus not probative evidence.

It is found that there is evidence to support Dr. Volarich's diagnosis of a preexisting injury to the low back for the claimant of - Herniated nucleus pulposus at L4-5 to the right causing right leg L5 radiculopathy, status post laminectomy and discectomy. It is further found that the substantial weight of the evidence establishes that this preexisting injury was a hindrance and obstacle to the claimant's employment, (i.e. Connors testified that after his prior back injuries and treatment he no longer was able to do construction work; he testified that he would take over-the-counter medication for his back pain, and on occasion stop his work for a few minutes to relieve the pain). The remaining question is whether or not the claimant's prior low back injury of a herniated disc at L4-5 and the reinjury to the same part of the body in the compensable work injury resulted in a synergistic effect rather than a simple sum.

Two cases are on point on this issue, and set for the criteria for a finding of a synergistic effect. The first is *Searcy v. McDonnell Douglas Aircraft Co.* 894 S.W.2d 173 (Mo.App. E.D. 1995) in which Searcy, who had prior low back injuries and three surgeries and lifting restrictions, re-injured his low back while performing physical labor which included lifting from five to fifty pounds, and considerable stooping, bending and walking. This work related low back injury also required surgery, and Searcy was eventually released to return to work with lifting restrictions of nothing heavier than thirty pounds and when Searcy sought to return to work his employer terminated his employment because of these restrictions. Medical experts assessed permanent partial disability for Searcy for his preexisting low back injuries and as a result of the work related low back injury; these opinions were simple sums (i.e. Dr. Conrad, who testified on the claimant's behalf, thought Searcy suffered 80 percent permanent partial disability of the man as a whole attributed to the low back, and of this 80 percent disability, Dr. Conrad believed 45 percent stemmed from the present injury, while 35 percent disability was from the pre-existing injuries). In affirming the Commission's decision of no liability against the Second Injury Fund, the *Searcy* court noted the following:

“The presence of a pre-existing industrial disability, in and of itself, is not enough to induce Second Injury Fund liability. To create Second Injury Fund liability, the pre-existing disability must combine with the disability from the subsequent injury in one of two ways: (1) the two disabilities combined result in a greater degree of disability than the sum of the degree of disability from the pre-existing condition and the degree of disability from the subsequent injury; or (2) the pre-existing disability combines with the disability from the second injury to create permanent total disability. § 287.220 RSMo 1986; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 482 (Mo.App.1990). Searcy's pre-existing disability did not combine with his subsequent injury in this manner.

.....The fund is never liable for pre-existing disabilities. The Second Injury Fund was established in order to assure employers that the hiring of workers with a permanent partial disability would not expose the employer to liability for a greater amount of disability than that which resulted from a compensable work-related injury. The potential for such enhanced exposure exists first where a pre-existing disability, when combined with a compensable disability, results in a greater degree of disability than the sum of the two disabilities, that is, a synergistic enhancement in which the combined totality is greater than the sum of the independent parts. In such a case, the Second Injury Fund is liable only for the enhancement, that is, for the degree of disability which exceeds the sum of the two disabilities.....

The Commission did not find any difference between the sum of the pre-existing disabilities and the work-related disability and the total disability resulting from a combination of the two. Indeed, as a general rule where the first and second injuries are to the same part of the body, as in this case, the second supplements the first rather than combining to create a greater disability than the sum of the two. [FN2]

FN2. Although there was some evidence of pre-existing disabilities to Searcy's arm and wrist, the finding that these were not industrial disabilities, implicit in the Commission's final award, is supported by Searcy's testimony that he had no problems with either hand or wrist." *Searcy*, 894 S.W.2d at 177–178.

In *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo.App. E.D. 2003), the court affirmed the Commission's decision that the claimant's work related injury to the same part of the body did not merely supplement the prior injury to the same part of the body as was the case in *Searcy* but rather the claimant's injuries combined to produce a synergistic effect of greater overall disability than the simple sum of those disabilities.

"Respondent sustained two separate work-related injuries to his back, one on May 22, 1995 and one on January 28, 1998. In 1995, Respondent herniated a disc between the L4 and L5 vertebrae of his lower back. Dr. David Kennedy (Dr. Kennedy) performed surgery on Respondent, namely an L4-5 microdiscectomy secondary to a herniated disc. Respondent's postoperative diagnosis was sciatica secondary to herniated nucleus pulposus, L4-5 right.

In 1998, Respondent again injured his back. Dr. Kennedy again performed surgery on Respondent, namely a lumbar facetectomy with removal of recurrent disc herniation and screw fixation and fusion with left iliac crest bone graft in the L4-5 area. Respondent's postoperative diagnosis was recurrent herniated nucleus pulposus, L4-5 with radiculopathy. In 1998, Respondent also experienced a recurrent herniation of the same disc level involved in his 1995 injury.....

Dr. Thomas Musich (Dr. Musich), one of Respondent's treating physicians, testified that the combination of Respondent's back disabilities was significantly greater than their simple sum, [FN1] and that Respondent's overall permanent partial disability exceeded 73 percent.

FN1. Dr. Musich said that this was due to new and more extensive required surgical procedures, along with new and additional physical complaints and significantly altered physical examination between Respondent's two evaluations in 1996 and 1999." *Uhlir*, 94 S.W.3d at 443

"Appellant argues, however, that *Searcy* does not allow recovery from the Second Injury Fund when the injuries are to the same part of the body.

In *Searcy*, we stated that, *as a general rule*, where the first and second injuries are to the same part of the body, the second supplements the first rather than combining to create a greater disability than the sum of the two. 894 S.W.2d at 178. However, no such limitation is present within the text of Section 287.220 itself. Section 287.220 provides that when a worker's preexistent injury, in combination with the primary work injury;

is substantially greater than that which would have resulted from the last injury, considered alone and of itself, ... the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund....

No same body part limitation is present within the statute.

Furthermore, the ALJ, in her Award that was adopted by the Commission, specifically points out that:

There is substantial evidence that although Claimant's injuries were to the same part of his back, they combined to produce a synergistic effect of greater overall disability than the simple sum of those disabilities and that the 1998 did not merely supplement the 1995 injury as was the case in *Searcy v. McDonnell Douglas Aircraft, Co.*, 894 S.W.2d 173 (Mo.App.1995).

Accordingly, the injury in *Searcy* has been carefully distinguished from that involved in the instant case. The injury in *Searcy* did not qualify for Second Injury Fund coverage because there was no synergistic effect of greater overall disability, which is a requirement under Section 287.220. Rather, the two injuries present in *Searcy* were merely cumulative. In the instant case, Respondent's two injuries combined to produce a synergistic effect of greater overall disability pursuant to Section 287.220, despite the fact that the two injuries were to the same part of his body.

Searcy's pronouncement of a general rule based on the factual scenario before it, which is different than the factual scenario before us now, does not disqualify Respondent from Second Injury Fund coverage under Section 287.220." *Uhlir*, 94 S.W.3d at 444-446.

In this case, as in *Uhlir*, there is medical opinion of a synergistic effect from the combination of preexisting injury combined with the work related reinjury (i.e. Dr. Volarich assessed 35% permanent partial disability of the body as a whole

rated at the lumbosacral spine as a result of the disk herniation at L4-5 to the left that required discectomy and laminotomy as a result of Connors' April 25, 2000 work related low back injury, and assessed an additional amount for the preexisting low back injury of 35% permanent partial disability of the body as a whole rated at the lumbosacral spine that required surgical repair; Dr. Volarich wrote that the combination of Connors' disabilities created a substantially greater disability than the simple sum or total). Dr. Volarich opined that Connors had an additional diagnosis as a result of the April 25, 2000 work injury of failed back syndrome, and testified that this was consistent with "the ongoing pain that he has, the limitations of motion, the radicular symptoms and so forth." (Volarich Dp. pg. 43) Dr. Volarich further opined:

"He has some arthritis, he has some degenerative disc disease, but I don't think those conditions were severe enough, or he would have had fusion put in, he would have had some hardware put in.

The best explanation is that this is epidural fibrosis because of the sequence of events, how they lined up. He did okay for a couple of weeks after the surgery and then started going back downhill again. That's very typical for epidural fibrosis." (Volarich Dp. pp. 43-44)

Dr. Raskas' post-surgical treatment record of January 26, 2001 included that Connors reported continued back and posterior buttock pain and lateral thigh pain, and he feels as though things are generally worsening with physical therapy. Dr. Raskas recommend an MRI to rule out a recurrent disc herniation. The doctor specifically wrote: "I don't think his reaction to his illness is inappropriate nor magnified." A 2/6/01 MRI of the lumbar spine report noted findings that included: There is no definite MRI evidence of recurrent disc herniation however. Material extending from the operated disc space into the canal does enhance rather diffusely compatible with scar formation... In the last treatment note, Dr. Raskas wrote that Connors reported continuing back and leg pain. The doctor wrote that he had reviewed the MRI scan, and Connors has some spinal stenosis at multiple levels, no evidence of any disc herniation or recurrent disc herniation, there was some scarring in the area, there was some minor degeneration. I believe Connors has reached maximum medical improvement from a surgical standpoint, Dr. Raskas wrote, and I am releasing him with permanent restrictions which are contained in a written office visit note. Dr. Raskas further wrote:

I referred Connors to Dr. Guarino for pain management. I think this is something he is going to need on a chronic basis in all likelihood. I think this is partially in relation to the degenerative condition in his spine and spinal stenosis that he has, and partially due to his work injury and his disc herniation.

Considering this evidence, along with the claimant's testimony about physical problems before the April 2000 work related low back injury including that he needed only Ibuprofen or other over-the-counter for his back pain, his physical problems subsequent to the April 2000 work related injury including his additional physical limitations, and his present need for prescription medication that is being prescribed by the VA, it is found there is substantial competent evidence establishing a synergistic effect from the combination of the claimant's preexisting low back disability with the disability as a result of the April 2000 work injury.

Considering the evidence in determining the extent of the preexisting low back disability, Dr. Raskas, in his initial treatment note, wrote that Connors' past medical history was significant for a prior back surgery 22 years ago on his lumbar spine and a chymopapain injection in the early 1980's in his lumbar spine, and since then, he has been pretty much asymptomatic. He has been doing heavy work and heavy labor without much trouble with his back until recently; he states his back was not bothering him prior to this event of April 25, 2000, Dr. Raskas wrote. Dr. Volarich agreed that Connors had described to him some of his job duties, and that they included some heavy lifting such as lifting up to 100 pounds at times, jobs where he spent half of the day driving, working approximately ten-hour days, and working full-time employment; Dr. Volarich agreed that Connors did not relay that he was missing work because of his back before the April 25, 2000 injury. Connors testified that he was no longer physically able to perform construction work after his prior back injuries. The claimant testified, though, about his job duties at Arnold Muffler prior to the April 25, 2000 work related injury, that he loaded and unloaded material, which required him to lift heavy boxes and equipment. Most of the time I performed all the duties without help, he said, but sometimes he needed to get help because his right hip and leg would bother him. Connors testified that prior to April 25, 2000, his back would really hurt when bending over sometimes, and he'd walk around bent over. Connors stated that he took medication on a regular basis after the prior back injuries, stating that it was prescription medication at first but then Ibuprofen and other over-the-counter medications. Considering the evidence (and the fact of minimal medical evidence of the preexisting back injuries with no prior treatment records), it is found that the substantial weight of the supports a finding of 20% permanent partial disability of the body as a whole referable to the lumbar spine preexisting the work related low back injury of April 25, 2000.

It is found that the evidence supports a determination of the synergistic effect of the claimant's preexisting low back injury combined with the April 25, 2000 work related low back injury to be 20%. Thus, **Second Injury Fund liability** is found to be: (For the April 25, 2000 work related injury: $30\% \times 400 \text{ weeks} = 120 \text{ weeks}$) + (Preexisting disability: $20\% \times$

400 weeks = 80 weeks) = 200 weeks; 200 weeks x 20% (synergistic effect) = 40 weeks; 40 weeks x \$286.68 = \$11467.20.

ISSUE: Future medical care

“It is well-settled that ‘in permanent partial disability cases, the Commission’s award may contain an allowance for the cost of future medical treatment.’ *Polavarpu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. E.D. 1995).” *Dean v. St. Luke’s Hospital*, 936 S.W.2d 601, 603 (Mo.App. W.D. 1997). In *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3rd 879 (Mo.App. S.D. 2001) the Court noted:

“The right to medical aid is a component of the compensation due an injured worker under §287.140.1. *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. S.D. 1996). That statute entitles the worker to medical treatment as may be reasonably required to cure and relieve from the effects of the injury. *Id.* This means treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Id.* Future medical care must, however, flow from the accident before the employer may be held responsible for it. *Modlin v. Sun Mark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App. E.D. 1985). In this regard, Employer contends that Employee was required to show causation for future medical treatment to a reasonable degree of medical certainty, citing *Carter v. Jones Truck Lines, Inc.*, 943 S.W.2d 821, 826 (Mo.App. S.D.1997).” *Sullivan*, 35 S.W.3rd at 888.

In this case, the Connors testified that he took medication on a regular basis after his prior back injuries, stating that it was prescription medication at first but then it was Ibuprofen and other over-the-counter medications. The claimant testified that when Dr Raskas (the authorized treating doctor) released him from his care for the April 2000 work injury, Dr. Raskas sent him to a pain management physician, and subsequently the workers’ compensation insurance company cancelled his treatment and medication. I got continued treatment with regard to my low back at the VA by a specialist, Connors testified. When I went to the VA, the VA put me in a pain management program, and I went through that program twice, the claimant stated. Connors agreed that the only treatment he is receiving at this point in time is medication prescribed through the VA for his low back.

Reviewing the medical evidence, Dr. Volarich evaluated the claimant on the claimant’s behalf; the doctor offered recommendations for future treatment:

In order to maintain his current state, he will require ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID’s), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints. Complimentary medical modalities may also benefit him and are recommended.

It is found, though, that it is not clear from Dr. Volarich’s report or testimony if his treatment recommendations are solely as a result of the April 25, 2000 low back injury or as a result of the combined condition of the claimant’s low back as a result of the prior low back injuries with the work related low back injury; Dr. Volarich, in his diagnoses noted: a) diagnoses for the April 25, 2000 work related injury were – 1. Herniated nucleus pulposus at L4-5 to the left causing left leg L5 radiculopathy – status post laminectomy and discectomy, and 2. Failed back syndrome; and b) preexisting diagnoses included -- 1. Herniated nucleus pulposus at L4-5 to the right causing right leg L5 radiculopathy – status post laminectomy and discectomy, and 2. Recurrent back pain syndrome – status post chymopapain injection. In the initial treatment records subsequent to the April 25, 2000 work related injury, BarnesCare records, it was written that Connors had relayed a past medical history of low back or disc injury in 1974 with vertebrae/disc surgery of low back herniation surgery in 1974; it was noted that Connors was on no prescription at that date, and that Ibuprofen helped some. Dr. Raskas treated the claimant for the April 25, 2000 work related injury which included surgery; the doctor noted on several occasions in his record his opinion that Connors’ reaction to his illness was inappropriate nor magnified. In his final treatment note, Dr. Raskas wrote - I believe Connors has reached maximum medical improvement from a surgical standpoint, and I am releasing him with permanent restrictions which are contained in a written office visit note, he will follow up on an as needed basis only here. Dr. Raskas further wrote:

I referred Connors to Dr. Guarino for pain management. I think this is something he is going to need on a chronic basis in all likelihood. I think this is partially in relation to the degenerative condition in his spine and spinal stenosis that he has, and partially due to his work injury and his disc herniation.

The records of Dr. Guarino reflected that Connors was referred to him by Dr. Raskas for treatment beginning on July 20, 2000. The doctor noted a history from Connors about prior back problems, and also that Connors had relayed he did well until the April 2000 work related injury. Dr. Guarino’s record reflected that he performed several injections and prescribed

medication for Connors. In a final examination report, dated May 11, 2001, Dr. Guarino wrote that Connors' pain was unchanged from over the last year. It was noted that Connors was currently taking Neurontin and Norco for symptomatic relief, and the record reflected that Dr. Guarino prescribed medication for Connors on that date, May 11, 2001. Dr. Guarino further recommended that due to the persistence of his pain and the lack of response to surgery, he felt Connors was a candidate for a spinal cord stimulator.

Considering the medical evidence and opinions, it is found that the only definitive opinion on the cause for the claimant's need for future treatment is that of Dr. Raskas who stated that it is due partially to the degenerative condition in the spine and partially to the April 2000 injury. Again, it is found that Dr. Volarich did not clearly state an opinion on the cause of the claimant's need for his future treatment recommendations. It is found that Dr. Guarino did not express in his treatment records an opinion on the cause for his suggested future treatment, considering that this doctor had indicated a knowledge of the history of the claimant's low back condition. It is found that there is no substantial competent medical opinion establishing a causal connection on the need for future medical treatment to the work related injury of April 25, 2000. Consequently, future medical care is denied.

SUMMARY OF THE EVIDENCE

John William Connors, the claimant, testified that he is 58 years old, born on 09/07/45.

Connors stated that the extent of his education is a GED which he received in the early 1980's. I was in the armed services and received training for aircraft mechanic, the claimant said, and for approximately six months after my December 1967 discharge I worked at the airport as a mechanic. After that I have not done any mechanic work on airplanes, Connors said. I have not had any additional formal vocational training after my discharge, he stated. My current source of income is Social Security disability of approximately a thousand dollars per month, and this began on about May 3, 2000, the claimant agreed. Connors agreed that he as a veteran he is eligible for medical care through the VA and currently receives all of his medical care through the VA. But they do charge me for it, he added. Agreeing that the VA provides the medication related to his low back condition, Connors stated that this current medication is Gabapentin, Nortriptyline, Oxypreson, Irbesartan, Cyclobenzaprine and Hydrocodone; and I have what they call a Duragesic Phentolol pain patch, the claimant said. Connors explained that the medication is basically for nerve damage and for pain relief; two of them are narcotic, and the patch I'm on is a narcotic, and I believe Hydrocodone is a narcotic also, he said.

The claimant testified about his additional past employments. I worked as a roofer, he said, the last company was Missouri Roofing and there I worked for approximately four different companies. Agreeing that he received an injury of the job while in the roofing employment, Connors stated that it was in New Orleans on the Superdome, and he slid down the side of the dome and ruptured a disc. They sent me back to St. Louis to Barnes Hospital to be operated on, he said, and agreed that the surgery was probably by Dr. Manske. Approximately two years after this surgery by Dr. Manske I had further injury to my low back and came under the care of Dr. Lee Ford, the claimant stated. He agreed that at Dr. Ford's suggestion he left the United States and went to Canada for additional treatment/surgery on his low back, which was an injection. I left the profession of roofing after that, Connors stated, and became employed by a company called R. A. Matheis Company where I worked from 1979 to 1988 as a sales assistant; I assisted mechanical engineers on the job sites, he said. My job entailed doing take offs of pending job sites and going out to the customers and updating their material, the claimant stated. I did not receive any injuries while I worked for R. A. Matheis, the claimant said. In 1988 I worked for McMahon Ford as a car salesman, Connors said, and in 1989 through 1990 I worked for Beltone Hearing as a hearing aid salesman. Then in 1990 I worked for ProTech Incorporated but I don't recall what this was, the claimant said. Also in 1990 I worked for New York Carpet where I was trying to sell carpets, he said. Connors admitted that he was not successful in any of these sales jobs. In 1991 I went to work for Maaco Auto Painting, the claimant said, and this employment required me to bend, stoop and crawl as I was an estimator which required one to inspect a vehicle. I became the manager of the Maaco shop, he said. I was self employed in 1993 as an insurance adjuster for automobile insurance, Connors stated, and agreed that he got some of that training when he worked at Maaco. He agreed that this job required him to bend, stoop, crawl and get under vehicles. In 1994 to 1995 I worked for G. C. Services operating a computer in customer service, the claimant said. I didn't need any computer skills other than the process of entering data, he stated, it did not require programming or the use of programs such as Windows. I never acquired the skills to be a Programmer or to use Windows or such programs, Connors said. The claimant was queried if he had been turned down for employment because he couldn't use the programs such as Windows, and the claimant responded - I believe it was a year and a half ago, I tried to get with a company in Arnold and I couldn't operate the computers, and was never contacted to be hired; Connors agreed that this was after his injury at Arnold Muffler. I worked for J. B. Hunt in 1995 driving a 18-wheeler over-the-road, the claimant said, and agreed that the job required some loading and unloading, required him to occasionally get on, about and under the truck and the trailer, and required hooking up. I next went to work for Interstate Transit again driving a truck, he said. Then from 1997 until the date of the April 25, 2000 injury I worked for Arnold Muffler, the claimant said.

My job duties at Arnold Muffler was as a truck driver, Connors testified, I would load and unload material, which required me to lift heavy boxes and equipment. Most of the time I performed all the duties without help, he said. There were occasions when you had to have help; usually if the object was not just heavy but it was a weird shape or something of that nature you would have to have help, the claimant testified. He further stated that sometimes he needed to get help because his right hip and leg would bother him.

Discussing prior injuries before April 25, 2000, Connors testified that the symptoms in his right hip and right leg began years ago, after the second back operation. Agreeing that he continues to have ongoing problems with his low back after the first two surgeries, Connors explained that his back really hurts when bending over sometimes, and also across his back would tighten up for some unknown reason and he'd walk around bent over. After my first two back surgeries I did not ever return to the construction industry, Connors said. I was just not physically able to do the work that I had done before such as the roofing and spraying insulation, he explained. Connors agreed that a physician, Dr. Ford, recommend that he not return. Connors stated that he occasionally lost time from work as a result of those conditions. He agreed that he took medication on a regular basis after the first two surgeries; I don't remember what it was before, but I do know that I also took Ibuprofen a lot, he said. Also, prior to April 25, 2000 there was injury to my left shoulder and my left arm, the claimant said, and agreed that this was while he was employed by Arnold Muffler. He agreed that as a result of this left shoulder/arm and neck injury he received medical care, compensation while he was off the job, and a settlement. The continuing problems that I have related to my neck and left arm injury are that occasionally it would give me difficulty in trying to raise my arm over my head and sometimes just getting it up level with my shoulder, and it would start to hurt again in my left shoulder, the claimant said. My arm would hurt in my left shoulder, to the center of the left side of my back and then down to my hand, he said, and I would get tingling and numbness as well. My neck and left arm after injury to them affected the way I performed my job duties in that it really kind of slowed me down after that. Upon returning to work after the neck and left shoulder injury I compensated a little bit for things in performing my job; I had to be more careful with getting up in the truck because I would use my left arm a lot, the claimant stated, and sometimes I'd have to carry something to stand on because the other side of the truck wasn't made to help me get up into it. The truck I was driving for Arnold Muffler was not a tractor trailer, it was all combined; it was larger than a van and it required you to step up a number of steps to get into the cab. I picked up mufflers and related vehicle parts at the warehouse in Barnhardt, and drove the truck and delivered the parts to repair shops in Illinois and Missouri, the claimant said. Agreeing that after his two low back surgeries and his left shoulder/cervical injury he had to request assistance to help him load and unload the truck, Connors testified that he actually got a new system implemented after the injury to his cervical spine. We would have the people in the service area load the trucks for us, and that made it considerably easier, he said, of course you still had to unload them. Discussing the problems he had prior to April 25, 2000 unloading the truck, the claimant testified that there were times when he would have to get up into the truck a different way because it would be bothering his left arm, and then he would still have to unload the material and sometimes it took him longer than other folks. My low back, after the first two low back surgeries, affected the way I performed my job duties in that I just couldn't bend certain ways or move certain ways without it starting to hurt, the claimant said, and usually with the way I would move would be a little bit different than others, and slower. My low back condition up to April 25, 2000 affected the right side of my body, Connors said, I never had any complaints to my left lower body or leg prior to April 25, 2000. The symptoms that I just described and the conditions that I was working under related to my low back, neck and left arm continued to bother me up until April 25, 2000, the claimant said. These symptoms present prior to April 25, 2000 changed depending upon my activity, Connors stated, and to relieve the symptoms sometimes I would take over-the-counter medication, but there would be times where I would just lay down just to get a rest. I never did this while I was on the job; I remember maybe stopping occasionally but not laying down, I never did that, he said. Agreeing that his motion was limited prior to April 25, 2000, the claimant testified that in regards to his low back area and left shoulder, he would have to move differently, and sometimes he couldn't just pick things up the way he would like. Connors agreed that at the time of his injury on April 25, 2000 he was taking Ibuprofen or other over-the-counter medication on a regular basis. Usually just to keep going day after day, he said.

On April 25, 2000 while working for Arnold Muffler, Connors testified, I was bending over a pallet to pick up what were called glass back mufflers that come in a box, and I had to bend over to get this particular box out between two pallets and I was pulling it out and I felt something in my back like a pop or a twinge or something like that. I reported the injury to my supervisor that day but did not seek treatment that day, the claimant said, and explained that he had had lot of aches and pains, and his supervisor had said - fine, if it gets worse let him know. The symptoms did not go away and I requested treatment, Connors said, and agreed that he was sent to BarnesCare, saw Dr. Raskas an orthopedic specialist, and had physical therapy; he agreed that he received injections and then surgery. The claimant agreed that he began losing time from work at Arnold Muffler on or about May 3, 2000, and had never returned to work. When queried, after Dr. Raskas released you from care did you continue to receive treatment from the Veterans Administration Hospital (VA) related to his low back, Connors responded that Dr. Raskas sent him to Dr. Guarino and he was being treated by Dr. Guarino, a pain management physician, and then the insurance company sent him to a Dr. Graham and that's when Dr. Graham cancelled all the medication and everything. After Dr. Graham released me, I got continued treatment with regard to my low back at the VA

by a specialist, Connors said. When I went to the VA, the VA put me in a pain management program, and I went through that program twice, Connors stated. The program is all a psychiatrist and a psychologist that try to get my mental state able to handle the pain better and be able to relate to people better in spite of my pain, Connors explained. The claimant agreed that the only treatment he is receiving at this point in time is medication prescribed through the VA for his low back.

Connors testified about the ongoing and continuing symptoms he has related to his low back that are different than before the injury of April 25, 2000. I normally have a pain level of about four to five continuously, he stated, and though it does vary where it's at, it generates from my left hip, my left buttocks, down into my left foot. There are times, like now, when it feels like somebody is standing on my left foot, he said. In getting in and out of a car, for example, sometimes it'll just jump to an eight level, between zero and ten; it's very aggravating, the claimant said. He agreed that the symptoms get worse depending upon activities, and they get worse on their own occasionally without an activity. Another symptom is that it almost feels like something twisting back and forth and rubbing in my left buttocks; that's the only way I can describe it - pain - and it usually happens if I've been up walking or something, and it will last for an hour or so, Connors testified. I just stop and it will go away in maybe about 45 minutes or so, he said.

I have intermittent burning and intermittent numbness in my left leg, Connors stated, and this occurs more often than the burning in my right leg; it changes from day to day, but I would say something like 70 percent left and 30 percent right, and maybe 90 percent left the next day and 10 percent right.

The continuing, ongoing symptoms I have related to my prior low back injury and surgery are that occasionally on what I call my good side will start to hurt the same as the left side, Connors testified. He agreed that he was referring to the hip on down his leg. It's like it generates back and forth from one side to the other, the claimant said. Connors stated that he has pain, not on one side or the other of his low back, but all the way across his low back; he stated that he has low back pain in basically the same location prior to April 25, 2000. I have occasional burning in the right leg, but no numbness, he said.

The claimant was asked what present continuing, symptoms, if any, did he have related to his neck or left arm at this time. Basically it feels as it did when I first injured it, he answered, but the pain in my left shoulder and left arm comes and goes. And it does it on its own; I don't lift anything, he added.

The symptoms or problems I had on a regular, ongoing basis after a days work prior to April 25, 2000 was being stiff and an occasional limp, but then I'd just take more medication, Connors testified. Prior to April 25, 2000 on the job to relieve my symptoms occasionally I would just plain stop and maybe lean over a little bit or stand straight up for a few minutes to relieve whatever was causing it, he said.

I am currently living alone and can take pretty much care of my daily needs, the claimant said.

The claimant testified that he is a member of a church, First Baptist in Arnold, Missouri, and prior to April 25, 2000 he did activities for the church such as basketball coach and things of that nature. He agreed that he taught Sunday School prior to April 25, 2000.

Since April 25, 2000 I have performed work for pay at the church Café, Connors testified, I started performing services for the church - I have been gone for about a year and a half - so I would say possibly 2002. He explained that it was for the Family Life Center which is part of the First Baptist Church in Arnold. I do not continue to work there, he said. Up until I started performing work at the church, I had not worked for anyone after the April 2000 work injury, Connors said. At the church Café, he stated, it was hamburgers, hot dogs, cheese burgers, it was like a cafe you might see in a food court at a mall. He agreed that the Café was open to the public. It operates basically for lunch Monday through Friday, he said. I worked about four to five hours a day when I worked there, Connors stated. He was asked if he would work every day of the week, and the claimant responded - When I could do it; yes. Connors agreed that he obtained this employment through the church, and agreed that the church officials were aware of his medical conditions when he obtained this employment and they made accommodations to him in order for him to work there. I was the manager and the employees would help lift, move things, or just plain bring things over for me that were too heavy for me to lift, he explained. Connors agreed that there were times that he did not report for work or would leave work because of his medical condition, and the church was fully aware of this. He agreed that his hours varied depending upon his symptoms. The claimant stated that most of the time he was able to leave work when he desired, but there would be an occasion or two where there just wasn't anybody to take his spot so he just had to stick it out. I believe I was paid \$7.50 per hour, he said. Explaining why he was no longer working there, Connors stated - I started to do more of the lifting and the moving and I couldn't; I started taking a lot of medication to try to compensate for it and I just couldn't do it anymore. So I went to the director and just told them that I was just taking too much medication; so I quit, the claimant testified. Connors agreed that he was unable to continue with this employment even though he had accommodations. When I first started at the café I occasionally did strenuous

things just because I'm a man, Connors said, but normally, I did not do strenuous things because it would increase the pain level. When I got home from working at the cafe, I had the symptoms I had before, but one thing was that I would normally lay down; I had a special chair I would sit in to try to relieve it, the claimant testified. He was queried if, in his opinion, as a member of the church he felt this was a make-work job for him, and Connors responded - They extended themselves quite a bit for me, yes. The claimant was asked his opinion if he thought he would have continued to be employed, and he answered - No. He was asked if at that time he was, and perhaps still is, economically pressed, and Connors answered - Yes. The claimant was asked his opinion if his church could have hired anyone else to perform the work at the same pay. Yes, he answered. He was then queried if he believed that the church allowed him to do this on a humanitarian basis, and he responded - Yes.

Connors stated that he has looked for other employment. I forget how long ago it was, but it is a company in Arnold that deals with phone solicitation type things, he said. It would have been part time, he said. The claimant was asked if they were able to make any accommodations for him, if he was aware of any, and Connors responded - No. I was never hired, he said, and explained that they told him the reason was because he did not pass the part of the test that had to do with computers.

The claimant testified about how he presently spends his day since the April 25, 2000 accident and injury and his release from treatment by Dr. Raskas. Normally I will get up and drink some coffee and take a bunch of pills, and then see if there's anyplace I can go, people to see, something of that nature, Connors said. I have been doing walking and things of that nature. I just kind of help people out a little bit by showing up and talking to people; I'm with a small church out at Washington, Missouri now where I'm just kind of helping them out, he stated. That's pretty much it, he said. I occasionally spend the entire day up and about, but most of the time I don't, Connors testified, and explained that this was because the discomfort level starts to really wear on him, and then a lot of the medication he is taking makes him drowsy. If the pain level increases what I try other than medication is some breathing exercises, he said, that was part of the pain management. And then I will just sit down, or lay down; normally I wind up laying on the floor if it's real bad and take enough medication to put me to sleep, Connors said. I am not able to function throughout the day without laying down or reclining, with rare exception, the claimant agreed. Depending upon my activity, he said, not only does the pain or the discomfort go from one side of my leg to another, it usually will increase if I do any -- like I couldn't play softball. The church has a softball team and last year I tried to swing a bat in the batting cage and it hurt, and I used to play ball for 20-something years, the claimant said. I also used to coach kids, young boys up to 14 or 15 years old, in basketball, and I can't do that, Connors said. I now occasionally teach Sunday School when I can get my head clear, but I did give that up, he said. Hobbies that I have continued to do that I did before the April 2000 work injury is basically reading, things of that nature; I will do that but it's still hard to keep my mind focused, the claimant stated; I read the Bible or books like that, its got to be something short, the claimant said.

Connors discussed his present physical abilities and limitations. I have gotten up to 45 minutes to maybe an hour in walking, he said, but I cannot do that everyday. Sometimes after the walking it will get worse, but a lot of times it just stays at that four or five, Connors stated. I can sit just a few minutes before I have a change in my symptoms, he said. I am able to drive maybe ten to fifteen minutes then my left hip, leg and foot really start to bother me; I can't drive a stick anymore; I drive automatics; I use my right foot for the brake and the gas, the claimant testified. I don't know how much I can lift at one time, the claimant said, I guess if I had to I could probably lift seventy-five to a hundred pounds, if I had to, but I could not do it repeatedly. If I do lift my symptoms increase real quick, the claimant said. Connors agreed that after April of 2000 but prior to the operation Dr. Raskas performed he was advised not to return to truck driving by Dr. Raskas.

The claimant was asked, based upon his symptoms did he feel he could do any work on a regular sustained basis, that is eight hours a day, five days per week, 52 weeks a year. No, I'm sorry, Connors answered. It just hurts, he explained, and with the medication I'm on I just have real difficulty sometimes even concentrating on what's going on about me. The claimant stated that he has attempted to be off the medication but the pain just is really great. I don't know, I could not function at all if I were off the medication, he said. The claimant agreed that Dr. Raskas give him a list of restrictions when he would visit him, up to and including the last time that he saw Dr. Raskas. With these restrictions placed upon me by Dr. Raskas, I do not feel I could do any of the employments that I had performed prior to April 25, 2000, Connors testified. The claimant stated that, other than selling hearing aids and automobiles, he did not believe there were any employments he performed that didn't require him to climb, lift, bend, stoop, get out and get under, including his self-employment. Connors agreed that prior to April 25, 2000 he attempted a job selling shoes. I did a little bit of it, but I couldn't keep it; it was dealing with ladies shoes and mentally I couldn't do that, but physically it was pretty difficult as it was after my two prior low back surgeries, the claimant explained. There are none of my prior employments that I feel I could physically do on an every day basis because of my condition, Connors testified.

On cross examination by the employer/insurer, the claimant stated that he believed it was true that he had his first

back surgery in the mid to late 1970's by Dr. Manske, and agreed that it was an open procedure. I believe they removed disc material; I do know that there was no fusing or anything of that nature, Connors said. The second procedure was done in Canada and was more of an injection, he agreed, and this was recommended by Dr. Ford. When queried if he knew if the second procedure was at the same level as the first low back surgery, Connors responded - It was still my right side and it was hurting, it could have been. After sending me for the injection procedure in Canada, Dr. Ford imposed limits on me, the claimant stated, Dr. Ford said that I should not return to the job that I had which was the construction job but did not put any kind of limitations on me. Connors agreed that it was after these two surgeries that he got out of the construction business. I had been doing roofing for about six to seven years, the claimant stated. He agreed that in the later jobs there was still physical activity involved. Explaining how he would handle the physical activity on the job prior to April 25, 2000, Connors stated that he would do the best he could. I was still kind of strong, he said, but my positioning of myself had to be compensated for sometimes to take into account the condition of my low back. Explaining how he had compensated for his left arm and shoulder between the time he hurt them in 1997 and the back injury in April of 2000, the claimant testified that for a while they gave him somebody - a high school student summer hire - to help out. Then after that I would be getting up and down, as I did in the past, with my left arm, but a lot of times I would have to get up on the other side of the truck using my right arm; sometimes I would get a truck that had a one of those bumpers that you use to stop a car from going under, and if that was there I could get up on that and get the door up and down, but that's not the normal way to do it, Connors testified. The claimant agreed that he had testified on direct examination that it came to the point where they would load the truck for him at Arnold Muffler. When asked if he was the only driver they were doing that for, Connors responded - At first it was but then they realized that it was a good idea and they started doing that for the other guys. This was approximately eight months before the injury in April of 2000, he said. Connors agreed that initially this was an accommodation, where they loaded the truck for him, and something he had to discuss with the management, and they allowed him to do this. The helper Arnold Muffler gave me to help me load was after my 1997 arm injury which occurred after I started there, Connors said, and agreed that this was because of the arm condition. He was asked if this accommodation had helped his back condition. Yeah, my overall condition it helped because it's a very tedious thing to load the truck and it is actually a lot easier to unload it, the claimant stated, and agreed that when you unload you're only taking a few items off at a time. I think, but I'm not really positive, that they did give me somebody to go with me on the truck to unload after they began loading the truck for me, Connors said. I would have the person for the whole day, not just for certain jobs or certain deliveries, he said.

During cross examination by the employer/insurer, Connors stated that with the shoulder injury before April 25, 2000 he was given prescription medication for about two months, and then after that they said - just live with it, be aggravated. The claimant agreed that he had testified that at that point he would take over-the-counter Ibuprofen. I took Ibuprofen before April 25, 2000 just about everyday, he said, though the amount of times I took it per day may have varied because some days were worse. It was occasionally that I would miss work at Arnold Muffler before April of 2000 due to my back or my arm, the claimant said, maybe four or five times throughout that time period of two or three years. Sometimes I would not do overtime which was offered to me because of my back and shoulder, he said, and this happened a couple of times a month maybe.

Connors agreed, during cross examination, that he worked about five or six days beyond the back injury of April 25, 2000. During that approximate week my left hip started to really get worse, he explained, and the Ibuprofen and the medication I was taking wasn't helping it at all. It resembled what had happened to me many years ago on the right side, so I got very concerned, especially when I couldn't bend to get in and out of the truck easily, Connors stated. He agreed that it had been only the right side bothering him up until April 25, 2000. When the left side started bothering me after the April 25, 2000 injury, the right side then bothered me off and on after the initial month or so of my left side; but my right side does act up from time to time now, more so than it used to before April 25, 2000, the claimant said.

During cross examination, Connors stated that before surgery for the April 25, 2000 injury Dr. Raskas released him with restrictions to do light duty work. After that there wasn't any restrictions, the claimant said, I just didn't go back to work at Arnold Muffler. The claimant was queried if Dr. Raskas assigned some kind of restrictions after the surgery. He wrote one that was a generic, Connors responded, and he just never wrote it again. When queried if it was correct that he didn't even try to go back to Arnold Muffler, Connors answered - Well, I called them but they told me - No.

The claimant was questioned during cross examination about his activities subsequent to the April 2000 injury. He stated that he was manager at the church café for about eight months. He stated that he was not the first person in that position. Connors was asked if he had replaced someone, and he responded - I assisted someone, let's put it that way. The person who was managing the café, they put me under her authority as manager of the cafe and she did some other things as well, he explained. Connors stated that at that time, when he transitioned under the original manager, they were not asking other people to fulfill that job at that spot other than him. He was asked, when he left the job of manager at the cafe did he know if they searched for another manager. They had a person that kind of went to that position but they never hired

anybody else; I was just kind of the extra, he answered. Connors stated that at the time he left they did not look for somebody outside of the church to replace him. Connors agreed that at his deposition he had talked about a job he had applied for in phone solicitation with the company Convergys; he agreed that he tried to get on there several times. I put in no other actual applications anywhere else, the claimant said. I did talk to people from time to time about if I could get any accommodations and basically part time, Connors testified, and it just didn't work.

During cross examination by the employer/insurer, Connors testified about employment prior to April 25, 2000. In 1995 I worked for J. B. Hunt driving an 18-wheeler for about eight to nine months. Explaining why he left that job, Connors stated that they had an agreement that he would be able to drive throughout the Midwest and be home on Friday evenings and then pull out the following Sunday afternoon or evening, and they broke that commitment, not only to him but to about 50 of us. Connors agreed that when he left that job it wasn't in regard to his back condition.

It was noted, during cross examination by the employer/insurer, that Connors had stated during direct examination that sometimes while on the job at Arnold Muffler he would stop working; Connors was asked give more detail about his stopping. A couple of minutes, he answered, not as much as five or ten minutes. He stated that he did not know how many times a day he would have to stop working before April 25, 2000; it was such a part of my life style I honestly don't know; a couple, three times, I'm not sure.

On cross examination by the Second Injury Fund, Connors agreed that he is able to read and write, and able to do basic mathematics such as balance a checkbook. When queried, isn't it correct that he had used a home computer in the past, Connors answered - I probably don't have three hours total time on one. He agreed that he has done e-mail and the Internet before. Connors agreed that in a former job he had made phone calls to people who owed money to MCI and then recorded the data from those phone calls on a computer. Connors agreed that he had been self-employed as an independent insurance estimator in the past, and stated that this job required basic mathematics in terms of adding up the estimates of the damage that was in the car and required him to keep records of a full explanation of the damage that was done or parts that were missing. I also did a little bit of other kind of paperwork in regards to my pay, Connors said, for things such as travel or photographs that were taken and amount of time spent. He agreed that he also worked for Maaco in the past doing estimating, and also was manager of that particular Maaco location. I managed 12 to 15 people, the claimant said. He agreed that he had to fill out paperwork for customers when they would come in and was responsible for ordering the parts that were necessary to do the repair. Connors agreed that he was in charge of keeping control of the inventory, and also scheduled the work for those underneath him. Concerning his shoe sales job, Connors was queried if it wasn't correct that they had wanted to move him into a position as manager at that shoe store. They had talked about that, Connors answered, but it wasn't like they came up and said - "Here it is, what do you want to do?" Connors agreed that his job at Arnold Muffler at times required him to lift up to 75 to 100 pounds, and he could need to do that as often as 7 to 8 times a day; he agreed this was true up until the time of his April 25, 2000 injury. Connors agreed that he also spent up to 75 percent of his day driving from location to location, and that he normally would work a ten hour day at least four days a week, sometimes up to five days a week, and sometimes up to 12-hour days. The claimant agreed that prior to the April 25, 2000 injury he coached a basketball team for boys up to the age of 14 or 15, and practiced with his stepson at home. I had a garden before the April 25, 2000 injury, the claimant agreed, and performed care for that garden in terms of weeding and that sort of thing. Connors agreed that reading the Bible is one of the things he does and taught Sunday school in the past to adults. My preparation time was each day for probably about an hour, and then Saturday is the put it together day, he said. I don't teach on a regular basis now; I occasionally teach Sunday school class, just recently, last week; I did two or three weeks in a row, Connors stated.

Connors was asked about his work in the cafe at the Family Life Center at First Baptist Arnold Church, during cross examination by the Second Injury Fund. He agreed that the cafe actually charged for the food and he ran a cash register when he was working that job. I had someone to clean up the tables after people would leave; but, yes, I did that periodically, Connors stated. I prepared some of the food and did some of the cooking as well, he said. I believe I was managing about six people, he stated. Connors agreed that they still have people running that cafe to this day.

During cross examination, Connors agreed that at the First Baptist Arnold Church they also have an information desk there, and he worked the information desk as a volunteer once a week when he was at the church. I would be stationed at the information desk approximately two to three hours, he said. He agreed that he also occasionally did social activities with the church in the evenings after April 25, 2000. After April 25, 2000 I occasionally did Bible studies at the Wednesday evening service.

Connors agreed that before his April 2000 back injury, the last medical treatment he had received for his low back was in the early 1980's and that was the injections in Canada.

During cross examination by the Second Injury Fund, Connors agreed that in regards to his prior neck and shoulder problems, there was no surgical procedure performed on his neck or shoulder. He agreed that after the shoulder injury he returned to the same job at Arnold Muffler and at times was required to do all of the job duties that he'd been required to do before that shoulder injury.

On redirect examination, Connors gave further testimony about his managing of the café in the church's Family Life Center. Since I quit working there they have turned the cafe back over to the lady's position that I was working under; they do not have a manager as I was; it's all under the control of the office now, he testified. Connors agreed that they did not replace him. Prior to my getting that job it was the office people doing that job, he said.

On further cross examination by the Second Injury Fund, Connors agreed that the Family Life Center, is an outreach to the public and community where people come in and use the exercise facilities, and people come in on Friday nights and hang out at the place where there's games.

Medical records offered into evidence included the following:

1. Certified records of BarnesCare (Claimant's Exhibit No. C) reflected treatment of Connors from May 3, 2000 through June 5, 2000 for complaints of low back pain on the left radiating down left hip and leg as a result of a work incident on 4/25/00 of lifting glass back paks. The initial diagnosis was – resolving strain lower back. It was noted that Connors had relayed a past medical history of low back or disc injury in 1974 with vertebrae/disc surgery of low back herniation surgery in 1974; it was noted that Connors was on no prescription at that date, and that Ibuprofen helped some. The record indicated that Connors was treated with medication and physical therapy. The record indicated that on June 2, 2000 Connors was discharged to the care of Orthopedic Surgery consultant on June 2, 2000 with a diagnosis of – possible radiculopathy lumbosacral. A report by Jonathan M. Foss, M.D. of an MRI of the lumbar spine, dated May 30, 2000 (See, also, Claimant's Exhibit No. D), included the following in its findings:

At L1-L2 there is mild diffuse disc bulge evident with spinal or neural foraminal stenosis evident. The posterior elements appear intact.

At L2-L3 and L3-L4 levels there is no bulge, protrusion or extrusion evident.

No spinal or neural foraminal stenosis is seen.

The posterior elements are unremarkable.

At L4-L5, there are post operative changes posteriorly consistent with the previous reported laminectomy. There is a moderate left pericentral disc protrusion evident at this level which is not definitely enhanced with Gasolinium administration and the possibility of recurrent herniation is considered. There may be impingement of the L5 nerve root on the basis of this process.

The neural foramina appear patent at this level.

At L5-S1, there is a mild central disc bulge evident without spinal or neural foraminal stenosis evident. The posterior elements appear intact.

The impression written in the May 30, 2000 MRI report was:

Post operative changes at the L4-L5 level.

Left pericentral disc protrusion at L4-L5 with the possibly of recurrent herniation considered. This process may impingement upon the left L5 nerve root. There is a mild central disc bulge at L5-S1. There also appears to be a mild bulge at the L1-L2 level.

2. Records of Spine Care Alliance (Claimant's Exhibit No. E) concerned the treatment of Connors by **Dr. David S. Raskas** beginning on June 12, 2000 for complaints of left hip pain radiating down the left leg to the foot which began on April 25, 2000 after leaning over and trying to lift a heavy box and felt something pull in his back. Dr. Raskas noted the following as Connors' past medical history:

Is significant for a prior back surgery 22 years ago on his lumbar spine and a chymopapin injection in the early 1980's in

his lumbar spine. Since then, he has been pretty much asymptomatic. He has been doing heavy work and heavy labor without much trouble with his back until recently. He states his back was not bothering him prior to this event of April 25, 2000.

Examination findings on June 12, 2000 included: obese male – height 5 feet 9 inches and 285 pounds; gait is normal; heel toe walking is normal; muscle strength in hip flexors, quads, foot dorsiflexors, invertors, plantar-flexors is normal; sensory exam is diminished over the dorsum of the left foot; little bit of sciatic notch tenderness; straight leg raise is positive on the left; Waddell signs are negative; range of motion is about 30% limited; Achilles is present on the left and absent on the right, it should be noted that is the same side he had sciatica at the time of the chymopapain injection. Dr. Raskas written impression was: the patient has an L5 radiculopathy with recurrent disc herniation and degenerative disc disease of his lumbar spine. It is my opinion this condition is work related, the doctor wrote. The treatment plan was for some epidural steroid injections and restrictions. The record reflected that Connors reported the nerve blocks were the only thing to give him successful relief of his L5 symptoms, but that he continued to have episodic, significant buttock and left leg pain. In the August 30, 2000 entry, Dr. Raskas wrote that at this point Connors' options were continued observation with activity modifications and limitations or a revision microdiscectomy or revision microdiscectomy and fusion; the doctor noted that if Connors chose surgery, he suggested a myelogram/CAT scan prior to this.

Records of **Missouri Baptist Hospital** (Claimant's Exhibit No. G) included records of Connors' hospitalization in September 2000 for lumbar myelogram and CT post lumbar myelogram studies, and then hospitalization in October 2000 for the surgical procedures of L4-5 laminotomy and microdissection. The report of the 9/13/00 lumbar myelogram noted the following findings:

L4-5: There is moderate ventral epidural impression upon the thecal sac at L4-5 which is asymmetric to the left. There is non-filling of the left L5 nerve sleeve. There is decreased filling of the right L5 nerve root sleeve.

There is mild ventral epidural impression upon the thecal sac identified at L1-2, L2-3, L3-4 and L5-S1. The nerve root sleeves fill symmetrically at these levels. There is mild overall canal stenosis noted at L4-5. AP and Lateral views of the thoracic spine are unremarkable.

The report of the 9/13/00 lumbar CT post lumbar myelogram noted the following findings:

L4-5: There is left paracentral disc protrusion at L4-5 which results in left ventral lateral impression upon the thecal sac and mild overall canal stenosis. There is mass effect and non-filling of the left L5 nerve root sleeve. There is mild bilateral degenerative facet change at this level.

L5-S1: Vacuum disc phenomenon is appreciated at this level. There is no evidence of canal or neural foramina compromise.

The conus terminates in its expected normal location. The paravertebral soft tissues are unremarkable.

Dr. Raskas, in his next treatment entry of September 18, 2000 in his record, included the following:

(Connors) returns to the office today...I talked to him again. His prior surgery was done for pain that was on his right side. He now has an L4-5 disc herniation on the left and he has some mild spinal stenosis associated with this and some mild spondylotic changes, but he does have spondylotic changes throughout the rest of his lumbar spine.

It was noted that Connors' symptoms were continuing, and that a microdiscectomy was to be performed.

An operative report was in the record and reflected that on October 31, 2000 Dr. Raskas performed on Connors the procedure of: 1. L4-5 left laminotomy, and 2. L4-5 microdissection. The pre- and post-operative diagnosis was: L4-5 herniated disc. In a post-operative exam entry, dated January 26, 2001, Dr. Raskas included the following:

John Connors returned to the office today. He continues to have back and buttock pain, posterior buttock, and lateral thigh pain. He has been to 10 out of 11 physical therapy visits and feels as though things are generally worsening with physical therapy. He missed one visit because he states it was hurting so much, he thought he would likely aggravate things more by attending therapy that day.

On physical examination, active range of motion is 25% for flexion and extension. He is 50% limited for rotation. His incision appears to be healing well. His strength is normal in the lower extremities. He states that the buttock pain and most of the leg pain was gone immediately after surgery and he was feeling quite a bit better. Gradually,

this has increased over time and has become especially worse in the last couple of weeks. He is currently taking Neurontin and Vicodin. He is now about three months post-op.

Given the above findings, I recommend an MRI with contrast to rule out a recurrent disc herniation. I have reviewed his physical therapy report which suggested signs of the patient's positive Waddell signs. More correctly, the report should have reported that the patient had 1 out of 5 Waddell signs, that being for simulation. I don't find any overreaction, regionalization signs, or any other signs that Waddell classified in his paper in 1980. While I do think that Mr. Connors has some significant concerns about his future, it is inescapable that these will interact with his symptoms. I don't think his reaction to his illness is inappropriate nor magnified.

His work restrictions are to remain the same and he is to continue taking Neurontin and Vicodin. I will reevaluate him after an MRI scan is obtained.

A 2/6/01 MRI of the lumbar spine report noted the following findings:

Patient has undergone left L4-5 hemilaminotomy for discectomy. There is enhancing scar and granulation tissue at the operated level. There is no definite MRI evidence of recurrent disc herniation however. Material extending from the operated disc space into the canal does enhance rather diffusely compatible with scar formation...Degenerative disc disease is also noted at the L5-S1 level. This appears greatest centrally in the canal. Degenerative facet disease noted L4-5 and L5-S1. Mild diffusely bulging disc is noted at L3-4. Degenerative change also observed at L1-2. Bony alignment is within normal limits. There is no definite canal stenosis. The tip of the conus medullaris is unremarkable in appearance. There are no enhancing abnormalities. There is focal small central protrusion at the L1-2 level.

In the last treatment note, Dr. Raskas wrote that Connors was seen on that date and reported continuing back and leg pain. The doctor wrote that he had reviewed the MRI scan, and Connors has some spinal stenosis at multiple levels, no evidence of any disc herniation or recurrent disc herniation, there was some scarring in the area, there was some minor degeneration. I believe Connors has reached maximum medical improvement from a surgical standpoint, Dr. Raskas wrote, and I am releasing him with permanent restrictions which are contained in a written office visit note, he will follow up on an as needed basis only here. Dr. Raskas further wrote:

I referred Connors to Dr. Guarino for pain management. I think this is something he is going to need on a chronic basis in all likelihood. I think this is partially in relation to the degenerative condition in his spine and spinal stenosis that he has, and partially due to his work injury and his disc herniation.

3. Spine Care Alliance/Dr. Raskas records concerning restrictions for Connors (Claimant's Exhibit No. F) indicated in the final Disability Certificate of 02/12/01 that Connors was released at maximum medical improvement and released to restricted work duties. The form indicated that for the diagnosis of L4-5 disc herniation, work restrictions of: a. lifting/carrying restrictions of – 20 pounds; b. occasional - squatting/bending/kneeling, pushing/pulling, and reaching/overhead; c. totally restricted from – climbing; d. 0-2 hours at a time of standing/sitting/walking; e. 0-2 hours in a day of standing; f. 2-4 hours in a day of walking; g. 4-6 hours in a day of sitting; and g. driving limited to 15 minutes at a time.

4. Records of Barnes-Jewish Pain Management/Dr. A. H. Guarino, M.D. (Claimant's Exhibit No. I) reflected that Connors was first seen by Dr. Guarino on July 20, 2000 by referral of Dr. Raskas. In the July 20, 2000 examination report, Dr. Guarino noted Connors prior back problems, noting that they began 24 years earlier and Connors had had back surgery at that time, and that approximately 22 years earlier Connors had had an injection of chymopapain in his back. The doctor wrote that Connors relayed he did well until the April 2000 work related injury, and this injury was discussed by Dr. Guarino. The doctor discussed the subsequent treatment Connors had received, including physical therapy which only gave momentary relief, and an epidural steroid injection by anesthesiologist in Dr. Raskas' office which did not give any relief instead caused great pain; it was written that Connors had been referred for consideration of a left L5 nerve root injection.

The record reflected that several injections at the L5 nerve root were performed with some improvement in Connors' pain. The record reflected that Dr Guarino prescribed medication for Connors.

In a final examination report, dated May 11, 2001, Dr. Guarino wrote that Connors' pain had unchanged from over the last year. He is currently taking Neurontin and Norco for symptomatic relief, the doctor wrote. Dr. Guarino wrote that due to the persistence of his pain and the lack of response to surgery, he felt Connors was a candidate for a spinal cord stimulator. The record reflected that Dr. Guarino prescribed medication for Connors on that date, May 11, 2001.

5. A report of a Functional Capacity Evaluation performed on the claimant on July 26, 2001 at The Work Center, Inc. (Employer/Insurer's Exhibit No. 2) reflected the following assessment: "Mr. Connors was cooperative and attempted all tasks with apparent maximal effort. Primary limitations at this point appear to be (1) subjective complaints, (2) limited trunk

mobility in all planes, (3) postural deviations, and (4) decreased strength in left hip flexors.”

The FCE summary included the following: a. Physiological changes – Connors demonstrated appropriate and expected physiological changes during functional testing, indicating good effort; b. Self reports – subjective reports of pain ranged between 3 to 8 out of 10, depending on the activity, and these reports were consistent and appropriate for given activity. Lifting capacity was noted as follows: 60 pounds occasionally - floor to waist, waist to shoulder, and floor to shoulder; 30 pounds frequently – floor to waist, and floor to shoulder; and 12 pounds constantly – floor to waist, and floor to shoulder. It was written that Connors’ carrying capacity was 50 pounds bilaterally, a distance of 80 feet, and he could climb stairs up/down 9 steps x 4 rep (90 total steps). It was noted that all functional and transitional movements were slow and guarded. The primary limiting factors were noted as: “Subjective reports of low back and right buttock pain.” In the category of Symptom Magnification Indicators, it was written: “Based on observation and objective testing versus subjective reports, it is felt there are no signs of symptom magnification present at this time.”

The Work Demand Level section reflected: required work demand level – medium (50 pounds occasionally); and current work demand level – medium (60 pounds occasionally).

The Overall Impression was:

Mr. Connors arrived on time for his 8:30 a.m. appointment on 7/26/01. He was pleasant and cooperative throughout the evaluation, attempting all tasks presented, with apparent maximum effort. Subjective reports were consistent with objective performance, and correlated well with the findings of the gross motor assessment. Despite subjective complaints of pain, it is felt that a valid assessment of his current functional level was obtained during this evaluation.

As of this report date, Mr. Connors presented with subjective complaints of low back and left hip pain. He displayed minimal left antalgia during ambulation tasks, performing activities all activities with reports of “sharp/shooting” pain. He reported this pain to be fleeting, exacerbate during some activities, then abating quickly.

Mr. Connors reports his occupation as a “delivery truck driver” is no longer available, as the company he was working for has been “sold”. He reports at this time his vocational goals are unknown. Based on his performance during this FCE it is felt Mr. Connors would be able to safely perform within the “medium” work demand level (50 pounds occasionally).

This evaluation was approximately 3 ½ hours in duration over one day.....

The **Division of Workers' Compensation record for Injury No. 97-037831** (Claimant’s Exhibit No. H) included a Report of Injury form which indicated that Connors was a full-time employee with Arnold Muffler, Inc. as a truck driver. The form reflected that on May 5, 1997 Connors was making a delivery and injured his neck and left shoulder while climbing up the right rear side of the trailer van using the steps and hand hold, and pulled or twisted his neck and left shoulder.

Medical records in the Division file indicated that Connors received physical therapy for the May 5, 1997 work injury up to mid June 1997. In a June 13, 1997 examination report, Dr. David G Kennedy, M.D., neurological surgeon, wrote of the work injury and Connors’ subsequent symptoms. The doctor noted that Connors’ past medical history was essentially unremarkable except for a discectomy in 1977 and Connors’ current medication was Lodine and Flexeril. Dr. Kennedy wrote that he had reviewed and MRI of the cervical spine which revealed mild cervical spondylosis, more noticeable at C5-6 and C6-7, and that an EMG was supposedly a negative study. It appears to me that Connors has a mild cervical radiculopathy but does not need any operative intervention for this, the doctor wrote. Dr. Kennedy wrote that Connors was making substantial improvement with cervical traction and he would be continued with Lodine. The doctor then wrote: “In the interim, he should not bend nor lift more than 20 pounds. We will see him back in one month and I expect we would be able to return him to normal duty at that time.”

A form was in the record which reflected that Connors received 1 1/7 weeks of temporary total disability benefits for the period of May 19, 1997 through May 26, 1997, and returned to work on May 27, 1997.

Dr. Kennedy prepared a rating report, dated July 15, 1997, after seeing Connors on that date. The doctor wrote that Connors was still having some intermittent discomfort in the arm but overall was doing quite well; it was noted that Connors had no neurologic deficits associated with the injury. Dr. Kennedy’s final notation in his July 15, 1997 report were:

I believe that he does have mild aggravation of cervical spondylosis which is currently not restricting him to any significant degree except that the notes that he has some difficulty pulling himself up in the truck. Overall, given his benign examination I do not think anything further needs to be done. He may need Lodine on an as needed basis in the future. I gave him a prescription for this. From my standpoint he is at maximum medical improvement. I would rate him at 3 percent permanent partial disability.

A Work Status Report form dated 7-15-97 completed by Dr. Kennedy was in the Division file, and reflected that Connors could return to work regular duty on 7-16-97. Dr. Kennedy further wrote in the Additional Comments section of the form: "use caution entering vehicle".

A February 18, 1998 examination report by Dr. David G Kennedy, M.D. included that Connors relayed complaints of various degrees of pain that had been more prominent over the past two weeks. It is not necessarily related to activity, the doctor wrote, except that he does note that sometimes climbing into the truck tends to aggravate his pain. Dr. Kennedy noted examination findings of: range of motion of the neck is unrestricted; motor examination shows normal tone and bulk throughout with no atrophy or fasciculations; sensory exam shows some scattered sensory loss in the left hand, previously it was on the right; reflexes at 1- plus and symmetric. Dr. Kennedy wrote that overall, Connors appeared the same, and that Connors had symptoms consistent with cervical spondylosis. Connors may need anti-inflammatory agents on a regular, although not necessarily daily, basis, the doctor wrote. Dr. Kennedy again wrote that from his standpoint, Connors was at maximum medical improvement and there was no change in his disability.

The Division file included a Stipulation for Compromise Settlement form which indicated that on May 19, 1998 Connors, pro se, and the employer/insurer entered into a settlement of his May 5, 1997 work related injury of 5% permanent partial disability of the cervical and upper thoracic spine.

Dr. David Thomas Volarich, D.O. testified by deposition on behalf of the claimant. The doctor indicated that he evaluated the claimant on the claimant's behalf on or about June 13, 2002 in regards to the April 25, 2000 work related injury. The evaluation included taking a history from Connors of his job activities, his present complaints regarding the work injury of April 25, 2000, any pre-existing injuries or illnesses, his past medical background, a physical examination, and a review of medical records. Dr. Volarich stated that he would testify in accordance to his June 13, 2002 evaluation report, which was marked as Employee's Exhibit 2 at the deposition and offered into evidence without objection. (See, Volarich Dp. pp 10-11)

In his June 13, 2002 evaluation report, Dr. Volarich noted Connors' relayed history of the April 25, 2000 work accident. Dr. Volarich discussed the subsequent treatment Connors received, including surgery on 10/31/00 by Dr. Raskas at Missouri Baptist Medical Center, per the medical records, for left L4-5 laminotomy and microdiscectomy. It was noted that postoperatively, Connors continued to complain of back pain and left leg pain, and Connors did not experience any improvement with physical therapy which was discontinued. Dr. Raskas placed Connors at maximum medical improvement and released him with permanent restrictions on February 12, 2001 and Connors was referred to pain management for future care, the doctor noted. Medical records reviewed were listed by Dr. Volarich. Dr. Volarich noted prior injuries for Connors of: a. in 1974 – he fell on the slope off the side of the Super Dome in New Orleans and sustained injury to his low back with right leg radicular pain and underwent L4-5 discectomy on the right; b. in 1978 Connor was working around the house and experienced an aggravation of his low back pain, and was treated conservatively and had a chymopapain injection for 6 to 8 months before returning to full duty work; and c. on May 5, 1997 he was pulling himself up into the back of his truck and strained his left shoulder and experienced pain down his left arm, and was diagnosed with left shoulder and cervical strain. Connors' continuing complaints from the April 25, 2000 injury as well as from the prior injuries were noted by Dr. Volarich. Examination findings at the June 13, 2002 evaluation were noted by Dr. Volarich, and included: left-hand dominant; symmetric bulk and tone in upper and lower extremities; strength in right shoulder at rotator cuff and deltoid is +5/5 and the left in +4.5/5; lower extremities both quadriceps are weak at +4/5 because of back pain; right calf is strong at +5/5 and left is weak to both plantarflexion and dorsiflexion at +3.5/5 because of left leg pain; sensory touch is normal; deep tendon reflexes are +1/4 and symmetric in the upper extremities and +2/4 and symmetric in the lower extremities with the exception of absence of the right Achilles reflex even with augmentation; difficulty maintaining balance when tandem walking; can hop once on the right without difficulty, but is unable to hop on the left because of left lower extremity pain; difficulty with toe walk and heel walk on the left due to pain in the left leg; cervical spine range of motion is restricted; no trigger points in cervical spine; lumbar spine – worst pain with flexion, palpation of lower back elicits pain in the sacroiliac joints and notch, a trigger point is found in the left sciatic notch, diffuse spasm is not identified, there is an 11 cm scar in the midline from past surgical repair, straight leg raising is accomplished to 70 degrees on the right without difficulty, but on the left leg at 70 degrees pain radiates into the left calf; left shoulder – 15% loss of motion and +1 crepitus is noted with range of motion, the impingement test is weakly positive, weakness in the shoulder.

Dr. Volarich wrote that his diagnoses for the April 25, 2000 work related injury were: 1. Herniated nucleus pulposus at L4-5 to the left causing left leg L5 radiculopathy – status post laminectomy and discectomy; and 2. Failed back syndrome. Preexisting diagnoses, the doctor wrote, were: 1. Herniated nucleus pulposus at L4-5 to the right causing right leg L5 radiculopathy – status post laminectomy and discectomy; 2. Recurrent back pain syndrome – status post chymopapain injection; 3. Chronic lumbar syndrome; 4. Chronic cervical syndrome; and 5. Left shoulder impingement.

The doctor wrote of his opinion on causation:

It is my opinion that the work accident that occurred on 04/25/00, when Mr. Connors leaned over to lift a 70-pound box of mufflers that was wedged between 2 pallets at which time he felt a pop in the low back and then pain that radiated from the back into the left leg, is the substantial contributing contact factor causing the disk herniation at L4-5 to the left that required surgical repair.

Dr. Volarich assessed permanent partial disability in relation to the April 25, 2000 work related injuries: 35% of the body as a whole rated at the lumbosacral spine due to the disk herniation at L4-5 to the left that required discectomy and laminotomy; this rating accounts for this injury's contribution to loss of motion, low back pain, and persistent left leg radiculopathy consistent with failed back syndrome. Dr. Volarich noted that there was additional disability in the low back preexisting the April 25, 2000 work injury: 1. 35% of the body as a whole rated at the lumbosacral spine due to the disk herniation at L4-5 to the right that required surgical repair, this rating accounts for this injury's contribution to loss of motion and recurrent back pain leading up to 04/25/00; 2. 12.5% of the body as a whole rated at the cervical spine due to the chronic cervical syndrome causing ongoing neck pain and loss of motion; and 3. 20% of the left upper extremity rated at the shoulder due to the impingement syndrome causing loss of motion, pain, and weakness in the dominant arm. Dr. Volarich wrote that the combination of Connors' disabilities creates a substantially greater disability than the simple sum or total of each separate injury/illness, and a loading factor should be added.

Dr. Volarich further wrote in his June 13, 2002 evaluation report:

It is my opinion that Mr. Connors is unable to engage in any substantial gainful activity, nor can he be expected to perform on an ongoing working capacity in the future. It is my opinion that he cannot be reasonably expected to perform on an ongoing basis 8 hours a day, 5 days a week throughout the work year. It is also my opinion that he is unable to continue in his line of employment that he last held as a truck driver for the Arnold Muffler, Inc., nor can he be expected to work on a full-time basis in a similar job. I note that he is currently working part time light duty functioning as a manager and a cook at a church working less than 24 hours a week and performing no lifting duties. He tells me he is able to tolerate this work activity since he doesn't have any lifting requirements and can rest whenever needed.

Based on my medical assessment alone, it is my opinion that Mr. Connors is permanently and totally disabled and unable to work as a truck driver/laborer as a result of the work accident of 04/25/00 in combination with his pre-existing back, neck, and left shoulder injuries.

In his report, Dr. Volarich noted that based on the treatment provided to date, Connors had achieved maximum medical improvement; the doctor wrote that based on examination on June 13, 2002 additional surgery was not indicated. Dr. Volarich stated the following about future treatment recommendations:

In order to maintain his current state, he will require ongoing care for his pain syndrome using modalities including but not limited to narcotics and non-narcotic medications (NSAID's), muscle relaxants, physical therapy, and similar treatments as directed by the current standard of medical practice for symptomatic relief of his complaints. Complimentary medical modalities may also benefit him and are recommended.

Dr. Volarich listed work and other activity restrictions for Connors referable to the spine and restrictions referable to the left shoulder.

In his deposition testimony, Dr. Volarich testified that the objective findings upon examination of difficulty with toe walk and heel walk, and trigger point in the left sciatic notch were related to the April 25, 2000 work injury. When queried if he felt his diagnosis of failed back syndrome was due to the April 25, 2000 injury, Dr. Volarich indicated that that was his opinion, though further stated the following in his explanation: "It's all of it, and that's a very good question, because I think that the failed back syndrome occurred as a result of the scar tissue from the prior surgery in the '70's, it occurred as a result of the bulge at the L5-S1 level, and it occurred as a result of the surgery at L4-5 on the left." (Volarich Dp. pp. 25-26)

On cross examination by the employer/insurer, Dr. Volarich stated that in the process of his examination he looks for

symptom magnification; he stated that his not specifically addressing Waddell signs in his report indicated that he found none for Connors.

During cross examination by the employer/insurer, Dr. Volarich was queried about his opinion that he felt that there was scar tissue in Connors low back, especially at the L4-5 level, following the surgeries, and how would one observe this scar tissue. “Well, the best thing to do is to do an MRI scan with gadolinium. That’s the ultimate way to diagnoses epidural fibrosis. I’m not sure it was really necessary in this case – because the surgeon already knew there was fibrosis from the first operation.” (Volarich Dp. pg. 43) The doctor was further queried how he personally knew there was scar tissue short of an MRI, what did he base it on. Dr. Volarich answered: “On the findings that are consistent with failed back syndrome^[3], the ongoing pain that he has, the limitations of motion, the radicular symptoms and so forth.” (Volarich Dp. pg. 43) The doctor was further queried how did he not know it was due to scar tissue as opposed to recurrent herniation or a degenerative condition, and Dr. Volarich answered:

“Well, spinal stenosis would have been taken care of at the time of surgery had he had that. Okay? I mean, the surgeon would have had to decompress the canal in order to get adequate release of the nerve. So he doesn’t have that.

He has some arthritis, he has some degenerative disc disease, but I don’t think those conditions were severe enough, or he would have had fusion put in, he would have had some hardware put in.

The best explanation is that this is epidural fibrosis because of the sequence of events, how they lined up. He did okay for a couple of weeks after the surgery and then started going back downhill again. That’s very typical for epidural fibrosis.” (Volarich Dp. pp. 43-44)

On redirect, Dr. Volarich testified that the medical records he reviewed did reveal prior evidence of surgery and a herniated disc. Concerning Dr. Raskas’ records and the imaging studies, the doctor indicated. “...I’m looking here at the MRI scan from May 30, 2000, postoperative changes consistent with previously reported laminectomy, so, yes, there’s evidence that he had surgery”, Dr. Volarich testified. (Volarich Dp. pg 54) The doctor was asked if he had previously mentioned that when Dr. Raskas had gone in and surgically removed the herniated disc on the left side, Dr. Raskas had commented that there was interstitial scar tissue on the right. Dr. Volarich answered:

“I believe – let me look at the note here just to be sure that I’m not misspeaking. No. I misspoke. I thought that in the medical record he made comment about epidural scarring or postoperative scarring on the opposite side, but he doesn’t. I might have seen that somewhere else, but he does not say it in the operative note, so I apologize for that. My mistake.” (Volarich Dp. pg. 54)

Agreeing that, assuming somewhere in the medical records there is mention of epidural scarring, a person who has developed scarring before would have a tendency to redevelop it, Dr. Volarich testified: “Typically if a person is going to scar, they’re going to scar just about every time. Keloid formers, for example, would be a good example of that, but the same thing in the back.” (Volarich Dp. pg. 55)

On cross examination by the Second Injury Fund, Dr. Volarich agreed that he was not able to see the medical records from Connor’s prior back surgery or the chymopapain injections, or any medical treatment records concerning treatment of Connors’ back prior to April 25, 2000. The doctor agreed that Connors relayed to him the history that the last treatment by a physician he had had for his back was the chymopapain injection therapy in 1978 prior to April 25, 2000. Dr. Volarich agreed that Connors did not relay that a physician had placed on him any restrictions because of his neck or because of his left shoulder prior to April 25, 2000, and he did not see any medical records showing any physical restrictions placed on Connors for the neck or left shoulder by a treating physician before April 25, 2000. The doctor agreed that Connors had described to him some of his job duties, and that they included some heavy lifting such as lifting up to 100 pounds at times, jobs where he spent half of the day driving, working approximately ten-hour days, and working full-time employment; Dr. Volarich agreed that Connors did not relay that he was missing work because of his back or neck and shoulder before the April 25, 2000 injury.

Dr. Volarich agreed, during cross examination by the Second Injury Fund, that Connors had relayed to him that he is still performing some work, and that work can be up to 24 hours per week, and this job would require him to be on his feet for at least part of the day. The doctor agreed that he did not perform any vocational testing on Connors, and beyond talking about his job history at Arnold Muffler he did not discuss with Connors in detail his prior job history. Dr. Volarich agreed that generally he does not place people in jobs in the open labor market. When queried if he would defer to a vocational rehabilitation specialist as to whether there could be a job found for Connors given Connors’ restriction that he had placed on Connors and Connors’ physical makeup, Dr. Volarich answered: “I don’t have a problem with him trying to get back to work, to doing something if there’s something available with the restrictions, but, again, whether he can do it full-time would

be another story.” (Volarich Dp. pp. 52-53)

Timothy Lalk testified by deposition on behalf of the claimant. (Claimant’s Exhibit No. B). A vocational rehabilitation counselor, Lalk stated that he interviewed Connors and obtained information on his history of medical conditions and treatment, education background, his family and social background, past and present complaints, past and present activities, his functional abilities and his vocational background. Vocational testing was also done on Connors, Lalk said, and medical records were reviewed. Lalk agreed that after evaluation of Connors he prepared a report which included his summaries and conclusions; Lalk agreed that he would testify in accordance to his report, and his report was marked at the deposition as Employee’s Exhibit Number 2 and was offered into evidence without objection (See, Lalk Dp. pg. 9).

In his August 26, 2002 report, Lalk noted that he had seen Connors on 08/13/02. Lalk wrote of the vocational testing results for Connors:

I administered the reading and arithmetic portions of the Wide-Range Achievement Tests, Revision 3. The reading was at the high school level and the arithmetic was at the eighth-grade level. I also administered the reading comprehension portion of the Adult Basic Learning Examination, Level 3. He scored at the post-high school level. This reading comprehension test indicates that Mr. Connors could probably pursue post-secondary training successfully. This is consistent with his history of considering pursuing an associate’s degree in the 1980’s. Any re-entry into an academic program would require some remedial arithmetic.

Lalk included the following in the Summary and Conclusion Section of his report:

Based upon a consideration of Mr. Connors’ complaints and his reported level of functioning, relying upon all of the medical records with attention paid to the restrictions of Dr. Volarich and Dr. O’Day, it is my opinion that he is not able to secure and maintain employment in the open labor market and is not able to secure work in a competitive employment situation. Currently Mr. Connors has received accommodation by his employer which allows him to sit and stand as necessary to perform his job duties. Furthermore, he is able to limit his work time to either three or four hours per day. He works in a food service situation, but is not required to lift food heavier than material for a salad and a soda. He is not required to stock and can avoid all bending or squatting. Although these job duties and situation are similar to those of an individual working as a cashier in a cafeteria or working as a cashier in a self-service, convenience store, I do not believe that Mr. Connors would be able to compete for those positions, nor do I believe that he could maintain employment in an actual job situation. In most situations a cashier in a cafeteria/restaurant has other duties which occur before the establishment opens and requires some food preparation. Typically these jobs are provided to individuals who have already been working for the employer for some time. The jobs are usually not open as entry-level positions. The cashier position in a convenience store is typically an entry-level position. Often an individual can obtain accommodations in which they are only performing cashier work when their work shift can be combined with an individual who performs primarily stocking duties. The difficulty for Mr. Connors is that these jobs typically would not be available to an individual claiming that they can only work 3-4 hours per day. This also implies that an individual is not available to work at any time required by the employer. Additionally, Mr. Connors has indicated that he needs two periods during the day in which he is only able to control his symptoms by lying down. He reports at other times that if he stands or walks too much, sitting alone does not relieve his symptoms and he will need to lie down on those occasions also. He has also indicated that despite the accommodations that he receives at work, he is sometimes not able to control his symptoms during a four-hour work shift. I do not believe that an employer would choose Mr. Connors to work in one of these unskilled, entry-level positions with the constraints involving his work time, duration and level of activity with allowances for him to lie down during the day to control his symptoms.

Although it appears that Mr. Connors has the academic skills to pursue additional training, I do not believe that he could function any better in a skilled, sedentary position. Even with additional skills, an employer would still be reluctant to hire an individual into an entry-level position with the accommodations as described above. I cannot recommend any vocational rehabilitation services for Mr. Connors unless his control of his symptoms improves and he is able to function at the sedentary level through a full workday.

In his discussion of Connors’ vocational history, Lalk wrote the following about subsequent to the April 25, 2000 work injury:

Following the injury in April 2000, he was eventually seen by a doctor on 05/03/00. This doctor placed him on light duty, but there was none available. Mr. Connors claimed that his employer made no other effort to accommodate his condition and one month later he was advised that he was terminated.

Mr. Connors reported that he attempted to work at the information desk at his church. This was on a volunteer basis

and he was able to sit and stand as needed. Eventually in November 2001 after his worker's compensation ended, Mr. Connors was offered a job at the cafeteria at his church. He told me that he works 3-4 hours each day. He mainly works the cash register and occasionally works at the soda fountain. He can also occasionally work on the grill and help make salads. The church serves lunch during the school year and during summer camp. He earns \$7.00 per hour. He is not required to do any stocking or lifting. He is also able to sit and stand as necessary during the 3-4 hours he is present at the cafeteria. He told me that he earns less than \$730.00 per month so that this will not interfere with his Social Security disability benefits.

He told me that he might be able to work more than 3-4 hours per day on some days, but on other days he is having difficulty just working three hours.

Lalk noted that at the time of his evaluation of Connors on August 13, 2002 Connors was working in a church café. Lalk gave the following opinions about Connors' work at the church cafe:

"Based upon the information that I received, I would not consider that a competitive employment. It would fall into a category of this was a job that was available through a friend or acquaintance or an organization that is well acquainted with him that were making efforts to provide assistance for an individual by offering that individual a job. It doesn't meet the criteria of being competitive, insofar as there were a number of people that were considered for the job and the most efficient or the most qualified to be chosen." (Lalk Dp. pp. 17-18)

Lalk agreed that Connors had relayed to him that he had association with the church where he had the position in the café.

At his deposition, Lalk was asked his opinion of whether or not a reasonable employer would hire Connors reasonably expecting Connors to be able to perform the functions of the employment, whether or not Connors could compete on the open labor market. "He cannot compete in the open labor market", Lalk answered. (Lalk Dp. pg. 16) Lalk indicated that, other than Dr. Graham's report, there was no other physician or medical practitioner that would lead him to a different conclusion with regard to Connors' ability to compete on the open labor market and his opinion that Connors was not a candidate for vocational rehab.

Lalk was asked, assuming the information he had obtained from Connors, did he feel Connors would be a viable candidate for vocational rehabilitation. "At this time he is not a candidate for vocational rehabilitation services", Lalk answered. (Lalk Dp. pg. 16) He explained:

"The problem is that even if he goes back to school and if he's able to successfully complete a program, either an associate degree level, a two year program or a business college program or even a four year degree program, he still will need to go to an employer as an entry-level employee and talk to them about some very major accommodations, those being his need to lie down frequently during the day, take extended periods of rest and sometimes not being dependable because of the type of symptoms that he's reporting. It's been my experience that even with professional skills or skills that would allow a person to work in a sedentary position, that employers will still be reluctant to consider an employee for an entry-level position. In other words, there's going to be a number of candidates with the same type of professional training and experience that aren't going to require those types of accommodations, and those individuals would have a greater opportunity for employment than an individual that would require those types of accommodations just to start work." (Lalk Dp. pp. 19-20)

Lalk discussed the significance of Connors' age of 56 years at the time of evaluation and Connors' present age of 58 years at the time of Lalk's deposition:

"I'm not exactly sure how they separate – at what age they separate that, but in terms of vocational potential, a person of his age has limitations in a number of different areas, first and foremost for a person who does not have any skills, the positions in factories are usually denied an individual of that age. Most employers don't have to worry about that because they have so many applications that it's not going to show up as age discrimination. They can easily fill positions with unskilled entry-level workers at a younger age than in a person's late 50's. There's service positions that many employers still refuse to accept the idea that they can't be age sensitive. So there are some service occupations in which new employees will be preferred over older employees. Now, legally they can't fire people up to a certain age, but I'm thinking people that work in – often work in the travel industry, that's been one area where that has routinely shown up. More importantly, for a person of that age, even if they do receive retraining, they need to present themselves to an employer who realizes that even with a four year college degree most of the training and development of that job is going to occur after the person has actually been hired, and many employers are unwilling to invest the time and money needed to train that individual when a person is clearly going to be very close to retirement age." (Lalk Dp. pp.

On cross examination by the employer/insurer, Lalk stated that Connors did not describe the job at his church as a make-work job. "I don't think he – he didn't explain it in terms as a make-work, that the job wasn't created specifically for him." (Lalk Dp. pg. 30) Lalk stated that he did not talk to anybody at the church about the nature of the job, and stated that he did not know if there was someone else doing the job before Connors did it.

Lalk discussed Connors' ability in arithmetic stating that Connors tested at an eighth grade level and would require some remedial work, and adding that he thought that "possibly many of his mistakes were due to simply to not being challenged by arithmetic for many years" and "that he would probably be able to pick it up. Again, that's why I recommended remedial work if he wanted to pursue (a high school level or post secondary level beyond high school)". (Lalk Dp. pg. 32) Lalk further testified, though:

"Well, the remedial arithmetic would only – that would be a recommendation if he wished to pursue post secondary training. I've indicated that, in my opinion, that if he pursued post secondary training, that he probably should not expect success with that, even if he successfully completed the training in terms of the job market based upon the symptoms and limitations that he's reporting to me at this time. So even, and the other conclusion based on everything else he improved his (math), I don't think it would improve his vocational - -

"Even if he improved his arithmetic, it's not going to improve his vocational potential." (Lalk Dp. pp. 34 and 35)

During cross examination, Lalk agreed that he gave two conclusions in his report – one based solely upon Dr. Graham^[4], and the other conclusion based on everything else.

On cross examination by the Second Injury Fund, Lalk was queried if it wasn't correct that from his review of the medical records Connors was not under any physical restrictions from a treating physician in regards to his low back prior to April 25, 2000. Lalk answered:

"Well, I can't say that he was because I don't have any medical records going back before May of – or pardon me. Yes, the first record that I have is May 3, 2000, so I don't have any records of any physicians. Based upon his report, it appeared that he had been given permanent restrictions after treatment in the early 80's because he was told that he wasn't supposed to continue working in construction, that he needed to avoid heavy lifting and repetitive bending." (Lalk Dp. pp. 44-45)

Lalk agreed that Connors told him that part of his work at Arnold Muffler involved occasionally lifting up to 100 pounds and daily lifting between 5 to 60 pounds, some overhead work, some climbing in order to get in and out of his truck, and he worked 10 to 12 hours days, five days a week. He agreed that Connors had relayed to him that up until April of 2000 he wasn't missing work because of any condition, and that Connors did not relay a history to him that he needed to lie down during the day before the April 2000 injury. Lalk agreed that in discussing his position at the church, Connors told him that his usual work hours on the days he worked was ten to two and he got there about 9:30, and that sometimes he would stay an extra hour and a half or so to talk with friends, and often he would go home and take a nap and return on a number of the week days for evening activities at the church. He agreed that Connors also told him that up until his surgery following the April 2000 injury he was continuing to have outside activity of coaching basketball and was occasionally playing pickup games of basketball.

Date: 12/27/2004

Made by: /s/ LESLIE E. H. BROWN
LESLIE E. H. BROWN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ GARY ESTENSON
GARY ESTENSON

Director
Division of Workers' Compensation

[1] **Summary of the Evidence** begins on page 20.

[2] Dr. Volarich, D.O., who performed an independent medical examination of the claimant on the claimant's behalf, stated an opinion on the claimant's ability to work, but admitted that generally he does not place people in jobs in the open labor market, and indicated that he would defer to a vocational rehabilitation specialist as to whether a job could be found for the claimant.

[3] Dr. Volarich, during direct examination had testified about what failed back syndrome was:

“Failed back syndrome is a term that we use after surgical repair on the spine where the patient's outcome was not what was intended. Basically the surgery failed. It didn't have the positive effect of eliminating the radiating pain to the leg. It did not improve symptoms of back pain. It did not improve function or motion.

It happens in some people. It's – it's more frequent in patients that smoke, but basically the reason is that these patients, when they heal, they heal with excessive scar tissue and that scar tissue wraps around the nerve and the nerve thinks that he disc ruptured again and it creates a spiral of a pain syndrome, and that's what we have in this case.” (Volarich Dp. pg 25)

[4] In his August 26, 2002 report, Lalk included the following:

Based upon the findings of the Functional Capacity Evaluation and the recommendations of Dr. Graham, it is my opinion that Mr. Connors could return to a job similar to his last position. I noted that the FCE indicated that he could lift/carry sixty pounds occasionally. The medium work demand level is defined as exerting fifty pounds of force occasionally. I noted that Mr. Connors indicated that he routinely had to lift sixty-pound parts at his job at Arnold Muffler. Considering the more conservative weight limit of fifty pounds, Mr. Connors would not be able to return to Arnold Mufflers and perform exactly the same work. He should be able to find work as a driver for companies hauling packages limited to the fifty-pound level. Other alternatives for Mr. Connors with these work limits would be to return to a position as an over-the-road truck driver working for companies which did not require loading and unloading by the driver. These jobs typically require the driver to be away from home for extended periods. Mr. Connors could also utilize his experience and seek work as an estimator for automobile insurance or working in a repair shop. Based upon his work descriptions, I do not believe there is any skilled position he could enter based upon his experience in roofing and working with Trane.

Mr. Connors could consider unskilled, entry-level positions. Because he has already demonstrated abilities and experience in the field, he could apply for positions with companies who staff customer service representatives or account representatives. This type of job requires on-the-job training involving work procedures and minimal use of a computer keyboard and monitor. These individuals usually handle routine information exchange between a company and its clients/customers. There are a wide variety of occupations available to an individual without skills or experience and which meet the criteria set by the FCE and by Dr. Graham's restrictions. Some of the more common would include retail sales clerk, cashiers, food service workers and a variety of desk clerks. If he is still interested in driving he could work as a courtesy driver, a taxi cab driver, or a courier. Although there are many assembly and packaging positions which meet these criteria, most employers will not consider starting a person at age 56.