

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge  
by Separate Opinion)

Injury No.: 03-145458

Employee: Jimmy Culley  
Employer: Royal Oaks Chrysler Jeep, Inc.  
Insurer: Missouri Chamber of Commerce Group  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (open)  
Date of Accident: September 10, 2003  
Place and County of Accident: St. Charles County, Missouri

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. We have reviewed the evidence, read the briefs, and we have considered the entire record. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 19, 2005, by issuing a separate opinion denying compensation in the above-captioned case.

#### I. Trial Issues and Award Issued by Administrative Law Judge

The parties stipulated before the administrative law judge that the following issues were in dispute: (1) notice of accident, section 287.420 RSMo; (2) whether or not employee sustained an injury due to an accident arising out of and in the course of employment; (3) medical causal relationship between employee's complained of condition and alleged accident; (4) employer's liability for past medical expenses; (5) employer's liability for future medical treatment; and (6) nature and extent of temporary total disability.

Employee was requesting the issuance of a temporary award and there was no issue at trial concerning nature and extent of permanent disability, nor any evidence offered concerning that issue.

In the award issued by the administrative law judge, compensation benefits were denied, as the administrative law judge did not find a medical causal relationship between employee's conditions complained of and the alleged accident.

The Commission affirms the conclusion by the administrative law judge that employee is not entitled to any workers' compensation benefits. However, the basis of the denial by the Commission is that we find employee did not provide timely notice to employer, either written or verbal, and employee has failed to demonstrate that employer was not prejudiced by employee's failure to provide timely notice. The Commission further finds that employee did not have good cause for failure to timely provide notice to employer. The issue of notice was a stipulated issue, was fully tried by the parties, and is dispositive of the outcome of this case, and accordingly, we issue a final award and decision denying all compensation in this claim. All other issues are moot.

#### II. Summary of Facts

Witness Jimmy Culley, employee

In summary fashion and as relevant to the notice issue, the testimony of Mr. Culley was as follows: as of the date of the accident, September 10, 2003, employee was employed as a new and used car salesperson; employee had

fifteen years experience in the field; his duties with employer were, among other things, to greet customers, and attempt to sell a potential customer a new or used automobile; and employee testified that if he was successful in completing a sale, it was his responsibility to follow-up with the needs of the customer and if necessary, deliver the vehicle, clean it, service it, etc.

As of the date of the accident employee was dating and residing with Ms. Ann Evans; Ms. Evans was the owner of an automobile which had been purchased from the employer; on September 10, 2003, the automobile owned by Ms. Evans was in the repair shop of the employer; and the requested repair work was completed that day by the employer.

Prior to September 10, 2003, employee, on several occasions, had driven the vehicle owned by Ms. Evans to and from his employment; employee testified that prior to the accident occurring September 10, 2003, he would, on occasion, leave work in order to pick up Ms. Evans at her job location, somewhere between 3:30 p.m. and 5:00 p.m.; and on September 10, 2003 the accident occurred at 3:37 p.m.

Employee testified that on the day of the accident he was working a split shift, from 9:00 a.m. until 1:00 p.m., and then a four-hour break until 5:00 p.m., at which time he would return to the employer and work from 5:00 p.m. until 9:00 p.m. Employee testified that he was not on the clock and his work shift was not adhered to in strict manner.

On September 10, 2003, employee testified that he informed Joe Gustafson, his supervisor, that the vehicle owned by Ms. Evans had been repaired, was finished, and he was going to return the vehicle to Ms. Evans and she would return him to work. Employee stated that while driving the motor vehicle owned by Ms. Evans from the employer's lot and while merging onto a public street, he was involved in a motor vehicle accident, and sustained personal injuries.

Immediately subsequent to the accident, employee was able to remove himself from the automobile and ambulate; an ambulance was summoned to the scene of the accident but employee, at that time, was not in need of any assistance; subsequently, approximately three hours later, employee presented himself to St. Joseph Health Center for medical treatment due to this accident; employee presented with complaints of stiffness, dizziness, back pain and perhaps being in shock due to the accident; and employee was treated and discharged.

Subsequent to the accident, employee separated from employment and continued to work as a car salesperson being employed with three different employers as of the date of the hearing.

By the date of the hearing employee had received extensive medical care and treatment including back surgery. This surgery was performed in 2005.

#### Witness Allan Brodhead

Mr. Brodhead was a sales representative for the employer on September 10, 2003; he was familiar with employee, Jimmy Culley; Mr. Brodhead was aware that Jimmy Culley was in a motor vehicle accident on September 10, 2003; Mr. Brodhead was further aware that employee was driving the automobile belonging to Mr. Culley's girlfriend, Ann Evans; Mr. Brodhead had never seen employee drive any other automobile other than the automobile owned by Mr. Culley's girlfriend, Ann Evans; and Mr. Brodhead verified that Mr. Culley's work shift the date of the accident, September 10, 2003, was similar to his, and that it was a split work shift, with the hours being 9:00 a.m. to 1:00 p.m. and 5:00 p.m. to 9:00 p.m. Mr. Brodhead admitted that the hours were not strictly enforced as business actually dictated the hours.

#### Witness Gary Clark

Mr. Clark was a salesman with the employer as of September 10, 2003; he was familiar with employee, Jimmy Culley; Mr. Clark was aware Mr. Culley was involved in a motor vehicle accident on September 10, 2003; Mr. Clark testified that Mr. Culley told Mr. Clark that the automobile belonged to himself and his girlfriend, Ms. Evans; Mr. Clark testified he was aware on several occasions that Mr. Culley drove the motor vehicle to and from work; and Mr. Clark verified the split shift schedule involving employee, i.e., 9:00 a.m. to 1:00 p.m. and 5:00 p.m. to 9:00 p.m., on the date of the accident

### Witness Joseph Gustafson

Mr. Gustafson was the used car manager and supervisor of employee as of September 10, 2003; Mr. Gustafson was aware employee was involved in a motor vehicle accident on September 10, 2003; Mr. Gustafson unequivocally denied that employee requested permission of Mr. Gustafson to return the automobile owned by Ms. Evans to her; he unequivocally denied that employee informed him that he intended to return her car to her that afternoon; and Mr. Gustafson was aware that the automobile that employee was driving was owned by Ms. Evans and often times used by employee to go to and from work.

### Sheryl Crisler

Ms. Crisler was the office manager, secretary, treasurer and the individual who handled insurance claims and injuries in behalf of the employer. If an employee was involved in a work related accident as of September 10, 2003, she was the person an individual was to notify, and upon being notified, she would immediately commence investigation of the accident as well as arrange immediate medical care and treatment for the injured employee.

Ms. Crisler unequivocally testified that she was never notified that employee, Jimmy Culley, was alleging a work related accident had occurred on September 10, 2003, until she received notice from the Missouri Division of Workers' Compensation (Division) that a formal Claim for Compensation had been filed. The formal Claim for Compensation was filed with the Division on December 23, 2004, more than fifteen months post accident. Employee never filed a written notice of accident with Ms. Crisler; employee never verbally apprised Ms. Crisler of the accident; and employee never requested Ms. Crisler or any supervisor or management personnel of the employer to provide him workers' compensation benefits in the form of medical treatment, temporary total disability, etc.

Ms. Crisler testified that she did not have an opportunity to investigate employee's alleged work accident or to arrange for medical care and treatment for him because she was never aware his accident was allegedly work related. Ms. Crisler testified that she heard other people talking that employee was involved in a motor vehicle accident in which he wrecked "his" car. Ms. Crisler testified that she never received actual notice of an alleged work related accident until she received a copy of the Claim for Compensation sent to her by the Division of Workers' Compensation some fifteen months post accident.

### St. Joseph Hospital Emergency Room Records

The emergency room records of St. Joseph Hospital dated September 10, 2003, indicate employee was involved in a motor vehicle accident that was not work related.

### III. Findings of Fact Conclusions of Law

As to the issue of notice of accident, the relevant statutory provision is section 287.420 RSMo, which provides:

"No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby."

Accident is defined as "an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Section 287.020.2 RSMo. Employee's accident occurred on September 10, 2003. Although employee did not learn of the ultimate extent of his injuries until later, the motor vehicle accident occurred violently and suddenly and produced at that time objective symptoms of an injury as employee presented himself within approximately three hours to the emergency room of St. Joseph Hospital. Accordingly, employee had thirty days from September 10, 2003, to provide notice of the accident to the employer.

The purpose of this section is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. *Gander v. Shelby County*, 933 S.W.2d 892 (Mo. App. E.D. 1996). However, the failure to give timely written notice may be excused if the Commission finds either that there was good cause for the failure or that the failure did not prejudice the employer. *Willis vs. Jewish Hospital*, 854 S.W.2d 82 (Mo. App. E.D. 1993).

The most common way for an employee to establish lack of prejudice is for the employee to show that the employer had actual knowledge of the accident when it occurred. *Soos v. Mallinckrodt Chemical Co.*, 19 S.W.3d 683 (Mo. App. E.D. 2000). Where, as here, the employer does not admit actual knowledge, the issue becomes one of fact. *Id.* If the employee produces substantial evidence that the employer had actual knowledge, the employee thereby makes a prima facie showing of absence of prejudice, which shifts the burden of showing prejudice to the employer. *Id.* However, when the employee does not show either written notice or actual knowledge, the burden rests on the employee to supply evidence and obtain the Commission's finding that no prejudice to the employer resulted. *Id.* If no such evidence is adduced, we presume that the employer was prejudiced by the lack of notice because it was not able to make a timely investigation. *Id.*

The fact that employer was aware that an accident occurred does not impute notice that the accident was work related. As stated in *Gander v. Shelby Co.*, 933 S.W.2d 892 (Mo. App. E.D. 1996):

It is not enough, however, that the employer, through its representatives, be aware that the claimant 'feels sick,' or has a headache, or fell down, or walks with a limp, or has a pain in his back, or shoulder, or is in the hospital, or has a blister, or swollen thumb, or has suffered a heart attack. There must in addition be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim."

Quoting, 2B A. Larson, *The Law of Workmen's Compensation* § 78.31(a)(2).

Employee contends that employer received actual notice of a work related accident due to the fact that employee told his supervisor, Joseph Gustafson, that he was going to deliver a customer's car immediately preceding his accident. However, the Commission finds the more believable and credible evidence is the testimony of Joseph Gustafson, who unequivocally testified that employee never related to him that he was delivering a customer's car immediately preceding the accident and in fact Mr. Gustafson testified that his information lead him to believe that the accident did not involve any automobile connected with the dealership or employer.

Employee also attempts to circumvent the written notice requirement by alleging the mere fact that employer knew that employee was involved in an accident constituted notice to the employer. However, as stated above in the *Gander* case, *supra*, simply knowing employee was involved in an accident is not notice to the employer. There must be knowledge of some accompanying facts connecting the accident/injury with the employment.

In the instant case, the employee was involved in a motor vehicle accident while driving a car that belonged to either him or his girlfriend; the accident occurring at a time between his split work shift; occurring in a motor vehicle which he admittedly drove to and from work on several occasions; and the only knowledge of the employer was that employee was involved in a motor vehicle accident in "his" car.

In summary, the relevant facts are as follows: employee did not provide written notice of any accident to the employer within thirty days of the accident; employee never provided any verbal notice to the employer; Ms. Crisler's knowledge of the event was employee was involved in a motor vehicle accident in "his" car; the initial emergency room record at St. Joseph Hospital dated September 10, 2003, indicated employee was involved in a motor vehicle accident not work related; the accident occurred at 3:37 p.m., between employee's split work shift of 1:00 p.m. to 5:00 p.m.; the accident occurred while employee was driving his girlfriend's car which he frequently drove to and from work; no supervisor was aware that employee was delivering a customer's car at the time of the accident; employee never requested employer provide employee workers' compensation benefits, i.e., medical treatment, temporary total disability, etc.; and employer did not receive notice from employee that the accident was possibly work related until employer received a copy of the formal Claim for Compensation filed with the Division of Workers' Compensation which was more than fifteen months post accident.

Based on the above factual findings, the Commission finds employee did not provide employer with actual notice of a compensable injury, nor were there accompanying facts connecting the injury with the employment.

In addition to failing to provide written or actual notice, employee failed to show that employer was not prejudiced by the lack of notice; in fact, employee adduced no evidence as to this issue other than attempting to show actual notice of the accident. Since employee failed to provide notice, employer was not given a chance to timely investigate the alleged accident, and provide medical care and treatment to mitigate any injury, and was thereby prejudiced. A period of greater than fifteen months had elapsed prior to the employer being notified that employee was alleging a work related injury due to this motor vehicle accident.

As in *Willis, supra*, the prejudice to employer had already occurred when employee gave notice.

#### IV. Conclusion

Employee's claim for benefits is denied pursuant to section 287.420 RSMo. Because the notice issue is dispositive of the claim, we do not address the remaining issues, as they are moot.

The award and decision of Administrative Law Judge Leslie E. H. Brown, issued September 19, 2005, is attached, but her findings and conclusions are not to be construed as being incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4<sup>th</sup> day of August 2006.

#### LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

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

#### DISSENTING OPINION FILED

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

Attest:

\_\_\_\_\_  
Secretary

#### DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon 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 denying compensation should be reversed.

#### Notice

The majority of the Commission denies employee's claim upon a finding the employee failed to provide timely notice of his injury to employer. I disagree.

[T]he settled principle announced and applied in our Missouri decisions is that actual timely notice or knowledge of a *potentially* compensable injury makes a prima facie showing that the employer was not prejudiced by failure to receive a timely written notice and shifts onto the employer the burden of proving the contrary.

*Smith v. Plaster*, 518 S.W.2d 692, 699 (Mo. App. 1975).

Employer had actual knowledge of employee's September 10, 2003, motor vehicle accident and that any injury therefrom was potentially compensable. Several employees testified they were aware of the accident including employee's supervisor. Employer's workers' compensation officer admitted she had actual knowledge of the car accident within one or two days of the incident. A bus hit the car employee was driving just as employee was leaving employer's lot. Employee was driving a customer vehicle that was just serviced in employer's shop. It was customary for employees to deliver vehicles to customers. Contrary to the conclusion of the majority, I conclude that employer had "knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Gander v. Shelby County*, 933 S.W.2d 892, 896 (Mo. App. 1996). The burden shifted to employer to show that it was prejudiced by the failure of written notice. Employer did not so show.

The administrative law judge correctly concluded that notice is not a bar to this claim.

### Causation

The administrative law judge erred in concluding that employee did not prove medical causation. Both medical experts agree that employee suffered from pre-existing degenerative disc disease but both also offered testimony to support a medical causal link between the vehicle accident, employee's aggravated back condition, and his need for surgery. Dr. Lange opined that, "there is a very high likelihood that Mr. Culley did trigger symptoms in the previously degenerative disc at L5-S1 during the motor vehicle accident." Dr. Graven testified, "[a]ny of the complaints that he had, yes, I believe that they were related to the motor vehicle accident." Dr. Graven testified the surgery was necessary because employee had ongoing, incapacitating pain.

For an award of temporary disability and medical aid, proof of cause of injury is sufficiently made on reasonable probability. *Downing v. Willamette Indus.*, 895 S.W.2d 650, 655 (Mo. App. 1995). It has long been the rule in Missouri that an inherent weakness or bodily defect, such as degenerative spine disease, occurring in conjunction with an abnormal strain will support a claim for compensation. See *Johnson v. General Motors Assembly Division G.M.C.*, 605 S.W.2d 511, 513 (Mo. App. 1980). (citations omitted) (overturned on other grounds). To prove a compensable injury, employee must prove he experienced a change in pathology as a result of the work incident. "The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a 'change in pathology.'" *Winsor v. Lee Johnson Construction Co.*, 950 S.W.2d 504, 509 (Mo. App. 1997), citing *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo. App. 1991).

Employee has proven that the motor vehicle accident was the substantial factor in the development of his surgically treated back condition; i.e. L5-S1 disc herniation and radicular symptoms.

Employee is entitled to compensation. I would issue a temporary award of compensation to include past temporary total disability and past medical expenses, as well as ongoing, temporary disability and medical care until such time as employee reaches maximum medical improvement. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

---

John J. Hickey, Member

## **AWARD**

Employee:	Jimmy L. Culley	Injury No. 03-145458
Employer:	Royal Oaks Chrysler Jeep, Inc.	Before the
Add. Party:	State Treasurer, as Custodian of the Second Injury Fund	<b>DIVISION OF WORKERS' COMPENSATION</b>
Insurer:	Missouri Chamber Group, Self-Insured c/o CCMSI	Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

**FINDINGS OF FACT AND RULINGS OF LAW**

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: September 10, 2003
5. State location where accident occurred or occupational disease was contracted: St. Charles County, MO
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? No
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 was delivering a car to customer.
12. Did accident or occupational disease cause death? No Date of death? --
13. Part(s) of body injured by accident or occupational disease: ---
14. Nature and extent of any permanent disability: ---
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None
  
17. Value necessary medical aid not furnished by employer/insurer? ---
18. Employee's average weekly wages: \$371.76
19. Weekly compensation rate: \$247.81/\$247.81
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)  
--- weeks of permanent partial disability from Employer  
---weeks of disfigurement from Employer
22. Second Injury Fund liability: n/a

TOTAL: -----

23. Future requirements awarded: None

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

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

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

Employee: Jimmy L. Culley

Injury No: 03-145458

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

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

Dependents: ---

Employer: Royal Oaks Chrysler Jeep, Inc.

Add. Party: State Treasurer, as Custodian of the  
Second Injury Fund

Insurer: Missouri Chamber Group, Self-Insured  
c/o CCMSI

Checked by: LEHB:df

This is a hearing in Injury Number 03-145458; the claimant is seeking a temporary award. The claimant, Jimmy L. Culley, appeared in person and by counsel, Attorney David Bender. The employer/insurer appeared by and through counsel, Attorney Carl Kessinger. The Second Injury Fund remains open and was not present at this hearing. There are child support liens in this case

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

#### **STIPULATIONS:**

On or about September 10, 2003: a. the claimant was in the employment of Royal Oaks Chrysler Jeep, Incorporated in St. Charles County, Missouri in St. Charles 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 insured by Missouri Chamber Group, self-insured fund c/o CCMSI; d. the employee's average weekly wage was \$371.76, the rate on the date at issue was \$247.84/\$247.84.

e. A claim for compensation was filed within the time prescribed by law. f. No temporary total disability benefits

have been paid. g. No medical aid has been provided.

h. Official notice is taken of the fact that the accident of September 10, 2003 was a Wednesday.

**ISSUES:**

1. Notice
2. Arising out of and in the course of employment
3. Medical causation
4. Liability of past medical expenses (reasonableness and necessity)
5. Future medical care
6. Nature and extent of temporary total disability

**EXHIBITS**

The following exhibits were admitted into evidence:

Claimant's Exhibits

- No. A: Deposition transcript of Dr. Timothy G. Graven, D.O. taken on behalf of the claimant on June 7, 2005 (Admitted subject to the objections therein)
- No. B: Deposition of Sergeant Nick Bellfield taken on behalf of the claimant on June 8, 2005 (Admitted subject to the objections therein)
- No. C: Medical bills from St. Peters Bone and Joint
- No. D: WITHDRAWN
- No. E: Bill from St. Joseph's Health Center.
- No. F: Job description from Royal Oaks for new and pre-owned vehicle salespeople
- No. G: Letter dated November 12, 2004 written by Dr. Timothy Graven
- No. H: Group exhibit consisting of Ford Suntrup payroll information

Employer/Insurer's Exhibits:

- No. 1: Claim for Compensation, date-stamped received by the Division on December 23, 2004
- No. 2: September 10, 2003 police report
- No. 3: Payroll check register
- No. 4: A salesperson's compensation report
- No. 5: Treasury lien (Ruling: claimant's objection on grounds of relevancy is overruled.)
- No. 6: A Vehicle Service Invoice
- No. 7: 2003 W-4 form
- No. 8: Employment eligibility verification form
- No. 9: Currently filed as a \$1,924.28 child support lien
- No. 10: Currently filed as a \$34,966.87 child support lien
- No. 11: Dr. David R. Lange, M.D.'s May 10, 2005 report (modified to exclude a portion that has been marked out by pen in the report)
- No. 12: St. Joseph Hospital records of September 10, 2003

FINDINGS OF FACTS AND RULINGS OF LAW<sup>[1]</sup>

**ISSUE: Notice**

At issue is whether or not the employer, Royal Oaks, received notice of the car accident the claimant, Culley, was involved in on September 10, 2003. The "notice" provision in Workers' Compensation Law is Section 287.420 RSMo. 2003, and states:

No proceedings for compensation under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, have been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or the commission finds that there was good cause for failure to give the notice, or that the employer was not prejudiced by failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact misled and prejudiced thereby.

The purpose of the Workers' Compensation statute requiring written notice to the employer within 30 days of the work-related accident is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. See, *Messersmith v. University of Missouri-Columbia/Mt. Vernon Rehabilitation Center*, 43 S.W.3d 829 (Mo.banc 2001). In this case, there is no dispute that the claimant did not provide the employer with timely written notice of the September 10, 2003 motor vehicle accident. If claimant establishes that the employer had actual notice of a potentially compensable injury, the claimant makes a prima facie showing that the employer was not prejudiced by failure to receive timely written notice of time, place, and nature of claimant's injury, and the burden of proving prejudice then shifts to employer. See, *Dunn v. Hussman Corp.*, 892 S.W.2d 676 (Mo.App. E.D. 1994). An employer's having actual notice of an injury will excuse the claimant's failure to make timely, written notice of injury. See, *Loepke v. Opies Transport, Inc.*, 945 S.W.2d 655 (Mo.App. W.D. 1997).

In this case, the claimant testified that the actual location where the September 10, 2003 accident occurred was right as he was pulling out of the parking lot of employer, Royal Oaks Chrysler Jeep. Culley agreed that there are other salespeople and staff that are on the parking lot at all times. He agreed that the police came and a police report filled out, and it was very obvious that there had been an accident there that involved himself and that anyone from Royal Oaks could have seen. Culley stated that he knew for a fact that there were people from Royal Oaks out there and saw him. A St. Peters Police Department report of the September 10, 2003 motor vehicle accident was in evidence (No. 2) and corroborated the claimant's testimony as to the location of the car accident, that the claimant was turning out of Royal Oaks onto Mexico Road at the time of the accident. Culley testified I got to the hospital that day after the accident occurred; my primary complaints were stiff, I think I was a little dizzy, and I was still in shock from the accident. Records from St. Joseph Health Center (No. 12) corroborate treatment of Culley on September 10, 2003 for injuries sustained in a motor vehicle accident that day.

Sheryl Crisler testified on behalf of the employer/insurer, and stated that she is employed at Royal Oaks Chrysler Jeep, and has been for almost fifteen years. My position is the office manager, secretary, treasurer, Crisler stated, and agreed that this was her position in September of 2003. My duties in regards to any workers' compensation is I handle all the insurance claims, insurance payments, all the human resource issues, problems, and I do all the financial reports, Crisler said. Crisler stated that she is familiar with Jimmy Culley and that he worked for Royal Oaks. Crisler testified that Royal Oaks first become notified that Culley was alleging that he had a work-related accident on or about September 10, 2003 when she received the notice in the form of the formal Claim for Compensation from the State which wasn't until sometime in 2005. Crisler agreed that as part of her duties in September, 2003 she was the one people should notify when they had any work-related injuries and then she would then immediately investigate the accident and arrange for immediate medical care of that employee. Crisler testified that she did not have an opportunity to investigate Culley's alleged work accident immediately on or about September 10, 2003 and arrange for immediate medical care for him. I wasn't aware that it was a work-related injury, she said. The procedure in September, 2003 for employees in regards to reporting work injuries, Crisler testified, was that they were to report it to me, and then we would send them to either Urgent Care or Barnes Hospital and we do a post accident drug screen. In September 2003, employees were to notify me after a work accident of its occurrence as soon as possible, Crisler stated. On cross-examination by the claimant, Crisler was asked if she knew where the September 10, 2003 accident occurred. I didn't see it Crisler answered, but they told me it was at the exit from the parking lot on Mexico Road. I heard the salespeople talking, she said. When asked if she had heard this on September 10<sup>th</sup>, Crisler responded - It was a day or so later; I don't really recall the exact date. They didn't inform me of the accident in my capacity as a person handling insurance claims, Crisler said, it was just - Jimmy got in an accident, he wrecked his car and got hit by a bus or something like that. Crisler agreed that by September 11<sup>th</sup> or 12<sup>th</sup> at the latest, she was aware of the accident that occurred.

It is found, considering the evidence, that there is testimony from a representative of the employer, the workers' compensation officer, admitting actual knowledge of the September 10, 2003 car accident involving the claimant within one or two days of the incident. It is found that the employer had reasonable notice of claimant's condition and could have, if it had so chosen, investigated the case. It is found that the employer has not put forth no evidence as to how it was prejudiced by claimant's failure to give written notice. It should be noted that the evidence is the claimant sought immediate medical attention the day of the car accident. It is found that as the competent and substantial evidence establishes that the employer had some actual notice of a potentially compensable injury and did not demonstrate any prejudice due to a lack of written notice, the notice given by claimant to employer's representative is sufficient.

**ISSUES: Arising out of and in the course of employment; Medical causation**

Section 287.020 RSMo 2003 states, in part:

An injury shall be deemed to arise out of and in the course of the employment only if:

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and
- (b) It can be seen to have followed as a natural incident of the work; and
- (c) It can be fairly traced to the employment as a proximate cause; and
- (d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life;

“A claimant's injury must both *arise out of* and *in the course of* employment. § 287.120.1 RSMo 1986. These are two separate tests both of which must be met before an employee is entitled to compensation. *Ford v. Bi-State Dev. Agency*, 677 S.W.2d 899, 901 (Mo.App.1984).....

“The ‘in the course of employment’ test refers to the time, place, and circumstances under which the injury is received. *Ford*, 677 S.W.2d at 901. An injury occurs ‘in the course of employment’ if it occurs ‘within the period of employment at a place where the employee may reasonably be, while engaged in the furtherance of the employer's business or if he is injured in doing an act reasonably incidental to the performance of his duties, of which his employer might reasonably have knowledge or reasonably anticipate.’ *Jordan*, 699 S.W.2d at 125-26 (quoting *Dillard v. City of St. Louis*, 685 S.W.2d 918 (Mo.App.1985)).

“An injury arises ‘out of’ employment when there is a causal connection between the nature of the employee's duties or the conditions under which he is required to perform them and the resulting injury. *Ford*, 677 S.W.2d at 901. More specifically, ‘[a]n injury ‘arises out of’ the employment if 1) the injury results from a natural and reasonable incident of the employment, a rational consequence of some hazard connected therewith or a risk reasonably inherent in the particular conditions of the employment and 2) if the injury is the result of a risk peculiar to the employment or enhanced thereby.’ *Jordan*, 699 S.W.2d at 126 (quoting *Dillard v. City of St. Louis*, 685 S.W.2d 918 (Mo.App.1985)).” *Mann v. City of Pacific*, 860 S.W.2d 12, 15 and 16 -17 (Mo.App. E.D. 1993)

There is no dispute that the claimant was involved in a motor vehicle accident on September 10, 2003. However, whether or not this activity arose out of and in the course of the claimant's employment at Royal Oaks Chrysler Jeep is in dispute, ad there are numerous factual disputes in this consideration.

An initial consideration is the vehicle the claimant was driving on September 10, 2003 -- whether or not it was customer's vehicle or was his personal vehicle. Culley, the claimant, alleges that at the time of the September 10, 2003 motor vehicle accident in which he was involved, he was delivering to a customer her car after repair work. On the day of the accident, Wednesday, September 10, 2003, Culley testified, I was at work that day and Mike Kosta which was the service manager, came up and told me that Miss Evans' car was finished, and I told my supervisor, Joe Gustafson that I was going to take her car back to her, deliver it to her and that they would drop me back off at work in about fifteen minutes. Miss Evans' work, in relation to Royal Oaks, was roughly two or three blocks down the street, the claimant said. Miss Evans' car had been in the service repair shop on and off for about three weeks, getting repaired for something, he said. They put the wrong transmission in the first time, and then put another part in it that was defective, and the car was in and out of the service department almost four weeks, and Mike Kosta did say I can't charge her; she was extremely upset because the car was not fixed properly, Culley testified. Mike Kosta said I will knock this down to three hundred dollars and I'll cover it under a warranty that he came up with, and he said let's just make this problem go away, the claimant stated, because he knew that she was upset, and he said due to the fact that she was a customer and she was also a school teacher at Harris Elementary, which is right down the street, that they felt that we would knock the bill down to three hundred because of all the problems that they had. Culley stated that that part was correct, that the three hundred dollar charge that was withheld from his check was associated with the services performed to Ms. Evans' vehicle before the accident. He agreed that he had signed off on authorizing the service department to take that three hundred dollar charge for the vehicle. Mike Kosta asked me if that was all right; I said I'll call Miss Evans and she'll call me back, and a few hours later she called back and said three hundred dollars is fine, and I initialed it; Mike said put your initials by it, just so that we know this problem is over, Culley testified. The claimant was handed Employer-Insurer's Exhibit 6 and referred to the page where he had initialed that three hundred dollar charge; Culley agreed that that portion of the statement was regarding the services that had been performed right before the accident. Culley agreed that where it said customer signature, it was his signature.

Obviously, Culley agreed, Miss Evans was a customer of Royal Oaks, and I was going to drop her car off at her work. He agreed that she was then going to drive him back to work and she would continue on. This was not an abnormal activity in any way whatsoever for my position and my duties, Culley stated, this was very much something that was standard and done with frequency -- dropping off vehicles for customers. Culley agreed that Miss Evans was his

girlfriend at the time and they were residing together at the time. The claimant was asked if he would have done things out of the ordinary for Miss Evans, such as delivering the vehicle to her work, that he wouldn't do for other customers. No, I do the same things for all my customers, Culley answered. The fact that somebody might be a family member or related to me or a good friend has nothing to do with whether or not I may or may not have been doing my job as it normally would be done, Culley agreed, and stated - It has no bearing whatsoever. The treatment that a family member or a friend or a girlfriend would get would be exactly the same as the treatment that a customer of mine who's not related to me would get, he said. Culley agreed that that treatment would include delivering vehicles from repair shops, picking people up, whatever was necessary to make the clients happy. Miss Evans is still a customer of Royal Oaks, Culley said. I am not currently employed with Royal Oaks, he said. The claimant testified after Miss Evans' car was completed by the Royal Oaks Service Department on September 10, 2003 and Mike Kosta handed him the keys and he told his boss -- I'm going to deliver it to her and I'll be back in about fifteen minutes, he drove the car out of the service department and pulled to the end of the lot away from the stoplight, and as he pulled onto Mexico Road a bus came from nowhere and it just hit him.

Allan Brodhead testified on behalf of the employer/insurer, and stated that he works for Royal Oaks Chrysler Jeep, and his position there is a sales representative. I was also a sales representative at Royal Oaks in September, 2003, he said. Brodhead stated that he worked with Jimmy Culley at Royal Oaks, and was familiar with the car that Culley was driving at the time of the September 10, 2003 accident. When asked if that car belonged to Culley's girlfriend, Ann Evans, Brodhead responded -- I wasn't aware of her name but I knew it belonged to his girlfriend. He agreed he knew this because Culley told him. I had on occasion before September 10, 2003 seen Culley driving this very same vehicle into work, Brodhead stated. Gary R. Clark testified on behalf of the employer/insurer, and stated that he is an employee of Royal Oaks Chrysler Jeep, and his position is Salesman; he agreed that he was at Royal Oaks as a salesman in September, 2003. I am familiar with Jimmy Culley, Clark said, I worked with Culley at Royal Oaks. Clark stated that he was familiar with the fact that Culley was involved in an automobile accident on September 10, 2003, and he was familiar with the car Culley was driving at the time of the September 10, 2003 accident. The car was his and his girlfriend's, Clark stated. Clark said he knew this by Culley telling them this. Clark stated that before the September 10, 2003 accident he had seen Culley driving that very same vehicle to work. On cross examination by the claimant, Clark was queried if he knew whose name the car was titled in, the one that he referred to as Culley's and his girlfriend's. No, sir, I do not, Clark answered. Sheryl Crisler, who testified on behalf of the employer/insurer, stated that she has been employed by Royal Oaks Chrysler Jeep for almost fifteen years, and her position is the office manager, secretary, treasurer. She agreed that this was her position in September of 2003. Crisler stated that she is familiar with Jimmy Culley and that Culley worked for Royal Oaks, she said. Crisler reviewed Employer-Insurer's Exhibit 6, specifically to the page here with Culley's signature; Crisler identified the document as a service work order for his girlfriend's car. She agreed that the service order was for the car that was ready on September 10, 2003. Crisler was asked to explain what it meant that Culley's signature was on the document where it said customer signature. When someone drops a car off we have them sign that they're authorizing us to do the repairs, Crisler explained. The person we would have sign at that spot would be the person who brings the car in, she stated. It was noted that the document contained a note referencing three hundred dollar deductible with Culley's signature, and Crisler was asked to explain what this was. After they determined how much the repairs would be, they needed authorization for the repairs and he authorized the repairs in the amount of three hundred dollars, Crisler explained. She agreed that that three hundred dollars was deducted from Culley's check later, and explained that this was because it was money he owed. Crisler agreed that Culley owed it because, as far as the paperwork was concerned, it was his vehicle that was brought in for services that he authorized. Crisler stated that she was just barely familiar with the vehicle Culley was driving at the time of the September 10, 2003 accident. When asked who it belonged to, Crisler responded - Ann Evans. The relationship between Culley and Ann Evans at the time was they were roommates, boyfriend/girlfriend, Crisler said. She was asked if before September 10, 2003 had she seen Culley driving that same vehicle in to work on occasion. I don't recall, Crisler answered. In September, 2003 Culley did not have a Royal Oaks car for his personal use, she stated. On cross-examination by the claimant, Crisler agreed that Ann Evans was a Royal Oaks Chrysler customer. It was noted that Crisler had testified on direct that for the signature, where it said customer signature for the repair work, whoever brings the vehicle in usually signs that line; she was asked if it was always the owner of the vehicle that brings their vehicle in or is it sometimes family members, relatives, things of that nature. It is sometimes other people, Crisler answered, we ask the person dropping the car off to sign that.

Reviewing Employer/Insurer's Exhibit No. 6, it is found that it was a group exhibit containing several service repair invoices during the period of August -- November, 2003 for the vehicle in question, including the one discussed by Crisler. This exhibit also contained a VIP Summary Report, dated August 30, 2003, which reflected the VIN number and the make/model of the car, and noted in the Owner Information Section that the owner was -- Miss Ann M. Evans; this same information was on the service repair invoices, as well as was noted in the police report of the September 10, 2003 motor vehicle accident (See No. 2)

It is found, that the competent and substantial weight of the evidence establishes that the car the claimant was driving at the time he was involved in the September 10, 2003 motor vehicle accident was owned by Ann M. Evans, and that Ann M. Evans was a customer of Royal Oaks Chrysler Jeep.

The next question is whether or not the act of driving Ann Evans' car at the time of the September 10, 2003 was in the course of the claimant's employment. Culley, the claimant, alleges that at the time of the September 10, 2003 motor vehicle accident in which he was involved, he was delivering to a customer her car after repair work. On the day of the accident, Wednesday, September 10, 2003, Culley testified, I was at work that day and Mike Kosta which was the service manager, came up and told me that Miss Evans' car was finished. The claimant was asked his typical work hours on a Wednesday. If I remember correctly, Culley answered, it was an early shift or late shift, but in the car business you did not go by the time clock at all, I mean that was just a formality. He was asked if he recalled whether he was going to come back to work after dropping off Miss Evans' vehicle. Yes, Culley responded, I told Joe Gustafson that she would drop me back off at work, I would return to work in about fifteen minutes. Miss Evans' work, in relation to Royal Oaks, was roughly two or three blocks down the street, the claimant said. Miss Evans' car had been in the service repair shop on and off for about three weeks, getting repaired for something, he said. Obviously, Culley agreed, Miss Evans was a customer of Royal Oaks, and I was going to drop her car off at her work. He agreed that she was then going to drive him back to work and she would continue on. This was not an abnormal activity in any way whatsoever for my position and my duties, Culley stated, this was very much something that was standard and done with frequency -- dropping off vehicles for customers. Culley agreed that Miss Evans was his girlfriend at the time and they were residing together at the time. The claimant was asked if he would have done things out of the ordinary for Miss Evans, such as delivering the vehicle to her work, that he wouldn't do for other customers. No, I do the same things for all my customers, Culley answered. The fact that somebody might be a family member or related to me or a good friend has nothing to do with whether or not I may or may not have been doing my job as it normally would be done, Culley agreed, and stated - It has no bearing whatsoever. The treatment that a family member or a friend or a girlfriend would get would be exactly the same as the treatment that a customer of mine who's not related to me would get, he said. Culley agreed that that treatment would include delivering vehicles from repair shops, picking people up, whatever was necessary to make the clients happy. Miss Evans is still a customer of Royal Oaks, Culley said. I am not currently employed with Royal Oaks, he said. The claimant testified after Miss Evans' car was completed by the Royal Oaks Service Department on September 10, 2003 and Mike Kosta handed him the keys and he told his boss -- I'm going to deliver it to her and I'll be back in about fifteen minutes, he drove the car out of the service department and pulled to the end of the lot away from the stoplight, and as he pulled onto Mexico Road a bus came from nowhere and it just hit him.

Sergeant First Class Nick Bellfield, commander at the Webster Groves recruiting station, testified by deposition on behalf of the claimant. Bellfield stated that he met Jim Culley "(S)hopping for a new car" at Suntrup Ford on Manchester. (Bellfield Dp. pg. 5) Culley showed me around the floor room and the different vehicles, Bellfield said, and I decided to buy a car. Agreeing that he had an opportunity to see Culley again, Bellfield testified:

"I went back, talked to him on a few occasions. The car had a few deficiencies with it. It was an '02 Mustang. And he does a very good job of establishing a rapport and taking care of his customers. So he said if I ever needed anything, just give him a call." (Bellfield Dp. pg. 6)

Testifying about an instance where he needed something, when a door lock didn't work Bellfield stated: "Yeah, the alarm and all that. They weren't working so he's like, 'Well, hey, I'll come pick up your car for you, bring it down. I'll get it programmed and bring it back to you.'" (Bellfield Dp. pg. 7) Culley did this, Bellfield stated, "(H)e actually came up, picked up it up from my office one day. I worked about eighty hours a week." (Bellfield Dp. pg. 7) Agreeing that Culley drove to his place of business and picked up his vehicle, Bellfield further stated: "Took it into the shop, got everything done for me, and that afternoon he had brought it back, dropped it off." (Bellfield Dp. pg. 7) Explaining how Culley had gotten to his place of business to pick up his car, Bellfield testified: "He drove a vehicle. I don't know if it was his personal vehicle or a program vehicle. I have no idea." (Bellfield Dp. pp. 7-8) "I let him park it in front of my station where I can keep an eye on it", Bellfield said. (Bellfield Dp. pg. 8) On cross examination, Bellfield agreed that this - Culley coming out, picking the car up and driving it in for the service -- this was not while Culley was working for Royal Oaks Chrysler Jeep. Bellfield stated that the first time he had met Culley was at the dealership when he was looking for a car. When asked if he had ever seen Culley on a social basis away from the dealership, Bellfield answered: "No, sir. I work too much, sir. I have a hard enough time seeing my family." (Bellfield Dp. pp. 9-10) Bellfield was queried if the occasion when Culley had come up and picked up his car and took it to the dealership was the only occasion, and Bellfield answered: "He did that on one occasion and on another occasion he actually -- I dropped my car off and he dropped me off and then came back and picked me up later." (Bellfield Dp. pg. 10) This was also at the Ford dealership, Bellfield said. Bellfield stated that he has purchased seven to nine cars from dealerships, and there have been other individuals

other than Culley who have come and delivered vehicles to him or picked him up to take him for vehicles. "I can't give – three or four I would say", Bellfield said as to how many others had done this. (Bellfield Dp. pg. 11)

Bellfield further testified: gave the following testimony on redirect:

"Yes, sir. I've been in the Army almost seventeen years now so, you know, I've bought multiple new cars and I've had people come and take care of stuff. 'Hey, call me if you need our first oil change.' Or, you know, 'Something happens on your new car, give me a yell.'

And just like I'm in sales myself obviously. And I'm in recruiting and it's standard practice you establish a rapport with our customers. The better you do doing that, the more the customers return to you for business."

"I've got cars in Tennessee, Kentucky, Illinois, Texas. I've had people do work plus I'm a platoon sergeant so I've had thirty-four men working to me at once. Standard practice.

"Sarge, I need the day off to do the –"

"No, no. Call the dealership. If he wants your return business, he'll come and get it."

Proper – it's just being a salesman. (Bellfield Dp. pp. 14-15)

On further cross examination, Bellfield admitted that he had no personal knowledge concerning Royal Oaks Jeeps' practices so far as picking up and delivering vehicle for customers.

Matthew Schuler testified on behalf of the claimant, and stated that he is currently employed as a sales consultant for vehicles, new and used, and has been in the business of sales for new and used vehicles for about two years. I was employed by Royal Oaks in November or December of 2004, Schuler testified, and my duties were to sale vehicles and to do whatever it takes to get that vehicle with the customer. He was asked if customer satisfaction was a high priority for sales people. It was number one; that's how we get paid, Schuler answered. Schuler stated that family and friends and significant others are just as valued a customer as people that are not family and friends. If I sell them a car, that's how I make my living, Schuler added. He stated that he had occasions when he worked at Royal Oaks where he would deliver vehicles to customers, whether it be at their employment, at their home, somewhere else. This occurred with some frequency, Schuler said. He was asked, if, for example, a customer's car was in the repair shop and it was finished, would one of his duties include possibly delivering that vehicle to that person at their work or their home. To keep the customer happy, if that's what we had to do to accommodate them, that's what I did, Schuler responded. Schuler agreed that he is friends with Jim Culley, but stated that the fact that I'm friends with him is not affecting my testimony in any way. I worked at Royal Oaks right about five or six months, Schuler stated during cross examination. I left for a better opportunity, he said. Right now I'm working at Suntrup Ford in Kirkwood, Missouri. Schuler agreed that he works at Suntrup Ford with Jimmy Culley at Suntrup Ford.

Allan Brodhead testified on behalf of the employer/insurer, and stated that he works for Royal Oaks Chrysler Jeep, and his position there is a sales representative. I was also a sales representative at Royal Oaks in September, 2003, he said. Brodhead stated that he and Culley worked the same shift in September, 2003. When asked what was that shift that he and Culley worked in September, 2003, Brodhead answered - It depends on the day of the week. Monday and Wednesday we worked nine to one, then we were off from one to five, and then we came back at five and worked till nine; on Tuesday we worked nine to six, we were off on Thursday, and Friday we worked noon till nine; Saturday we worked nine to five-thirty, Brodhead testified. In my years as a sales representative I also was a dealer, Brodhead responded, and I have on previous occasions, being I worked at my own dealership, driven a customer's car in for service; it could have been -- obviously it had miles on it, because it was going in for service, could have been purchased new, could have been purchased used. I never did this at Royal Oaks, Brodhead said, I have never taken a car for service or delivered a car from service to a customer while I've been at Royal Oaks, Brodhead stated.

Gary R. Clark testified on behalf of the employer/insurer, and stated that he is an employee of Royal Oaks Chrysler Jeep, and his position is Salesman; he agreed that he was at Royal Oaks as a salesman in September, 2003. Clark stated, that he worked with Culley at Royal Oaks. During the period that I and Culley worked together at Royal Oaks, Culley did leave during the course of the day to pick up his girlfriend at school after the school day, Clark said. Clark stated that in September, 2003 he and Culley worked the same schedule. On that particular day, a Wednesday, we were due to be at work at nine o'clock, we have a shift split at one o'clock, then we're due back at five to finish the evening up to approximately nine, Clark stated. He agreed that he would work nine to one, off one to five, and work five to nine. On cross examination by the claimant, Clark testified that the hours he had stated - nine to one and then a break and then five to close – there were days where those strict time constraints were not adhered to. He agreed that it was somewhat common to be there after one o'clock or maybe come back early based on customer service needs.

Joseph Gustafson testified on behalf of the employer/insurer, and said that he is an employee of Royal Oaks Chrysler Jeep and his position is General sales manager. I have worked at Royal Oaks Chrysler Jeep for nine and a half years, Gustafson stated, and agreed that he worked there on September 10, 2003. I was the used car manager on September 10, 2003, Gustafson said, and my duties as used car manager were making sure all sales were completed, make sure the sales people are aware of their jobs, training, scheduling, etc. I would have been one of Culley's supervisors on September 10, 2003, Gustafson said. Gustafson stated that he was familiar with the fact that Culley was involved in an automobile accident on September 10, 2003. On or about September 10, 2003 I did not tell Culley to deliver a customer's vehicle that had been in the shop for repairs, Gustafson stated. He was asked what was the practice in September, 2003 at Royal Oaks insofar as sales people delivering vehicles to customers that had been in for repairs. I would say it would be more of an exception, Gustafson answered, and I typically didn't direct any of that, if they were doing it, they would ask or let us know they were doing something of that nature. Typically customer sales handles sales customers, he added. Gustafson was asked, to his knowledge, did Culley ever request permission or advise any of the supervisors at Royal Oaks that on or about September 10 he was delivering a customer's vehicle to her that had been in for service. Not to my knowledge, Gustafson answered. On cross-examination by the claimant, Gustafson agreed that he had testified a salesperson delivering a car that had recently been repaired would be more of an exception than the rule. When queried if it would occur some times, though, Gustafson responded – I would imagine it would. I personally have brought in a neighbor's vehicle for service and brought it back to them, he stated. Gustafson was queried, if it was a car salesman's customer whose vehicle was being repaired, might that make it more common for them to take care of that customer and return the vehicle. They don't want to spend any time off the floor, he answered, if they're out doing activity that you're suggesting takes them away from floor time, it's not really productive as far as the mindset of most salespeople.

Documentary evidence included a Job Description from Royal Oaks for new and pre-owned vehicle salespeople (No. F); this job description listed the essential duties, and noted that other duties might be assigned. Twenty essential duties were listed, and among these essential duties were: 1. Satisfies the transportation needs of new/pre-owned vehicle purchasers; 2. Delivers vehicles to customers, ensuring that the customer understands the vehicles operating features, warranty, and paperwork; 3. Follows up on all post-delivery items, title work, we-owes and special requests to be sure that all customer expectations are met.

It is found, considering the evidence, that the substantial weight of the evidence, including the testimonies of the witnesses the majority of which were found to be credible, establish that salespeople delivering vehicles to customers is standard and customary in the car sales business. It is further found that the substantial weight of the evidence establishes that this practice was in effect at Royal Oaks Chrysler Jeep at or during the time of the September 10, 2003 car accident; (it should be noted that Gustafson's testimony that he typically did not direct the sales people delivering of vehicles to customers tempers his testimony that he had no knowledge of Culley delivering on September 10, 2003 a customer's vehicle that had been in service). Additionally, official notice was taken of the fact that the accident of September 10, 2003 was a Wednesday; there is no dispute among the witnesses that on Wednesdays at Royal Oaks the salesmen such as Culley worked nine to one, then were off from one to five, and then came back at five and worked till nine. However there is also no dispute among the witnesses that it was somewhat common for a salesman to be there after one o'clock or maybe come back early based on customer service needs. It is further found that the substantial competent evidence establishes that at the time of the September 10, 2003 motor vehicle accident, the claimant was engaged in the furtherance of the employer's business by performing the standard, customary and accepted act of delivery a car to a customer after repair work at a time common for a sales person such as himself to be working. It is found that the claimant's activities on or about September 10, 2003 were in the course of his employment.

The second part of the test for a compensable injury is that there is a causal connection between the employee's duties and the resulting injury, that the injury arose out of employment. The claimant alleges that as a result of the September 10, 2003 motor vehicle accident, he suffered injury to his back resulting in the need for the surgery performed by Dr. Graven. Two doctors opined on the diagnosis and cause for the condition of the claimant's back; in making their determination, both doctors indicated a reliance upon sophisticated studies, such as an MRI and a discogram to aid them in their evaluations.

“A claimant must show not only causation between the accident and the injury but also that a disability resulted and the extent of such disability. *Smith v. National Lead Co.*, 228 S.W.2d 407, 412(4) (Mo.App.1955). While proof of cause of injury is sufficiently made on reasonable probability (*Smith v. Terminal Transfer Company*, 372 S.W.2d 659, 664(7) (Mo.App.1963)), proof of permanency of injury requires reasonable certainty. *Davis v. Brezner*, 380 S.W.2d 523, 588(6--9) (Mo.App.1964). Whatever may be the quantum of proof the law imposes on a given issue in a compensation case, however, such proof is made only by competent substantial evidence and may not rest on surmise or speculation.

“For an injury to be compensable the evidence must establish a causal connection between the accident and the injury. The testimony of a claimant or other lay witness can constitute substantial evidence of the nature,

cause and extent of the disability when the facts fall within the realm of lay understanding.

“An injury may be of such a nature [however] that expert opinion is essential to show that it was caused by the accident to which it is ascribed. (Citations omitted)” *Griggs v. A. B. Chance Co.*, 503 S.W.2d 697, 703 and 704 (Mo.App. 1973).

\* \* \*

“...an injury may be of such a nature that expert opinion is essential to show that it was caused by the accident to which it is ascribed. When the condition presented is a sophisticated injury that requires surgical intervention or other highly scientific techniques for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding...” *Knipp v. Nordyne, Inc.* 969 S.W.2d 236, 240 (Mo.App. 1998).

\* \* \*

“A medical expert’s opinion must have in support of it reasons and facts supported by competent evidence which will give the opinion sufficient probative force to be substantial evidence.” (citations omitted) *Pippin v. St. Joe Minerals Corp.*, 799 S.W.2d 898, 904 (Mo.App. 1990).

It is found that due to the highly scientific techniques required for a diagnosis in this case, medical opinion on causation is necessary. Dr. Lange offered one of the two medical opinions on the nature and cause of the claimant’s back condition. In his May 10, 2005 report (No. 11), Dr. Lange discussed his review a 10/26/04 MRI of the lumbar spine stating that it revealed: a degenerative disc at T11-12 with dessication; a degenerative disc at L5-S1 with significant dessication, narrowing of the disc and also circumferential enlargement; no discreet herniation; some bilateral narrowing of the L5 nerve root canals; and it appears, however, that the L5 ganglia are above the area of the narrowing. In his May 10, 2005 report, Dr. Lange wrote: “The issue of causation arises. There is a very high likelihood that Mr. Culley did trigger symptoms in the previously degenerative disc at L5-S1 during the motor vehicle accident.” Section 287.020 RSMo 2003 specifically states: “An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.” It is found that Dr. Lange’s opinion fails to establish that the claimant’s back injury is compensable.

Dr. Timothy G. Graven offered the other medical opinion on the cause of the claimant’s back condition. Dr. Timothy G. Graven, D.O. testified by deposition on behalf of the claimant on June 7, 2005. (No. A) An orthopedic surgeon with St. Peters Bone & Joint Surgery, Inc., Dr. Graven testified that Jim Culley was a patient of his. Dr. Graven noted - Culley was first seen in this office in early 2004 and “I took over his treatment April of 2004”. (Graven Dp. pg. 6) Dr. Graven testified as to his opinion of the cause of Culley’s back pain:

“I felt that his back pain was due to actually two conditions; one, the degenerative disc disease at the L5-S1 disc and then a herniated disc in the disc above L4-5 which resulted in back pain as well as leg pain.” (Graven Dp. pg. 7)

Dr. Graven stated that he was aware Culley had been in a motor vehicle accident on or about September 10, 2003. When asked if any of the injuries he treated Culley for were as a result of the September 10, 2003 accident, Dr. Graven answered:

“Any of the complaints that he had, yes, I believe that they were related to the motor vehicle accident. I do believe that he had a pre-existing condition; namely degenerative disc disease at L5-S1. But I’m fairly confident having not seen x-rays prior to the accident that this was present prior to the accident. However, I believe it was exacerbated by the motor vehicle accident, yes.”

“Certainly Mr. Culley had two problems as I see it; number one, degenerative disc disease at L5-S1 and some degenerative change not as severe at L4-5 with a disc herniation at L4-5.

I think that the severity of the L5-S1 disc did not come about in a year’s time. I believe that some degree of degenerative change was present at L5-S1 prior to his accident.

The fact that he did not have – or that his complaints were back pain prior to the accident and subsequently became back pain with leg pain radiation after the accident would lead me to believe that this condition was made worse by the motor vehicle accident.” (Graven Dp. pp. 8-9)

Dr. Graven discussed the surgery he had recently performed Culley: “He had a decompression with an interbody fusion

both at L4-5 and at L5-S1 with posterior instrumentation; i.e., replaced screws and rods in the back and posterior fusion, additional fusion besides the interbody fusion.” (Graven Dp. pp. 9-10) The doctor stated his opinion as to why the surgery was necessary:

“Well, it was necessary because he had continued ongoing, oftentimes incapacitating pain. He had numbness and tingling in his lower extremities. And he had failed all other conservative treatments and it was truly the only treatment left to offer him.” (Graven Dp. pg. 10)

Dr. Graven stated that it was his opinion the sometimes incapacitating pain that Culley suffered was at least related in part to the automobile accident that occurred in September of 2003.

On cross examination, Dr. Graven agreed that as his file indicated, the first time Culley was seen at the office was on January 29, 2004. Dr. Graven agreed that the record indicted the nurse practitioner was the first to see Culley, seeing him on January 29, 2004; Dr. Graven agreed that in the first note, the history given by Culley was of having problems in his back starting in his twenties. Dr. Graven stated that he did not recall seeing any prior medical records of treatment prior to the car accident, but agreed that Culley had told Nurse Hemmer that he had treated with a chiropractor. Dr. Graven agreed, Culley had a pre-existing problem in his back. Agreeing that he believed degenerative changes in Culley’s back pre-existed the car accident, Dr. Graven stated – “Yes. Well, at least some of them, yes.” (Graven Dp. pg. 15) The doctor agreed that if Culley did herniate a disc in the September 10, 2003 car accident he would expect Culley to have specific complaints after that accident. Explaining the kind of complaints he would have expected Culley to have, Dr. Graven stated: “Back pain, leg pain, numbness, tingling.” (Graven Dp. pg. 16) It was noted that these complaints were not there right away, and Dr. Graven was asked how soon after the car accident did he think complaints should have appeared. The doctor answered: “It seems that’s somewhat variable from individual to individual but certainly within a few months.” (Graven Dp. pg. 16) Dr. Graven gave the following testimony on causation during cross examination:

Q. And if I’ve got your testimony correct, you believe that Mr. Culley has actually two conditions, degenerative changes in his back and a herniated disc?

A. He certainly has the degenerative disc disease which is markedly severe at L5-S1, to a less degree at L4-5 with disc protrusion. More significantly at L4-5 than L5-S1, yes.

Q. Are you basing your opinion that the herniated disc is related to the car accident on the history he gave you?

A. Based on – yes, based on the history that there were no significant radicular or – radicular symptoms meaning leg pain, pain in the lower extremity, prior to the accident

And then post accident he had those symptoms and that’s why I’m relating the accident as being integral in the causation of his symptoms. (Graven Dp. pg. 17)

Dr. Graven agreed that there are a number of activities that can herniate a disc – in some cases simple activities as bending, lifting, sneezing or coughing have been known to herniate a disc. **It is found** that Dr. Graven’s opinion on the cause of the diagnoses he gave regarding the claimant’s back are not supported by the medical evidentiary facts presented in this case. The only treatment record in evidence, a St. Joseph Hospital September 10, 2003 emergency room record (No. 12), noted the motor vehicle accident that had occurred earlier that day and the diagnosis was right forearm contusion and lumbar strain with no indication in the record of lower extremity symptoms. It is the claimant’s contention that lower extremity symptoms started a few weeks after the September 10, 2003 motor vehicle accident at which time he again sought emergency room treatment, but no records of such treatment was offered into evidence nor was there any indication from Dr. Graven of having reviewed these records. There was no indication that Dr. Graven reviewed any medical records of treatment prior to or subsequent to the September 10, 2003 motor vehicle accident. Dr. Graven indicated that he based his opinion on the history relayed by the claimant to him; the claimant’s statements and testimony at times were found to be inconsistent (i.e. the claimant testified that he did not have any problems with his back prior to the September 10, 2003 accident and the St. Joseph September 10, 2003 reflected the same history from the claimant in regards to prior problems with back, but Dr. Graven agreed that his office records reflected a history from the claimant of having problems in his back starting in his late twenties), thus raising questions as to his credibility. It is found Dr. Graven’s opinion that the kind of complaints he would expect Culley to have of symptoms in the lower extremities within a few months after the accident is not indicated or supported by the medical evidence presented. It is found that Dr. Graven’s opinion does not have in support of it reasons and facts supported by competent evidence to give the opinion sufficient probative force to be substantial evidence. It is found that the claimant has not met the requirements of the second part of the test of presenting competent and substantial evidence that his back condition for which he received surgery “arose out of “ his employment. Thus, a compensable injury cannot be found.

In light of the above finding, all remaining issues are moot.

### SUMMARY OF THE EVIDENCE

Jimmy L. Culley, Jr., the claimant, testified that on or about September 10, 2003 he had been employed by Royal Oaks Chrysler Jeep St. Peters for roughly a month. I think I started August 11<sup>th</sup>, he said. I was a new car and

used car salesperson, Culley stated, and agreed that that was what his title was as well. Agreeing that he had had experience in this field, Culley stated - Yeah, about fifteen years in the same field.

The claimant described some of his duties as a new car and used car salesperson at Royal Oaks. Basically what our duties were, we greeted the customers and we would try to sell them a new or pre-owned car, Culley stated. At that point if we did sell them a new or pre-owned car, it was our responsibility to take care of them as far as delivering the vehicle, having the vehicle cleaned, making sure it was serviced properly, he said. Also, in certain cases we delivered the vehicle to the customer's house or their work environment, depending on the customer's situation, Culley testified. Whatever it took to please the customer, we did, he said. Culley stated that he had worked at other car dealerships other than Royal Oaks, and it was the practice to deliver cars; it was all the same, it was the standard at all the different places I worked, the claimant said. .

Culley was asked how was he paid at Royal Oaks. We were paid by commission on what we sold, the claimant answered. He agreed that what he sold was based partly on his customer service. Agreeing that customer service also related to referrals, new business, and things of that nature, Culley further stated that customer referrals were based upon, customers previously sold, family members, friends, things of that nature. He agreed that based on his experience it would be his opinion that customer satisfaction was imperative to his business.

On Wednesday, September 10, 2003, the date in question, I was involved in an accident, Culley stated. Describing what happened, Culley testified I was at work that day, doing just our normal stuff that we do. Mike Kosta which was the service manager, came up and told me that Miss Evans' car was finished, Culley stated and I told my supervisor, Joe Gustafson, whose title was actually used car manager, that I was going to take her car back to her, deliver it to her and that they would drop me back off at work. The claimant was asked his typical work hours on a Wednesday. If I remember correctly, Culley answered, it was an early shift or late shift, but in the car business you did not go by the time clock at all, I mean that was just a formality. He was asked if he recalled whether he was going to come back to work after dropping off Miss Evans' vehicle. Yes, Culley responded, I told Joe Gustafson that she would drop me back off at work, I would return to work in about fifteen minutes. Miss Evans' car was in the service repair shop on and off for about three weeks, getting repaired for something, he said. Culley agreed that day, September 10<sup>th</sup>, when he went to return the car, he had gotten a call from the repair shop saying the car was finished, Obviously, Culley agreed, Miss Evans was a customer of Royal Oaks, and I was going to drop her car off at her work. Miss Evans' work, in relation to Royal Oaks, was roughly two or three blocks down the street, the claimant said. He agreed that she was then going to drive him back to work and she would continue on. This was not an abnormal activity in any way whatsoever for my position and my duties, Culley said, this was very much something that was standard and done with frequency -- dropping off vehicles for customers. Culley agreed that Miss Evans was his girlfriend at the time; he agreed that they were residing together at the time. The fact that she was my girlfriend and we were living together would have no affect on whether or not she was still a customer, Culley said. The claimant was asked if he would have done things out of the ordinary for Miss Evans, such as delivering the vehicle to her work, that he wouldn't do for other customers. No, I do the same things for all my customers, Culley answered.

The claimant stated that like his girlfriend, a good portion of his business comes from family members, friends, girlfriends, people of that nature. The fact that somebody might be a family member or related to me or a good friend has nothing to do with whether or not I may or may not have been doing my job as it normally would be done, Culley agreed, and stated - It has no bearing whatsoever. The treatment that a family member or a friend or a girlfriend would get would be exactly the same as the treatment that a customer of mine who's not related to me would get, he said. Culley agreed that that treatment would include delivering vehicles from repair shops, picking people up, whatever was necessary to make the clients happy. Miss Evans is still a customer of Royal Oaks, Culley said. I am not currently employed with Royal Oaks, he said.

The claimant testified about the accident that occurred on September 10, 2003. Miss Evans' car was completed by the Royal Oaks Service Department and Mike Kosta handed me the keys and said Miss Evans' car is done, and I told my boss I'm going to deliver it to her and I'll be back in about fifteen minutes Culley stated. I drove it out of the service department and pulled to the end of the lot away from the stoplight, is the best way I can describe it. It was about four o'clock roughly, I think, he said. Traffic had stopped and they were waving me on and obviously I pulled out into Mexico Road into the merge lane, and the bus came from really nowhere and it just hit me, Culley said. He agreed that this was while he was in the process of driving Miss Evans' vehicle to her work to deliver it because it had been completed at the repair shop.

Culley was asked if he knew whether or not Miss Evans ever wound up paying for the repair work that she had done on the vehicle. Yes, it was paid for, he answered. Agreeing that something was taken out of his check due to that

accident, Culley testified actually, we got into a big argument over that, Royal Oaks took out \$300.00 out of my check illegally without me giving them permission to. I'm not aware of any kind of policy at Royal Oaks that damage to a customer's vehicle will be subject to being taken from your paycheck, the claimant said.

I got to the hospital that day after the accident occurred, Culley testified. My primary complaints were stiff, I think I was a little dizzy, and I was still in shock from the accident, he said.

The claimant was queried if it was true that back as early as his twenties he had some low back pain. No, not really, Culley answered. He denied that he had ever been diagnosed with degenerative disc disease prior to the accident. The claimant agreed that as far as any degenerative disc disease or back problems that may have been present prior to the accident, he didn't have any problems with his back prior to the accident.

After the accident what happened was after a few weeks after the accident my legs felt like they weighed about a hundred and fifty pounds apiece, the claimant said, and that's when I went to the hospital. There were no other events that could have possibly contributed to the onset of this between the time of the accident on September 10th and the problems I just described with my legs, Culley stated. Once my legs started hurting and I went to the hospital, they took x-rays of my back. Basically, my legs felt like they weighed a hundred and fifty pounds, he said, and what happened was, it was severe chronic pain running down from my butt to my knees on both sides in the back; both legs were the same; it was just severe pain, Culley said.

My job at Royal Oaks required me to be on my feet for most of the day, Culley stated, I mean, pretty much all day. I had to walk around the lot, move cars around, test driving and things of that nature, and it became increasingly difficult, he said, almost impossible.

Culley agreed that there came a time when he ceased employment with Royal Oaks. Explaining the reasoning behind this, Culley testified it was the fact that one day Jim Ball, the general manager slash part owner, screamed and yelled at me on the showroom floor and we had a conflict. And I thought I was mistreated, and I felt that I could no longer put up with that type of treatment at work, the claimant said. He agreed that he had been doing the very best that he could given his condition while he was at Royal Oaks Chrysler, and it was not up to standard to what he could have done previously. I was tied for second and third place as far as salesperson there, and I couldn't do anywhere near what I could do prior to the accident, he added.

Agreeing that the actual location where the accident occurred was right as he was pulling out of the parking lot of Royal Oaks, Culley stated that it was right out of the parking lot. He agreed that there are other salespeople and staff that are on the parking lot at all times. Culley agreed that the police came and a police report filled out, and it was very obvious that there had been an accident there that involved himself and that anyone from Royal Oaks could have seen. Culley stated that he knew for a fact that there were people from Royal Oaks out there and saw him.

Culley agreed that he recently underwent surgery. We tried many different treatments for my back and none of it worked. Agreeing that his condition continued to worsen, Culley stated that it got to the point where he couldn't walk anymore. Surgery the last option; it was the only choice. I have not been able to work since the date of the surgery, the claimant said. I am unable to work for the simple fact that I'm just right now walking with a walker, Culley said, I still have chronic pain. Actually, I'm restricted not to work just due to the medicine, he said. He stated that he is not allowed to drive with the medication he is on. Culley agreed that a part of his job is going on drives, being on his feet. He agreed that he is just not able to perform his duties.

The claimant stated that he will need to be seen by a doctor again, and agreed that he had an appointment already scheduled with Dr. Graven for follow-up to check his status in another week and a half away.

Culley was asked if there were any other customers besides Ann Evans that he had ever delivered a vehicle for. In the fifteen years I've been in the car business, he answered, I would say the number is well over -- I mean, it's probably a couple hundred people that I delivered cars to, and whether it's home, work, I mean, deliver it out of town. Culley was shown Claimant's Exhibit F, described as a document titled Royal Oaks Chrysler job description new, pre-owned salespeople. Culley stated that he had seen this document before, and that it was a document that's provided by Royal Oaks. He agreed that, in his opinion, this document fairly and accurately described some of his job duties. The claimant read the sixth line from the bottom of the document, which was noted to be underlined -- "Delivers vehicles to customers".

On cross examination, Culley agreed that the car he was driving at the time of the accident belonged to Ann Evans. The claimant agreed that at the time of the accident Ms. Evans was his girlfriend and he was living with Ann

Evans. Culley agreed that before Ms. Evans had brought the car involved in the accident in for service, he had you on prior occasions driven that vehicle to work. The claimant was queried - when the police showed up after the accident, did he tell the police officer that investigated the accident that the vehicle involved was his? Actually, I do not remember, Culley answered. At the time of the accident I had another vehicle available for me to drive other than Ms. Evans' car, the claimant said.

During cross examination, Culley stated that the money withheld from his check that he disputed was about three hundred dollars and some change. It was held to pay for Miss Evans' bill, he said. Stating that he did not mean the bill for the services that had been performed before the accident, Culley explained what it was for: The way I understood, it was for partial of the bill because of the fact the car was in the service department so long that Mike Kosta was charging her over fifteen hundred dollars since the car was messed up, he said. They put the wrong transmission in the first time, and then put another part in it that was defective, and the car was in and out of the service department almost four weeks, and Mike Kosta did say I can't charge her; she was extremely upset because the car was not fixed properly, Culley testified. Mike Kosta said I will knock this down to three hundred dollars and I'll cover it under a warranty that he came up with, and he said let's just make this problem go away, the claimant stated, because he knew that she was upset, and he said due to the fact that she was a customer and she was also a school teacher at Harris Elementary, which is right down the street, that they felt that we would knock the bill down to three hundred because of all the problems that they had. Culley stated that that part was correct, that the three hundred dollar charge that was withheld from his check was associated with the services performed to Ms. Evans' vehicle before the accident. He agreed that he had signed off on authorizing the service department to take that three hundred dollar charge for the vehicle. Mike Kosta asked me if that was all right; I said I'll call Miss Evans and she'll call me back, and a few hours later she called back and said three hundred dollars is fine, and I initialed it; Mike said put your initials by it, just so that we know this problem is over, Culley testified. The claimant was handed Employer-Insurer's Exhibit 6 and referred to the page where he had initialed that three hundred dollar charge; Culley agreed that that portion of the statement was regarding the services that had been performed right before the accident. Culley agreed that where it said customer signature, it was his signature. The claimant agreed that he had signed that.

After the accident Ms. Evans purchased another vehicle from Royal Oaks, a Mustang, Culley agreed during cross examination. He admitted that on a couple of occasions he would drive that Mustang to work at Royal Oaks.

Culley agreed that he had said at the time of the accident Ms. Evans taught at a school that was near Royal Oaks. He admitted that before the accident he would on a few occasions leave work to pick Ms. Evans up from school after the school day. Culley denied that Ms. Evans got off around approximately three. When asked at what time did she usually leave school to where he picked her up, Culley answered - There was no certain time; somewhere between three-thirty and five.

I have lived in Missouri fifteen years, the claimant stated during cross examination. He was asked if he had a valid Missouri driver's license at the time of the accident. No, I have an Indiana driver's license, Culley answered. He agreed that he still does not have a Missouri license; I still have an Indiana driver's license, Culley said.

Culley agreed, during cross examination, that he was able to get out of the car by himself immediately after the accident and was able to walk around a little bit. From what I remember, the only mark on my body after the accident was an air bag abrasion on my arm, Culley admitted. He agreed that after the accident an ambulance arrived on the scene to check him out, however it did not take him to the hospital at that time.

During cross examination, Culley agreed it was his testimony that before September 10, 2003 he did not have any complaints of aching or pains in his legs or back. Culley agreed that at the evaluation by Dr. Lange at the request of his employer, this is the history he had given Dr. Lange, that he did not have any back problems or leg problems before September 10, 2003. The claimant agreed that before he saw Dr. Graven he saw a Dr. Hemmer at his office. I did not tell Dr. Hemmer that I had had back problems since my twenties, Culley said.

Culley agreed, during cross examination, that he had testified his back surgery would cost a hundred and forty to a hundred and eighty thousand, and that he'd be off work about one to one and a half years after the surgery. If I ever walk again properly; in my mind that was proper, the claimant added. Culley stated that he has not have any accidents or injuries at all since September 10, 2003.

The claimant was asked if he was seeking any damages from the driver of the bus or the bus company. At this time, no, Culley answered.

Culley stated, during cross examination, that he knows a Mr. Allan Brodhead and that he worked with him at the time of the accident. He agreed that he knows Mr. Gary Clark and worked with Mr. Clark at the time of the accident.

Agreeing that his first treatment after the accident would have been the St. Joseph's Emergency Room, Culley further that the day of the accident he went to St. Joseph's in St. Charles. He agreed that he has also gone to Dr. Graven's office for care. For treatment of my September 10, 2003 injuries, Culley testified, many times I have been to St. Peters Barnes Hospital; repeated times at St. Peters Bone and Joint; at the Surgery Center next to it, two times for spinal injections; and obviously Crossroads Hospital for surgery. Many times St. Peters Hospital though, emergency room, the claimant said.

After I stopped working for Royal Oaks, I next worked at Auto Centers, but I did not work there for very long, Culley said, maybe about four weeks, maybe a little longer than that, I'm not sure on the exact date. I did not have essentially the same duties at Auto Centers as I had at Royal Oaks, the claimant said. At Auto Centers, well, obviously I sold pre-owned cars, he said, it was a much smaller lot, not near the responsibilities I had at Royal Oaks. I left there because I was not happy with the rate of pay, the claimant stated. From there I went to Jay Wolff Automotives where I sold only new cars. Taking a rough guess, I was at Jay Wolff Automotives six months, I don't remember. It was a brand new store and there were some changes that I didn't like, Culley explained as to why he left Jay Wolff Automotives. Basically, I left to go to a much, much smaller store due to the fact that my legs were bothering me, he further stated. I then went to Suntrup Automotive, pre-owned cars department, only, just sales. I was here -- let's see, prior to surgery -- again, I'm guessing, six, seven months.

On redirect examination, the claimant was queried if on the day of the accident was he going to pick Miss Evans up to take her home or was he going to deliver her vehicle to her. I was to deliver her vehicle to her and return to work, Cullley answered. Culley agreed that the Mustang that Miss Evans purchased, Royal Oaks made a profit on that sale. We made over two thousand dollars, he said. Stating that he knew the reasons why Miss Evans was upset about her repair bill, Culley testified that she was extremely upset because her car was in the service department for over three weeks; wrong parts were put in and she was extremely upset over that; the car wasn't taken care of properly. Culley admitted that as far as his deposition testimony as to the cost of the surgery and time off subsequent, he was not medical doctor. I was basing that opinion on the fact if I walk proper; the year and a half was based on really me, Culley said.

On further cross examination, Culley agreed that he had said Miss Evans was upset about that repair bill, yet she went back later and bought a new Mustang from Royal Oaks.

Matthew Schuler testified on behalf of the claimant. Schuler stated that he is currently employed as a sales consultant for vehicles, new and used. Right now I'm in the pre-owned division, but I can also sell new, Schuler stated. I have been in the business of sales for new and used vehicles for about two years, he said.

I was employed by Royal Oaks in November or December of 2004, Schuler testified, and my duties were to sale vehicles and to do whatever it takes to get that vehicle with the customer. He was asked if customer satisfaction was a high priority for sales people. It was number one; that's how we get paid, Schuler answered. He stated that he had occasions when he worked at Royal Oaks where he would deliver vehicles to customers, whether it be at their employment, at their home, somewhere else. This occurred with some frequency, Schuler said. He was asked, if, for example, a customer's car was in the repair shop and it was finished, would one of his duties include possibly delivering that vehicle to that person at their work or their home. To keep the customer happy, if that's what we had to do to accommodate them, that's what I did, Schuler responded.

Schuler agreed that he is friends with Jim Culley. The fact that I'm friends with him is not affecting my testimony in any way, he said. I am not being compensated in any way for my testimony today, Schuler stated.

On cross-examination by the employer/insurer, Schuler was asked on how many occasions at Royal Oaks did he deliver a vehicle to a customer that had been in for service. To remember an exact number, that's -- you know, I couldn't tell you honestly; but there's been times where I've taken customer's cars even they dropped them off, I've taken them to the tire shop, and taken it back to them, Schuler answered.

Schuler stated that he sees Culley socially. Culley will come over to my house, he said.

I worked at Royal Oaks right about five or six months, Schuler stated during cross examination. I left for a better opportunity, he said. Right now I'm working at Suntrup Ford in Kirkwood, Missouri. Schuler agreed that he works at Suntrup Ford with Jimmy Culley at Suntrup Ford.

On redirect examination, Schuler stated that family and friends and significant others are just as valued a customer as people that are not family and friends. If I sell them a car, that's how I make my living, Schuler added.

Allan Brodhead testified on behalf of the employer/insurer. My employer is Royal Oaks Chrysler Jeep, Brodhead said, and my position there is a sales representative. Brodhead stated that he was at Royal Oaks in September, 2003, and was also as a sales representative at that time.

Brodhead stated that he is familiar with Jimmy Culley. I worked with him at Royal Oaks, Brodhead said. He stated that he was familiar with the fact that on September 10, 2003 Culley was involved in an automobile accident, and was familiar with the car that Culley was driving at the time of the September 10, 2003 accident. When asked if that car belonged to Culley's girlfriend, Ann Evans, Brodhead responded – I wasn't aware of her name but I knew it belonged to his girlfriend. He agreed he knew this because Culley told him. I had on occasion before September 10, 2003 seen Culley driving this very same vehicle into work, Brodhead stated. Culley and I worked the same shift in September, 2003, Brodhead said. When asked what was that shift that he and Culley worked in September, 2003, Brodhead answered - It depends on the day of the week. Monday and Wednesday we worked nine to one, then we were off from one to five, and then we came back at five and worked till nine; on Tuesday we worked nine to six, we were off on Thursday, and Friday we worked noon till nine; Saturday we worked nine to five-thirty, Brodhead testified.

On cross-examination by the claimant, Brodhead was asked if he ever saw Culley drive any vehicles other than Miss Evans' to work. I can't say that I did, Brodhead answered. He was asked if he had ever in his years as a sales rep delivered a vehicle to a customer. I have, Brodhead answered.

On redirect examination, Brodhead was asked if the vehicles he had delivered to customers, were those new cars or cars that had been brought in for service, or both.

In my years as a sales representative I also was a dealer, Brodhead responded, and I have on previous occasions, being I worked at my own dealership, driven a customer's car in for service; it could have been -- obviously it had miles on it, because it was going in for service, could have been purchased new, could have been purchased used. What about at Royal Oaks, Brodhead was asked. I never done it at Royal Oaks, Brodhead answered. I have never taken a car for service or delivered a car from service to a customer while I've been at Royal Oaks, Brodhead stated.

Gary R. Clark testified on behalf of the employer/insurer. I am an employee of Royal Oaks Chrysler Jeep, Clark said, and my position is Salesman. Clark agreed that he was at Royal Oaks as a salesman in September, 2003.

I am familiar with Jimmy Culley, Clark said, I worked with Culley at Royal Oaks. Clark stated that he was familiar with the fact that Culley was involved in an automobile accident on September 10, 2003, and he was familiar with the car Culley was driving at the time of the September 10, 2003 accident. The car was his and his girlfriend's, Clark stated. He said he new this by Culley telling them this. Clark stated that before the September 10, 2003 accident he had seen Culley driving that very same vehicle to work.

During the period that I and Culley worked together at Royal Oaks, Culley did leave during the course of the day to pick up his girlfriend at school after the school day, Clark said.

Clark stated that in September, 2003 he and Culley worked the same schedule. On that particular day, a Wednesday, we were due to be at work at nine o'clock, we have a shift split at one o'clock, then we're due back at five to finish the evening up to approximately nine, Clark stated. He agreed that he would work nine to one, off one to five, and work five to nine.

On cross examination by the claimant, Clark was queried if he knew whose name the car was titled in, the one that he referred to as Culley's and his girlfriend's. No, sir, I do not, Clark answered. Clark stated that the hours he had stated - nine to one and then a break and then five to close – there were days where those strict time constraints were not adhered to. He agreed that it was somewhat common to be there after one o'clock or maybe come back early based on customer service needs.

Joseph Gustafson testified on behalf of the employer/insurer. I am an employee of Royal Oaks Chrysler Jeep, Gustafson said, and my position is General sales manager. I have worked at Royal Oaks Chrysler Jeep for nine and a half years, he stated. Gustafson agreed that he worked there on September 10, 2003. I was the used car manager on September 10, 2003, Gustafson said, and my duties as used car manager were making sure all sales were completed, make sure the sales people are aware of their jobs, training, scheduling, etc.

Gustafson stated that he is familiar with Jimmy Culley. I would have been one of Culley's supervisor on September 10, 2003, Gustafson said.

Gustafson said that he was familiar with the fact that Culley was involved in an automobile accident on September 10, 2003. On or about September 10, 2003 I did not tell Culley to deliver a customer's vehicle that had been in the shop for repairs, Gustafson stated. He was asked what was the practice in September, 2003 at Royal Oaks insofar as sales people delivering vehicles to customers that had been in for repairs. I would say it would be more of an exception, Gustafson answered, and I typically didn't direct any of that, if they were doing it, they would ask or let us know they were doing something of that nature. Typically customer sales handles sales customers, he added. Gustafson was asked, to his knowledge, did Culley ever request permission or advise any of the supervisors at Royal Oaks that on or about September 10 he was delivering a customer's vehicle to her that had been in for service. Not to my knowledge, Gustafson answered.

On cross-examination by the claimant, Gustafson agreed that he had testified a salesperson delivering a car that had recently been repaired would be more of an exception than the rule. When queried if it would occur some times, though, Gustafson responded – I would imagine it would. I personally have brought in a neighbor's vehicle for service and brought it back to them, he stated. Gustafson was queried, if it was a car salesman's customer whose vehicle was being repaired, might that make it more common for them to take care of that customer and return the vehicle. They don't want to spend any time off the floor, he answered, if they're out doing activity that you're suggesting takes them away from floor time, it's not really productive as far as the mindset of most salespeople. Gustafson was asked if he recalled if on September 10, 2003 Culley ever coming to him and saying I'm going to deliver this car to Ann's school or anything to that nature. No, Gustafson answered.

On redirect examination, Gustafson testified about split shifts. Well, the salespeople know, they'll come in and work from, say, nine until one and then have a split between one and five, and come back and work five to nine, he stated, and from my recollection the day that this happened is he was going on his split and the accident happened. The first thing I said when they told me there was a crash out front - was he in one of our cars - that's what I'm concerned about, was there damage to one of our cars; we, in fact, lose money, we have to disclose it, and I also lose time on that car, you have so much time to sell it, Gustafson stated. He agreed that when he said one of our cars, he meant one of their new cars that a customer was taking out for a test drive or used car that someone's --.

On further cross examination, Gustafson was queried - your first thought was I hope it's not one of our cars, did you ever think I hope my employee is okay? Well, if he wasn't okay, they would have told us that right away, Gustafson responded. He was asked about the split shift arrangement - the get there at nine and leave at one, go back at five and leave at nine - was that fairly set in stone or were there occasions where based on customer service and the needs on the floor, that salesmen would work basically as needed. Sure, Gustafson answered, that's -- I was going in that direction as far as he could have been with a customer for all I knew, you know, because if he's got a guest at twelve-thirty, and he's still working past one, he could have been with a guest, taken them for a test drive, come back, now it's two-thirty, he can go out and go on a split until five o'clock.

Sheryl Crisler testified on behalf of the employer/insurer. My employer is Royal Oaks Chrysler Jeep, Crisler said, and I have been employed there for almost fifteen years. My position is the office manager, secretary, treasurer, Crisler stated. She agreed that this was her position in September of 2003. My duties in regards to any workers' compensation is I handle all the insurance claims, insurance payments, all the human resource issues, problems, and I do all the financial reports, Crisler said.

Crisler stated that she is familiar with Jimmy Culley. Cullley worked for Royal Oaks, she said. Crisler agreed that she knew Culley was seeking workers' compensation benefits for injuries allegedly sustained in an automobile accident on or about September 10th of 2003. Royal Oaks first become notified that Culley was alleging that he had a work-related accident on or about September 10, 2003 when I received the notice from the State, Crisler testified. She agreed when she said notice, she meant the formal Claim for Compensation. She was asked - that wasn't until sometime this year in 2005. I don't remember the exact date, Crisler answered, whenever it was mailed out. Crisler agreed that as part of her duties in September, 2003 she was the one people should notify when they had any work-related injuries. In September, 2003 when any Royal Oaks employee would have a work accident, she would then immediately investigate the accident and arrange for immediate medical care of that employee, Crisler agreed. She stated that she did not have an opportunity to investigate Culley's alleged work accident immediately on or about September 10, 2003 and arrange for immediate medical care for him. I wasn't aware that it was a work-related injury, she said. The procedure in September, 2003 for employees in regards to reporting work injuries, Crisler testified, was that they were to report it to me, and then

we would send them to either Urgent Care or Barnes Hospital and we do a post accident drug screen. In September 2003, employees were to notify me after a work accident of its occurrence as soon as possible, Crisler stated.

Indicating that she knows Mike Kostka, Crisler stated that he was Royal Oaks' service manager at that time. He is not still employed by Royal Oaks, she stated. Crisler reviewed Employer-Insurer's Exhibit 6, specifically to the page here with Culley's signature; Crisler identified the document as a service work order for his girlfriend's car. She agreed that the service order was for the car that was ready on September 10, 2003. Crisler was asked to explain what it meant that Culley's signature was on the document where it said customer signature. When someone drops a car off we have them sign that they're authorizing us to do the repairs, Crisler explained. The person we would have sign at that spot would be the person who brings the car in, she stated. It was noted that the document contained a note referencing three hundred dollar deductible with Culley's signature, and Crisler was asked to explain what this was. After they determined how much the repairs would be, they needed authorization for the repairs and he authorized the repairs in the amount of three hundred dollars, Crisler explained. She agreed that that three hundred dollars was deducted from Culley's check later, and explained that this was because it was money he owed. Crisler agreed that Culley owed it because, as far as the paperwork was concerned, it was his vehicle that was brought in for services that he authorized. Crisler stated that she was just barely familiar with the vehicle Culley was driving at the time of the September 10, 2003 accident. When asked who it belonged to, Crisler responded - Ann Evans. The relationship between Culley and Ann Evans at the time was they were roommates, boyfriend/girlfriend, Crisler said. She was asked if before September 10, 2003 had she seen Culley driving that same vehicle in to work on occasion. I don't recall, Crisler answered. In September, 2003 Culley did not have a Royal Oaks car for his personal use, she stated.

Crisler stated that if an employee needed treatment for work injuries, she would be the one at the employer they would go to and say I need to get to a doctor. She was asked if Culley ever contacted her requesting treatment for any alleged work-related September, 2003 injury. No, he didn't, Crisler answered. I never authorized any treatment for Culley for any alleged September, 2003 work injuries, Crisler said.

On cross-examination by the claimant, Crisler agreed that Ann Evans was a Royal Oaks Chrysler customer. Crisler was asked if she knew where the September 10, 2003 accident occurred. I didn't see it Crisler answered, but they told me it was at the exit from the parking lot on Mexico Road. I heard the salespeople talking, she said. When asked if she had heard this on September 10<sup>th</sup>, Crisler responded - It was a day or so later; I don't really recall the exact date. They didn't inform me of the accident in my capacity as a person handling insurance claims, Crisler said, it was just - Jimmy got in an accident, he wrecked his car and got hit by a bus or something like that. Crisler agreed that by September 11<sup>th</sup> or 12<sup>th</sup> at the latest, she was aware of the accident that occurred.

During cross examination, it was noted that Crisler had testified on direct that for the signature, where it said customer signature for the repair work, whoever brings the vehicle in usually signs that line; she was asked if it was always the owner of the vehicle that brings their vehicle in or is it sometimes family members, relatives, things of that nature. It is sometimes other people, Crisler answered, we ask the person dropping the car off to sign that.

Sergeant First Class Nick Bellfield testified by deposition on behalf of the claimant. (No. B) "I'm station commander at the Webster Groves recruiting station", Bellfield testified. (Bellfield Dp. pg. 5) I met Jim Culley "(S)hopping for a new car", he stated. (Bellfield Dp. pg. 5) This was at Suntrup Ford on Manchester, I guess, Bellfield stated. Culley showed me around the floor room and the different vehicles, Bellfield said, and I decided to buy a car. Agreeing that he had an opportunity to see Culley again, Bellfield testified:

"I went back, talked to him on a few occasions. The car had a few deficiencies with it. It was an '02 Mustang. And he does a very good job of establishing a rapport and taking care of his customers. So he said if I ever needed anything, just give him a call." (Bellfield Dp. pg. 6)

Testifying about an instance where he needed something, when a door lock didn't work Bellfield stated: "Yeah, the alarm and all that. They weren't working so he's like, 'Well, hey, I'll come pick up your car for you, bring it down. I'll get it programmed and bring it back to you.'" (Bellfield Dp. pg. 7) Culley did this, Bellfield stated, "(H)e actually came up, picked up it up from my office one day. I worked about eighty hours a week." (Bellfield Dp. pg. 7) Agreeing that Culley drove to his place of business and picked up his vehicle, Bellfield further stated: "Took it into the shop, got everything done for me, and that afternoon he had brought it back, dropped it off." (Bellfield Dp. pg. 7) Explaining how Culley had gotten to his place of business to pick up his car, Bellfield testified: "He drove a vehicle. I don't know if it was his personal vehicle or a program vehicle. I have no idea." (Bellfield Dp. pp. 7-8) "I let him park it in front of my station where I can keep an eye on it", Bellfield said. (Bellfield Dp. pg. 8)

On cross examination, Bellfield agreed that his testimony was while Culley was working for the Suntrup Ford dealership Culley came out, picked the car and drove it in for the service. When queried if it was correct that this was not while Culley was working for Royal Oaks Chrysler Jeep, Bellfield responded: "No. I don't even know where Royal Oaks is. I just moved up here recently, sir, so I didn't even know where Royal Oaks is." (Bellfield Dp. pg. 9) Bellfield stated that the first time he had met Culley was at the dealership when he was looking for a car. When asked if he had ever seen Culley on a social basis away from the dealership, Bellfield answered: "No, sir. I work too much, sir. I have a hard enough time seeing my family." (Bellfield Dp. pp. 9-10) Bellfield was queried if the occasion when Culley had come up and picked up his car and took it to the dealership the only occasion, and Bellfield answered: "He did that on one occasion and on another occasion he actually – I dropped my car off and he dropped me off and then came back and picked me up later." (Bellfield Dp. pg. 10) This was also at the Ford dealership, Bellfield said. Bellfield stated that he has purchased seven to nine cars from dealerships, and there have been other individuals other than Culley who have come and delivered vehicles to him or picked him up to take him for vehicles. "I can't give – three or four I would say", Bellfield said as to how many others had done this. (Bellfield Dp. pg. 11)

The last time I spoke to Culley was when I stopped by the dealership because I needed some stickers on the side of my car as it had started to come off, Bellfield said, Culley said to just give him a call when I was ready, but I've been out of town. I have known Culley since the day I purchased the car, Bellfield said, "February, March if that" of 2005. (Bellfield Dp. pg. 12)

Bellfield gave the following testimony on redirect:

Q. You stated that at some other dealerships –

A. Yes, sir. I've been in the Army almost seventeen years now so, you know, I've bought multiple new cars and I've had people come and take care of stuff. "Hey, call me if you need our first oil change." Or, you know, "Something happens on your new car, give me a yell."

And just like I'm in sales myself obviously. And I'm in recruiting and it's standard practice you establish a rapport with our customers. The better you do doing that, the more the customers return to you for business.

Q. So in your experience from what you've personally experienced, multiple dealerships –

A. Yes, sir.

Q. I've got cars in Tennessee, Kentucky, Illinois, Texas. I've had people do work plus I'm a platoon sergeant so I've had thirty-four men working to me at once. Standard practice.

"Sarge, I need the day off to do the –"

"No, no. Call the dealership. If he wants your return business, he'll come and get it."

Proper – it's just being a salesman. (Bellfield Dp. pp. 14-15)

On further cross examination, Bellfield admitted that he had no personal knowledge concerning Royal Oaks Jeeps' practices so far as picking up and delivering vehicle for customers.

Medical evidence included:

A. St. Joseph Hospital records of September 10, 2003 (No. 12) indicated that Culley presented on that date with complaints of injury to the low back and right forearm after a motor vehicle accident that had occurred earlier that day. The Emergency Physician's Record noted physical exam findings, which included: in mild distress; severity of pain mild; head – no evidence of trauma; neck - non tender, painless range of motion, trachea in midline; neuro was – oriented x 3, normal mood & affect, central nervous system normal as tested, sensation & motor normal limits; on a body chart, it was indicated that Culley had injury to the right forearm, and mild pain in the mid back. Past medical history included only GI sensitivity, and that Culley was on no medications. The diagnosis on September 10, 2003 was: right forearm contusion, and lumbar strain. The record indicated that Culley was discharged home on September 10, 2003 with pain level at a 2-3 out of 10, that his condition was improved and he was walking. Treatment consisted of medications. Written in the record was that Culley should be able to return to work in 2 days, 09/12/03, with no work limitations indicated.

B. Dr. Timothy Graven prepared a letter dated November 12, 2004 (No. G) The doctor noted that he had previously written on September 28, 2004 that at that time Culley's "diagnosis of low back pain secondary to degenerative disk disease was outlined and the treatment possibilities and/or surgical recommendations made". The doctor further wrote:

As noted in my previous notes, dated July 13, 2004, I believe that his degenerative disk disease and pain is secondary to

a motor vehicle accident sustained in the past. I am not quite sure of the exact date of this, but this is documented in my notes.

B. Dr. David R. Lange, M.D.'s May 10, 2005 report (No. 11) indicated that Culley was seen on that day for an independent spine evaluation on behalf of the employer/insurer. Dr. Lange wrote the following:

Mr. Culley is a thirty-nine-year-old car salesman with residual symptoms that he associates with his work activities approximately a year and a half ago. He basically states that he was returning a customer's car after servicing when he was "hit by a school bus". He states that he initially had no complaints really. He actually was seen in the Emergency room. He states that this was primarily for dizziness, however. Approximately three to five weeks later, he developed a peculiar sensation in the bilateral posterior thigh. He states it felt as if the "legs weigh 150 pounds each". He presented to an Emergency Room with this. He states that radiographs were obtained. He claims that he was told that he might have a "hairline crack" in the spine.

Dr. Lange noted that Culley had recently been seen by a Dr. Graven and had undergone diagnostic studies including discography; it was noted that Culley had been offered surgery and was in fact scheduled for surgery as of 05/16/05. "Mr. Culley seems to suggest that the results of surgery may well not be ideal and he may well have more permanent symptoms and also impairment to the point that employment might even be an issue", Dr. Lange noted. Culley's current symptoms were noted to be: peculiar sensation in the bilateral posterior thigh, legs felt heavy, and some pain in the low back first thing in the morning. The doctor wrote that Culley denied symptoms of a similar sort in the past. Examination findings on May 10, 2005 included: neurologic exam was normal in the lower extremities; straight leg raise exam was negative; actual range of motion of the spine was totally normal; he did suggest low back pain, however, with extension. Dr. Lange discussed his review a 10/26/04 MRI of the lumbar spine:

This reveals a degenerative disc at T11-12 with dessication. There also is a degenerative disc at L5-S1 with significant dessication, narrowing of the disc and also circumferential enlargement. There is no discreet herniation. There is some bilateral narrowing of the L5 nerve root canals. It does appear, however, that the L5 ganglia are above the area of the narrowing.

Dr. Lange discussed the medial records he had reviewed. The doctor noted that a 03/16/05 discography suggested concordant discomfort at L5-S1. Dr. Lange stated the following in the Discussion section of his May 10, 2005 report:

Mr. Culley presents with residual referred discomfort into the bilateral thighs. Considering his MRI appearance with a degenerative disc at L5-S1 and acknowledging a positive discogram (hopefully performed in a true blinded fashion), it is reasonable to assume that the two are related. If Mr. Culley truly has enough symptoms in the lower extremities, offering surgery at L5-S1 with a fusion is reasonable.

The above having been said, it must be pointed out that Mr. Culley seems to have either a significant problem with embellishment (in regard to what he had been told by Dr. Marchovsky and Graven) or he has been provided with a significant amount of misinformation. Obviously having simply a degenerative disc at the lumbosacral junction with referred discomfort in the lower extremities (as opposed to a significant neurologic problem) is typically not considered either an urgent or emergent situation. In fact given that most males do develop degenerative changes at L5-S1, suggesting that some delay in surgical treatment is simply not rather likely. Unfortunately if the issue is one of embellishment, then the outlook of Mr. Culley might be problematic. It was noted that in his deposition he had mentioned "total disability" obviously even before his surgery and a chance to see exactly what his postoperative symptoms might be.

The issue of causation arises. There is a very high likelihood that Mr. Culley did trigger symptoms in the previously degenerative disc at L5-S1 during the motor vehicle accident. Because he likely will have surgery, he as yet has not reached maximum medical improvement. A permanency rating would be premature.

Dr. Timothy G. Graven, D.O. testified by deposition on behalf of the claimant on June 7, 2005. (No. A) Dr. Graven stated that he is an orthopedic surgeon employed at St. Peters Bone & Joint Surgery, Inc. Jim Culley is a patient of mine, the doctor said, he was first seen in this office in early 2004 and "I took over his treatment April of 2004". (Graven Dp. pg. 6)

The doctor discussed Culley's complaints when he presented:

“Yes, he came here with complaints of low back pain. He initially had been seen in the office in January and our nurse practitioner, Mr. Hemmer, had seen him first. History of back pain, radiation to the lower extremities.” (Graven Dp. pp. 6-7) (Ruling: Employer/Insurer’s objection on grounds of Seven Day Rule is overruled. Dp. pp. 6, 7, 10, 11)<sup>[2]</sup>

Dr. Graven testified as to his opinion of the cause of Culley’s back pain:

“I felt that his back pain was due to actually two conditions; one, the degenerative disc disease at the L5-S1 disc and then a herniated disc in the disc above L4-5 which resulted in back pain as well as leg pain.” (Graven Dp. pg. 7)

Dr. Graven stated that he was aware Culley had been in a motor vehicle accident on or about September 10, 2003. When asked if any of the injuries he treated Culley for were as a result of the September 10, 2003 accident, Dr. Graven answered:

“Any of the complaints that he had, yes, I believe that they were related to the motor vehicle accident. I do believe that he had a pre-existing condition; namely degenerative disc disease at L5-S1. But I’m fairly confident having not seen x-rays prior to the accident that this was present prior to the accident. However, I believe it was exacerbated by the motor vehicle accident, yes.”

“Certainly Mr. Culley had two problems as I see it; number one, degenerative disc disease at L5-S1 and some degenerative change not as severe at L4-5 with a disc herniation at L4-5.

I think that the severity of the L5-S1 disc did not come about in a year’s time. I believe that some degree of degenerative change was present at L5-S1 prior to his accident.

The fact that he did not have – or that his complaints were back pain prior to the accident and subsequently became back pain with leg pain radiation after the accident would lead me to believe that this condition was made worse by the motor vehicle accident.” (Graven Dp. pp. 8-9)

The doctor agreed that he had recently performed surgery on Culley, and discussed the surgery he had performed: “He had a decompression with an interbody fusion both at L4-5 and at L5-S1 with posterior instrumentation; i.e., replaced screws and rods in the back and posterior fusion, additional fusion besides the interbody fusion.” (Graven Dp. pp. 9-10) Dr. Graven stated his opinion as to why the surgery was necessary:

“Well, it was necessary because he had continued ongoing, oftentimes incapacitating pain. He had numbness and tingling in his lower extremities. And he had failed all other conservative treatments and it was truly the only treatment left to offer him.” (Graven Dp. pg. 10)

Dr. Graven stated that it was his opinion the sometimes incapacitating pain that Culley suffered was at least related in part to the automobile accident that occurred in September of 2003. Testifying as to his opinion of the recovery time for Culley after that surgery, Dr. Graven said:

“Oftentimes it takes approximately six years – not six years, six months to twelve months to recover from a lumbar fusion. Usually at about three months people are able to do a fair amount of tasks. But truly in about six to twelve months to completely recover from this operation.” (Graven Dp. pg. 11)

The doctor was asked his opinion as to whether Culley could be gainfully employed as of the date of the doctor’s deposition. Dr. Graven answered: “Sure. He could be employed. At the present time he would have some restrictions however (because of the surgery).” (Graven Dp. pg. 11) The doctor discussed his recommended restrictions for Culley, and further noted: “Those will certainly progress as he heals further and he will have less restrictions as time passes.” (Graven Dp. pg. 12) Dr. Graven testified during cross examination that the next follow-up appointment with Culley would be in late June.

On cross examination, Dr. Graven agreed that as his file indicated, the first time Culley was seen at the office was on January 29, 2004. Dr. Graven agreed that the record indicted the nurse practitioner was the first to see Culley, seeing him on January 29, 2004; Dr. Graven agreed that in the first note, the history given by Culley was of having problems in his back starting in his twenties. Dr. Graven agreed, Culley had a pre-existing problem in his back. Agreeing that he believed degenerative changes in Culley’s back pre-existed the car accident, Dr. Graven stated – “Yes. Well, at least some of them, yes.” (Graven Dp. pg. 15) The doctor agreed that if Culley did herniate a disc in the September 10, 2003 car accident he would expect Culley to have specific complaints after that accident. Explaining the kind of complaints he would have expected Culley to have, Dr. Graven stated: “Back pain, leg pan, numbness, tingling.” (Graven Dp. pg. 16) It was noted that these complaints were not there right away, and Dr. Graven was asked how soon after the car accident did he think complaints should have appeared. The doctor answered: “It seems that’s somewhat variable from individual to individual but certainly within a few months.” (Graven Dp. pg. 16) Dr. Graven stated

that he did not see any prior medical records of treatment prior to the car accident, and agreed that Culley had told Nurse Hemmer that he had treated with a chiropractor.

The doctor gave the following testimony on causation during cross examination:

- Q. And if I've got your testimony correct, you believe that Mr. Culley has actually two conditions, degenerative changes in his back and a herniated disc?
- A. He certainly has the degenerative disc disease which is markedly severe at L5-S1, to a less degree at L4-5 with disc protrusion. More significantly at L4-5 than L5-S1, yes.
- Q. Are you basing your opinion that the herniated disc is related to the car accident on the history he gave you?
- A. Based on – yes, based on the history that there were no significant radicular or – radicular symptoms meaning leg pain, pain in the lower extremity, prior to the accident.  
And then post accident he had those symptoms and that's why I'm relating the accident as being integral in the causation of his symptoms. (Graven Dp. pg. 17)

Dr. Graven agreed that there are a number of activities that can herniate a disc – in some cases simple activities as bending, lifting, sneezing or coughing have been known to herniate a disc. The doctor was asked, based on the fact that Culley did have degenerative changes in his back was he more likely to herniate a disc than other people, and Dr. Graven answered:

“I wouldn't think so. At the level where he has the most severe changes at L5-S1, most of the disc is gone. And that's not the level that I think that was most symptomatic as far as a herniated disc. That was at L4-5.  
So is he at any more – in any greater risk at L4-5 than someone else? No, I don't think.” (Graven Dp. pp. 18-19)

The doctor was queried, wasn't it correct that the diskogram showed that the problem was at the L5-S1. “That's where he had the most significant pain on discography, yes, sir”, Dr. Graven answered. (Graven Dp. pg. 19) It was noted that the CT scan seemed to show the problem at L5-S1 as well. “The severe degenerative change, yes”, Dr. Graven responded. (Graven Dp. pg. 19) When asked if the CT scan showed any problems at L4-5, Dr. Graven answered: “The CT scan, no. But I wouldn't expect to see a herniated disc, a plain CT.” (Graven Dp. pg. 19) The doctor was further queried if it was his belief that the car accident caused a herniated disc at L4-5, and Dr. Graven answered – “Yes, sir”. (Graven Dp. pg. 20) When again queried if the problems at L5-S1 would have been due to degenerative changes, Dr. Graven answered: “As I testified, I believe that the L5-S1 degenerative changes were exacerbated or made worse by the accident but not solely caused by the accident.” (Graven Dp. pg. 20)

Date: \_\_\_\_\_ Made by: \_\_\_\_\_  
LESLIE E. H. BROWN  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Patricia “Pat” Secret  
*Director*  
*Division of Workers' Compensation*

[1] **SUMMARY OF THE EVIDENCE** begins on page 3.

[2] It is found that the employer was not prejudiced by the claimant's failure to provide the employer with the doctor's complete medical report seven days before the doctor's testimony as the employer/insurer conducted extensive cross-examination of the doctor, and the employer/insurer did not make further efforts to cross-examine the doctor or seek continuance of the deposition. *See, generally, Sprung v. Interior Construction Service, 752 S.W.2d 354 (Mo.App. 1988)*