

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

Injury No.: 03-001980

Employee: Mark Dannenmueller
Employer: Noranda Aluminum, Inc.
Insurer: Ace USA Claims

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Findings of Fact

The administrative law judge's award sets forth the stipulations of the parties and the administrative law judge's findings of fact as to the issues disputed at the hearing. We adopt and incorporate those findings to the extent that they are not inconsistent with the modifications set forth in our award. Consequently, we make only those findings of fact pertinent to our modification herein.

Nature and extent of the work injury

The administrative law judge found that Dr. Cantrell offered the more persuasive testimony on the question whether employee's work injury and L5-S1 fusion surgery caused advancement of degenerative changes in employee's lumbar spine at the L4-5 and L3-4 levels. We disagree. Dr. Cantrell testified that he looked primarily at medical records from 2006 going forward, and did not review any of the prior diagnostic studies of employee's spine that were generated during employee's initial treatment and surgeries following the January 2003 work injury.

Employee underwent a post-fusion CT scan on September 23, 2003, that was essentially normal at L3-4 and which revealed mild degenerative changes at L4-5. On April 26, 2010, a CT scan revealed moderate-to-severe central spinal canal stenosis and bilateral foraminal stenosis at L3-4 and moderate-to-severe left foraminal stenosis at L4-5. A discography on December 28, 2010, demonstrated symptomatic degenerative disc disease most prominent at L4-5, which causes radiating pain into employee's back and left testicle. Dr. Smith, one of employer's authorized treating physicians, opined that employee's fusion surgery at L5-S1 put stress on and caused the degeneration at L3-4 and L4-5. Dr. Cantrell concedes that fusion surgeries can put stress on adjacent lumbar levels and cause degenerative disc disease, but denies that this process is involved in employee's presentation. Instead, Dr. Cantrell's theory is that employee's problems at L3-4 and L4-5 following the work injury are solely due to the fact employee went from being 50 years old to being 57 years old.

Employee: Mark Dannenmueller

- 2 -

We do not believe that Dr. Cantrell has persuasively explained the degeneration at L4-5 and L3-4 where he did not consider imaging studies of employee's spine from 2003 going forward. We find, instead, Dr. Smith's opinion more persuasive. We modify the administrative law judge's factual findings as to this issue. We adopt Dr. Smith's opinion (and so find) that the work injury and fusion at L5-S1 put stress on the adjacent levels of employee's spine and caused the symptomatic degenerative pathology at L3-4 and L4-5. We also deem persuasive Dr. Smith's opinion (and so find) that employee reached maximum medical improvement on June 15, 2011.

Past medical expenses

Employer initially authorized treatment with Dr. Smith for employee's ongoing pain problems with respect to his low back injury. On June 16, 2011, Dr. Smith recommended that employee return to Dr. Coyle or to him to discuss a long-acting opioid. On September 23, 2011, however, employer secured an opinion from Dr. Cantrell that employee's continued symptoms were not causally related to his back injury and instead the product of multilevel degenerative processes in employee's spine. As a result, employer stopped authorizing medical treatment for employee.

Employee continued to seek treatment with Dr. Smith. On December 19, 2011, and April 9, 2012, employee underwent epidural steroid injections to address complaints of radicular pain. Employee received bills of \$1,853.00 and \$1,756.00 for these visits, and incurred mileage in the amount of \$326.00.

Employee visited the emergency room at Southeast Missouri Hospital on March 29, 2012, complaining of unrelenting left leg and left testicular pain. Employee testified that he sought treatment on that date because of increased pain symptoms he experienced after falling down. Employee explained that he fell down due to his left leg giving out, and that this is a problem he's dealt with occasionally since his back surgery in 2003. Employee's testimony is supported by the treatment note, which suggests that employee told attending physicians that he had fallen a week ago and landed on his left hip; that he had left hip pain since; and that his pain felt similar to his chronic pain stemming from his 2003 back surgery, except that nothing was helping with the pain. Employee rated his pain at 10 out of a possible 10 in intensity. Treating doctors ordered a course of intravenous pain medications, performed some diagnostic studies, and discharged employee with a recommendation to follow up with Dr. Smith. Employee received a bill of \$5,122.27 for this treatment.

We find credible employee's testimony regarding the circumstances of his March 2012 emergency room visit. We find that employee sought treatment for increased pain owing to his falling down as a result of the left leg radicular symptoms from his work injury and surgery in 2003.

Permanent total disability

Employer has provided surveillance footage gathered by investigators following employee. The surveillance covers the time periods from August 2006 to March 2007 and July 2009 to October 2009. Jerry Wolsey, the private investigator hired by employer, explained that his surveillance company followed employee for three to four days per

Employee: Mark Dannenmueller

- 3 -

week from four hours per day up to sixteen hours per day. From approximately 310 hours of surveillance, the investigators gathered approximately 48 hours of video footage. This footage was later edited under the direction of employer's counsel.

We have carefully reviewed the surveillance videos. The edited footage shows employee engaged in about 15 or 16 individual instances of activities such as bending to pick up a garden hose, pulling weeds, riding an ATV, operating equipment such as lawnmowers and leaf blowers, and running to catch a dog. During the entire period that investigators followed employee, only about five days demonstrate employee engaged in activity spanning a time period over one hour. The longest period of activity was approximately two hours on October 1, 2006, when employee was mowing his lawn. We note that the investigators did not capture any significant activity by employee for nine days after October 1, 2006; this lends support to employee's testimony that he is "laid up" with back pain after engaging in activities such as those depicted in the videos.

Employer's authorized treating physicians Drs. Bernardi and Swarm found employee was permanently and totally disabled in 2004. But employer's experts Drs. Cantrell and Coyle believe employee is not permanently and totally disabled based on the surveillance footage, while employee's experts Mr. England and Dr. Volarich opined that if the videos show employee is capable of repetitive activity, their opinions that employee is permanently and totally disabled could change. Neither Mr. England nor Dr. Volarich actually saw the videos, but instead responded to a question posed by employer's counsel wherein they were asked to assume employee engaged in the 15 or 16 instances of activity shown on the videos.

We believe that the videos depict only isolated moments over a lengthy period rather than anything approaching the demands of full-time employment. Accordingly, we do not believe the videos would affect Mr. England's or Dr. Volarich's opinions regarding permanent total disability, which are premised upon employee's age, lack of education, and intractable low back pain referable to the work injury. Especially when we consider that employee was using narcotic pain medications while engaged in the activities shown on the videos, and that employee was incapacitated with back pain after the more strenuous activities, we do not find the surveillance videos to be particularly compelling evidence on the subject of permanent total disability.

We modify the administrative law judge's finding with respect to the issue of permanent total disability. We find that Mr. England and Dr. Volarich offer the more persuasive opinions as to this issue. We find that employee is permanently and totally disabled as a result of the effects of the work injury.

Conclusions of Law

Medical causation

Section 287.020.2 RSMo sets forth the standard for medical causation applicable to this claim and provides, in relevant part, as follows:

Employee: Mark Dannenmueller

- 4 -

An injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.

We have modified the administrative law judge's findings with respect to this issue, and found most persuasive and adopted the testimony from Dr. Smith that the work injury and fusion at L5-S1 caused the symptomatic degenerative pathology seen at L3-4 and L4-5. We conclude that the accident of January 2003 was a substantial factor in causing not only the disc herniation at L5-S1, but the subsequent development of symptomatic degenerative pathology at L4-5 and L3-4.

Permanent total disability

Section 287.200 RSMo provides for the payment of weekly benefits where the employee is determined to be permanently and totally disabled. We have found that employee is permanently and totally disabled as a result of the work injury. We conclude that employer is liable for weekly permanent total disability benefits at the stipulated rate of \$649.32.

Past medical expenses

Section 287.140.1 RSMo provides, as follows:

In addition to all other compensation paid to the employee under this section, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.

Employer has an "absolute and unqualified duty" to furnish medical care under § 287.140 RSMo; once a compensable injury is shown (as it was here) employee needs only to prove that the disputed treatments "flow" from the work injury. See *Martin v. Town & Country Supermarkets*, 220 S.W.3d 836, 844 (Mo. App. 2007); *Tillotson v. St. Joseph Med. Ctr.*, 347 S.W.3d 511, 519 (Mo. App. 2011). Employer has the right under § 287.140.10 to direct treatment; the courts have indicated that an employer may avoid an award of past medical expenses if the employee has received treatment with his own providers where employer had no notice that the employee was in need of treatment. *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995).

Here, employee claims unpaid past medical expenses for treatment he received from Dr. Smith, whom employer initially authorized to provide employee with injections, and from Southeast Missouri Hospital, where employee received emergency treatment for a flare-up of left leg and left testicle pain after he suffered a fall caused by the left leg radiculopathy resulting from his 2003 work injury and surgery. Employer argues employee is not entitled to his expenses because employer did not authorize these treatments.

Notably, employer does not claim to be ignorant of the fact employee continued to seek additional pain management treatment, or of the fact employee was contesting employer's denial of such treatment. The records of the Division of Workers' Compensation

Employee: Mark Dannenmueller

- 5 -

associated with this file (of which we take administrative notice) reveal that the issue whether employer must continue paying for employee's pain management treatment was the subject of multiple requests for hardship hearings before an administrative law judge throughout the pendency of employee's claim. We note also Dr. Smith's records, wherein he recommended, in his last authorized visit with employee, that employee return to Dr. Coyle or to him to discuss a long-acting opioid.

Notwithstanding its awareness of employee's ongoing pain condition and his need for follow-up treatment, employer stopped paying for treatment with Dr. Smith on the basis of Dr. Cantrell's September 23, 2011, opinion that employee's ongoing problems and symptoms were not related to the work injury. Given these circumstances, the assertion that a lack of authorization shields employer from an award of past medical expenses is without merit.

We find that the treatment with Dr. Smith and at Southeast Missouri Hospital flowed from the work injury. We conclude that employee is entitled to his expenses for these treatments, plus mileage. We modify the award of the administrative law judge as to this issue. Employer is ordered to pay past medical expenses in the amount of \$9,057.27.

Future medical treatment

The parties dispute whether employer is liable to provide employee with future medical treatment pursuant to § 287.140.1 RSMo. The administrative law judge ordered employer to provide future medical treatment for the ongoing complaints of enhancing scar tissue at the L5-S1 level referable to the discectomy and fusion, but found that employee is not entitled to medical treatment to cure and relieve symptoms related to the pathology at L3-4 and L4-5.

We have modified the administrative law judge's findings with respect to the issue of medical causation, and found that the work injury was a substantial factor in causing not only the L5-S1 herniation, but also the pathology at L3-4 and L4-5. We are persuaded that employee has demonstrated a reasonable probability that he has a need for future medical treatment by reason of his work injuries affecting these levels of his lumbar spine. We conclude that employer is obligated to provide future medical treatments that may reasonably be required to cure and relieve from the effects of employee's work injuries.

Conclusion

We modify the award of the administrative law judge as to the issues of medical causation, nature and extent of disability, employer's liability for past medical expenses, and employer's liability for future medical treatment.

Beginning June 15, 2011, the date employee reached maximum medical improvement, employer is liable for weekly permanent total disability benefits at the stipulated rate of \$649.32. The weekly payments shall continue thereafter for employee's lifetime, or until modified by law.

Employer is liable for past medical expenses and mileage in the amount of \$9,057.27.

Employee: Mark Dannenmueller

- 6 -

Employer is ordered to provide future medical treatment that may reasonably be required to cure and relieve the effects of employee's injury.

The award and decision of Administrative Law Judge Maureen Tilley, issued September 18, 2012, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

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

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

Given at Jefferson City, State of Missouri, this 8th day of August 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Mark Dannenmueller

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I am convinced that the award of the administrative law judge should be affirmed without modification.

I disagree with the majority's choice to credit Dr. Smith, a pain management specialist, as to the cause of employee's symptoms related to degenerative disc disease of the lumbar spine at the L3-4 and L4-5 levels. Dr. Smith provided the sweeping generalization that "every person" who has a fusion surgery suffers degeneration at adjacent levels of the spine. *Transcript*, page 254. Dr. Coyle, who specializes in spine surgery, discussed this testimony from Dr. Smith, and noted that Dr. Smith "has a huge selection bias, because he's only seeing the people who have problems. We operate on hundreds of people who never go out and see Dr. Smith years later because they're doing fine. ... But Dr. Smith's practice is very focused and it's focused on people who don't do well for whatever reason." *Transcript*, page 547. I find this testimony from Dr. Coyle persuasive; Dr. Smith's view of causation has clearly been skewed by the nature of his practice.

I also disagree with the majority's choice to disregard the testimony from Dr. Cantrell, who testified that he reviewed over 300 pages of medical records in the course of rendering his opinions in this matter. I am convinced Dr. Cantrell fully understood employee's presentation, despite his failure to review some of the earlier diagnostic studies of employee's lumbar spine. I would affirm the administrative law judge's finding that employee's current complaints referable to degenerative pathology at L3-4 and L4-5 are not causally related to the work injury.

As to the issue of permanent total disability, I wish to once again quote from the testimony of Dr. Coyle, as he adequately summed up my own views after watching the surveillance footage provided by employer:

I don't think a reasonable person would conclude that [employee]'s disabled based on looking at those videos. I think they're compelling.

Transcript, page 570.

Especially with respect to the surveillance footage showing employee engaged in lawn care and landscaping work in 2009, I don't see how anyone can view these videos and conclude that employee is permanently and totally disabled. As but one example, employee is shown bending down to start a gas-powered leaf blower. The machine is of the type that requires pulling a starter cord; employee makes multiple attempts to start the leaf blower before he is successful, engaging in a yanking and twisting motion, all while bending down. He then stands up straight and straps the leaf blower onto his back. Employee then uses the machine to clear a sidewalk area, walking on hard concrete surfaces. Throughout, employee's movements are confident, vigorous, and conspicuously free of any indication that he is suffering from pain or discomfort.

Employee: Mark Dannenmueller

- 2 -

I think the majority misses the point of the surveillance footage when it asks whether the investigators were able to capture employee engaged in sustained activity comparable to an 8-hour day or a 40-hour work week. The importance of the videos is that they contradict employee's evidence regarding his subjective limitations. Even Dr. Volarich was constrained to admit that, "[t]here's no question [employee] was doing more in those surveillance videos than what I was able to coax him to do when I saw him." *Transcript*, page 203. This is an individual who would have us believe that he "cannot walk on concrete or anything hard," cannot bend over but has to squat down, has to change positions all the time, and can't do "any real physical activity" without suffering pain. *Transcript*, pages 48-51. Employer has provided videos that not only demonstrate employee is capable of walking on concrete, bending over at the waist, and maintaining a fixed position, but also that employee is able to perform such activities (and many others) without even the slightest indication of pain or discomfort. Dr. Coyle went so far as to say he's *never* seen this much activity in someone who has had back surgery. *Transcript*, page 568.

I find, based on the surveillance footage, that employee's evidence about his limitations lacks credibility. I find more persuasive the testimony from Drs. Coyle and Cantrell that employee is not permanently and totally disabled given his abilities as irrefutably demonstrated on the surveillance footage.

For the foregoing reasons, I would affirm the award of the administrative law judge concluding that employer is not liable for permanent total disability benefits, past medical expenses, or future medical care referable to the degenerative changes of employee's lumbar spine at the L3-4 or L4-5 levels. I respectfully dissent from the majority's findings and conclusions as to these issues.

James G. Avery, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Mark Dannenmueller Injury No. 03-001980
Dependents: N/A
Employer: Noranda Aluminum Inc.
Additional Party: N/A
Insurer: Ace USA claims c/o Sedgwick Claims Management
Hearing Date: 6-10-2012 Checked by: MT/rmm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident or occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? January 9, 2003.
5. State location where accident occurred or occupational disease was contracted: New Madrid County, Missouri.
6. Was above Employee in employ of above Employer at time of alleged accident or occupational disease? Yes.
7. Did the Employer receive proper notice? Yes.
8. Did the accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was the claim for compensation filed within time required by law? Yes.
10. Was the Employer insured by above insurer? Yes.
11. Describe work Employee was doing and how accident happened or occupational disease contracted? Employee was lifting a ninety pound block. The block started to slip and as

he grabbed hold of it, he felt a pain in his back at the belt. The pain went down his right thigh into his foot. This accident caused Employee to injure his lumbar spine.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Lumbar spine.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to-date for temporary disability: \$209,637.60.
16. Value necessary medical aid paid to date by Employer-Insurer: \$475,207.51.
17. Value necessary medical aid not furnished by Employer-Insurer: None.
18. Employee's average weekly wage: \$1649.87.
19. Weekly compensation rate: \$649.32 for TTD; \$340.12 for PPD.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: None.
23. Future requirements awarded: See findings.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

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

FINDINGS OF FACT AND RULINGS OF LAW

On June 19, 2012, the employee, Mark Dannenmueller, appeared in person and with his attorney, Matthew Padberg, for a hearing for a final award. The employer was represented at the hearing by its attorney, Lawrence Rost. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. The Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and the liability of the Employer was fully insured.
2. On or about the date of the alleged accident the Employee was an employee of and was working under the Worker's Compensation Act.
3. The Employee sustained an accident that arose out of and in the course of his employment on or about January 9, 2003.
4. The Employer had notice of the Employee's accident.
5. The Employee's claim was filed within the time allowed by law.
6. The Employee's average weekly wage was \$1,649.87. His rate for temporary total disability was \$649.32. His rate for permanent partial disability was \$340.12.
7. The Employer paid \$475,207.51 in medical benefits.
8. The Employer paid \$209,637.60 in temporary total benefits from 01-10-03 to present.

ISSUES:

1. Medical causation: Whether Employee's injury was medically causally related to accident or occupational disease.
2. Employee is making a claim for previously incurred medical in the amount of \$8,731.23. There is a dispute as to authorization.
3. Employee is making a claim for mileage in the amount of \$326.00.
4. Employee is requesting future medical aid.
5. Nature and extent of disability. Whether Employer-Insurer is liable for permanent total disability or permanent partial disability.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Deposition of James M. England and attached Exhibits.
- B. Deposition of Dr. David Volarich and attached Exhibits.
- C. Deposition of Dr. Gregory Smith.
- D. Records of Dr. Kee Park (01-14-03 - 06-30-03).
- E. Records of Dr. William Collyer (07-08-03 - 06-04-10).
- F. Records of Dr. Kevin Vaught (07-30-03 & 08-20-03).
- G. Records of Dr. Robert Bernardi (09-23-07 - 07-27-05).
- H. Records of Dr. Robert Swarm (005-27-04 - 06-28-05).
- I. Records of Dr. Kenneth Stone (04-25-05 - 01-22-10).
- J. Records of Dr. Rick Smith (09-15-10).
- K. Records of Southeast Hospital (06-22-06 - 12-07-06).
- L. Records of Southeast Hospital (03-29-12).
- M. Records of Dr. Gregory Smith (06-07-10 - 04-09-12).
- N. Unpaid Medical Bills.

Employer-Insurer's Exhibits

- 1. Curriculum Vitae of James J. Coyle, M.D.
- 2. Medical records of James J. Coyle, M.D.
- 3. 3-27-12 Deposition of James J. Coyle, M.D.
- 4. Curriculum Vitae of Russell Cantrell, M.D.
- 5. Medical records of Russell Cantrell, M.D.
- 6. 3-27-12 Deposition of Russell Cantrell, M.D.
- 7. Curriculum Vitae of Tracy Fortenberry, CRC.
- 8. 6-07-12 Report of Tracy Fortenberry, CRC.
- 9. 6-12-12 Report of Tracy Fortenberry, CRC.
- 10. Tom Emmendorfer - 27 min. DVD Record.

11. Tom Emmendorfer - 16 min. DVD Record.
12. DVD - Raw Footage Tapes 1 thru 15 (2006-2007).
13. DVD - 27 min. (2006-2007 condensed).
14. DVD - Raw Footage (2009 Tapes 1A,2A,2B,3A,3B).
15. DVD - 16 min. (2009 condensed).
16. Medical Records of John D. Graham, M.D.
17. 9-20-06 Deposition of Mark Dannenmueller.
18. 4-06-94 Stipulation for Compromise Settlement (Inj. # 91-023401).

FINDINGS OF FACT

Employee's history, accident, and medical treatment

Claimant testified that he is 59 years old. He is a high school graduate but obtained no additional formal training. He began working for Noranda in 1976 doing physically demanding work. He started in the rod wire mill, then air control, metal services and pot services. His work required a lot of lifting, stirring hot metal, cleaning out furnaces and pouring hot metal. Claimant testified that he liked to work and always worked overtime.

Claimant testified that on January 9, 2003 he was lifting a ninety pound block. The block started to slip and as he grabbed hold of it, he felt a pain in his back at the belt. The pain went down his right thigh into his foot. He reported the injury and was told to see the doctor the next day. He was put on light duty for a couple days, then Dr. Pfefferkorn took him off work. He has not been back to work since Dr. Pfefferkorn took him off.

Claimant testified that he injured his back in the 1990s when he stepped into a hole. He went to a chiropractor for a period of time and felt better in three to four months. He went back to work full time without restrictions and doing all his regular work duties and working overtime. Prior to 2003, Claimant had never experienced pain going down his lower extremities from his back.

Following his treatment by Dr. Pfefferkorn, Claimant was referred to Dr. Kee Park. (Ex. D). At his first visit with Dr. Park, on February 6, 2003, Claimant's chief complaint was back and right leg pain and right groin and testicle pain. Dr. Park noted that the MRI of January 14, 2003 showed severe L5-S1 disc collapse with paracentral disc herniation with displacement of right S1 nerve root. Dr. Park recommended a lumbar epidural steroid injection and physical therapy. Dr. Park restricted work for two weeks with no lifting more than five pounds. Standing, walking and sitting were limited to one to four hours and frequent breaks were recommended. Claimant returned to Dr. Park on February 13, 2003 when it was recommended that he undergo diskectomy with concurrent interbody fusion and posterior fixation.

On February 21, 2003 Dr. Park performed an L5-S1 bilateral laminotomy with microdiscectomy and foraminotomy with microdissection; L5-S1 lumbar interbody fusion and placement of allograft prostheses; L5-S1 posterior fusion using local bone and iliac crest bone; L5-S1 posterior instrumentation; and right iliac crest bone graft harvest. Claimant testified, and the records of Dr. Park confirm, that following the surgery Claimant developed severe left leg radiculopathy. (Ex. D). He was treated with multiple injections and medications. Three months following the surgery, Dr. Park noted that Claimant's right leg pain had returned at the same level as prior to the surgery. Claimant underwent both physical therapy and work conditioning. (Ex. D).

Due to continued complaints of bilateral testicular pain and tenderness following the injury of January 9, 2003, Claimant was referred to Dr. Collyer, a urologist. On July 8, 2003, Claimant presented to Dr. Collyer with complaints of right testicular pain following his back injury and indicated that following his back surgery, he developed bilateral testicular pain. (Ex. E). Dr. Collyer noted that Claimant had no erections since the injury of January 9, 2003. Dr. Collyer prescribed Flomax and Viagra. Claimant testified that his testicular pain continued without improvement.

Claimant was evaluated by Dr. Kevin Vaught, a neurosurgeon, on July 30 and August 20 of 2003, for bilateral leg and testicular pain. (Ex. F). Dr. Vaught determined that much of Claimant's pain was from deconditioning and probable postoperative failed back syndrome. Dr. Vaught noted that Claimant was continuing to receive medication for his pain and was to be evaluated by a physiatrist. Dr. Vaught recommended continued therapy and myofascial release and ordered another lumbar myelogram CT.

On September 23, 2003, Claimant presented to Dr. Robert Bernardi for an independent medical evaluation. (Ex. G). Dr. Bernardi reviewed the history of Claimant's injury and performed a physical examination. Dr. Bernardi noted that prior to surgery Claimant had right sided leg pain which initially resolved after surgery, but then returned. He noted that Claimant developed new left leg pain following the surgery by Dr. Park. Dr. Bernardi noted Claimant had nerve root tension signs and at least one EMG/nerve conduction study consistent with an L5-S1 radiculopathy. Dr. Bernardi ordered another CT scan. Dr. Bernardi determined that Claimant's ongoing nerve root compression could be caused by L5 nerve root irritation from his instrumentation anterior to the sacrum. Dr. Bernardi recommended hardware removal and redo L5 foraminotomies. On October 13, 2003, Claimant was admitted to Barnes-Jewish West County and underwent hardware removal and a left L5 foraminotomy. He was discharged on October 16, 2003.

Following the surgery of October 2003, Claimant's symptoms remained unchanged. Claimant continued to follow up with Dr. Bernardi. (Ex. G). Claimant testified that in February of 2004, he was in so much pain and frustrated with his inability to work, that he considered suicide. Claimant's wife and daughter contacted Dr. Bernardi with their concerns as Claimant expressed suicidal ideation. Dr. Bernardi directed them to take Claimant to a local hospital, where he was admitted on the psychiatric ward.

On March 9, 2004, Claimant was evaluated by Dr. Bernardi following a discogram. (Ex. G). Dr. Bernardi noted that Claimant had no complaints of pain with injection of the L4-5 disc and that he had mild pain with injection of L3-4. Dr. Bernardi expressed that he did not believe additional surgery “has anything to offer him.” Dr. Bernardi stated, “I do believe he is permanently and totally disabled as the result of his work injury and associated surgery.” (Ex. G).

Claimant was evaluated by Dr. Swarm on May 27, 2004. (Ex. H). Dr. Swarm noted that following the 2003 injury, Claimant developed severe back and right lower extremity pain. Following surgery in 2003, Claimant developed severe left lower extremity and severe bilateral groin and testicular pain. He further noted depression related to disability and insomnia. Dr. Swarm stated he did not believe surgery would be indicated, but discussed spinal cord stimulation for chronic sciatica as a possible treatment. On June 22, 2004, Dr. Swarm noted that Claimant had been hospitalized for bowel obstruction and required abdominal surgery/exploration. As such, Claimant was cautioned to reduce opioid use.

On October 1, 2004, Dr. Swarm provided restrictions for Mr. Dannenmueller. Dr. Swarm’s impression was of “total disability.” His limitations included:

Walking is limited to 10-15 minutes, lifting limited to 15 pounds on a rare basis and no overhead lifting, standing limited to 10 minutes, and sitting limited to 1 hour; however, he requires lying down due to severe pain 5-6 times per day. Due to the severity of pain and resultant impairment, he is not able to work in any capacity. (Ex. H).

On November 5, 2004, Dr. Swarm placed the spinal cord stimulator for a trial. (Ex. H). The stimulator was implanted on January 4, 2005. On March 9, 2005, Dr. Swarm placed Claimant at maximum medical improvement. He noted that Claimant does need ongoing access to currently prescribed analgesic therapies. He further stated that Claimant “remains totally disabled. As he has reached MMI, it is anticipated that this disability will be permanent.”(Ex. H).

On April 25, 2005, Claimant began to receive treatment by Dr. Kenneth Stone. (Ex. I). Claimant testified that with all the medications he was on, he was in need of one local doctor to manage the medications. Dr. Kenneth Stone’s primary job was to continue prescribing Claimant medication for his primary injury. At his first visit, Dr. Stone stated that “at this time he is permanently and totally disabled as a result of damage to the sciatic nerve.” (Ex. I). In May of 2005, Claimant suffered a flare up of pain into his right side after bending over. On June 10, 2005, Dr. Stone referred Claimant back to Dr. Bernardi due to the severity of pain; amount of pain medication needed and increased symptoms.

Dr. Bernardi examined Claimant and on July 8, 2005, noted that the pain in the right leg was a flare up of the same leg pain that Claimant had going back to 2003. (Ex. G). He recommended right sacroiliac joint injections, which did not decrease Claimant’s pain.

On September 15, 2005, Dr. Rick Smith of Mid-South Urology examined Claimant for his complaint of chronic and bilateral testicular pain since surgery on his lumbar spine. (Ex. J). Dr. Smith performed bilateral testicular cord blocks. Claimant testified that these blocks helped for a period of time, but the pain returned after a short period.

In June of 2006, Claimant underwent additional diagnostic testing, including EMG and nerve conduction studies of his right lower extremity which suggested L5 radiculopathy. (Ex. K). Dr. Abdul Chaudhari provided epidural blocks at L2-3, L3-4 and L5-S1 in June and December of 2006. (Ex. K).

From 2007 to 2010, Dr. Kenneth Stone continued to provide pain medication for Claimant's injuries resulting from the work accident of January 9, 2003. (Ex. I). Additionally, Dr. Stone managed Claimant's medications for anxiety, depression and insomnia that were caused by his injury and resulting disability.

On April 13, 2010, Claimant was examined by Dr. James Coyle. (Ex. 2). Dr. Coyle recommended additional diagnostic studies, including a lumbar myelogram, CT of the lumbar spine and EMG nerve conduction study. The results of the CT scan indicated severe central spinal canal stenosis at L3-4 due to bulging disc and facet arthropathy and foraminal stenoses at multiple levels most pronounced on left at L2-3, bilaterally at L3-4 and on left at L4-5. Claimant's spinal chord stimulator was removed in August of 2010 so that an MRI could be performed. Dr. Coyle was concerned with an additional surgery as he did not believe the symptoms were coming from one level and could not guarantee that a fusion at L3-4 would relieve his symptoms.

Dr. Coyle sent the Claimant to Dr. Smith for a discogram to try and isolate a clear pain generator at one of the levels. Following the discogram, Dr. Coyle stated in his report on January 26, 2011: "All of the objective tests that have been performed show significant results, but the results all contradict each other".

During cross-examination, when Dr. Coyle was asked at his deposition on March 27, 2012, whether Mr. Dannenmueller's condition was a failed back syndrome, he responded:

- A: That's a very specific term that is used loosely. I think that Mr. Dannenmueller's condition as it applies to L5-S1 would qualify as failed back syndrome, but something different is going on at all the levels above. For example, it was my impression that L3-4 was the most problematic area that Mr. Dannenmueller had, and I don't think you can attribute anything going on at L3-4 to surgery that was done at L5-S1.
- Q: All right. Failed back syndrome means what, Doctor?
- A: Failed back syndrome is most commonly called post-laminectomy syndrome, and it actually has to do with patients who have had a fusion, and it has an ICD code. The ICD code is --
- Q: We don't need the code, Doctor, but thank you.

- A: It's --
- Q: I just want you to explain in --
- A: Yeah, the most specific description of it is a formal diagnosis. If you call something back pain, that's not really a diagnosis. Post-laminectomy syndrome for failed back syndrome is the code applied to somebody who has had a lumbar fusion and did not do well for whatever reason.
- Q: And Mr. Dannenmueller fits that description?
- A: I think he could, yes. But there is more to what's going on with him than post-laminectomy syndrome.
- Q: But you would agree that post-laminectomy syndrome is at least part of it?
- A: It's at least a part of it. It doesn't explain the groin pain. It doesn't explain what's going on at L1-2, L2-3 and L3-4, and probably not at L4-5.

In his March 27, 2012, deposition, Dr. Coyle was asked, "So Doctor, assuming as true all of the facts and rigorous activities that you viewed on the videos of Mr. Dannenmueller, are there not contradictions in the subjective complaints that were given to you by Mr. Dannenmueller?" Dr. Coyle responded, "Mr. Dannenmueller had multiple complaints of pain, and complaints of pain by definition are subjective. The videos only demonstrate objective behavior. Obviously, you can't ask him a question or hear him say anything because there is no sound associated with it. What I could say is that he demonstrated the ability to do things that he does in the videos. He may have some degree of pain but he doesn't have an impediment to sustain function over an extended period of time performing diverse activities that require bending, twisting, lifting, climbing, carrying, all kinds of things that you see in a functional capacity level. The videos represent the equivalent of a functional capacity evaluation sustained over a period of months, from August until March of the following year".

In the same deposition of Dr. Coyle, he was asked, "You don't believe just because Mr. Dannenmueller showed that he could bend over on intermittent occasions over a six-month period of time that means he can do full time work, do you?" Dr. Coyle responded, "I think it's a pretty good indicator that he's not disabled. I would be surprised if anybody would look at those films and say this is somebody who is disabled".

Dr. Gregory Smith provided Claimant with epidural steroid injections in the lumbar spine at the level of L3-4 and/or L4-5 on June 7, June 22, September 14 of 2010, and February 14, March 7, and June 16 of 2011. (Ex. M). On June 16, 2011, Dr. Smith noted that the injections provided, at best, a couple months of relief before the return of symptoms. Dr. Smith stated that he felt that Claimant had probably reached his maximum medical improvement. Following this, Claimant returned to Dr. Smith on December 19, 2011 and April 9, 2012 for epidural steroid injections at L3-4 and L4-5. Dr. Smith's medical note indicates that Dannenmueller's wife contacted him about a repeat injection after the Employee presented to the emergency room in Cape Girardeau. Employer/Insurer did not pay for these two visits.

In a deposition, Dr. Smith opined that Employee is in need of pain medication and will continue to need pain medication into the future and possibly for the remainder of his life. (Ex. C, p. 30).

On March 29, 2012, Claimant presented to Southeast Missouri Hospital for complaints of severe testicular pain after a fall a week prior. (Ex. L). Claimant testified that his fall was caused by his leg giving out, which happens occasionally since his work injury of January 9, 2003. The medical record indicated that Dannenmueller fell one week before and landed on his left hip, and had left hip pain since.

Dr. Russell Cantrell

On September 28, 2011, an Independent Medical Evaluation performed by Dr. Russell Cantrell, he stated the following, "I would concur completely that Mr. Dannenmueller does not require any further surgical treatment as it relates to his injury of January 9, 2003. The injury led to a disc herniation at the L5-S1 level for which he had undergone a discectomy and fusion. The pathology which has been observed at the L3-4 and L4-5 levels would appear to be degenerative in nature and, in my opinion, not causally related to his January 9, 2003 work injury. It would further appear that while there may be a minor contributing factor from his work injury in January of 2003 to his current and ongoing complaints, namely the findings of enhancing scar tissue at the L5-S1 level status post the discectomy and fusion from L5 to S1, the bulk of his pain complaints would appear to be originating from degenerative changes present at the L3-4 and possibly L4-5 levels as evidenced by the marked relief of pain complaints reported by the patient on a number of occasions as a consequence of injections given by Dr. Smith. This pathology at these levels, however, would appear to be degenerative in nature and not causally related to his work injury."

Dr. Cantrell continues, "It is my understanding that although Dr. Swarm has in the past, in 2005, considered Mr. Dannenmueller to be permanent and totally disabled. I do not feel that this opinion is supported by the information contained in the 2006-2007 DVD surveillance videos I reviewed. In fact, despite Mr. Dannenmueller's subjective complaints of chronic low back and lower extremity symptoms, he has engaged in what appears to be regular and vigorous physical activity which would otherwise be in my opinion inconsistent with permanent and total disability. Medical records which were available for my review are as Dr. Coyle noted, inconsistent in a definitive etiology for Mr. Dannenmueller's subjective complaints of pain in his low back, testicular area and left lower extremity".

In the same report, Dr. Cantrell goes on to state, "It is my opinion that Mr. Dannenmueller has reached maximum medical improvement regarding his January 2003 work injury. Based upon my observations and a video surveillance tape from 2006 and 2007, it would be my recommendation that the only restriction required of Mr. Dannenmueller as it relates to discogenic pathology at L5-S1 and the associated fusion would be a lifting limit of 50 pounds. There appears to be no indication for avoidance of repetitive bending, no evidence to suggest that he requires avoidance of operation of heavy equipment, and no indication that he requires any limitations to walking, carrying, squatting, kneeling, or crouching. It is my understanding and

reviewing his medical records that previous utilization of a spinal cord stimulator did not provide significant relief of his pain complaints. It was on this basis that Dr. Coyle suggested the spinal cord stimulator be removed so that further imaging of his lumbar spine could be obtained. It is therefore my opinion that the re-implantation of a spinal cord stimulator would not be necessitated by his January 2003 work injury. Continued epidural steroid injections provided by Dr. Smith do not, in my opinion, appear to be necessitated by his work injury as the pathology present at the L3-4 and L4-5 levels appear to represent degenerative pathology and not an anatomic pathology attributable to the January 2003 work injury. Mr. Dannenmueller has multi level degenerative changes from L2 through L5. The multi level nature of these complaints in my opinion is not consistent with any juxtafusal arthritis occurring as a result of the fusion at the L5-S1 level. It is worth noting that although Mr. Dannenmueller has described to me that his depression is related to markedly inactive lifestyle for which he sits around most of his days doing no physical activity and watching TV, this would be inconsistent with the video surveillance that has been provided to me. I would agree with Dr. Graham's previous assessment that continued utilization of a narcotic medication such as Hydrocodone at a dosage of 10 mg and at a frequency described by this patient would not be necessitated by his work injury. It is reasonable for Mr. Dannenmueller to continue utilizing Celebrex due to the presence of multi level degenerative changes within his lumbar spine."

Dr. John D. Graham

In his April 29, 2010 report to Dr. Coyle, Dr. Graham stated the following: "From a purely pain management perspective, I would not expect any additional surgery to provide this patient substantial improvement to his subjective complaint. I would certainly leave the necessity of any additional surgery to you from an anatomic standpoint, but from a pain management subjective complaints standpoint, the patient's duration of complaints, the signs of symptom magnification, and the findings on his psychological screening exam as well as a litigated worker's compensation case would all point to a very guarded outcome that any additional surgery would provide this patient an substantial benefit to his subjective complaints".

In his May 12, 2010 report to Dr. Coyle, Dr. Graham stated: "We will follow up with the patient at the time of his next appointment with your office. We will continue to work on weaning off medications. Again, in summary, I do not deny that patient could have complaints in his lower extremities, but the patient has signs of symptom magnification. The findings on his psychological screening exam would indicate he is likely to have a functional overlay component to his complaint. I would expect his complaints to be out of proportion to objective findings and I would expect his complaints to be recalcitrant to treatment".

Tracy Fortenberry

Tracy Fortenberry, a certified rehabilitation counselor, met with the Claimant on April 18, 2012, for a vocational assessment at the Sikeston Missouri public library.

Ms. Fortenberry reviewed medical records from the following: Dr. James Coyle, Dr. Russell Cantrell, Dr. David Volarich, Dr. Kee Park, Dr. Kevin Vaught, Dr. Robert Bernardi, Dr.

Robert Swarm, Dr. Rick Smith, Dr. William Ogle, Dr. William Fillamen, Dr. Abdul Choudhari, Dr. Ken Stone, and Dr. Gregory Smith. She also had the opportunity to review vocational assessment from Mr. James England. She reviewed Mr. Dannenmueller's 2006 deposition. She reviewed depositions from Mr. Dannenmueller, Mr. England, Dr. Coyle, Dr. Cantrell, Dr. Gregory Smith and Dr. Volarich.

On April 18, 2012, Mr. Dannenmueller reported the following subjective pain complaints and inabilities:

1. Frequent numbness of the left leg and testicle.
2. Occasional numbness of the right leg and testicle.
3. Can sit 10 to 15 minutes at a time.
4. Can stand on grass as long as he is moving.
5. Difficulty standing on concrete.
6. Can walk slowly for 30 minutes on grass area.
7. Can reach within an arm's length.
8. Drive locally.
9. Sleeps 4 to 5 solid hours before waking. Goes to bathroom, and can fall back to sleep. Needs to take Xanax and Ambien.
10. Can bend, kneel, stoop, squat and crouch but not on a repetitive basis.
11. Has difficulty with steps. The 3 steps to get into his house he normally has to "side-step" in.

Ms. Fortenberry did a transferable skills analysis and found that Claimant's work history and education would place him in a semi-skilled work category Level 4. The training time for a semi-skilled Level 4 worker would be up to six months, the usual amount of time spent by the typical worker to learn techniques, acquire the information, and develop the faculty needed for average performance in a specific job.

Ms. Fortenberry contacted employers in the greater Sikeston, Missouri area in order to determine if Claimant's current physical capabilities and specific vocational preparation would allow him to access positions in the available open labor market. Potential employers were contacted to verify physical requirements and job duties, prior skills required, and opportunities for employment. Employers were also asked to clarify if on-the-job training would be provided to a potential employee if he required skills enhancement.

Among those contacted were:

- a. Orkin, Sikeston, Missouri.
- b. Terminex, Sikeston, Missouri.
- c. AT&T Wireless, Sikeston, Missouri.

- d. Title Max, Cape Girardeau, Missouri.
- e. Securitas Security Services, Jackson, Missouri.
- f. Tru Green, Cape Girardeau, Missouri.
- g. Holiday Inn Express, Sikeston, Missouri.
- h. Comfort Inn and Suites, Sikeston, Missouri.
- i. Enterprise Rent-A-Car, Sikeston, Missouri.

Ms. Fortenberry's Employment Impression: "Based on the available medical records, my past and current employer contacts, and the records provided for Mr. Dannenmueller, it is my opinion within a reasonable degree of professional certainty, Mr. Dannenmueller's medicals would not preclude him from returning to the workforce, seeking, accepting, being hired, and maintaining full-time gainful employment in the greater Sikeston, Missouri open labor market".

Upon cross-examination, Ms. Fortenberry did not recollect that Dr. Bernardi, back in 2004 and Dr. Swarm, in 2005, had stated that Dannenmueller was totally, permanently disabled, notwithstanding that her report had indicated that she reviewed both of these doctors' medical records. Indeed, her report states that she reviewed 13 medical reports, including James England's vocational assessment and depositions of Dannenmueller, England, Dr. Coyle, Dr. Cantrell, Dr. Smith and Dr. Volarich to arrive at her conclusion that Dannenmueller could maintain full time gainful employment in the open labor market. It was her opinion that the totality of these records supported her conclusion that Dannenmueller was employable at some level in the open labor market.

James M. England, Jr.

The deposition of James M. England, Jr., a certified vocational rehabilitation counselor, was taken on March 22, 2012.

Cross-examination by Employer produced the following testimony:

Q: I'm going to ask you a rather long hypothetical question this morning, and in doing so I want you to assume the following facts. Number one, video surveillance was done on Mr. Dannenmueller in 2006 that would be subsequent to your seeing him in 2006.

A: Okay.

Q. Also in 2007 and also 2009. Assume further that on August the 23rd, 2006, the surveillance video shows Mr. Dannenmueller squatting while washing his car; that another -- another video from August 25th, 2006, shows Mr. Dannenmueller bending freely at the waist, picking up a garden hose and sprinkler and repositioning it. He is noted to bend fully 90 degrees at the waist. He is noted then to bend fully 90 degrees at the waist, slightly bending his knees while resetting the sprinkler.

Assume further, Mr. England, that on September 7th, 2006, he is seen getting in a Chevrolet pickup truck elevated on a large --

elevated larger than most pickups that you're familiar with or that I'm familiar with because of suspension and larger wheels.

On September the 15th, 2006, the video shows him riding a four-wheeler, and on the same date he is shown climbing over a wooden fence.

On September the 20th, 2006, assume further that the video shows that he bent forward at the waist fully 90 degrees while pulling weeds out of a pasture. He is shown doing this on a continuing basis.

Assume further, Mr. England, that on October the 1st, 2006, he is shown pushing a hand propelled lawn mower, and, again, is shown doing this on October the 11th, 2006. Then on November the 21st, 2006, he is shown shoveling.

Assume further that on December 13, 2006, he is shown operating what appears to be a John Deere lawn mower with a piece of equipment attached to the back, which he is shown twisting his trunk fully to the right while backing this piece of equipment into a building. Assume further that on December 19th, 2006, he is shown walking his property without any obvious antalgia.

On January 2nd, 2007, he is shown shoveling contents into a wheelbarrow.

On January 3rd, 2007, he is shown getting off and on a riding lawn mower pulling a piece of farm equipment without any obvious distress. On January 3rd, 2007, again, he is shown operating a four-wheeler type vehicle, getting on and off of this without any obvious pain behaviors.

On the same day he is shown lifting a cylindrical drum off of the back of a four-wheeler.

On July 10th, 2007, he is shown bending at the waist and crouching slightly as a front end loader is used to push a trailer. He is later seen standing on the edge of the front end loader while someone else operates it. On that date, he is shown running trying to catch a dog.

On January 17th, 2007, he is shown standing and sitting on a four-wheeler while pulling a trailer that reportedly contains manure.

On February 15, 2007, he is shown again operating a four-wheeler with a trailer attached to the back of it. On February 20th, 2007, he is shown pushing a wheelbarrow and shoveling what appears to be dirt, compost or manure into the wheelbarrow on a repeated basis.

On February 26, 2007, he is shown carrying a yellow, what appears to be a gas can, and on March the 2nd he is shown offloading a pickup truck with sacks of an unknown product. He has offloaded this truck independent of any assistance.

On March 8, 2007, he and another individual are carrying a wood structure that appears to be a doghouse. An object that appears to be a kennel is also being carried by him.

Assume further that there are videos on July 20th and 21st, 2009, showing Mr. Dannenmueller working for a local firm called Four Seasons Lawn Care Service in which he performs very physical work such as mowing, weed eating on a continuing basis.

So, Mr. England, assuming as true all of the facts and activities that I recited to you, are you still of the opinion that based on a vocational rehabilitation certainty he remains unemployable in the open labor market?

A: I think if he could sustain even, you know, sedentary to light activity consistently, I think he would be employable. I mean, I haven't seen the stuff, but, obviously, if he were doing -- some of the things I don't think to me would have as much as an effect, you know, bending occasionally to get a water hose or something like that, but if the guy was actually able on a consistent basis to do mowing lawns and weed eating and stuff like that, I think that would certainly be commensurate with the ability to do at least light level work activity.

Q: (By Mr. Rost) Well, I point that out because that seems to be contradictory to some of the things he told you six years ago. So assuming further that these videos do contradict Mr. Dannenmueller's statements to you in 2006, about his ability to repetitively bend, knee, squat, stand, walk, are you still of the opinion that he remains unemployable?

A: Well, I don't think -- from what you read I don't know that all that was repetitive in nature. I mean, they were occasional things here and there. If he can do those things on a regular basis, then I think that would certainly be very different from what I saw when he was in here, sure.

Q: Assuming again that these videos are true and ultimately will be used at the final hearing in this matter, based on your expertise and based on your knowledge over the years of what it would take to put a person back to work, would these videos suggest to you that he could be a candidate for additional counseling for the purpose of returning to work or for the purpose of being retrained for a different type of work, i.e., sedentary or something that would be available?

A: It would certainly appear to be reasonable. If he can sustain that activity, you know, to a reasonable extent, I think that would be true.

David Volarich, D.O.

Dr. Volarich evaluated Employee on August 9, 2011. He diagnosed Employee with the following:

1. Lumbar right leg radicular syndrome secondary to disc herniation L5-S1 to the right s/p bilateral laminotomy, discectomy, foraminotomy with fusion and instrumentation at L5-S1.
2. Post-laminectomy syndrome with significant left leg radiculopathy-S/P hardware removal and redo left sided L5 foraminotomy.
3. Placement and removal spinal cord stimulator.
4. Severe post-laminectomy syndrome secondary to chronic bilateral L5 and left sided S1 radiculopathy.

Dr. Volarich also opined that the work accident was the substantial contributing factor as well as the prevailing or primary factor causing the disc herniation of L5-S1 to the right that required bilateral laminotomies, discectomies, foraminotomies and fusion with instrumentation at the L5-S1 level. He stated that as a result of this surgical repair, Employee developed a severe post-laminectomy syndrome with left leg radicular symptoms that required hardware removal and a redo left sided L5 spinal cord stimulator. He required significant pain management including placement and removal of a spinal cord stimulator. He stated that Employee continues to experience post-laminectomy syndrome due to chronic bilateral L5 and left sided S1 radiculopathy documented on EMG.

Dr. Volarich further opined that Employee is permanently and totally disabled as a direct result of the 1/9/03 work related injury.

Dr. Volarich opined that Employee will continue to need narcotic and non-narcotic medications, muscle relaxants, physical therapy and similar treatments to maintain his current state. Additionally, Dr. Volarich opined that Employee will need treatment at a pain clinic and possibly need replacement of the spinal cord stimulator.

The Deposition of Dr. David Volarich was taken on March 22, 2012.

Cross-examination by Employer produced the following testimony:

Q: So, Dr. Volarich, I -- I'm gonna ask you a -- a hypothetical question, and in doing so, I want you to assume the following facts.

A: Okay.

Q: No. 1, there was a video surveillance done by the Employer in 2006, 2007, and 2009. And I want you to assume further that on August the 23rd, 2006, the surveillance video shows Mr. Dannenmueller squatting while washing his car, that another from August the 25th, 2006, shows Mr. Dannenmueller bending freely at the waist picking up a garden hose and a sprinkler and

repositioning the sprinkler. He is noted then to be -- to be bending fully 90 degrees at the waist, slightly bending his knees while resetting the sprinkler. I want you to assume further, Doctor, that on September the 7th, 2006, he is seen getting into a Chevrolet pickup truck which is elevated above normal. In other words, it has it looks like maybe 2--inch wheels and probably has a suspension system that he has to climb up into. On September the 15th, 2006, the video shows him riding a four-wheeler, and on the same date, he is shown climbing over a wooden fence. Later on September the 20th, 2006, he is shown bending forward at the waist fully 90 degrees while pulling weeds out of a pasture. He is shown doing this on an ongoing and continuing basis. I want you to assume further that on October the 1st he is shown pushing a hand-propelled lawn mower and, again, is shown doing this on October the 11th, 2006. On November the 21st, 2006, he is shown shoveling. On December the 13th, 2006, he is shown operating what appears to be a John Deere lawn mower with a piece of equipment attached to the back which he's shown twisting his trunk fully to the right while backing this piece of equipment into a building. Assume further that on December the 19th, 2006, he is shown walking on his property without any obvious ant -- antalgia -- acta -- antalgia. On -- On January the 2nd, 2007, he is shown shoveling contents into a wheelbarrow. On January the 3rd, 2007, he is shown getting on and off of a riding lawn mower pulling a piece of farm equipment without any obvious distress. On January the 3rd again he is again operating a four-wheel type vehicle getting on and off without any obvious pain behaviors. On the same date, he is shown lifting a cylindrical drum off the back of a four-wheeler. On January the 10th, 2007, he is shown bending at the waist and crouching slightly as a front end loader is used to push a trailer. He is later seen standing on the edge of this front end loader with some -- while someone else operates it. On that date, he is also shown running trying to catch a dog. On January the 17th, he is shown standing and sitting on a four-wheeler while pulling a trailer that reportedly contains mature. On February the 15th of 2007, he is again shown operating a four-wheeler with a trailer attached to the back of it. On February the 20th, 2007, he is shown pushing a wheelbarrow and shoveling what appears to be dirt, compost, or manure into the wheelbarrow on a repeated basis. On February the 26th, 2007, he is shown carrying a yellow -- what appears to be a gas can. And on March the 2nd, 2007, he is shown offloading a pickup truck with sacks of an un -- unknown product. He has offloaded this truck independent of any assistance. On March 8th, 2007, he and another individual are shown carrying a wooden structure that appears to be a doghouse. Another object

that appears to be a kennel is also being carried by him. Assume further, Doctor, that there are videos on July the 20th and 21st, 2009, showing Mr. Dannenmueller working for a local firm called Four Seasons Lawn Care Services in which he performed very physical work such as mowing and weed eating on a prolonged basis. So, Dr. Volarich, assuming as true all the facts that I've just mentioned and the rigorous physical activity shown in these videos of Mr. Dannenmueller, are there not contradictions in the subjective complaints and limited activities given to you by Mr. Dannenmueller.

A: Well, when I saw him two years after that, after the 2009 incident, it's different from what you described. There's no question he was doing more in those surveillance videos than what I was able to coax him to do when I saw him. Dr. Coyle's examination of 4/13 of '10 was very similar to mine August of '11 as far as ongoing problems with post-laminectomy syndrome. So I don't know if he was having good days at that point or he was taking more medicines. He was still under pain management back at that time. I can't explain it.

Q: (By Mr. Rost) So despite his subjective complaints of low back pain, if the videos show that Mr. Dannenmueller has engaged in what appears to be regular and vigorous physical activities, wouldn't that be inconsistent with permanent and partial disability?

A: I'd have to see him again and talk with him directly about that. I'd like to sit down and review those videos with him, too. That is the reason I have this foreword page on my report to address the issues of these kind of things when they come up. Again, it's two years before that I saw him. I don't know if he deteriorated in that time. He didn't tell me about any new injuries. But, yeah, it's possible I'd have to change my opinion, but I'd like to talk to about it.

MR. ROST: That's all the questions. Thanks, Doctor.

Redirect Examination - Questions by Anna E. Haber:

Q: I just have one follow-up question. Would doing any of these activities or some of these activities like moving a lawn -- Or I'm sorry, moving a sprinkler or pulling weeds on a one-time basis change your opinion?

A: A one-time basis, no. Not one time.

Q: As opposed to a sustained day in/day out doing these activities over and over again?

A: Yeah. If it's repetitive, I would have to reconsider. But a one-time basis, I think, you know, people got to live life. They got to do a little bit of things to try to keep busy, try to stay moving. Some of the things that Mr. Rost described were more than just pulling weeds though.

Surveillance Videos

The Employer introduced, and played video surveillance of Mr. Dannenmueller in 2 distinct time frames, namely:

1. 15 tapes of raw footage beginning August 9, 2006 and ending March 8, 2007 (EXH. J) and condensed to a 27 minute DVD (EXH. K).
2. Tapes 1A, 2A, 2B, 3A and 3B of raw footage beginning July 18, 2009 and ending October 1, 2009 (EXH. L) and condensed to a 16 minutes DVD (EXH. M).

The video surveillance was conducted by Jerry Wolsey, of Jerry Wolsey Investigations, LLC. The raw footage was then condensed into the two DVDs shown at the hearing by Tom Emmendorfer in documentary style with captions.

The DVDs show Mr. Dannenmueller in 2006 and 2007 engaging in vigorous physical activity to include shoveling, riding 4-wheeler pulling a manure spreader, climbing over fences, bending, squatting, running (to catch a dog), unloading sacks of feed and mineral salt blocks, and operating on many occasions 4-wheeler type vehicles, getting off and on without any obvious pain behaviors.

The 2009 DVDs show even more aggressive physical activities as Mr. Dannenmueller, over a summer period, performed lawncare services for a company called 4 Seasons Lawncare Services, in which he uses weed eaters, leaf blowers operated with a back pack, and riding lawn mowers. He is shown weedeating curbs while walking on hard surface streets, lifting the heavy back packs onto his shoulders and back, and repeatedly shifting the manual turn controls on the riding mowers without any obvious pain behaviors, all for sustained periods of time. (The July 21, 2009 segment EXH. I) begins at 7:53 AM with Dannenmueller working to 1:53 PM).

There is no evidence to suggest that Dannenmueller requires any avoidance of repetitive bending or operation of heavy equipment, or any limitations to walking, carrying, squatting, kneeling, lifting or climbing.

RULINGS OF LAW:

Issue 1. Medical causation

Dr. Volarich opined that the work accident was the substantial contributing factor as well as the prevailing or primary factor causing the disc herniation of L5-S1 to the right that required bilateral laminotomies, discectomies, foraminotomies and fusion with instrumentation at the L5-S1 level. He stated that as a result of this surgical repair, Employee developed a severe post-laminectomy syndrome with left leg radicular symptoms that required hardware removal and a redo left sided L5 spinal cord stimulator. He required significant pain management including placement and removal of a spinal cord stimulator. He stated that Employee continues to

experience post-laminectomy syndrome due to chronic bilateral L5 and left sided S1 radiculopathy documented on EMG.

Dr. Volarich further opined that Employee is permanently and totally disabled as a direct result of the 1/9/03 work related injury.

Dr. Cantrell stated "I would concur completely that Mr. Dannenmueller does not require any further surgical treatment as it relates to his injury of January 9, 2003. The injury led to a disc herniation at the L5-S1 level for which he had undergone a discectomy and fusion. The pathology which has been observed at the L3-4 and L4-5 levels would appear to be degenerative in nature and in my opinion not causally related to his January 9, 2003 work injury. It would further appear that while there may be a minor contributing factor from his work injury in January of 2003 to his current and ongoing complaints, namely the findings of enhancing scar tissue at the L5-S1 level status post the discectomy and fusion from L5 to S1, the bulk of his pain complaints would appear to be originating from degenerative changes present at the L3-4 and possibly L4-5 levels as evidenced by the marked relief of pain complaints reported by the patient on a number of occasions as a consequence of injections given by Dr. Smith. This pathology at these levels, however, would appear to be degenerative in nature and not causally related to his work injury."

Based on all of the evidence presented, I find the opinion of Dr. Cantrell more credible than the opinion of Dr. Volarich on the issue of medical causation. I find that work was a substantial factor in causing the disc herniation at L5-S1, however I find that work was not a substantial factor in causing pathology which has been observed at the L3-4 and L4-5 levels and his pain complaints at L3-4 and L4-5.

Issue 2. Previously incurred medical aid

Employee is claiming unpaid medical bills as follows (EXH. N):

Dr. Greg Smith 12-19-11	\$1,853.00
Dr. Greg Smith 04-09-12	\$1,756.00
Southeast MO Hospital 03-29-12	\$1,853.00

The medical record indicated Employee fell one week before and landed on his left hip, and had left hip pain since. Based on all of the evidence presented, I find that Employee did not prove that the need for the emergency room visit on 3-29-12 was causally related to Employee's injury from the accident that he sustained on January 9, 2003. There is no showing of Employer's authorization of the emergency room visit to Southeast Missouri Hospital on 03-29-12 (EXH. L). Therefore, Employee's request to be reimbursed for previously incurred medical aid to Southeast MO Hospital is denied.

Dr. Gregory Smith provided Claimant with epidural steroid injections in the lumbar spine at the level of L3-4 and/or L4-5 on June 7, June 22, September 14 of 2010, and February 14, March 7, and June 16 of 2011. On June 16, 2011, Dr. Smith noted that the injections provided, at best, a couple months of relief before the return of symptoms. Dr. Smith stated that he felt that Claimant had probably reached his maximum medical improvement. Following this, Claimant returned to Dr. Smith on December 19, 2011, and April 9, 2012, for epidural steroid injections at L3-4 and L4-5. Furthermore, Dr. Smith's medical note indicates that Dannenmueller's wife contacted him about a repeat injection after the Employee presented to the emergency room in Cape Girardeau. A lumbar selective nerve root injection was performed without prior authorization. Based on all of the evidence presented, I find that Employee's visits and epidural steroid injections with Dr. Smith on 12-19-11 and 4-9-12 were not authorized. Therefore, employee's request for reimbursement of these expenses is denied.

Issue 3. Mileage

Employee requested mileage reimbursement for the trips to Dr. Smith's office on 12-19-11 and 4-9-12. Those visits were not authorized. Therefore, Employee's request for mileage reimbursement is denied.

Issue 4. Future medical aid

With respect to future medical treatment, Section 287.140.1, R.S.Mo., provides that "in addition to other compensation paid to the employee, the employee shall receive and the employer shall provide such medical, surgical, chiropractic and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required . . . to cure and relieve the effects of the injury."

Dr. Volarich opined that Employee will continue to need narcotic and non-narcotic medications, muscle relaxants, physical therapy and similar treatments to maintain his current state. Additionally, Dr. Volarich opined that Employee will need treatment at a pain clinic and possibly need replacement of the spinal cord stimulator.

Dr. Cantrell opined "It is my understanding and reviewing his medical records that previous utilization of a spinal cord stimulator did not provide significant relief of his pain complaints. It was on this basis that Dr. Coyle suggested the spinal cord stimulator be removed so that further imaging of his lumbar spine could be obtained. It is therefore my opinion that the re-implantation of a spinal cord stimulator would not be necessitated by his January 2003 work injury. Continued epidural steroid injections provided by Dr. Smith do not in my opinion appear to be necessitated by his work injury as the pathology present at the L3-4 and L4-5 levels appear to represent degenerative pathology and not an anatomic pathology attributable to the January 2003 work injury. Mr. Dannenmueller has multi level degenerative changes from L2 through L5. The multi level nature of these complaints in my opinion is not consistent with any juxtafusal arthritis occurring as a result of the fusion at the L5-S1 level. It is worth noting that although Mr. Dannenmueller has described to me that his depression is related to markedly inactive lifestyle for which he sits around most of his days doing no physical activity and watching TV, this would

be inconsistent with the video surveillance that has been provided to me. I would agree with Dr. Graham's previous assessment that continued utilization of a narcotic medication such as Hydrocodone at a dosage of 10 mg and at a frequency described by this patient would not be necessitated by his work injury. It is reasonable for Mr. Dannenmueller to continue utilizing Celebrex due to the presence of multi level degenerative changes within his lumbar spine."

Employee's treating doctor, Dr. Smith, opined that Employee is need of pain medication and will continue to need pain medication into the future and possibly for the remainder of his life.

Based on all of the evidence presented, I find that the opinions of Dr. Cantrell and Dr. Smith regarding future medical aid is more credible than Dr. Volarich's opinion on this issue. Employer is directed to provide additional medical treatment to cure and relieve him from the ongoing complaints of enhancing scar tissue at the L5-S1 level status post the discectomy and fusion. However, the majority of the Employee's pain complaints originate from degenerative changes at the L3-4 and L4-5 levels and the pathology at these levels are not causally related to his work injury. Employer is not responsible for medical treatment to cure and relieve the Employee from the multilevel degenerative changes within his lumbar spine.

Issue. 5 Nature and extent of disability

The Employee is claiming he is permanently totally disabled. The term "total disability" in Section 287.020.7 means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App.1992). Total disability means the "inability to return to any reasonable or normal employment". *Brown v. Treasurer State of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990).

The Employee relies primarily on the permanent total opinions of Dr. Robert Bernardi (EXH. G) and Dr. Robert Swarm (EXH. H). Dr. Bernardi's opinion is dated March 9, 2004, now eight years old. Dr. Swarm, a pain management specialist, rendered his impression of total disability on July 28, 2005, now seven years old. Neither Dr. Bernardi nor Dr. Swarm has seen Dannenmueller since 2005. Neither Dr. Bernardi's opinion or Dr. Swarm's impression are supported by the information contained in the 2006, 2007 and 2009 DVD surveillance videos reviewed by Dr. Russell Cantrell and Dr. James Coyle.

The April 19, 2006 vocational rehabilitation report of James England concludes that Dannenmueller would not be able to compete successfully for employment. (EXH. A). However, in his deposition on March 22, 2012 (EXH. A), when confronted with a hypothetical question on

cross-exam setting out the multiple activities performed by Dannenmueller in a 2006-2007 video surveillance, England qualified his disability opinion.

Dr. Volarich also opined that Employee was permanently and totally disabled as a direct result of Employee's January 9, 2003 accident. However, in his deposition on March 22, 2012, when confronted with a hypothetical on cross-exam setting out the rigorous physical activities performed by Dannenmueller in the 2006-2007 video surveillance, Dr. Volarich thought "it's possible that I'd have to change my opinion".

The video surveillance of 2006, 2007 and 2009 is significant. In his deposition on March 27, 2012 (EXH. 6), Dr. Cantrell states that, despite Dannenmueller's subjective complaints of chronic low back and lower extremity symptoms, (the videos show) he has engaged in what appears to be regular and vigorous physical activity which would otherwise be in my opinion inconsistent with permanent and total disability. In addition, Dr. Coyle states in his deposition on March 27, 2012, "But I don't think a reasonable person would conclude that he's disabled based on looking at those videos. I think they are compelling".

Dannenmueller's position is that the video surveillance does not show him working 24-7. However, these videos were more than inadvertent snapshots. On the contrary, they showed a distinct pattern of substantial and significant activities over a sustained period, impressing upon the viewer Dannenmueller's ability to function in a working capacity. This is especially true in the 2009 videos where Dannenmueller is working for 4 Seasons Lawncare ("just to keep himself occupied"?). These activities, when combined with the ongoing and unrestricted use and operation of motorcycles, jet skis, pontoons, and multiple vehicles (to include an elevated pickup truck), defy the conclusion that Dannenmueller is permanently, totally disabled.

Based on all of the evidence presented, I find that the opinions of Dr. Cantrell, Dr. Coyle, and Ms. Fortenberry are more credible than the opinions of Dr. Bernardi, Dr. Swarm, Dr. Volarich and Mr. England on the issue of permanent total disability.

Based on all of the evidenced presented, I find that Employee did not prove that he was unemployable in the open labor market. Furthermore, Employee did not meet his burden of proof that he is permanently and totally disabled. Therefore, Employee's claim for permanent total disability is denied.

I find that the Claimant sustained permanent partial disability from the January 9, 2003, accident to the body as a whole, referable to the lumbar spine.

Based on all of the evidence presented, I find that Employee sustained 35% permanent partial disability to the body as a whole, referable to the lumbar spine (140 weeks). Employee's permanent partial disability rate is \$340.12. Therefore, Employer-Insurer is directed to pay Employee \$47,616.80.

ATTORNEY'S FEE

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

INTEREST

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

Made by:

Maureen Tilley
Administrative Law Judge
Division of Workers' Compensation