

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

Injury No.: 07-131234

Employee: Harry M. Darlington

Employers: 1) Harrah's North Kansas City LLC
2) Harrah's Enter Promus Co.

Insurers: 1) Old Republic Insurance Company
2) Zurich American Insurance Co.

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (Open)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 6, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Robert B. Miner, issued April 6, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 4th day of February 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Harry M. Darlington

Injury No.: 07-131234

Employer: Harrah's North Kansas City LLC and Harrah's Enter Promus Co.

Insurer: Old Republic Insurance Company and Zurich American Insurance Co.

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Dates: December 18, 2008, January 6, 2009, and January 20, 2009.

Checked by: RBM

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: Alleged: Repetitive through August 29, 2007.
5. State location where accident occurred or occupational disease was contracted: Alleged: North Kansas City, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Not determined.
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 alleged that he repetitively lifted supplies and pushed and pulled carts and dollies that allegedly caused repetitive trauma to his low back and left leg.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Alleged: back and left leg.
14. Nature and extent of any permanent disability: Not determined.
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? Not determined.
18. Employee's average weekly wages: \$524.01.
19. Weekly compensation rate: \$349.36 for temporary total disability and for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

No weeks of temporary total disability (or temporary partial disability).

No weeks of permanent partial disability from Employer.

No weeks of disfigurement from Employer.

22. Second Injury Fund liability:

No weeks of permanent partial disability from Second Injury Fund.

TOTAL: None.

23. Future requirements awarded: None.

Claimant's entire claim against Employer/Insurer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund is hereby denied.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Harry M. Darlington

Injury No.: 07-131234

Employer: Harrah's North Kansas City LLC and Harrah's Enter Promus Co.

Insurer: Old Republic Insurance Company and Zurich American Insurance Co.

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Hearing Dates: December 18, 2008, January 6, 2009, and January 20, 2009.

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on December 18, 2008, January 6, 2009, and January 20, 2009. Employee, Harry M. Darlington, ("Claimant") appeared in person and by his attorney, Mark E. Kelly. Employer, Harrah's North Kansas City LLC, ("Employer") and Insurer, Old Republic Insurance Company ("Insurer") appeared by their attorney, John R. Fox. Scott Bradshaw, Risk and Safety Manager of Employer also appeared. The parties agreed at the beginning of the hearing that alleged Employer, Harrah's Enter Promus Co., and alleged Insurer, Zurich American Insurance Co., should be dismissed from this case. The Second Injury Fund is a party to this case but was not represented at the hearing since the parties agreed to bifurcate the Second Injury Fund claim. Mark E. Kelly requested an attorney's fee of 25% from all amounts awarded.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following issues:

1. On or about August 29, 2007, Harry M. Darlington ("Claimant") was an employee of Harrah's North Kansas City LLC ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about August 29, 2007, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Old Republic Insurance Company ("Insurer").
3. Claimant's Claim for Compensation was filed within the time allowed by law.

4. The average weekly wage was \$524.01 and the rate of compensation is \$349.36 per week for temporary total disability and also for permanent partial disability.
5. No compensation had been paid by Employer for temporary disability.
6. No medical aid had been paid or furnished by Employer.
7. Alleged Employer, Harrah's Enter Promus Co., and alleged Insurer, Zurich American Insurance Co. should be dismissed from this case.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Whether on or about August 29, 2007, Claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment for Employer.
2. Whether Claimant's current condition is medically causally related to the alleged work injury of August 29, 2007.
3. What is Employer's liability, if any, for past medical expenses in the alleged amount of \$15,163.85?
4. What is Employer's liability, if any, for future medical aid?
5. What is Employer's liability, if any, for permanent partial disability benefits?
6. What is Employer's liability, if any, for past temporary total disability benefits for the alleged period August 30, 2007 through February 1, 2008?
7. What is Employer's liability, if any, for interest?

At the beginning of the hearing, Claimant offered the following exhibits which were admitted in evidence without objection:

- B—Deposition of John Woodford taken on December 16, 2008.
- C—Deposition of Gary Robertson taken on December 16, 2008.
- D—Harrah's Casino personnel file.
- F—Medical records of Kearney Family Chiropractic Center.
- G—Medical records of The Liberty Clinic.

- H—Medical records of Neurosurgery P.A.
- I—Medical records of Liberty Hospital.
- J—Medical records of Northland PT & Rehab Services.
- K—Medical Records of Liberty Orthopedic Associates, P.C.
- M—Records of Prudential Insurance Company.
- P—LeBeau—Prudential email.
- Q—FMLA file.

In addition, Claimant offered Exhibit A—Deposition of Claimant taken on October 28, 2008, Exhibit E—Medical Report of Dr. Michael Poppa dated June 12, 2008, and Exhibit L—Medical Expense Summary, to which Employer/Insurer's attorney objected. The objections to these exhibits were taken under advisement.

Claimant called the following witnesses: Claimant, Scott Bradford, and Jennifer LeBeau.

Employer/Insurer called the following witnesses: Tim Jordan, John Woodford, and Scott Bradshaw. Employer/Insurer offered the following exhibits that were admitted in evidence without objection:

- 2—Job Safety Training file.
- 3—Income analysis report.
- 4—Employee check history.
- 5—Time edit report.
- 6—Time record historical display.
- 8—Calendar of Employee's attendance.
- 9—Deposition of Dr. John Pazell taken on December 11, 2008.
- 10—Liberty Clinic medical records.
- 12—Prudential Telephone Claim Submission pamphlet.
- 13—60 day letter regarding Dr. Pazell report with report and medical records.

In addition, Employer/Insurer offered Exhibit 16, OSHA logs, to which Claimant's counsel objected. Exhibits 16 was admitted in evidence over the objections.

Findings of Fact

Based on a comprehensive review of the substantial and competent evidence, including the testimony of the witnesses, the expert medical opinions and deposition, the medical records, the exhibits admitted in evidence, and my personal observations of Claimant at the hearing, I find:

Claimant was born on September 10, 1951. He graduated from high school in 1969. He took a computer course in 1968. At the time of the hearing, he was working part-time driving vehicles.

Claimant worked for Employer from August 8, 2005 until August 29, 2007 as a warehouse clerk. He processed and delivered orders for food products, unloaded trucks, inventoried product, and cleaned up freezers. At times, he pulled product and put it on a non-motorized four-wheel cart or a two-wheel dolly. He occasionally used forklifts. There were usually five employees doing the same job as Claimant at one time at Employer. Claimant testified that ninety-eight percent of the time that he lifted at Employer, he lifted alone.

The heaviest items Claimant delivered at Employer were 80-pound prime ribs. He stacked up to four of those on a two-wheel dolly. He delivered prime ribs two-to-three times per week. He also delivered other items including 25 pound turkeys, 10 pound roast beefs and 20-pound hams. The heaviest weight he moved on the dolly was 320 pounds consisting of four prime ribs. On average, the fully loaded dollies he used weighed about 125 pounds. He also delivered sixteen cases of water on a cart that weighed about 225 pounds. He sometimes walked up to five minutes delivering product. The floor surface in the warehouse where he worked was concrete. The bar area at the casino was carpeted. It was difficult to push the four-wheel flatbed cart on the carpeting.

Claimant generally worked four ten-hour days each week at Employer. He worked occasional overtime. He estimated that he moved or pulled product eight hours of the ten hours each day. Exhibit N, a job summary description of warehouse clerk Claimant obtained off the internet, accurately reflected his job duties at Employer, except the requirement of having a California driver's license and working in temperatures over 115 degrees.

Claimant testified he had low back pain and severe sciatica down his left leg to his foot that began on Thanksgiving Day 2005. He had pain in the back of his left thigh to his left knee. It went away after two days. He did not know what it was. He had never had pain there before August 2005.

Claimant testified that in 2006, the pain in his left leg would go away for two or three days and then come back in a month. He stated that by June 2007, he had pain in his leg and back all the time. He testified that in June 2007 he learned that his back caused pinching of a nerve in his leg. Claimant said he took no prescription pain medication for his back while working at Employer. He occasionally took ibuprofen.

Claimant did not miss any time from work during the summer of 2007. The first day of work that he missed was August 31, 2007. That was the only day of work he missed in his two years at Employer.

Claimant testified that before August 29, 2007, he had talked to his supervisor, John Woodford, about his pain. He said that Mr. Woodford stopped him and asked about him limping. He said he told Mr. Woodford he had sciatica in his left leg and that he got it from bending and lifting. He said his first conversation with John Woodford about that was in late June or early July 2007. It was within a week of when it first came on. Claimant testified that Mr. Woodford told him that he had a job, and he had to do it. Claimant said he told Mr. Woodford that he had something pinching a nerve and that his job duties caused the pain. Mr. Woodford did not ask him to fill out any form. Claimant did not think any single event caused his back pain and sciatica.

Claimant said sciatica is nerve pain. He testified he had a horrible throbbing, constant pain in his back that went down the back of his left leg all the way down into his foot. The pain was sharp. He first attributed it to work activities in June 2007. He attributed the pain to work because it always initiated when he was at work. Claimant said his pain got worse during the day at work. He said the pain progressed from June through August 2007.

Claimant testified that in early August 2007, he was sitting in a chair during a break. Mr. Woodford asked him if he was still hurting. Claimant replied that he was and that it was sciatica. He testified that there were three or four times that Mr. Woodford said something to him about him limping. Mr. Woodford never offered him any medical treatment on behalf of Employer, never told him to fill out an accident report, and he never told him to go to a doctor provided by Employer.

Claimant did not work for Employer on August 28, 2007. He had a garden on a neighbor's land. He had tilled in the garden on August 28, 2007. He testified he spent a total of seven to eight hours in the garden that day. Claimant had sharp throbbing pain on August 28, 2007. He said he had never had the degree of pain that he had on August 28, before that day.

Claimant testified he had severe back pain on August 29, 2007 before he went to work. He said his pain increased that day and he could barely walk in the parking lot. He worked 10 ½ hours for Employer on August 29, 2007. His back pain became more severe at work. He said that before work that day his pain was 6 out of 10. During work that day, his pain was 8 out of 10. He did not report his pain to Employer on August 29, 2007.

Claimant saw a chiropractor, Dr. Strathman at Kearney Family Chiropractic, on August 30, 2007. Claimant said on August 30, 2007, he had severe lower back pain that went to his left hip and left leg, and numbness that went down the left leg.

Claimant testified he could not stand up in the shower on August 31, 2007. He called Bobby, who worked on the dock at Employer, and said he could not come in. He asked Bobby to tell the supervisor.

Claimant saw his family doctor, Dr. Fish, on September 4, 2007. Claimant testified that he believed he told Dr. Fish on September 4, 2007 that his work caused his pain, though Dr. Fish's records do not reflect that Claimant reported that.

Claimant called Mr. Woodford after that and asked him what he should do about being off work, and if he should file anything. He said Mr. Woodford told him he should probably take personal time off and short-term disability. Claimant reported he was having back pain and sciatic pain. His back pain was more severe, and he had numbness from his knee to his foot.

Dr. Fish gave Claimant a prescription for pain on September 4, 2007. He also scheduled an MRI for Claimant on September 6, 2007. After the MRI, Dr. Fish referred Claimant to Dr. Danner at Liberty Hospital. Dr. Danner administered three epidurals and prescribed physical therapy. Claimant agreed that he told Dr. Danner on September 13, 2007 that he had had significant pain since August 28, 2007. He said that all of his pain became more severe after August 28, 2007.

Claimant saw Dr. Gall, a neurosurgeon, on September 17, 2007. Dr. Fish sent him there. Claimant testified that Dr. Gall said that he was a candidate for surgery. Claimant has not had surgery.

Claimant's last epidural was on October 23, 2007. His last physical therapy was December 30, 2007. Claimant has not had any treatment since December 30, 2007. Claimant last saw Dr. Fish for his back and left leg in early 2008.

Claimant attempted to go back to work in November 2007 after Dr. Fish released him to light duty. Employer would not permit him to return to light duty work. He was only allowed to return to his regular job.

Claimant applied for short-term disability with Prudential on September 14, 2007. Jenny LeBeau in the Human Resources Department at Employer assisted him with the application. He testified he applied on the phone and told them that his back and leg problems were related to his work for Employer. Prudential called him back ten days

later and denied his application for disability benefits on September 24, 2007 because he claimed his injury was work-related.

Claimant testified he then called the manager of the warehouse, Tim Jordan, who was John Woodford's supervisor, and told Mr. Jordan that his disability application had been denied. He said he told Mr. Jordan his injury was work-related. Mr. Jordan said he would talk to HR and get back to Claimant. Mr. Jordan called Claimant back later that day and said he had talked to Matt Foley at Prudential, and everything had been taken care of. Claimant then got a two page form from Prudential that a doctor needed to fill out. Claimant's short-term disability was later approved. Claimant's short-term disability benefits lasted 26 weeks from September 2007 until March 2008.

Claimant talked to Jenny LeBeau in November 2007. She said he needed to send her an update form. He said he faxed it back to her. She later said that if he was not back to work by January 3 he would be permanently terminated. Claimant had not been released to return to full duty on January 3, 2008. Jenny LeBeau called him that day and again the next day and told him that he had been terminated.

Claimant testified his current problems that he related to work were lower back pain with any lifting and occasional sciatica in his left leg. He said his pain limits his activities with lifting, bending and walking. He no longer has radiation in his left foot and his pain is less severe than it was before. He described his pain at the time of the hearing on December 18, 2008 as a 4 to 5 on a 1 to 10 scale. He said that he can lift up to 20 pounds before sciatica kicks in. He said he gets sciatica if he walks "pretty long." He said he had not lifted anything over 20 pounds since August 30, 2007. He had not had numbness in his left calf since January 2008.

Claimant testified on cross-examination that if Dr. Fish's records indicated he seen Dr. Fish 54 times, he would not disagree with that. He was asked about a record of Dr. Fish dated October 11, 1999 that indicated Claimant had fallen off a truck while lifting straw bales. Claimant said he twisted his back. He could not remember feeling a pop, although the record said so. He saw a chiropractor for that one time four days before he saw Dr. Fish in October 1999. Claimant said that the back problems he had after his 1999 fall healed quickly. Claimant testified that he did not hurt himself lifting bales of straw in October 1999. He fell off the truck onto his feet on the ground. It took a week or less for his pain to go away.

Claimant saw Dr. Fish for annual checkups between August 5, 2005 and August 2007. He testified he did not see Dr. Fish for left leg or back pain because it was not severe enough. Claimant did not see a doctor or a chiropractor for left leg pain or low back pain while he worked at Employer.

Claimant was not employed between December 2004 and August 2005 and did not do any heavy lifting during that time. He worked as a storage clerk for American Airlines from June 2002 until December 2004 where he processed documents for parts being repaired. He did very little lifting at American Airlines. He had help when he lifted at American Airlines. Claimant denied having left leg sciatica at American Airlines. He said the jobs at American Airlines and at Employer were not physically similar. Claimant testified he pulled a hamstring in his left thigh in May 2002 and had taken a test to work at American Airlines. He was still having pain when he had that test. He took the test again two days later and passed it. The pain he had in 2005 was different than the pain he had in 2002. He said that nothing in particular caused his pain in November 2005. It was just his job.

Claimant worked at TWA from October 1986 until June 2002 as a network online computer operator. He monitored systems, inventory, fuel, and weather at TWA and did not do lifting. He worked at a computer all day. He worked at Ozark Airlines from July 1969 until October 1986. He did the same duties at Ozark as at TWA.

Claimant had shoulder surgery in 2003. He did not have an accident. The condition just came on over time. He said his shoulder wore out from everyday wear and tear.

Claimant was evaluated by Dr. Michael Poppa in June 2008. He did not recall if he told Dr. Poppa about gardening on August 28, 2007.

Claimant admitted that in his deposition, he testified he did not tell John Woodford and Gary Robertson that he believed his work at Employer was causing him to have problems with his back and his leg. He said he was not aware of Employer's policy about what he was to do if he had a work injury. He acknowledged that he did receive an employee handbook when he was hired on August 20, 2005, and they had gone over that at his orientation. He did not read the whole handbook. He signed an acknowledgement on August 23, 2005 that he had received an instruction to report all accidents, incidents no matter how slight to his supervisor (Exhibit 1).

Claimant was asked about a record from Prudential dated September 24, 2007 indicating that Claimant had said that he did not know one way or the other about whether his injury was related to work—that it just crept up over time. Claimant said he did not know one way or the other if it was work-related, and told them that because his claim had been denied. He testified he was not sure at that time whether it was work-related.

Claimant was asked by Prudential to sign a Reimbursement Agreement. That agreement dated October 5, 2007 was admitted as Exhibit 11. He and his wife signed the

agreement. He checked a box on the form that indicated that he was unsure if his disability was work-related, and he had not filed for workers' compensation benefits. He said that statement was not true when he checked that box. He testified that as of October 5, 2007, he was sure his disability was work-related.

Claimant signed his workers' compensation Claim on March 13, 2008. He signed a second Reimbursement Agreement on March 15, 2008 that is contained in Exhibit 11. The second Agreement provides in part that he understood that Prudential would not reduce his benefits by an estimate of workers' compensation benefits, and that only the workers' compensation benefits he actually received would be used to reduce benefits.

Claimant had incurred medical expenses, and none have been paid by Employer. Claimant did not receive workers' compensation temporary total disability benefits or medical benefits from August 29, 2007 to February 2008. Employer never told him what doctor to see.

Claimant submitted his medical bills to his group health insurer, United Healthcare, and they have paid some of those bills. He testified he intended to pay United Healthcare back anything that he received in workers' compensation. He also intended to reimburse Prudential if he received workers' compensation.

Claimant testified he was never given any training by Employer about reporting repetitive trauma injuries and was never offered a safety belt by Employer.

Claimant said he believed his lower back and sciatica condition was caused by his job. Claimant stated that he did not work for Employer after August 29, 2007 because he could not work.

It is noted that Claimant did not appear to this Court to be in any pain during the hearings held on December 18, 2008, January 6, 2009 or January 20, 2009. This Court did not observe Claimant grimace, change positions in his chair, or stand while the hearings were in session.

I find that Claimant's testimony was generally credible except as specifically indicated otherwise.

Medical Treatment Records

The records of Dr. Mark Strathman, Kearney Family Chiropractic Center, dated August 30, 2007 were admitted as Exhibit F. The Consultation Form in the records noted Claimant's major symptom was left sciatica. It noted Claimant first noticed this problem on August 28, 2007—"flair-up." The Consultation Form stated, "How did it originally

occur? gardening 7/8 hrs.—bending.” The condition was noted to be constant and the pain was noted to be sharp and throbbing. Bending, lifting, twisting and walking were noted to make the problem worse. Another page of the records noted, “major complaint and symptoms” – “today dur”, and “pre-existing condition”, “none”. Dr. Strathman performed an adjustment.

Exhibit G contains records of the Liberty Clinic pertaining to Claimant. These include a note of Dr. William Fish dated September 4, 2007 that documents that Claimant presented with radicular pain down his left hip and into his ankle. The record notes, “He has had troubles with this off-and-on for several months. Seemed to improve for a period of time, but recently had worsened.” Dr. Fish assessed “lumbosacral strain with radicular pain increasing in severity and frequency.” He prescribed medication and ordered an MRI of the lumbosacral spine.

The Liberty Hospital MRI lumbar spine report dated September 6, 2007 contained the impression: “Multi-level lumbar spondylosis with broad-based disk bulges and facet disease. There is some impingement on existing nerve roots. . . .” Bilateral lateral recess narrowing was noted at L3-L4. It was also noted that the disk extends into the neural foramina and lateral recesses and causes mild impingement. At L4-L5, it was noted there was mild disk bulge and facet disease. The report noted: “the disk bulge is fairly prominent in the left lateral recess causing impingement on the exiting L4 nerve root as well as mild predominance on the right as well causing impingement of the exiting right L4 nerve root. L5-S1 shows no significant stenosis.”

Dr. Fish saw Claimant again on September 10, 2007. He noted Claimant had radicular pain down his left leg and some paresthesia. His symptoms had not improved. The record noted that the MRI showed nerve impingement at multiple levels on the right and left. He referred Claimant to Dr. Gall and pain management and kept Claimant out of work.

Exhibit I contains medical records of Liberty Hospital pertaining to Claimant. Liberty Hospital’s Self-Reporting History record dated September 13, 2007 pertaining to Claimant contains these questions and answers on page 2:

2. When did you first notice the pain for which you are now seeking treatment? August 28, 2007.
3. Have you had this same type of pain before? Yes, not nearly this severe.
4. Have you ever had other painful conditions in the past? Yes, sciatica.

The record recites that standing and sometimes even sitting causes his pain to increase and that laying down decreases the pain. The form has a question that asks how the pain affects his daily activities. The answer is: "Have to stay off my feet." The record notes it is painful to stand and walk. The pain was described as burning, sharp, aching, throbbing, and shooting. It was noted to be always present. The usual level of pain was noted to be eight. The worst was nine out of ten and the lowest was four out of ten. The pain was noted to awaken him from sleep almost every night. Numbness in the left foot was also noted on the form.

The Liberty Hospital records also document Dr. Shavonne Danner's treatment of Claimant beginning September 13, 2007. Her first Consultation note, which is dated September 13, 2007, recites that Claimant stated that he had had significant pain since August 28th. The note states, "He knows of no inciting incident. He has had what he describes as 'sciatica' on and off for years. It is generally not nearly as severe and is localized to the left thigh. Now he is having pain radiating from is (sic) left buttock to his left foot. There is numbness and tingling down the anterior aspect of his left leg as well as his left foot."

Dr. Danner performed a physical examination and reviewed the September 6, 2007 MRI. Her assessment was bulging discogenic disease with lumbar radicular pain; facet joint arthritis; hypertension; and hypercholesterolemia. They discussed epidural injections. She noted he had failed conservative care and was to see Dr. Clifford Gall the next week. Dr. Danner administered an epidural injection on September 13, 2007.

Claimant saw Dr. Clifford Gall on September 17, 2007. His two-page report in Exhibit H notes Claimant presented with a complaint of back and left-sided leg pain. He reported some numbness in the left leg. The physical exam revealed minimal straight leg raising pain on the left. An MRI of the lumbar spine was noted to demonstrate spinal stenosis at L2, L3, L4 and L5. The report further stated, "This may be more on a congenital basis than a degenerative basis as it seems like there is an awful lot of fat around the spinal canal at these levels even where it is narrow. There is certainly no significant disk herniation." Dr. Gall's report noted that he wondered about the possibility of a lumbar disk herniation or perhaps more likely spinal stenosis. They discussed options including epidural steroid injections, physical therapy, acupuncture, and surgery. Dr. Gall offered Claimant laminectomies at L2, L3, L4 and L5. Claimant wanted to try the epidural steroids first.

Claimant returned to Dr. Fish on September 19, 2007. He was noted to have been in pain management and had epidural steroid injections. He was noted to still be unable to work. He was noted to have seen Dr. Gall who gave him the option of surgery or

continued epidural steroid injections, and Claimant had elected to have the epidural steroid injections. Dr. Fish's assessment was lumbar radiculopathy.

Dr. Danner saw Claimant again on September 20, 2007 and performed a second injection. Her note dated October 1, 2007 stated that Claimant had called and stated he had excellent pain control after the two injections and would like to cancel his appointment.

Claimant saw Dr. Danner on October 23, 2007. He had slight increase in pain but remained much better than when she saw him in mid-September. He had not gone back to work, had a lot of heavy lifting to do, and she was concerned about that. She thought that placing him in work hardening might be a benefit. She administered a steroid injection on October 23, 2007.

Claimant saw Dr. Fish on October 23, 2007. His note reported that Claimant is adamantly opposed to surgery. He had three epidural steroid injections with some improvement but stated he still cannot do work. Dr. Fish scheduled Claimant with a physiatrist for evaluation and gave him a note to return to light duty immediately, but no lifting and no bending. Dr. Fish wrote a report dated October 24, 2007. It noted Claimant still had severe pain and was unable to do any type of lifting without excruciating pain.

Liberty Hospital records document Claimant's physical therapy there in September and October of 2007.

Claimant saw Dr. Fish on November 15, 2007 and continued to have severe pain in his back. Dr. Fish noted the physiatrist had canceled Claimant's appointment thinking it was for disability determination rather than for improvement to return to work. Dr. Fish encouraged Claimant to go back to Dr. Gall. His note stated Claimant was unable to return to the type of vigorous lifting he did in his job, but could return to light duty with no bending and no lifting until he saw Dr. Gall.

The treatment records of Northland Physical Therapy and Rehab Services, Inc. pertaining to Claimant (Exhibit J) document the physical therapy treatment Claimant received there from November 27, 2007 through December 27, 2007. Claimant attended nine visits for treatment of low back pain and sciatica.

Claimant saw Dr. Fish on February 1, 2008. He was noted to have had some physical therapy and was continuing to do exercises at home. Dr. Fish told Claimant that they could not give disability determinations. The record noted Claimant felt he was able to do other types of work outside of his most recent employment.

The Liberty Clinic records contain notes of several office visits Claimant had with Dr. Fish in 2005, 2006 and 2007 prior to September 4, 2007. Those entries do not contain any notes that Claimant complained of low back or leg pain. The Liberty Hospital records also include an Operative Report dated December 2, 2004 that notes pre-operative and post-operative diagnosis of severe osteoarthritis, acromioclavicular joint, right shoulder. The procedure performed was right distal clavicle resection. The record also includes a Discharge Summary pertaining to admission on September 20, 2003 and discharge on September 30, 2003 for motor vehicle roll-over crash. Final diagnosis was closed head injury, scalp laceration, chest wall contusion, possible pulmonary contusion, and abrasions.

Additional Evidence.

Exhibit 8, a summary of the hours Claimant worked for Employer, indicates that Claimant generally worked four days per week for Employer, during June 2007, July 2007 and August 2007, and that he usually worked 10.5 hours per day during most of the days he worked during those months.

Scott Bradshaw, Risk and Safety Manager of Employer, also testified at the hearing. He stated Employer does not have a policy against compensating for repetitive trauma injuries. He did not participate in safety training of Employee. He acknowledged that the safety training materials refer to accidents or incidents and do not mention cumulative trauma.

Mr. Bradshaw said a workers' compensation claim at Employer is triggered by an employee reporting the injury. Emergency Medical Technicians are sent and complete a report. An employee's immediate supervisor is contacted so that an accident form can be filled out. He said the Employer's policy is for employees to report any injuries immediately to their supervisor. Claimant did not report an injury to Employer to his knowledge.

Mr. Bradshaw identified copies of OSHA logs (Exhibit 16) that indicated Employer had cases where employees reported not a specific injury date or time, but rather a specific body part. He said Claimant's name was not listed on the OSHA logs because no initial accident log had been completed.

I find Mr. Bradshaw to be a credible witness.

Jennifer LeBeau testified at the hearing that she is a Benefits Specialist for Employer. She said there is no light duty work at Employer. She told Claimant on November 26, 2007 that Employer could not accommodate his restrictions due to his job

duties. She said Claimant's last day of work at Employer was August 29, 2007. She did not recall Claimant ever telling her his problems were work-related.

I find Ms. LeBeau to be a credible witness.

Tim Jordan testified at the hearing that he had worked for Employer for twelve years. He is Regional Manager of Contracts Administration. He primarily oversees purchasing of products and oversees the warehouse. Claimant worked in the warehouse while he was Manager there. He did not recall Claimant ever telling him that he was having any problems caused by work. After Claimant's last day of work at Employer on August 29, 2007, Claimant called Mr. Jordan about the Family Medical Leave Act. He referred Claimant to Jenny LeBeau. Claimant called him about short-term disability, and he directed Claimant to Ms. LeBeau. He testified that Claimant did not ever tell him that his physical problems were related to or caused by his work at Employer. He said if he had, he would have told Claimant to contact the Risk and Safety Department.

I find Mr. Jordan to be a credible witness.

John Woodford testified that he is the North Kansas City Warehouse Supervisor at Employer. He had worked there for fourteen years and was in charge of all operations in the warehouse. Tim Jordan was his boss. Claimant worked in the warehouse as a warehouse clerk. Claimant checked in production, filled orders, and performed general housekeeping. Mr. Woodford said that in general, ten to twelve employees worked at the warehouse at one time. They worked staggered shifts and there were generally four to seven workers there at any given time.

Mr. Woodford saw Claimant frequently during the day. He had numerous informal meetings with his employees. The heaviest items warehouse clerks would pick up and carry were bags of sand weighing 100 pounds and prime ribs weighing 70 to 80 pounds. Bags of sand were handled once or twice per week, generally one to two bags at a time. They were lifted from a pallet to a two-wheeler. Two cases of prime ribs were usually ordered every other day. One warehouse clerk would not handle every order of prime rib.

During the day, items are unloaded from trucks, checked in, and put away on shelves. Orders are then generally filled until 10 o'clock a.m. Housekeeping duties are performed. There is usually a down-time of one to one and one-half hours. Requisitions are then filled in the afternoon and there is another down-time. More orders come in generally around 2 o'clock. Employees have two fifteen minute breaks and one thirty minute lunch break.

Employees use two-wheelers, manual jacks, an electric jack, a stand-up forklift, and a cherry picker. Two-wheelers are used to move boxes of meat. The meat is pulled from a pallet and dropped to a two-wheeler and taken to an outlet. Mr. Woodford had not seen four boxes of meat on a two-wheeler. If there was an order for four boxes, clerks would put two boxes on a four-wheeler and add other product.

Claimant was regarded as a successful employee. He performed every job function he was asked to perform. He did not recall Claimant ever missing any time from work due to back or leg problems. Claimant was a very dependable employee. There is a no light duty policy in the warehouse.

Mr. Woodford testified at trial that at no time did Claimant ever tell him Claimant was having any physical problems Claimant believed were related to his work at Employer.

It was Employer's policy that if an employee had a work-related physical problem, the employee was to report it immediately. That related to an injury of any kind. That policy was frequently discussed with the employees, including Claimant.

Mr. Woodford noticed Claimant was favoring his back in 2007. He asked Claimant if anything had happened. Claimant said he was having issues with his back and that his back had been bothering him. Mr. Woodford asked Claimant if he needed to see an EMT, and Claimant said, "No." Claimant did not tell him that his problems were related to his work at Employer. He was not sure of the date of that conversation, but thought it could have been a couple of weeks before August 29, 2007.

Claimant never told Mr. Woodford that he was not able to carry out his work duties. Claimant was able to carry out his job duties and never asked for help.

Mr. Woodford said that Claimant never told him he had sciatica. He denied that he told Claimant that he had a job, and he had to do it. If Claimant had told him he had physical problems from work, he would have had an accident report filled out, and he would have called an EMT.

Mr. Woodford said he did not recall any conversation with Claimant about Claimant's work causing Claimant to have sciatica or leg problems. He saw Claimant favoring one side on more than one occasion. He did not ask Claimant what was causing it. He had never been instructed by Employer that repetitive injuries are not covered under workers' compensation.

John Woodford testified by deposition on December 16, 2008. His deposition was admitted in evidence as Exhibit B. Objections contained in Mr. Woodford's deposition

are overruled. Mr. Woodford was Claimant's direct supervisor. Claimant worked as a warehouse clerk under his supervision at Employer. Warehouse clerks unload trucks, put product away on shelves, fill requisitions for the property, distribute the product throughout the property, and do stocking. Physical requirements are that clerks be able to lift 75 pounds and be able to be on their feet for most of the day. There might be times when warehouse clerks spend a full hour at a time putting away product. They lift off and on all day.

Warehouse clerks stock the restaurants and five or six outlets for the entire casino. They have a lot of canned goods and cases of meat. A box of cans generally weighs 32 pounds.

The product is received on pallets at the receiving dock and is usually unloaded with an electric pallet jack. The pallets are moved to a staging area and then removed from the pallet by hand. Mr. Woodford testified the job can be heavy at times, but in general he did not consider the job heavy labor because the clerks are not lifting the heavy weights all day long.

Prime ribs only go to one outlet, and one prime-rib order is placed in the afternoon. If a warehouse clerk did that at all, he would do it once a day. Generally two boxes of prime ribs are put on the two-wheeler. One worker might get three on the two-wheeler. Two-wheelers are generally used to deliver orders.

Mr. Woodford testified in his deposition that Claimant complained to him about his back hurting. He asked Claimant if he did it on the job. Claimant indicated that he did not think so—that it had just been bothering him. Mr. Woodford asked Claimant if he needed an EMT. Claimant indicated he did not. Claimant continued to do his duties until it got to the point where he could not. Mr. Woodford noticed a couple of times when Claimant was in pain. When that happened, he asked Claimant if he needed to either sit down or go home.

Mr. Woodford observed Claimant having, what he believed to be, back problems before Claimant stopped working at Employer. He did not think Claimant was limping. It was more a favoring of the side of his back. At least two weeks before Claimant stopped working at Employer, Mr. Woodford observed Claimant's physical movements that indicated to him that Claimant was having problems with his back. That happened a few times. He recalled Claimant saying, "I don't think I did it at work." He understood that Claimant was not coming in after August 29, 2007 because he could not perform his duties.

I find John Woodford to be a credible witness.

Gary Robertson was deposed by Claimant's counsel on December 16, 2008. His deposition was admitted as Exhibit C. Objections contained in the deposition are overruled. Mr. Robertson testified that he is a warehouse clerk for Employer and has held that position since May 2000. He worked with Claimant at Employer from the time he started until Claimant left. Mr. Robertson testified he pushed or pulled 200 pounds probably on an every-other-day basis, maybe more than once a day.

Claimant talked to him about having back problems while he worked at Employer within a few months before Claimant last worked for Employer on August 29, 2007. Claimant did not ever tell him there was any particular event or incident where he was lifting and felt an immediate onset of back pain. He did not ever tell him that he hurt his back doing activities that were not work-related. Mr. Robertson noticed at times that Claimant would be moving a little slower and walked with a little bit of a limp.

I find Gary Robertson to be a credible witness.

Objections to Exhibit L, medical expense summary, are overruled, and Exhibit L is admitted in evidence. Exhibit L includes copies of medical bills pertaining to Claimant.

Exhibit 11 is a copy of the Prudential Insurance Company of America's disability insurance file pertaining to Claimant. The file includes an Employability Assessment of Sue Howard dated May 9, 2008 pertaining to Claimant. It states that Claimant was qualified to perform certain occupations identified in the report including computer operator, receptionist, cashier, shipping checker, shipping, receiving and traffic clerk, and security guard. The file also includes a document from One-Way Auto Transportation relating to "Harry Darlington 2008" that shows earnings and expenses for Claimant from January through April 2008. It notes Claimant had gross earnings in January 2008 of \$1,700.00, expenses of \$1,813.08, and net earnings of \$886.92.

The Prudential file includes a telephone call log of Matthew Foley dated September 24, 2007 pertaining to Claimant. The log states in part: "dcm adv ee clm submission indicated injury was work related. Ee said he doesn't know one way or the other, just something that crept up on him over time lifting heavy stuff most of his life. He has two bulging disks that are pinching his spinal column L4 and S1, sciatica mostly around knee." The file also contains an email from Jenny LeBeau of Employer to Michael Carpenter of Prudential dated November 27, 2007 confirming that with the duty of his job, they will be unable to accommodate his restrictions. Ms. LeBeau had responded to an email from Mr. Carpenter advising that he understood Claimant had been released by his doctor to return to work light duty with restrictions and limitations of no bending and no lifting.

The Prudential file includes Dr. Danner's Attending Physician Statement bearing her signature and dated September 20, 2007. The Statement has "yes" and "no" boxes below the statement, "Check all that apply to this disability." There were boxes for "work related," "accident" and "sickness." None of those boxes were checked.

The Prudential file also includes a Reimbursement Agreement signed by Claimant and his wife that is dated October 5, 2007. The Agreement recites that Mr. Darlington understood that short-term disability benefits are not payable under the plan if he is entitled to workers' compensation or similar coverage. Claimant checked a box that recited that he requested that Prudential honor his claim for short-term disability benefits as he had not filed for workers' compensation benefits, "As I am unsure if my disability is work-related." The Agreement provided that he agreed to reimburse Prudential the amount of STD benefits paid to him in the event he received any workers' compensation benefits or lump sum payments arising out of the same claim for injury or illness which occurred or commenced on September 4, 2007.

Exhibit N is the job summary from Harrah's from the internet. It includes physical, mental and environmental demands of being able to continually push and pull heavy materials weighing up to 200 pounds, being able to maneuver throughout the casino and hotel areas to deliver items, being able to reach below and above shoulders while performing receiving duties, being able to lift up to and carry up to 70 pounds continuously, must possess the ability to operate a pallet jack, fork lift, weigh scale and pull carts and dollies filled with items weighing up to 100 pounds, and must be able to lift continuously through the day.

Exhibit 1, Employer's personnel file pertaining to Claimant, includes Harrah's North Kansas City Casino and Hotel job description for warehouse person. The job description was described as follows: "Unloads trucks, detail receives goods, stocks and rotates, quality inspects goods, recycles glass-cardboard paper, fills requisitions in a timely and accurate manner, operates and maintains consistent mail delivery. Housekeeping responsibility, overall safety. Responsible for checking deliveries for accuracy and product integrity. Responsible for stocking product on shelves. Responsible for product rotation." Physical requirements were noted to be: "Ability to lift 75 pounds."

Employer's personnel file also includes a department safety and security procedures warehouse/packaging form signed by Claimant and dated October 6, 2005 that acknowledges that instruction had been given on proper lifting techniques. The file also includes a workers' compensation employee acknowledgement form signed by Claimant and dated August 23, 2005 that states that he is required to "Report all accidents/incidents, no matter how slight, to your supervisor immediately. Reporting on your next work shift is not an acceptable practice." The form also states, "I agree to follow all these responsibilities and understand that failure to do so may result in

termination of, or may adversely affect my workers' compensation benefits. I have been given a copy of this document."

Exhibit 2 contains Employer records pertaining to Claimant. It includes an Acknowledgement signed by Claimant and dated August 8, 2006 that acknowledges that instruction had been given on safety equipment needed for the job, proper lifting techniques, and be alert, don't get hurt. Exhibit 2 includes a document signed by Claimant titled "General Safe Work Practices" that states in part: "2. All accidents, injuries and illnesses are to be reported to the appropriate manager/supervisor immediately, regardless of severity." It also states, "6. No employee is to be permitted or required to work if they are not physically able to do so due to injury, illness or the use of medication or other drugs."

Exhibit 2 also contains a document signed by Claimant dated August 9, 2006 titled "Employee Responsibility Regarding On-the-Job Injury/Accident." It recites in part: "1. Report all accidents/incidents, no matter how slight, to your supervisor immediately. Reporting on your next work shift is not an acceptable practice. 2. If you need to see a doctor, your supervisor will refer you to the company clinic. Together with your supervisor, complete a supervisor's accident investigation form." That form also recites that Claimant acknowledged he had read the sheet, had been given an opportunity to ask questions, and agreed to follow the responsibilities and understood that failure to do so may result in termination of, or may adversely affect his workers' compensation benefits, and that he had been given a copy of the document.

The medical records in evidence do not document that Claimant sustained any permanent disability to his low back or left leg prior to working for Employer.

Medical Experts

Claimant offered Dr. Michael Poppa's June 12, 2008 medical report and Curriculum Vitae (Exhibit E). Objections to Exhibit E are overruled, and Exhibit E is admitted in evidence. Dr. Poppa's CV notes that he is board certified by the American Osteopathic Board of Preventive Medicine. Dr. Poppa is not an orthopedic surgeon or a neurosurgeon. No deposition of Dr. Poppa was offered in evidence.

Dr. Poppa's report, which is addressed to Claimant's attorney, notes that he saw and evaluated Claimant on June 12, 2008 for the purpose of an independent medical evaluation. His report notes that Claimant stated his duties included lifting supplies weighing up to 100 pounds as well as pushing and pulling carts weighing up to 250 pounds for approximately two years. Claimant reported to Dr. Poppa that his back pain came on gradually in the summer of 2007 and progressively worsened as he developed numbness and tingling in his left hip and leg.

Dr. Poppa noted Claimant's treatment with Dr. Strathman, Dr. Fish, Dr. Danner and Dr. Gall. He noted that Claimant reported he had trouble sitting or standing for any length of time and frequently experienced pain that radiated from his low back to his left knee. Claimant reported he was unable to lift anything of weight, and that severely restricted his ability to perform job duties.

Dr. Poppa's history noted that Claimant denied previous injuries or medical conditions requiring treatment involving his lower back or left leg prior to his work at Employer. The report did not mention any treatment with Dr. Fish in 1999 for Claimant's back. Claimant's current medications were noted to include ibuprofen. Claimant's employment history was noted.

Dr. Poppa performed an examination of Claimant. Claimant reported he had some buttocks pain when sitting. He reported he gets sharp pain in his back that goes down the back of his left leg if he lifts anything. He reported he gets pain with bending, and if he keeps doing it, it goes into his leg. Claimant reported he cannot do what he used to do. Claimant told Dr. Poppa that he could not stand very long or the sciatica would come back.

Dr. Poppa's report noted he had reviewed records of Liberty Clinic, Liberty Orthopedic Associates, P.C., Neurosurgery, P.A., and Liberty Hospital. His report did not indicate he had reviewed the Dr. Strathman chiropractic records dated August 30, 2007.

Dr. Poppa's report set forth his conclusions. These included:

- 1) Mr. Darlington has reached maximum medical improvement regarding non-operative treatment of his work related injury, which occurred as a result of a series of repetitive trauma through August 31, 2007 while employed by Harrah's Entertainment, Inc. (Mo Injury #07-131234) involving his lumbar spine (musculoligamentous sprain-strain/multi-level lumbar spondylosis with associated broad-based disc bulging and facet disease/disc/bulge at L4-L5 causing impingement on the exiting L4 nerve root/mild prominence noted on the right at L4-5 also causing impingement of the exiting nerve root/lumbar stenosis/pain/radiculitis).

- 2) Mr. Darlington did sustain an injury from an accident arising out of the course and scope of his employment from repetitively lifting supplies up to 100 pounds and pushing and pulling carts weighing up to 250 pounds each day and every day worked

through August 31, 2007. It is my opinion Mr. Darlington's employment and work duties at Harrah's Entertainment was the direct, proximate and prevailing factor in the cause of his resulting medical condition and disability.

3) The treatment Mr. Darlington has received to date from all providers has been reasonable, appropriate and directly necessary to cure or relieve the effects of his repetitive trauma through August 31, 2007.

4) As it relates to additional treatment, Mr. Darlington is certainly a surgical candidate and should be re-examined by Dr. Gall or another neurosurgeon for definitive surgical treatment.

5) As it relates to employment, Mr. Darlington is limited in his functional capabilities. He should avoid any lifting, pushing, pulling or carrying greater than 5 pounds on an occasional basis. He is limited to sedentary duties with frequent change of position.

6) As it relates to employment, it is my opinion that Mr. Darlington was temporarily and totally disabled as a result of the injuries he sustained due to repetitive trauma through August 31, 2007 from the date of his accident until he resumed employment at One-Way Auto on a part-time basis as a driver with frequent change of position.

7) If Mr. Darlington is not afforded additional treatment (surgical intervention) regarding his work related injury he sustained as a result of repetitive trauma through August 31, 2007, it is my opinion he has a 20% permanent partial disability of the body as a whole.

Dr. John Pazell evaluated Claimant at Employer/Insurer's attorney's request on October 20, 2008. Dr. Pazell's October 20, 2008 report was admitted with Exhibit 9, the deposition of Dr. Pazell taken on December 11, 2008. Objections contained in Exhibit 9 are overruled.

Dr. Pazell's report describes the history of Claimant's injury. He notes that although Claimant claimed he was injured in August, 2007 with an injury date of August 31, 2007, there were no medical records that supported that date. He notes Claimant's major complaints were, "lower back pain, sciatica in left leg, pain in left hip, pain in left

buttocks, pain in right hip and buttocks.” Claimant complained he was unable to lift without pain, bending was very limited, and walking caused left leg sciatica.

Dr. Pazell’s report set forth his summary of his records review. His report describes the history of Claimant’s treatment before and after September 4, 2007. Claimant’s complaints, past medical history, medications, personal and social history, family history, past surgical history and anesthetic history are noted. In addition, his report recites his review of systems, education history, and employment history.

Dr. Pazell performed a physical examination. His report notes that the lumbar spine exam revealed Claimant did not have a cane, crutches, brace, or corset. Claimant was noted to have moved around the room with ease. His gait was noted to be normal. He climbed onto the table without difficulty. He noted there were no muscle spasms. He noted range of motion to be normal and painless. Reflexes were noted to be normal. Claimant complained of straight leg raising at 50 degrees on the left with negative root test. The report notes that the lumbar spine exam was totally normal. Left knee pain and crepitation were noted as the left leg was slowly extended.

Dr. Pazell’s report states his diagnosis is that Claimant has lumbar spondylosis on MRI scan at a number of levels. Claimant had had non-operative treatment with a series of epidural exams. The report further notes, regarding causation, as follows: “There is no documentation or proof in any shape or manner that he was injured at work. Indeed, he noted that he could not even determine when his left-sided “sciatica” began. I could find no evidence of any left-sided sciatica. I could find no evidence of any objective findings.”

Dr. Pazell’s report further states that he did not believe Claimant is a surgical candidate and he would definitely not recommend surgery for him. The report further states, “I could not state to any degree of medical certainty that lifting would trouble him since I cannot find any abnormality on physical examination. I would state that I would not recommend any additional medical treatment.” The report further states, “Objective findings present at the time of my examination in his lumbar spine are absent. I do not believe there is any impairment nor is there any need for any future medical treatment nor would I place any restrictions on him. His report further notes that his findings are true to a reasonable degree of medical certainty and probability. The report further states, “I cannot determine whether he had an injury; therefore, I cannot point to a prevailing factor to the development of disability since I cannot find any disability.”

Dr. Pazell testified by deposition on December 11, 2008 that he is an orthopedic surgeon. He graduated from the University of Michigan Medical School and specialized in orthopedic medicine. He initially did spine surgery and then became interested in and did mainly arthroscopic surgery, sports medicine and disability evaluations. He has been

an orthopedic surgeon for about thirty years and has been doing independent medical evaluations for approximately twenty-eight years. He is board certified in orthopedic surgery and is a fellow in the American Academy of Disability Evaluating Physicians. He has treated patients who presented with low back complaints. He operated on patients with low back problems for approximately ten years.

Dr. Pazell testified that 99% of his current practice is medicolegal-medical evaluations. Twenty-five percent to one-third is defense and the rest is claimant. Dr. Pazell had done in the neighborhood of ten evaluations for Employer/Insurer's attorney in 2008. He testified that Claimant's attorney ha also hired him to do an IME.

Dr. Pazell testified he understood that Claimant presented to Dr. Fish on September 4, 2007 with complaints of left hip and left ankle pain, and that Dr. Fish assessed at that time a lumbar strain. He noted that Dr. Fish ordered an MRI that was done on September 6, 2007 that revealed that Claimant had multiple level degenerative disk disease, or disk changes and spinal stenosis. Spinal stenosis was noted to compromise the volume of the interior of the spinal canal through which the nerve root runs. He testified in general, spinal stenosis is age-related, time-related wear and tear. The MRI also revealed degenerative changes in the lumbar spine. That occurs as a result of time and activity. The MRI of the lumbar spine also indicated multi-level lumbar spondyloses. Spondyloses was described to mean disease of the joints that join the vertebrae together, the facet joints, and increase bone formation in those areas that can cause encroachment on the nerve roots. The degenerative changes occur over a period of time.

Dr. Pazell stated that studies have been done of the percentage that have bulging disks in the lumbar spine, and he recalled it was upward of 50% of males in their forties, fifties and sixties. Dr. Pazell stated that the MRI findings related to Claimant were consistent with a male of his age even without any history of acute or repetitive trauma to the lumbar spine. He said the changes in Claimant's MRI done in September 2007 of the lumbar spine were consistent with ordinary degeneration caused by aging.

Dr. Pazell asked Claimant how he hurt his back and Claimant replied, "Lower back injury with sciatica in left leg." Claimant was 5 feet 5 inches tall and weighed 205 pounds when he examined him. Claimant had an inconsistent straight leg raising test. He had pain in the left knee that could be consistent with a lateral meniscus injury.

Dr. Pazell reviewed medical records pertaining to Claimant and summarized those in his report. He said it was correct that his report did not make any reference to medical records that talked about low back problems or left leg problems between the date that Claimant was hired by Employer on August 22, 2005 and the date he last worked there on August 29, 2007. He agreed that Dr. Danner's history on September 13, 2007

indicated Claimant said that he had experienced sciatica for years before August of 2007. He agreed that Dr. Danner's records noted that Claimant had a history of significant pain since August 28, 2007.

Dr. Pazell testified that Claimant told him that he could sit in a hard chair for ten minutes and then he would have to change position; he could stand ten to fifteen minutes and then he would have to move; he could walk twenty minutes and then he would have to stop and rest. Claimant complained of trouble with walking, running, stooping, squatting, bending over, kneeling, carrying items, pushing or pulling, twisting, and climbing stairs at home. Claimant stated he could not move heavy items, vacuum, stand at the sink. Claimant reported he cannot lift or bend at work. Claimant had complaints of paresthesia—a stinging burning sensation that extended into the extremity, in his left, and occasionally his right leg. He also reported that he was employed part-time.

Dr. Pazell testified with a reasonable degree of medical certainty that his diagnosis of Claimant was a lumbar spondylosis based on the findings of the MRI scan and history. He could not come up with a cause. Claimant was not certain of the cause. Dr. Pazell could not pin down a specific injury other than age related. Claimant had a long history of working in occupations that are hard on the back, so it would be age related. Dr. Pazell testified that he was not able to determine any pathological change in Claimant's low back that could relate to any period of time during which Claimant worked at Employer from March 2005 and through August of 2007. He testified that he could not arrive at an opinion whether any of Claimant's work at Employer was the prevailing factor in causing any of the medical conditions which he diagnosed and which were imaged in the MRI. He testified that the labor performed by Claimant at Employer was not the prevailing factor in causing the medical condition that he diagnosed. He could not find any objective evidence of any specific acute or repetitive injury to Claimant's lumbar spine.

Dr. Pazell stated that in terms of future medical care, Claimant should not consider surgery on his lumbar spine. He would not recommend surgery for Claimant. He said there were no indications based only on the objective MRI findings that Claimant should have surgery on his low back. He stated Claimant would probably get worse with surgery. He felt Claimant needed no other specific conservative care with respect to his lumbar spine.

Dr. Pazell placed no specific restrictions on Claimant's activities of daily living or work. Dr. Pazell testified Claimant did not sustain any permanent partial disability as a result of his work at Employer. He also stated Claimant does not have any permanent disability from any source or cause with reference to his low back.

Dr. Pazell testified that Claimant did not relate any of the history of the Kearney Family Chiropractic Center records, and did not mention gardening in response to the question, "How did it originally occur?"

Dr. Pazell testified the medical treatment Claimant received from September 4 until February of 2008 related to his back was reasonable and necessary. He agreed that Dr. Danner's September 13, 2007 entry referred to "sciatica on and off for years". He stated that looking at the MRI results, Claimant is not a man who has significant degenerative problems in his back. He testified his diagnosis was spondyloses and he could find no findings on his exam that would support nerve root impingement. He did not know what caused Claimant's spondyloses. He said repetitively lifting heavy objects can cause spondyloses. He said that if you take half the population in that age group and do an MRI you will probably find the findings that Claimant had. He agreed that Claimant had a bulging disk at the L4-5 level and that a bulging disk can also be caused by repetitive heavy manual labor.

Claimant's attorney offered Claimant's entire deposition, Exhibit A, at the beginning of the hearing, and prior to calling Claimant to testify. Employer/Insurer's attorney objected to the admission of the deposition. The Court took the admissibility of Exhibit A under advisement. Claimant's attorney called Claimant as a witness, and Claimant testified at great length at the hearing. Claimant's attorney argues that the deposition is admissible under Missouri Civil Rule 57.07(a) which provides:

(a) Use of Depositions. Any part of a deposition that is admissible under the rules of evidence applied as though the deponent were testifying in court may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof. Depositions may be used in court for any purpose.

No Missouri case has been cited or found that deals directly with this issue. Numerous cases have been cited in *Admissibility of Party's Own Statement under Rule 801 (d)(2)(A) of the Federal Rules of Evidence*, 191 A.L.R. Fed 27, Section 11 [Cumulative Supplement] (2003) that recognize that to be admissible, an admission must be offered against the party who made it, not by the party who made it. I find that Claimant's deposition is not admissible because it was not offered by Employer/Insurer against Claimant, but rather by Claimant.

Rulings of Law

1. Did Claimant sustain an injury by accident or occupational disease arising out of and in the course of his employment for Employer, and if so, was his injury medically

causally related to an accident or occupational disease arising out of and in the course of employment?

Section 287.800, RSMo¹ provides in part that administrative law judges shall construe the provisions of this chapter strictly and shall weigh the evidence impartially without giving the benefit of the doubt to any party when weighing evidence and resolving factual conflicts.

Section 287.808, RSMo provides:

The burden of establishing any affirmative defense is on the employer. The burden of proving an entitlement to compensation under this chapter is on the employee or dependent. In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true.

Section 287.020.2, RSMo provides:

The word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor.

Section 287.020.3, RSMo provides in part:

3. (1) In this chapter the term 'injury' is hereby defined to be an injury which has arisen out of and in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. 'The prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.
- (2) An injury shall be deemed to arise out of and in the course of the employment only if:

¹ All statutory references are to RSMo 2006 unless otherwise indicated. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000). See also *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007).

- (a) It is reasonably apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and
- (b) 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.
- (3) An injury resulting directly or indirectly from idiopathic causes is not compensable.

- (5) The terms 'injury' and 'personal injuries' shall mean violence to the physical structure of the body. . . .

Section 287.020.10, RSMo provides:

In applying the provisions of this chapter, it is the intent of the legislature to reject and abrogate earlier case law interpretations on the meaning of or definition of 'accident', 'occupational disease', 'arising out of', and 'in the course of the employment' to include, but not be limited to, holdings in: *Bennett v. Columbia Health Care and Rehabilitation*, 80 S.W.3d 524 (Mo.App. W.D. 2002); *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo.banc 1999); and *Drewes v. TWA*, 984 S.W.2d 512 (Mo.banc 1999) and all cases citing, interpreting, applying, or following those cases.

Occupational diseases are compensable under the Missouri Workers' Compensation Act. Sections 287.067.1, 2, RSMo. An employee's claim for compensation due to an occupational disease is to be determined under Section 287.067.1, RSMo. It defines occupational disease as:

1. In this chapter the term 'occupational disease' is hereby defined to mean, unless a different meaning is clearly indicated by the context, an identifiable disease arising with or without human fault out of and in the course of the employment. Ordinary diseases of life to which the general public is exposed outside of the employment shall not be compensable, except where the diseases follow as an incident of an occupational disease as defined in this section. The disease need not to have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Section 287.067.2, RSMo provides:

2. An injury by occupational disease is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.3, RSMo provides:

An injury due to repetitive motion is recognized as an occupational disease for purposes of this chapter. An occupational disease due to repetitive motion is compensable only if the occupational exposure was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability. Ordinary, gradual deterioration, or progressive degeneration of the body caused by aging or by the normal activities of day-to-day living shall not be compensable.

Section 287.067.8, RSMo provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with the immediate prior employer was the prevailing factor in causing the injury, the prior employer shall be liable for such occupational disease.

Section 287.063.1 provides:

An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 8 of section 287.067.

Claimant must present substantial and competent evidence that he or she has contracted an occupationally induced disease rather than an ordinary disease of life. The Courts have stated that the determinative inquiry involves two considerations: "(1) whether there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort." *Polavarapu v. General Motors Corp.*, 897 S.W.2d 63, 65 (Mo.App. 1995); *Dawson v. Associated Elec.*, 885 S.W.2d 712, 716 (Mo.App 1994), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 228 (Mo.banc 2003)²; *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App 1991); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App 1988); *Sellers v. Trans World Airlines, Inc.*, 752 S.W.2d 413, 415 (Mo.App 1988); *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575, 578 (Mo.App. 1987). In proving up a work-related occupational disease, "[a] claimant's medical expert must establish the probability that the disease was caused by conditions in the work place." *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006) (citing *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991) (quoting *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716. There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease. *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997); *Dawson*, 885 S.W.2d at 716; *Sheehan v. Springfield Seed & Floral, Inc.*, 733 S.W.2d 795, 797 (Mo.App. 1987); *Estes v. Noranda Aluminum, Inc.*, 574 S.W.2d 34, 38 (Mo.App. 1978). Even where the causes of the disease are indeterminate, a single medical opinion relating the disease to the job is sufficient to support a decision for the employee. *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

In claims for compensation for medical conditions associated with repetitive activities, a claimant must prove: 1) the injury arose out of and in the course of employment; 2) causation from job-related activities; and 3) nature and extent of disability. *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994). Manipulations and flexions, iterated and reiterated within a concentrated time, are unusual conditions, and if they inhere in an employment task being performed by an employee, they expose the employee who performs them to a risk not shared by the public generally and to which the employee would not have been exposed outside of employment, and thus qualify for compensation pursuant to The Law. *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

² Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (Id. at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

Missouri courts have interpreted section 287.063, RSMo to provide that an employee with an occupational disease is “injured” within the meaning of the section 287.120, RSMo when the disease causes a “compensable injury.” *Coloney*, 952 S.W.2d at 759, citing *Hinton v. National Lock Corp.*, 879 S.W.2d 713, 717 (Mo.App. 1994) (citing *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 228 (Mo.App. 1988)). The “injury” requirement of the Act necessitates that the employee's “injury” create a harm that tangibly affects the employee's earning ability. *Coloney*, 952 S.W.2d at 763; *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995). Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the legislature in enacting the Workers’ Compensation Act which was to provide indemnity for loss of earning power and disability to work and not for pain, suffering, or mere physical ailment. *Coloney*, 952 S.W.2d at 760.

The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). “Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).

A claimant has the burden to prove all the essential elements of his or her case, and a claim will not be validated where some essential element is lacking. *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001); *Cook v. Sunnen Products Corp.*, 937 S.W.2d 221, 223 (Mo. App. 1996).

Based on substantial and competent evidence, including the testimony of fact and opinion witnesses, the medical records, my credibility determinations, and the application of Missouri Workers' Compensation Law, I find that Claimant failed to sustain his burden of proof that he sustained an injury arising out of and in the course of his employment for Employer.

Factors that support the conclusion that Claimant failed to sustain his burden to prove that his repetitive work for Employer was the prevailing factor in causing his back and left leg condition and disability include the following.

Claimant did not identify any traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift which occurred at work while working for Employer. No medical records document that either. Claimant did not think any single event caused his back pain and sciatica. I find that Claimant did not prove that he sustained a compensable accident arising out of and in the course of his employment for Employer.

Claimant worked full-time continuously for Employer until August 31, 2007. He generally worked at least ten hours a day. He worked occasional overtime. He performed repetitive lifting and bending. He moved product with a two-wheel dolly and a non-motorized cart. He occasionally delivered prime ribs weighing approximately 320 pounds on a two-wheel dolly. His complaints of pain did not prevent him from performing all of the duties of his job. He did not seek any medical treatment for his back or left leg while working for Employer until August 30, 2007. It was not until after Claimant spent seven to eight hours gardening, bending and using a tiller, on August 28, 2007, that he was diagnosed with a lumbosacral strain, was unable to work, and was prescribed medical treatment that included medication, an MRI, epidural steroid injections, and physical therapy.

Dr. Fish saw Claimant on September 4, 2007 and noted Claimant's pain had recently worsened. He diagnosed a lumbosacral strain. Dr. Fish's records do not document that Claimant sustained an injury while working for Employer.

The Liberty Hospital MRI lumbar spine report dated September 6, 2007 contained the impression: "Multi-level lumbar spondylosis with broad-based disk bulges and facet disease. There is some impingement on existing nerve roots. . . ."

Liberty Hospital's Self-Reporting History record dated September 13, 2007 includes the following question and Claimant's answer: "2. When did you first notice the pain for which you are now seeking treatment? August 28, 2007."

Dr. Danner treated Claimant. Her first Consultation note, which is dated September 13, 2007, recites that Claimant stated that he had had significant pain since August 28th. She completed an Attending Physician Statement on September 20, 2007. She did not note then, in response to a statement, "Check all that apply to this disability," that Claimant's condition was work-related. Further, her records do not document that Claimant reported to her that he believed his work caused his condition.

Claimant testified he told Mr. Woodford in late June or early July 2007 that he had sciatica in his left leg and that he got it from bending and lifting and that his job duties caused the pain. Mr. Woodford denied that. I find that this testimony of Claimant's is not credible. I find that if Claimant had reported that he had injured himself on the job, Mr. Woodford would have processed an incident report and offered Claimant medical treatment.

I believe Claimant's testimony that he had occasional complaints of pain in his back and left leg in the summer of 2007. Mr. Woodford and Mr. Roberts substantiated that. But Claimant having complaints does not necessarily prove that his work was the prevailing factor in causing his condition.

The Court notes that Claimant provided different accounts to Prudential of the cause of his complaints. Claimant's second application to Prudential was approved after he reported to Prudential that he was not sure if his disability was work-related. He agreed to reimburse Prudential if his workers' compensation case was compensable.

Dr. Poppa's opinions that Claimant sustained "an injury from an accident arising out of the course and scope of his employment from repetitively lifting supplies up to 100 pounds and pushing and pulling carts weighing up to 250 pounds each day and every day he worked through August 31, 2007" and that Claimant's "employment of work duties at Harrah's Entertainment was the direct, proximate and prevailing factor in the cause of his resulting medical condition and disability" are conclusory, and the basis of his opinions is not explained. No deposition of Dr. Poppa was offered in evidence in this case. His report does not address what effect Claimant having spent seven to eight hours working in a garden, bending and using a tiller, on August 28, 2007, may have had on his condition. I find that Dr. Poppa did not review Dr. Strathman's chiropractic records that noted: "How did it originally occur? gardening 7/8 hrs.—bending." Dr. Strathman noted constant pain that was sharp and throbbing. The history provided to Dr. Poppa was

incomplete and inaccurate because it did not include the history of Claimant's significant complaints and chiropractic treatment after gardening on August 28, 2007.

Dr. Pazell testified with a reasonable degree of medical certainty that his diagnosis of Claimant was a lumbar spondylosis based on the findings of the MRI scan and history. He could not come up with a cause. He could not pin down a specific injury other than age related. He was not able to determine any pathological change in Claimant's low back that could relate to any period of time during which Claimant worked at Employer from March 2005 and through August of 2007. He testified that he could not arrive at an opinion whether any of Claimant's work at Employer was the prevailing factor in causing any of the medical conditions which he diagnosed and which were imaged in the MRI. He testified that the labor performed by Claimant at Employer was not the prevailing factor in causing the medical condition that he diagnosed. He could not find any objective evidence of any specific acute or repetitive injury to Claimant's lumbar spine. I find these opinions of Dr. Pazell to be credible.

Dr. Pazell's report noted his diagnosis was that Claimant has lumbar spondylosis. He noted there is no documentation or proof in any shape or manner that Claimant was injured at work. He noted the MRI revealed degenerative changes in the lumbar spine. That occurs as a result of time and activity. The MRI of the lumbar spine also indicated multi-level lumbar spondyloses. Spondyloses was described to mean disease of the joints that join the vertebrae together and increase bone formation in those areas that can cause encroachment on the nerve roots. He stated the degenerative changes occur over a period of time. Dr. Pazell stated that the MRI findings related to Claimant were consistent with a male of his age even without any history of acute or repetitive trauma to the lumbar spine and the changes in Claimant's MRI done in September 2007 of the lumbar spine were consistent with ordinary degeneration caused by aging.

I find Dr. Pazell's conclusions are more credible and persuasive than Dr. Poppa's. Dr. Pazell is a board certified orthopedic surgeon. Dr. Poppa is not. Dr. Pazell reviewed Dr. Strathman's August 30, 2007 records. Dr. Poppa did not. Dr. Pazell explained the basis of his opinion that Claimant's condition was degenerative spondylosis, and that he could not identify that his work for Employer was the prevailing factor in causing his condition. Dr. Poppa did not explain the basis of his opinions.

In conclusion, based upon substantial and competent evidence and the application of the Missouri Workers' Compensation Law, I find in favor of the Employer/Insurer and deny Claimant's request for benefits. I find that Claimant failed to sustain his burden of proof that he sustained an injury by accident or occupational disease arising out of and in the scope and course of his employment for Employer. Claimant failed to show that work was the prevailing factor in the cause of his alleged occupational injury and the resulting medical condition. Because I have found that Claimant failed to sustain his

burden of proof that he sustained an injury by accident or occupational disease arising out of and in the scope and course of his employment for Employer, Claimant's claim against the Second Injury Fund must also be denied. Section 287.220, RSMo. Claimant's entire claim for benefits, including his claim against Employer/Insurer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund, is denied, and all other issues are moot.

Based on the stipulation of the parties, alleged Employer, Harrah's Enter Promus Co, and alleged Insurer, Zurich American Insurance Co. should be dismissed from this case, and they are hereby dismissed with prejudice.

Date: April 6, 2009 Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson
Naomi Pearson
Division of Workers' Compensation