

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

Injury No.: 04-052248

Employee: Darryl Z. Davis
Employer: Deffenbaugh Industries, Inc.
Insurer: Self through Zurich North American
c/o Sedwick Claims Management
Additional Party: Drisko, Fee & Perkins PC (Medical Fee Provider)
(Medical Fee Dispute Number 04-00394)
Date of Accident: January 14, 2004
Place and County of Accident: Platte County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 16, 2007. The award and decision of Administrative Law Judge Robert B. Miner, issued April 16, 2007, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 8th day of November 2007.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Darryl Z. Davis

Injury No.: 04-052248

Employer: Deffenbaugh Industries, Inc.

Additional Party: Drisko, Fee & Parkins PC (Medical Fee Provider) (Medical Fee Dispute Number 04-00394)

Insurer: Self through Zurich North American, c/o Sedgwick Claims Management

Hearing Date: January 8, 2007

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: Cumulative through January 14, 2004.
5. State location where accident occurred or occupational disease was contracted: Platte 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? N/A.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was Employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee drove a dumpster truck, climbed in and out of the truck, hooked up dumpsters to the truck with a hook and chain, placed tarps over the truck, opened and closed the doors of the dumpster with forceful pushing and pulling, and picked up debris, which caused repetitive cumulative trauma, resulting in injury to his back, hips, and legs.
12. Did accident or occupational disease cause death? No Date of death? N/A.
13. Part(s) of body injured by accident or occupational disease: Back, hips, and legs.
14. Nature and extent of any permanent disability: Permanent and total disability.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by Employer/insurer? None.
17. Value necessary medical aid not furnished by Employer/insurer? None.
18. Employee's average weekly wages: \$1,226.81.
19. Weekly compensation rate: \$662.55 for temporary total disability and permanent total disability, and \$347.05 for permanent partial disability.
20. Method wages computation: Section 287.250, RSMo.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$17,405.02. ^[1]

18 3/7 weeks of temporary total disability at the rate of \$662.55 per week in the amount of \$12,209.85.

No weeks of permanent partial disability from Employer.

No weeks of disfigurement from Employer.

Permanent total disability benefits from Employer in the amount of \$662.55 per week beginning on May 24, 2004 for Claimant's lifetime.

22. Second Injury Fund liability: None. (Second Injury Fund is not a party in this case.)

TOTAL: \$29,614.87, plus the amount of \$662.55 per week beginning on May 24, 2004 for Claimant's lifetime.

23. Future requirements awarded: Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his January 14, 2004 injury, in accordance with Section 287.140, RSMo.

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

The compensation awarded to the Claimant shall be subject to a lien in the amount of **25%** of all payments hereunder in favor of the following attorney for necessary legal services rendered to the Claimant: Timothy M. Alvarez, including the past temporary total disability compensation and medical bills, other than the sum of \$6,028.00 awarded to Drisko, Fee & Parkins, P.C.

This Award is subject to Missouri Department of Social Services Notice of Lien IV-D Case No.: 10208014, dated June 24, 2004 (Exhibit 7), and Missouri Department of Social Services Notice of Lien IV-D Case No.: 80525900, dated October 21, 2004 (Exhibit 8).

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Darryl Z. Davis

Injury No.: 04-052248

Employer: Deffenbaugh Industries, Inc.

Additional Party: Drisko, Fee & Parkins PC (Medical Fee Provider) (Medical Fee Dispute Number 04-00394)

Insurer: Self through Zurich North American, c/o Sedgwick Claims Management

Hearing Date: January 8, 2007

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PRELIMINARIES

A final hearing was held in this case in St. Joseph, Missouri on January 8, 2007. Employee, Darryl Z. Davis, ("Claimant") appeared in person. Attorney Timothy M. Alvarez appeared on behalf of Claimant. Self-insured Employer, Deffenbaugh Industries, Inc. ("Employer") and its self-insurance administrator, Zurich North American, c/o Sedgwick Claims Management, ("Insurer") appeared by and through their attorney, Steven C. Alberg. Tom Streck, Employer's workers' compensation administrator, appeared on behalf of Employer. Beverly Tebbe and Mary King, employees of Drisko, Fee & Parkins PC ("DFP"), medical fee provider, appeared for DFP. DFP was not represented by counsel. Ruth Ann Davis, Claimant's wife, was also present during the hearing. The Second Injury Fund is not a party in this case.

Counsel for Employer/Insurer requested that he be permitted up to thirty days from the date of the January 8, 2007 hearing (which was February 7, 2007) to offer additional medical records pertaining to treatment Claimant received a few weeks prior to the hearing. Claimant's counsel did not object to the

request, and the request was granted. However, counsel for Employer/Insurer did not offer any additional medical records into evidence during that thirty day period, and the record in this case was closed on February 7, 2007. The Administrative Law Judge disclosed that he had represented the medical fee provider (but not in this case) prior to being appointed an Administrative Law Judge effective January 1, 2006. Counsel for Employer and Insurer advised that they and their clients consented to the Administrative Law Judge handling the hearing in this case. The representatives of DFP present at the hearing also consented to the Administrative Law Judge handling the hearing in this case.

Timothy M. Alvarez requested a 25% attorney's fee from all compensation awarded, other than any amounts awarded relating to the medical fee requests of DFP.

Stipulations

It was stipulated between Claimant and Employer/Insurer that:

1. On or about January 14, 2004, Deffenbaugh Industries, Inc. was an employer operating under the provisions of the Missouri Workers' Compensation law and that their liability under said Law was fully self-insured through Zurich North America, c/o Sedgwick Claims Management.
2. On or about January 14, 2004, Darryl Z. Davis was an employee of Deffenbaugh Industries, Inc. and was working under the provisions of the Missouri Workers Compensation Law.
3. A claim for compensation was filed within the time prescribed by law.
4. No compensation had been paid and no medical aid had been furnished by Employer/Insurer.
5. The charges of DFP contained in Exhibit A were reasonable and necessary.

Issues

It was also stipulated between Claimant and Employer/Insurer that the issues in dispute to be determined in this case were:

1. Whether Claimant sustained an injury by accident or occupational disease arising out of and in the course of his employment for Employer, and whether Claimant's alleged injury was medically causally related to an accident or occupational disease arising out of and in the course of his employment for employer.
2. What is the nature and extent of Claimant's permanent disability, if any, including whether Claimant is permanently and totally disabled as a result of an injury by accident or occupational disease arising out of and in the course of his employment for Employer?
3. Whether Employer had notice of the alleged injury and whether notice was required?
4. What is Claimant's average weekly wage, and what are the compensation rates?
5. What is Employer/Insurer's liability for past temporary total disability from January 15, 2004 through May 24, 2004?
6. What is Employer/Insurer's liability for past medical bills, including the direct pay requests of DFP?
7. What is Employer/Insurer's liability for future medical aid?

Exhibits

Claimant offered the following Exhibits which were admitted in evidence:

- Exhibit A—Drisko, Fee and Parkins, P.C. medical records and bills.
- Exhibit B—North Kansas City Hospital records and bills.
- Exhibit C—Wyandotte Center records and bills.
- Exhibit D—Dr. Brent Koprivica deposition.
- Exhibit E—Michael Dreiling deposition.
- Exhibit F—Dr. David Mouille deposition.
- Exhibit G—Payroll printouts.
- Exhibit H—Medical bill summary.

Employer/Insurer offered the following Exhibits which were admitted in evidence:

- Exhibit 1—Dr. John Ciccarelli deposition.
- Exhibit 2—Dr. Allen Parmet deposition.
- Exhibit 3—Terry Cordray deposition.
- Exhibit 4—Dr. Michael Pronko deposition.
- Exhibit 5—Darryl Davis deposition.
- Exhibit 6—Darryl Davis deposition.
- Exhibit 7—Child support lien.
- Exhibit 8—Child support lien.
- Exhibit 9—Letter from Deffenbaugh.
- Exhibit 10—Letter from Deffenbaugh.

SUMMARY OF THE EVIDENCE

CLAIMANT

Darryl Davis stated that he was born on July 13, 1952 and was fifty-four years old. He and his wife, Roseanne, had been married for twelve years. They had no children. He had children from a prior marriage. He was not employed. He did not graduate from high school or obtain a GED. His last grade completed was ninth grade. He did not have typing or computing skills. He had no licenses except for a commercial driver's license. He said he was not very good at reading and writing and could not read the paper. He had driven a truck for about twenty years. He drove for an Employer, a meat company, and others. He was last employed as a roll-off driver for Employer. He worked there almost five years. His last day of work for Employer was January 14, 2004. His job title was the same during the time he worked there, that being roll-off driver. His route was near the airport. He picked up large dumpsters. He was paid by the load and earned about \$30.00 per load. He worked between twelve and fourteen hours per day, six to seven days a week. His weekly income was approximately \$1,200.00, and he earned about \$50,000 per year. He was shown Claimant's Exhibit G and noted that he had earnings of \$1,662.00 for the week of August 16, 2003 and \$880.00 and for the week of August 23, 2003. His wages decreased after that.

Claimant stated that his side, legs, back and hips started hurting in mid-August 2003. He had a burning sensation in his side. He did not attribute that to a work accident at that time. He had not been in a wreck. From August to January 2004, his symptoms went to his back and hips. His paychecks decreased because pain limited what he could do. He worked fewer hours because his pain was so bad. He cut down on days worked and hours worked and began taking days off. His pain was not so bad when he rested.

Claimant operated a semi-truck. He would go to a dumpster, load the dumpster, then go to Employer, and then return to the customer. He had to hook up at the beginning of the day. He got out of his truck and hooked up a D-ring to a cable. He manually hooked the cable to a winch, and hooked the winch to the truck. He then got back in the truck and loaded the box. He also picked up debris around the box. He had to crawl under the truck and hook chains to the box. Chains were permanently hooked under the truck. He then got back into the truck. He got into the truck twice and out of the truck twice when loading. He then went to the landfill in Shawnee. He had to get out of the truck at the gate to advise where the box had been picked up. The box was weighed. He then went to the dump. He got out and opened the back door of

the box in the back of the dumpster. He then got back into the truck and raised the rails and dumped his load. He then got out of the truck and closed the doors on the back of the dumpster. He got back into the truck, and then got out and unhooked the chains. He got out to disconnect the D-ring. He got in and out of the truck fourteen times on one trip. He made five or six trips per day and got into and out of his truck between seventy and eighty times per day. He had to climb three steps to get in and out of the truck. He used a handle bar on the side of the truck and twisted with his low back and hips to get in. In an average week, he got in and out of the truck over five hundred times.

Claimant also bent over and picked up debris around the dumpsters, including paper, compressors, and motors. He either threw the debris over the top and into the open top or put it in the back of the truck. He had to pick up debris on most of his loads. He spent between five and thirty minutes picking up debris on each trip. He also attached a tarp on the box. The tarps weighed about twenty-five pounds were located on the side of the truck. He took them off the side and threw them onto the top of the dumpster. He attached the tarps with bungee straps to hooks. He climbed to the top of the dumpster on a ladder. When the dumpster was on the ground, it was between two feet and eight feet high. The tarp went on before the dumpster was loaded on the truck. He took the tarp off at the dump site.

It took Claimant about thirty to forty-five minutes to drive from the airport to the dump. He bounced up and down in the truck and felt the bumps in the road. The truck had power steering and manual transmission. He drove about six to nine hours a day in a twelve hour day. He said that he did not ever report his injury to Employer prior to leaving work there because he did not know that his injury was from work. He said the burning sensation did not come from a single incident or accident. He had surgery and was not able to go back to work. He was fired for not reporting back to work. He went to an employment attorney who referred him to his workers' compensation attorney.

Claimant first went to Dr. Marcesi, his family doctor. She gave him tests and he then went to the Headache and Pain Center. He got shots in his back there that gave relief for a short time. He was still working then. He had pain in his sides, hips, legs, and back. He was then referred to Dr. Drisko who gave him surgery in 2004. His last day at work was January 14, 2004, and was before surgery. He never went back to work for Employer after that. He was released to return to work on May 24, 2004 by Dr. Drisko. He was off work from January 15, 2004 to May 24, 2004. He was fired before May 24, 2004.

Claimant said he developed depression because he could not work. He was the primary wage earner in the family before his surgery. He was treated for depression at Providence St. Mary's Medical Center for one week. He was prescribed pills and continued to have depression. He then went to Wyandotte Center, a mental health place, and still receives treatment there. He sees a psychiatrist and takes pills. He was getting better with his depression, but was still depressed. He told the Wyandotte Center that he was having problems because he was not able to work and because of other problems at home. He said the main reason he was there was because of his job. He lost weight because of his depression. He did

not attribute his weight loss to his back injury. He did not know when he started losing weight. He had had diabetes for ten years. He was diagnosed with diabetes in a Department of Transportation physical and put on pills. He did not take his diabetes medication regularly. The diabetes was not under control. He said that before August 2003, he did not have symptoms from diabetes. After leaving work, his diabetes went out of control because he could not pay for it. He was currently getting medication for his diabetes from a free clinic at the KU Medical Center. He said he thought he could work if he did not have back and leg pain.

His current symptoms in his back and legs were about the same. He had pain in his lower back that was always there. His pain was between a one and a one and one-half out of ten when it was as good as it got. It was a nine at its worst. The pain in his back was centered near his buttocks. On average, his pain was between one and a one and one-half, and nine, out of ten. His right leg bothered him more than his left. He had pain in his right leg that was always there. He had numbness in his right leg every once in a while. The pain was between one and a one and one-half, and nine, out of ten. The pain in his left leg was about the same as the pain in his right, but he had it less often. His left leg bothered him once a day or so. He had no numbness in his left foot. The only medication he took for pain was daily aspirin. He had a prescription for pain medication for a foot injury that was unrelated to employment. He took three to four aspirin, five to six times per day.

Claimant stated that since he was released by Dr. Drisko, he had stayed about the same. He has had to lie down about seventy-five percent of the day. He has been able to sit less for than one hour before it hurts a lot. He has been able to stand for a while, but his knees start to hurt. If he alternates sitting and standing, he cannot get through a day without lying down. Lying down helps his pain. He can sleep through the night, but not all night. He gets up and moves around a little. He worked after the ninth grade, and worked all the time until January 2004 except for some previous unemployment. His longest period of unemployment was three to four months.

His medical treatment was paid by insurance, but he had to pay the co-pays. He had not been able to make child support payments since May 2004. He saw Dr. Pronko and took an MMPI test at home. There were five hundred questions. It took him about one week to complete it, and his wife helped him read the test. He did not understand all the words on the test.

On cross-examination, Claimant stated that he did not have any particular incident to which he attributed his injury. It just came on over time. He first noticed it in August 2003. He did not have to work seven days per week. He started taking some days off for rest. He spent the vast majority of his time driving. It took between five and ten minutes to hook up the dumpster. Most of the debris that he picked up was trash and paper that blew out of the dumpster. Ten percent weighed more than twenty-five pounds. Some tarps were automatic. It took thirty to forty-five minutes each way to and from the dumpsite after he picked up a load. Most dumpsters had one back door, not two. They raised like a dump truck, and the dumpster stayed on the truck while it was dumping, except for self-contained units. He never reported his

injury to Employer as a work injury. His diabetes was out of control, but it never bothered him. He had had a heart attack. When stents were being put in, debris went to his toe. He had a toe taken off at Providence about two weeks before the January 8, 2007 hearing.

Claimant had his back surgery about two weeks after he left Employer. He was not aware that diabetes could cause depression. Six children had lived with him and his wife ever since they were born until one month before the hearing. Their mother, who had some problem with drugs, had lived with them too. His son had had some court problems relating to his wife charging him with rape. His son was put on probation and he spent a little time in jail a year ago or less. That worried him. He did not recall that he had been let go from work because he never brought any medical information into work after his FMLA leave ran out. The job description in Exhibit 4 of Dr. Ciccarelli's deposition was accurate for the most part.

Claimant stated on redirect that not being able to work made him feel useless and worthless. He went to Providence for depression before his son was charged with the crime. The six children living with him had never been a problem. He had never been treated for depression before losing his job. The doors on the dumpster were hard to open and had to be pulled open and pushed closed. That was done four to five times per day. He sometimes got help from a bulldozer to open and close the doors. He took between two and four five-minute breaks per day, but he did not take a lunch break. Later, when he was working fewer hours, he took breaks in the truck and at the landfill. He stretched to relieve pain and took ten to twenty minute breaks. At the end of his work for Employer, he took breaks with every load.

On re-cross examination, Claimant admitted that when he was treated at the Wyandotte County Center on September 26, 2005, he was stressed due to living arrangements. He felt stressed since his son was facing rape charges and might face life in prison. He would like to improve his relationship with his family. He went to the Wyandotte Center that day for those matters, not work. Claimant said the main stressing factor was his not being able to work.

Claimant was noted to have stood up a few times for a few minutes each time during the course of the hearing.

RUTH ANN DAVIS

Ruth Ann Davis testified that she and Claimant had been married for ten years. She said that Claimant's big toe problems were due to stents and a heart attack on October 2, 2006. She said he was let go from work because he could not come back to work. She did not ask Employer for Claimant to be allowed to come back to work. Claimant had diabetes for eight years. He was taking medication, but the diabetes was not under control. Claimant's diabetes was always out of control. He did not do well taking his pills. He did not complain of any symptoms relating to his diabetes. They could not afford medication for his diabetes.

She began to observe emotional changes in Claimant in September and October. She noticed that he really did not care. Before being hurt at work, he was a workaholic. He worked six or seven days a week, ten to twelve hours per day. Later, he said he did not want to go to work because it hurt. He stopped doing housework. He started losing weight and lost his appetite in October or November in the year his back trouble began. He went to the hospital at St. Mary's in April 2004. He felt everyone would be better off if he were not around. She was worried about suicide in April 2004, and she called the family doctor who told her that Claimant should go to St. Mary's Hospital. He was treating for his back then. His son had not been charged at that time. In August 2003, the side of his stomach started

bothering him. His right leg bothered him, and it started working around to the back and hip. Claimant gradually got worse while working.

Now Claimant lies on the couch and watches TV during the day. Claimant is not a good reader. She read questions from the psychological test to him. The test took five days to do. Claimant did not always understand the questions.

TOM STRECK

Tom Streck testified he had worked for Employer for seventeen years. He was Employer's workers compensation administrator. He knew Claimant, but did not know him before January 2004. Employees who are injured at work are supposed to report injuries to their supervisors who report the injuries to him. No injury was ever reported to Mr. Streck regarding Claimant. The first he heard of a work injury regarding Claimant was from a letter from Claimant's attorney in May 2004. Claimant's supervisor told him that Claimant was out on family medical leave, not a work injury. Claimant never reported a work injury to a supervisor. Employer's policy regarding family medical leave was that after twelve weeks, a letter was sent stating that an employee would be laid off. Claimant was a roll-off driver. Drivers were not supposed to pick up large amounts of debris. Drivers were paid by the load.

DEPOSITIONS OF CLAIMANT

Depositions of Claimant taken by Employer's counsel on August 13, 2004 (Exhibit 5) and on March 20, 2006 (Exhibit 6) were admitted in evidence. Exhibit 5 contained some handwritten notations. Those notations were on Deposition Exhibit 5 when it was offered in evidence at the hearing in this case. The notations were not added by the Administrative Law Judge. Claimant testified on August 13, 2004 in response to the question, "What incident are you claiming caused this worker's compensation case?", "I guess opening doors on them dumpsters." He was then asked, "And what do you mean by that?" Claimant answered, "You're under a lot of stress opening the doors on those dumpsters. Some of them are harder to open than the others." He also stated that he was paid by the load, and was paid \$30.00 per load and did about seven in a day. He also testified that he twisted his back in 1991 or 1992. Claimant testified on March 20, 2006 that he was on medication for depression, and that he attributed his depression to his back and not being able to work. He said he did not have depression before this accident happened. He was seeing a doctor at Wyandotte Center for depression. He started going there about six months before the deposition. He said the reason he started going there was because he cannot work.

MEDICAL TREATMENT RECORDS

The treatment and billing records of Drisko, Fee & Parkins, P.C. were admitted as Exhibit A. Counsel for Claimant and Employer stipulated that the medical bills of Drisko, Fee & Parkins were reasonable and necessary. The treatment records noted that Claimant first saw Dr. Robert Drisko on January 15, 2004 with the chief complaint of pain in his back with radiation to both of his legs. He had had difficulty since August 2003. The records included an MRI dated October 22, 2003. The impression was moderate lumbar spondylosis with posterior disc bulging at L3-4 and L4-5 causing bilateral foraminal narrowing. There was no evidence of a discrete disc herniation. Dr. Drisko's January 15, 2004 office notes stated that activities that put Claimant at extension bothered him a great deal. He could stay on his feet only about ten minutes at a time. The office note stated, "Working really bothers him." He had had epidurals blocks, but his pain recurred. He was noted to be miserable. It was affecting his mood. He could not sleep at night. Dr. Drisko's impression was symptomatic spinal stenosis. He said he would like to get a CT scan.

Dr. Drisko saw Claimant again on January 22, 2004 and reviewed the CT scan. The CT scan of the lumbar spine dated January 20, 2004 noted an impression of mild spondylosis at L3-4 and L4-5 without significant disc herniation. He had significant collateral recess stenosis at 3-4, 4-5, and 5-1. He was miserable and could not stand long enough to look at his x-rays. He was pretty much in bed all the time and could not even sit on the couch. Claimant wished to proceed with surgery. Claimant was admitted to North Kansas City Hospital on February 4, 2004. The operative report dated February 4, 2004 of Dr. Drisko at North Kansas City Hospital noted a preoperative diagnosis of spinal stenosis. The operative procedure was spinal decompression laminotomies with bilateral foraminotomies at L 3/4, L 4/5 and L 5/S 1. Claimant was discharged from the hospital on February 7, 2004.

Dr. Drisko's February 18, 2004 office note stated that Claimant was doing great. The back pain,

radicular pain, and bladder were all much improved. He was very eager to get back to work, but Dr. Drisko thought that was way too early. Dr. Drisko saw Claimant on March 23, 2004. His back pain, radicular pain, and bladder function were all much improved, but Claimant complained of significant pain in his hips. He said that was different from the pain he had preoperatively. The hip was his main problem, and he also complained of pain in his coccyx area. He was cachectic. Dr. Drisko thought Claimant had bilateral trochanteric bursitis, probably from clamping him on the spine table. Claimant returned to Dr. Drisko on April 8, 2004 with the chief complaint of pain in his right knee. There was no history of any trauma. The impression was inflamed infropatellar fat pad, right knee. The right knee was injected.

Claimant returned to Dr. Drisko on May 19, 2004 and was feeling much better. He was fully ambulatory and wanted to go back to work. Dr. Drisko thought that was reasonable. The knee was not bothering him any longer. He was noted to have gotten depressed but was on some medication and was definitely doing much better. The "Plan" portion of the Office Note stated: "Return to work on 5/24. We will put him on a 15-pound lifting restriction for the first 6 weeks. I will see him back at that time. If everything is okay then we will consider returning him to full duty." The records do not contain any reference to Claimant seeing Dr. Drisko after May 19, 2004. Dr. Drisko did not return Claimant to full duty. Dr. Drisko was not deposed. Dr. Drisko's work status report dated May 19, 2004 noted Claimant was doing much better. He was returned to modified (light) duty May 24, 2004 with carry restrictions of fifteen pounds fifty feet, and push/pull restrictions of fifteen pounds fifty feet.

Exhibit A included an itemization of medical bills of Drisko, Fee & Parkins, P.C., 2790 Clay Edwards Drive, Suite 600, North Kansas City, Missouri 64116, relating to Claimant from January 15, 2004 to May 19, 2004 in the total amount of \$6,223.00. The medical fee requests of DFP totaled \$6,028.00, and did not include charges of \$102.00 for an office visit on April 8, 2004 and \$93.00 for an x-ray of Claimant's knee on April 8, 2004.

The North Kansas City Hospital medical records and billing records were admitted as Exhibit B. The hospital's medical records related to Claimant's admission from February 4, 2004 to February 7, 2004 for his back surgery. The billing records for Claimant's hospitalization contained a record of total charges of \$11,182.02.

Medical records of Wyandotte Center were admitted as Exhibit C. Those records contained notes of treatment for depression between August 15, 2005 and April 17, 2006. A record dated September 19, 2005 noted that Claimant reported he had had problems with depression for approximately the last two years. He stated that it was triggered shortly after an accident at work where he ended up having to have surgery on his back and had been unable to work since that time. He reported that he had been a truck driver for many years and that the stress of the doors had hurt his back. He reported that not being able to work for the last two years made him feel useless and worthless. He reported that he had pain in his back and legs. A record dated October 28, 2005 noted that Claimant was having a lot of pain in his legs and back. He woke up many times because of pain. He was sleeping at night a total of five hours. A record dated November 7, 2005 noted that Claimant revealed his son was going to court that day and faced twenty five years to life in prison as possible punishment for charges. Claimant reported experiencing increase in knee and back pain which Claimant agreed may have been partially due to recent anxiety experienced due to his son's court appearance. The progress note dated April 17, 2006 noted that Claimant reported he was doing very little but watching TV every day. The medical records included in Exhibit C noted a balance due of \$145.08.

Claimant's Medical Bill Summary, Exhibit H, listed three bills: 1. North Kansas City Hospital--\$11,182.02; 2. Drisko, Fee & Parkins--\$6,223.00; and 3. Wyandotte Center--\$145.08.

MEDICAL EXPERTS

DR. P. BRENT KOPRIVICA

Dr. Brent Koprivica evaluated Claimant on March 7, 2005. His deposition taken on May 9, 2006 was admitted as Exhibit D. His March 7, 2005 medical report addressed to Claimant's attorney was identified as Deposition Exhibit 2. Dr. Koprivica is board certified in occupational medicine and emergency medicine. Dr. Koprivica reviewed records of Dr. Markese, Dr. Mahmoud, and Dr. Drisko. Later, he received and reviewed a report from Dr. Parmet dated April 20, 2006, a vocational report of Mr. Dreiling dated April 27, 2005, and a report of Dr. Ciccarelli from June 2005. He obtained

Claimant's educational and vocational history and noted that included Claimant had completed the tenth grade of formal education, had not obtained a GED, and had worked as a heavy equipment operator. He noted that Claimant worked for Employer from July 1999 until January 30, 2004 as a roll-off truck driver. In that employment he performed significant pushing and pulling types of activities in opening doors. He also drove a truck and climbed in and out of the truck. He noted Claimant was released to return to work by Dr. Drisko on May 24, 2004 with restrictions of fifteen pound maximum on lifting or carrying. He was terminated from Employer at that point and never returned to work.

Dr. Koprivica noted that Claimant had a history of diabetes mellitus, and was on oral hypoglycemics prior to working at Employer. He began having difficulties in May 2003. He had some back, right hip and right upper quadrant abdominal pain. He was first seen by Dr. Markese who noted right hip pain, abdominal pain, and back pain on October 20, 2003. MRI scan of the lumbar spine performed on October 22, 2003 was noted to have revealed moderate lumbar spondylolysis with foraminal narrowing. Claimant was referred to Drisko. A CT scan of the lumbar spine revealed stenosis at L3-L4, L4-L5, and L5-S1. He was begun on insulin. Dr. Drisko performed spinal decompressive laminotomies with bilateral foraminotomies at L3-L4, L4-L5, and L5-S1 on February 4, 2004. Claimant was returned to light activities by Dr. Drisko on May 19, 2004.

Dr. Koprivica did not find that Claimant's diabetes constituted a hindrance or obstacle to employment or reemployment. He stated that diabetics may have profound disability and may have no disability. Claimant's diabetes was not something that had reached that level of significance prior to his last day of employment, so he did not believe it was disabling. He would not assign any permanent partial disability for diabetes that was pre-existing his last day of work.

Dr. Koprivica noted that subjectively, Claimant had ongoing low back pain of significance. Claimant stated that he "can't hardly bend over." He was limited in his carrying or lifting capabilities to less than twenty pounds. Subjectively, his sitting tolerance was less than thirty minutes, his standing tolerance was less than twenty minutes, and his walking tolerance was less than twenty minutes. He had constant pain in his right leg, particularly from the right knee down to the ankle level. Claimant denied a history of prior surgeries or hospitalizations or work related injuries with permanent partial impairment or permanent partial disability. Dr. Koprivica's review of systems was positive for depression, hypercholesterolemia, and diabetes.

Dr. Koprivica performed a physical examination and noted that Claimant was five feet eight and one-half inches, one hundred seven and one-half pounds, and fifty-two years old. He said Claimant fulfilled the validity criterion on functional motion testing of the lumbar spine. Waddell's tests were appropriate in all five categories for symptom magnification. Claimant demonstrated loss of gross lumbar flexion and gross lumbar extension. He complained of bilateral knee pain and low back pain during the examination. He was able to heel and toe ambulate with difficulty, and was extremely weak with squatting. Claimant was not demonstrating psychological overlay or exaggerated pain behaviors. He had a healed surgical scar and limited lumbar motion of a sixty percent deficit in lumbar extension. That was considered to be in the severe impairment range. He felt Claimant had recovered neurologically from the surgery. He did not find any specific deficit in the lower extremities. Claimant had spinal stenosis. People with stenosis are limited functionally by the pain they have in their back.

Dr. Koprivica concluded that Claimant's work activities with Employer, which involved climbing in and out of the truck, as well as the forceful activities opening the doors with forceful pushing and pulling, represented activities that were felt to be a substantial factor resulting in permanent aggravation, acceleration, and intensification of the degenerative process resulting in the development of symptomatic spinal stenosis. He stated that Claimant did have an underlying lumbar spondylosis that was ongoing. The work activities were noted to be a substantial factor in the development of disability necessitating the surgical intervention. He said Claimant was at maximum medical improvement. He noted Claimant historically had developed problems with depression. It was his opinion that there was contribution to the disability he had developed from his workplace activities, and that the surgery necessitated by the cumulative injury through January 30, 2004 at Employer, as well as his loss of employment. He would expect Claimant to have ongoing treatment needs from a chronic pain management standpoint and psychological sequela standpoint, and should be provided appropriate monitoring and appropriate medications as dictated by his future clinical course.

He would restrict Claimant to only occasional lifting or carrying activities, and Claimant should limit those activities to twenty pounds or less. Claimant should avoid frequent or constant bending at the waist, pushing, pulling, or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should rarely squat, crawl, kneel, or climb. He should also be allowed postural flexibility. As a general guideline, captive sitting, standing or walking intervals of one hour would be recommended.

Dr. Koprivica recommended formal vocational evaluation. He stated that hypothetically, if the

vocational expert believed Claimant was permanently and totally disabled, the permanent and total disability arose based on consideration of the development of disability from symptomatic stenosis of which his work activities were a substantial contributor. Under that hypothetical, Claimant was permanently and totally disabled based on consideration of that condition in isolation in and of itself. If Claimant was still employable as determined by the vocational expert, he considered a thirty-five percent permanent partial disability to the body as a whole to be applicable.

Dr. Koprivica described spinal stenosis to mean narrowing of the spine where nerve root structures are in the spinal canal. There are factors that are involved in this degenerative process in the spine that leads to a narrowing that can occur over time, including activities of daily living, one's overall build, diet, and smoking. There may be some narrowing that does not cause symptoms. He believed that the spinal stenosis predated Claimant's on-the-job injury. He believed Claimant had degeneration in his spine, and that there was some narrowing that would have been present before he had his workplace exposure. He did not see any evidence that the spinal stenosis was symptomatic before Claimant's on-the-job injuries. He believed Claimant's work duties were a substantial factor in resulting in the aggravation and acceleration and intensification of the spinal stenosis. The term aggravation was meant to imply that there was a permanent structural change that had occurred because of the exposure.

He found activities in Claimant's work that would be competent to produce the structural changes to which he referred. Claimant had to climb in and out of the truck and hook up big dumpsters to the truck using a hook and chain. The pushing and pulling, hooking, and climbing in and out of the truck stressed the spine. Claimant was exposed to a whole body vibration when he operated the truck. Jarring in and of itself causes injury to spines. He had seen individuals have frank herniations merely from hitting a pothole. Reaching and twisting, and lifting of the tarp biomechanically loaded the spine significantly that would cause aggravation. Twisting and lifting and getting things off the ground picking up debris contributed to that. He believed all of those were substantial factors leading to aggravation in the low back that produced the symptoms, and Claimant made specific association between work and the progression of his back pain. He considered those risks to be unique to Claimant's employment. They were substantial in terms of their ability to cause aggravation to the low back, and they were very significant compared to his risks away from work. He thought work was of greater significance than any other activities or factors considered in isolation.

Dr. Koprivica stated that he was not provided any history that Claimant's pre-existing depression had significant vocational impact, so he did not consider it to be disabling with what he knew. Dr. Koprivica described a laminectomy as removing some of the lamina, some of the bone, trying to make a central area bigger where the spinal cord and the nerves exit off the spinal cord are located. A foraminotomy is making the opening bigger by removing bone where the spinal nerve roots exit out of the spinal canal from the side. It was unusual for the laminectomies and foraminotomies to be at three levels. Claimant was in a severe situation as opposed to one level.

Dr. Koprivica stated that in his opinion, it was not realistic to believe that any ordinary employer would employ Claimant. He based that on the vocational history in terms of skills that were required in his employment, Claimant's limited formal education, and being basically functionally illiterate. Claimant did not possess skills that were transferable that would fit the physical restrictions that he had outlined that were necessitated by his lumbar condition following the multi-level decompression that was necessitated by the aggravation from his workplace activities. He noted that the postural limitations were so severe in terms of sitting, standing, and walking limitations that Claimant could not do sustained activities on a forty hour per week basis within those postural limitations alone. He stated he had an extensive occupational practice between 1981 until 1992, and worked in returning people to work. He also stated that there was no pre-existing disability as a result of the spinal stenosis, the depression, or the diabetes. He noted that Claimant was engaged in those work activities from July 1999 until January 30, 2004, and that was more than sufficient to produce permanent aggravation. He stated that all his opinions had been rendered within a reasonable degree of medical certainty. Deposition Exhibit 1, his CV, Deposition Exhibit 2, his March 7, 2005 report, and Deposition Exhibit 3, a back function questionnaire which Claimant completed on March 7, 2005 were offered without objection, and are admitted.

On cross-examination, Dr. Koprivica noted that he believed Claimant's onset of difficulties began around 2003 and progressed until his last day of work in January 2004. The biggest thing he found from an injury standpoint was aggravation to degenerative disease. He thought Claimant had degenerative disease likely before he began at Employer. He stated that Claimant's work activities substantially aggravated that degenerative disease and it became symptomatic because of that aggravation. Lumbar degenerative disease can be caused by things other than work activities. He stated the entire population has degeneration of the spine. It depends on genetics. Underlying body weight and conditioning will also contribute to it. Carrying extra body weight puts stresses on the spine. The nature of one's recreational activities is a factor. What one does on a daily basis is a factor such as riding four wheelers

at home or doing construction activities at home.

Dr. Koprivica said he did not know of a direct correlation between the diabetic condition and the degeneration of the spine. He said if you have advanced neuropathy, people with neuropathy have an abnormal gait because they are pounding their foot down. They cannot feel the ground. They get what is called Charcot changes in the joints. The joints get destroyed and their feet will collapse. There is going to be a contribution to the back because of the abnormalities of not having normal sensation. If you eliminate the portion of diabetics that have neuropathy, he was not aware that there was a direct relationship between more degeneration in a diabetic than a non-diabetic. He said he did not clinically find evidence of neuropathy when he saw Claimant. Neuropathy is a progressive problem in diabetics. Neuropathy means disease of the nerve. Nerves become progressively damaged in people with abnormal blood sugar levels. He saw evidence in the record that Claimant was in poor control at times even before he left Employer. Claimant's hemoglobin A1C level was a little more than eleven percent. People who are on oral hypoglycemics, if they have good control, are going to be close to normal which is six. Claimant had good control when he had surgery and was hospitalized. He could not see evidence of systematic complication that was disabling prior to Claimant leaving Employer. But his hemoglobin A1C was out of control.

The higher the number, the worse the control. Claimant was 300 to 400 mg, and a normal blood sugar is 100. Leaving that uncontrolled at that level over a prolonged period of time leads to the person developing all the systemic complications. By complications, he meant retinopathy, neuropathy, nephropathy, and vascular disease. That can happen within eighteen months. Dr. Koprivica was not provided any record of a specific injury, like one trauma or one incident.

Claimant was noted to have seen Dr. Israel on October 29, 2003, and was noted to have had right-sided abdominal pain in the right flank radiating toward his back, along with a twenty to thirty pound weight loss in the previous six months, and a lack of energy. Dr. Koprivica did not know what to attribute that to, but he did not attribute it to Claimant's back. When asked why Claimant had a twenty to thirty pound weight loss, and whether that was something diabetes could produce, Dr. Koprivica said it was hard to know. He noted that Dr. Parmet had suggested possible pancreatitis associated with a diabetic condition. Dr. Koprivica said that you worry about malignancy, or cancer, too. He said Claimant was clearly diabetic. Claimant told him that before 1999, he had been on medicine. He thought Claimant was totally disabled from his symptomatic lumbar spinal stenosis following his decompressive surgery. He did not attribute any of that to cachexia, or profound wasting, prior to his leaving Employer. Dr. Koprivica noted that Claimant looked much older than his stated age. Degenerative lumbar disease is progressive. Diabetes is progressive. Its rate of progression and impact on Claimant's ability to function will be dependent upon his control. He noted from reading Dr. Parmet's report that Claimant was not taking care of himself and that was going to shorten his life. He did not apportion any of the functional disability impairment of thirty-five percent to pre-existing because it was not hindering or limiting Claimant's ability to do activity. He developed the symptoms from 2003 through January 2004 as work progressed.

Dr. Koprivica said there was no evidence that prior to January 30, 2004 Claimant's diabetic condition was disabling. There was no evidence that his depression was disabling. There was no evidence that his weight prior to his leaving was disabling. There was no evidence that before he became symptomatic as he was doing his work activities in terms of the low back, where he was sustaining aggravation, that it was symptomatic or disabling. He stated that looking at Claimant's back after his decompression, that those restrictions were sufficient in his situation to result in permanent total disability. He placed Claimant on a twenty pound occasional lifting or carrying restriction, and restrictions to avoid frequent or constant bending at the waist, pushing, pulling, or twisting, avoid sustained or awkward postures of the low back, rarely squat, crawl, kneel, or climb, and he needed to be able to change from sitting, standing, or walking at least hourly. He stated that Claimant could not do what he had done in the past. He felt that Claimant's situation from his back was a substantial reason why he was depressed. He was not saying it was the only factor, and would defer to a psychiatrist to try to sort that out.

DR. ALLEN PARMET

Dr. Allen Parmet was deposed by Employer's attorney on July 19, 2006. His deposition was admitted as Exhibit 2. All objections contained in Exhibit 2 are overruled. Dr. Parmet is a licensed physician and is board certified in occupational medicine and aerospace medicine. He is a full staff member at St. Lukes Hospital System and a consultant at the Research Hospital System. He evaluated Claimant at the request of Employer's attorney on April 20, 2006. He interviewed Claimant, performed an examination, and reviewed records. Claimant smoked about five cigars daily since age sixteen. Claimant reported that he hurt his back while working at Employer. Claimant reported that his back hurt gradually over a period of time. There was no specific injury. Claimant reported he was a roll-on, roll-

off truck driver. Claimant drove a large vehicle used for picking up dumpsters. It was usually a flatbed with a large hoist on the back, and it would come up and by attachment of a cable to a winch, bring the trash container onto the flat bed and carry it to a dumpsite where it would be emptied and then replaced at the original workplace. Claimant described operating the truck and attaching the winch and cable to the trash containers. The heaviest labor was tarping where you bring a tarp over the container so the contents will not blow out while driving. Claimant reported pain that started as a burning pain in his right flank and side, and then went to his hips and back. He thought it began in perhaps 2004.

Dr. Parmet did a review of systems and noted that Claimant's eyes were often very blurry. He had been depressed over the last year and reported losing sixty pounds which he attributed to the depression. Claimant reported he had diabetes. Claimant recalled the diabetes developed or had been diagnosed in 2001. Dr. Parmet suggested Claimant's blurry eyes were probably due to his uncontrolled diabetes. He said he was not able to assess Claimant's depression terribly well because the medical documentation behind it was for the most part illegible. He thought Claimant was a rather poor historian. Claimant was mildly depressed in the office, but Dr. Parmet said he could not go back to the cause. He said most depressions are hard to assign a specific cause to anyway. He said within the general population, about twenty-five percent of the populace has depression at some time or another. Dr. Parmet reviewed medical records and summarized them in pages two through seven of his report, deposition Exhibit 2. Dr. Parmet noted that Claimant's father had died at age sixty-seven of diabetes. Claimant reported taking Glucotrol and Concerta which are oral medications used for diabetes.

Dr. Parmet performed a medical examination and noted Claimant was thin as to be cachectic, a term that means that somebody is wasting away. Claimant was sixty-nine inches tall and one hundred ten pounds. The vascular exam was abnormal. The pulses in the feet were either diminished or absent. His capillary refill was slow, representing atherosclerotic vascular disease, a hardening of the arteries. Uncontrolled diabetes can progress fairly rapidly, but may still take many years. Claimant's skin showed loss of hair in the lower extremities that would go along with atherosclerotic vascular disease. Claimant was very thin and was abnormally weak for an adult male. That was probably cachexia from diabetes, probably on the basis of renal disease, though it may have been neurologic as well. All of Claimant's strength testing was judged diminished. When asked if that was due to the alleged injury, or something from diabetes, Dr. Parmet stated that was probably cachexia from diabetes, probably on the basis of renal disease, although it may have been urologic as well. He did lab tests that showed Claimant had large amounts of sugar and some protein in his urine. Protein leaking out of the kidneys indicates there is severe damage to the kidneys. Dr. Parmet stated that diabetes is basically a disorder of the ability to regulate the carbohydrates in your bloodstream.

Dr. Parmet said the spinal exam was abnormal. There was a healed surgical scar with some restriction in motion in the back. He did a urine specimen, and his blood sugar was 357. That was severely abnormal to the point that it was dangerous. Normal is between 60 and 115. His hemoglobin A1C was 13.9%. Normal is under six.

Dr. Parmet's diagnosis was that Claimant had degenerative disc disease in the lumbar spine that had surgically been operated upon. He had diabetes mellitus Type II which was out of control. He had a history of abdominal pain possibly pancreatitis, and had wasting that could be pancreatic based or kidney based, and he had been diagnosed with major depression. When asked whether Claimant's back condition and his degenerative back condition was caused or contributed to by his work, Dr. Parmet stated that it was not. When asked whether Claimant's work of driving a truck, tarping, pulling the dumpster up and down with a hoist onto the rig, would have substantially or materially aggravated his low back condition, he said unless he had a specific injury, he would not agree with that. He felt that Claimant's degenerative spondylosis was not caused by his work because that is a lifelong degenerative condition. It is not something that is unusual at all as people get older in their fifties. It is very very common to see that with spinal stenosis. He said it is basically the effect of us being upright standing people. That is what backs begin to do over time. It is accelerated clearly by smoking. The effect of exercise and activity, however, had not been demonstrated to cause or accelerate this. He noted there were complaints of back pain from people who operate in high vibration environments, including over the road truckers. He stated they have back pain, but did not have degenerative arthritis of the spine. Degenerative arthritis of the spine is accelerated by smoking, bad genetics, diabetes, lack of calcium in the diet, and lack of weight bearing exercise.

Claimant could not pass a driver's physical and could not do even light labor. He was cachectic from the diabetes. At best, he might be able to do a sedentary type job, but he was not even sure he could do that. Claimant was a very sick man and was at risk of his life if he does not get his diabetes under control. It was the doctor's suggestion that Claimant could not go back to work because of his overall condition, not because of this alleged occupational injury. If it were his back alone and everything else was perfect, he could probably go back to light, possibly even medium level labor. He stated all of his opinions had been within a reasonable degree of medical certainty. He identified his

report, Deposition Exhibit 2, and corrected a typographical error. Dr. Siccarelli's (sic) examination was in 2005, not 2003. Deposition Exhibit 2 was offered at the deposition. Claimant's counsel had no objections, and Deposition Exhibit 2 is admitted.

On cross examination, Dr. Parmet stated he examined Claimant on April 20, 2006. He was asked to assume that Claimant's last day of work was January 15, 2004. He acknowledged that Claimant's diabetes would have progressed between that date and April 20, 2006, though Claimant's diabetes was uncontrolled on January 15, 2004. He acknowledged that Claimant was working up until January 15, 2004, but stated Claimant's diabetes should have prevented him from working. It was an unsafe condition. He noted that Dr. Drisko took Claimant off work on January 15, 2004 because of Claimant's spinal stenosis and the fact that he may shortly need surgery. Claimant's glucose levels were well-controlled on a sliding scale when Claimant was in the hospital as a consequence of his back surgery. His glucose levels were being controlled when he was in the hospital.

Spinal stenosis is a narrowing of the spinal canal. It can be from disc herniation, congenital closure, and scarring. The most common cause is degenerative disc disease with the spondylosis of facet hypertrophy. In Claimant's case, narrowing of the canal was from a combination of all of these effects with the disk bulging and the spurs forming over that. Dr. Drisko went in and took out part of the bony structure and enlarged the foramina which are the holes on the side of the spinal canal where the nerves exit. He removed bone to permit the nerves to exit. He did that on three levels, L3-4, L4-5, and L5-S1. Spinal stenosis is considered to be a degenerative condition. It degenerates over time. Obesity is a factor in developing arthritis, but the relative risk increase in the spine is much lower than in the lower extremities. Smoking is a greater threat to spinal stenosis than being obese. Most of the studies do not show any detriment that physical levels of activity aggravate or accelerate spinal stenosis, but a few studies do. The bulk of them show it is actually beneficial. There are studies that show that spinal stenosis progresses slower in people who do heavy physical labor. They have less arthritis and fewer problems than people who are sedentary. When asked if a movement is producing pain in a patient with spinal stenosis, is that pain and indication that the activity is aggravating, accelerating or intensifying the stenosis, Dr. Parmet said that he used the analogy of walking on a broken leg. It is not going to make it worse, but it is sure going to make it hurt. It identifies the problem, it is not the cause. He stated that if Claimant complained of work activities as worsening his symptoms, that would not be worsening his spinal stenosis.

When Dr. Parmet was asked about a portion of an office note of Dr. Drisko dated January 15, 2004 that read, "He can only stand on his feet about 10 minutes at a time," and whether he attributed that to Claimant's diabetes or to his back trouble, Dr. Parmet stated that Dr. Drisko was describing claudication syndromes, and that is a vascular problem and would be diabetic in nature. When asked about the statement in Dr. Drisko's office note that read, "Working really bothers him," Dr. Parmet stated that working was just a symptom of the problem, and was not aggravating, accelerating or intensifying his spinal stenosis. When asked if it was activities over time, or just the time by itself that aggravated his spinal stenosis, Dr. Parmet stated it was just the time. He stated that the loading of the spine, the exercise, the heavy work would slow the development of the arthritis, and if the arthritis and degenerative changes were causing stenosis, that would decrease the development or slow the development and progression of the spinal stenosis. Dr. Parmet stated that the significance of the fact that Claimant's symptoms developed slowly told him that it was a degenerative process over time that they were dealing with, a degenerative arthritis involving his spine. Dr. Parmet said that if an individual could only sit for less than thirty minutes and then had to stand, and could only stand for thirty minutes or less, then had to sit, but could not go eight hours a day without having to lay down on multiple occasions, that would probably meet the standard that that person was permanently and totally disabled. Dr. Parmet noted that on July 30, 2000, Claimant's weight was one hundred thirty pounds. He was spilling protein in his urine, so he had diabetic neuropathy at that point.

Dr. Parmet's April 20, 2006 report (Deposition Exhibit 2) contained some handwritten notations in blue ink. Those notations were on Deposition Exhibit 2 when Exhibit 2 was offered in evidence at the hearing in this case. The notations were not added by the Administrative Law Judge. Deposition Exhibit 2 described medical records Dr. Parmet reviewed. The report discussed the history of present illness and noted that Claimant reported that he was hurt gradually over time. Claimant did not know exactly what happened. He did not know exactly when this started, but thought it may have been around 2004. Claimant had current complaints consisting of his back and legs hurting. The report described a January 20, 2004 CT scan of the lumbar spine which showed some osteoarthritis at L3-4 and L4-5. No disc herniations were noted, but bulges at those levels were noted. His report listed diagnosis as: 1) degenerative disc disease of the lumbar region; 2) diabetes mellitus type 2, out of control; 3) abdominal pain, possible pancreatitis with wasting; and 4) major depression. His report stated that based upon the accumulation of medical evidence and the patient's own history with lack of repetitive very heavy lifting or any specific injury, he concluded that there is no occupational relationship to Claimant's back pain and his degenerative spondylosis.

The report noted that Claimant's pain was of subtle onset and of long duration. He stated there was no significant contribution from work. There were significant contributions due to aging, smoking, and uncontrolled diabetes. The report noted that the only specific injury noted anywhere by Claimant or in the medical records was that of his work on his wife's car at home. He stated there was a contribution from endogenous depression which added to the weight loss. Severe wasting and cachexia contributed to the overall degenerative changes. He concluded that there was no evidence to support an occupational relationship to any of his current conditions. He stated there were no objective findings suggesting that Claimant was incapable of returning to work, although due to his debilitated status of cachexia and general wasting, he would be unable to maintain physical exertion above the light level of labor. He stated there were no injuries that were caused, aggravated, or accelerated by his job at Employer. He further stated that there was no permanent partial disability attributable to his work at Employer, and no restrictions attributable to any injuries that occurred at Employer. No further medical evaluation or treatment was recommended regarding any of his work at Employer. The report noted that his findings were stated to a reasonable degree of medical certainty.

DR. JOHN CICCARELLI

Claimant was evaluated by Dr. John Ciccarelli on June 1, 2005. Dr. Ciccarelli's deposition taken on July 13, 2006 was admitted as Exhibit 1. All objections contained in Exhibit 1 are overruled. Dr. Ciccarelli testified that he was board certified in orthopedics and was practicing medicine in Kansas. He saw Claimant for an independent medical evaluation regarding his lower back area. He only does spine surgery. Claimant provided him with a history of being employed with Employer where he was involved in driving a roll off truck and delivering containers to sites. Claimant described in detail how the mechanism worked to load and unload the containers. He reported an insidious onset of pain that he reported dated back to May 2003. Claimant did not tell Dr. Ciccarelli that he had any specific injury or any specific problem. Claimant described symptoms of pain across the front of his stomach area that would sometimes extend over to the sides of his posterior. Claimant reported his primary care physician had done extensive work ups and imaging studies, and there was no real definitive cause for his abdominal pains.

Claimant was noted to have eventually been seen by Dr. Drisko who apparently felt Claimant had some underlying stenosis in the lumbar area. Claimant underwent surgery in February 2004. Stenosis is a descriptive term that would imply some narrowing in the spinal canal which could cause some nerve root pressure. Dr. Drisko essentially performed a decompression procedure of multiple levels in Claimant's lower back on February 4, 2004. Claimant reported to Dr. Ciccarelli that initially he really did not have any significant improvement with respect to his back and hip pain following the surgery, but then a month later he began having again some pain radiating down his legs diffusely in no particular pattern or nerve root distribution, and complained of pain around his right knee. Records indicated that he was seen on March 23, 2004 and reported some improvement in his overall symptoms. He continued to have pain in his right knee and was diagnosed with some hip bursitis for which he underwent some injections. Bursitis is an inflammation of a bursa which is a fluid-filled sac that helps to decrease friction in areas and muscles around bones in certain parts of the body. He noted that Claimant saw Dr. Drisko on May 19, 2004, and expressed an interest of apparently returning back to work. His knee was better. He was returned with some restrictions and recommended to see Dr. Drisko in six weeks, and then allow him to return to full duties. He did not know whether Claimant ever returned to his work.

Dr. Ciccarelli noted that most of Claimant's last occupations involved truck driving type activities. He knew that Claimant had been terminated after he was returned to work by Dr. Drisko sometime in May 2004. When Dr. Ciccarelli saw Claimant, Claimant had not return to any work. Dr. Ciccarelli reviewed reports of a CT study and an MRI of the lumbar area taken in 2003, and x-rays he took. The October 7, 2003 CT study was reported as essentially negative. The MRI study of the lumbar spine in October 22, 2003 demonstrated moderate lumbar spondylosis or degenerative changes essentially with some foraminal narrowing. A CT of the lumbar region demonstrated against stenosis of multiple levels, L3 through S1.

Dr. Ciccarelli examined Claimant. Claimant demonstrated that he was thin and had a healed lumbar incision. He showed some decreased range of motion in his low back and hip areas. He complained of knee and back pain. His reflexes were slightly decreased but were symmetric. He had a copy of Dr. Koprivica's report and noted that Dr. Koprivica felt that Claimant had suffered an aggravation or acceleration of a degenerative process resulting in the need for surgery. Dr. Ciccarelli did not agree with that opinion. Dr. Ciccarelli said his opinion was that Claimant "essentially with really no specific episode or insidious onset of his pain essentially represented a manifestation of his underlying arthritic conditions that were causing some multilevel stenosis, and I did not feel it was due in any degree to any type of work activities." He did not know of diabetes being a definitive problem as far as

affecting degeneration, but diabetes can affect nerves. When asked if he felt that Claimant's work activities of climbing in and out of a truck and delivering five or six roll-off bins a day materially or substantially aggravated his lumbar degeneration, Dr. Ciccarelli stated he did not feel that was a substantial factor. Deposition Exhibit 1, Dr. Ciccarelli's CV, and Deposition Exhibits 2 and 3, his reports, were offered and are admitted. Dr. Ciccarelli stated that all of his opinions were within a reasonable degree of medical certainty.

On cross examination, when asked what the causes of spinal stenosis are, Dr. Ciccarelli stated that spinal stenosis can be multi-factorial. He said stenosis can be caused from arthritis, enlarged facet joints, disc herniations, and from masses involving the spinal canal of various types, anything that can potentially cause pressure or narrowing. In this case, we are talking about the growth of bone, or bone spurs or arthritis. He said that is a degenerative process. He said it was not typically caused by a single traumatic event. It is a progressive-type problem. Spinal stenosis typically is a slow progress or problem. Claimant's symptoms were consistent with spinal stenosis. Spinal stenosis would be more likely to result in radicular symptoms because of a progressive narrowing of the canal which could be causing pressure on the nerve roots involving the spinal canal. He was asked if there were any sorts of activities or conditions or events that can aggravate, accelerate, or intensify pre-existing spinal stenosis. He said it is a multi-factorial situation, and a heavier patient might be more prone to accelerate spinal stenosis because of the extra weight on his or her spine. He said there are several studies suggesting they just do not know what causes it, and that it is a normal aging phenomenon. He said there are questions of genetic components being related. Weight is a factor. Activity levels have been suggested. He did not believe anyone had determined exactly what had caused it. He said that the current thought in the medical community about doing heavy labor and the effects on spinal stenosis, is that it is suggestive that it can definitely worsen.

Dr. Ciccarelli had reviewed a copy of a job description (Deposition Exhibit 4) and had used it in determining his opinion in addition to the history he obtained from Claimant as a representation of what Claimant did. When asked, "Would driving a commercial truck like a dumpster truck, would that in and of itself aggravate spinal stenosis if that was done on a continual 40-hour a week basis?", Dr. Ciccarelli answered, "Sure, it is possible."

Dr. Ciccarelli also stated that the driver tarping over the open top of the box with a tarp the weighed twenty-five pounds, sometimes climbing up the side of the box that can vary from four to eight feet, was an activity that could aggravate, accelerate or intensify spinal stenosis. Activities of daily living could aggravate, accelerate, or intensify spinal stenosis. It would be normal with someone with spinal stenosis to get some relief by lying down. Dr. Ciccarelli was shown Deposition Exhibit 6, an office note from Dr. Drisko dated January 15, 2004 that had been highlighted "working really bothers him." Dr. Ciccarelli said that work would be one activity that could aggravate stenosis. Dr. Ciccarelli was asked that if work was an activity that aggravated the spinal stenosis, would he agree that work would then be a substantial factor in the aggravation or acceleration. He said that in Claimant's case, it could be a factor, but not be the substantial factor. When asked if he would agree that work was a substantial factor, he said that substantial was a subjective term, and would say it was just a factor in Claimant's case. He stated that it was possible that work was a substantial factor in aggravating the spinal stenosis if Claimant's work activities were producing pain and were done more at work than at home.

Dr. Ciccarelli said that he was familiar with Department of Labor categories and classifications, and routinely rendered opinions as to whether or not an Employer would reasonably be expected to hire Claimant. When he was asked to assume hypothetically, if Claimant could only sit for less than thirty minutes and then had to stand, and could only stand for less than thirty minutes and then had to sit, and could not make it through a day alternating sitting and standing, and had to lie down during the course of the day, he responded that an Employer could not accommodate a worker that had to lay down off and on during the course of the day.

On redirect examination, Dr. Ciccarelli stated that his opinion that there had been no material or substantial aggravation or acceleration because of Claimant's work duties had not changed. He also stated that when he saw Claimant on June 1, 2005, it was reasonable for Claimant to continue with some type of employment activities. He also stated that in his opinion there was not anything that Claimant did at work that caused any sort of a permanent disability because of his work. On re-cross examination, Dr. Ciccarelli agreed that if Claimant was doing an activity and it was causing him pain, that that was an activity that was aggravating or accelerating or intensifying the spinal stenosis. He also stated that if that activity was performed for a long enough period of time, then that exacerbation could become permanent in nature. On redirect, Dr. Ciccarelli stated that in the Claimant's case, he did not feel that it was.

DR. MICHAEL PRONKO

Dr. Michael Pronko, a board certified psychiatrist, evaluated Claimant on October 25, 2006 at the

request of Employer's attorney. His deposition, Exhibit 4 was admitted in evidence. All objections contained in Exhibit 4 are overruled. Deposition Exhibit 1, his CV, was identified. Dr. Pronko testified that he had been a psychiatrist for forty-two years and regularly treated patients. Dr. Pronko took a history from Claimant. Claimant stated he was injured on the job. He did not quite know what happened. He was a driver and had driven for about five years. He had back surgery that initially helped him. Since then there had been no change. He had a sharp pain in his back which went down into his knees. He had been unable to go back to work because of the back pain. Since then he had done very little. He mostly watched TV. He liked long-haul driving. He liked working at Employer. He had five children and thirteen grandchildren. He developed diabetes about two years before. A year ago he had to go on insulin. Claimant stated he was good about taking his insulin and watching his diet. He slept well, but did not feel rested in the morning. He had felt depressed. He did not have much of an appetite. He was regaining some weight that he initially lost. He wished he could go back to work but knew he could not. He felt the medication he initially took for depression had helped, but subsequently it did not help. His wife stated he was supposed to be earning the money for the family and was not able to. Finances were tough. Claimant had been impotent for about two years. His blood sugar had been out of control, but was now down into the 100s.

During his interview with Claimant, Dr. Pronko noted Claimant walked slowly and moved slowly. He sat at ease in the chair practically immobile. Sitting was okay. He felt best lying down. He said the pain was always there. He wished he were able to go back to work but knew he could not. Dr. Pronko gave Claimant the MMPI-2 test and a biographical data sheet which Claimant completed and returned. He had some degree of depression but mostly he had chronic maladjustment to life. He currently had lots of family problems, difficulties with his children, so he did not do well in most areas of his life. He was kind of always on the edge of things. That was a lifelong thing.

He described medical records he reviewed, including reports of Dr. Ciccarelli, Dr. Parmet, Dr. James Dickie, Dr. David Mouille, Dr. Koprivica, medical records from Wyandotte County Mental Health, Kansas City Pain Center, Pain Center at St. Luke's Northland, Dr. Mahmoud, North Kansas City Hospital, and Shawnee Mission Medical Center. Dr. Pronko stated that after reviewing the medical records and giving his psychological testing and a psychiatric evaluation, he concluded that there was no per se psychiatric illness. Claimant had complaints of depression and a lot of physical complaints. He thought Claimant was both seriously medically ill and neurologically ill. His complaints were being depressed, but that was a low grade, long-standing depression. He had very little energy. He had some pain symptoms, and his diabetes was seriously out of control. That affected his psychological functioning. Claimant was noted to be a heavy smoker with chronic lung disease. He had had a forty to sixty pound weight loss over the last two years. A CT of the head done in March 2004 showed cortical atrophy and compensatory ventricular dilatation in his brain. That is a neurological type of problem that can manifest itself in psychological, psychiatric terms in terms of a flattened affect, kind of bland person. He stated Claimant was not depressed, but was just kind of like unresponsive.

Dr. Pronko said Claimant's brain was shrinking like someone with Alzheimer's disease. He needed to have that investigated. He did not feel that Claimant's psychological symptomology had any relationship to the work-related accident that he told him about that occurred on or about 2003. Dr. Pronko thought there was no emotional fallout from his accident that resulted in psychiatric disability. Dr. Pronko noted that Claimant was treated at Shawnee Mission Hospital in May 2004 and was presumed to have had a transient ischemic attack (TIA). A TIA is a little stroke. He said people rarely have one TIA. He said he would presume that Claimant had pre-existing TIA's which may well have resulted in his cortical atrophy and which would have been going on for some time. Claimant had a low-grade depression that he thought was chronic and was more based upon some central nervous system path knowledge rather than the kind of major depressive disorder that ordinarily got presented in his office. He did not attribute that to Claimant's work injury. He testified that all of his opinions were within a reasonable degree of psychological certainty. He identified Deposition Exhibit 2, his report, and corrected a typographical error in paragraph 2 on page 7. He said it should be compensatory dilatation of the ventricular cyst. The dilatation is blown out.

On cross examination, Dr. Pronko was asked when Claimant's depression began. He said he had no idea, that it was vague. He said Claimant had this low-level depression well before he had his back surgery and his back problems. He testified that there are a number of factors that were contributing to Claimant's level of depression. When he was asked whether he would agree that one of the substantial factors were his problems arising from his back injury and work, he answered that he did not know he would see that as being substantial. He thought it was a factor, but he did not think it was of as great significance as his health in terms of his diabetes and whatever TIAs he was having and whatever came up on a CT scan of atrophy in his brain. Dr. Pronko's Deposition Exhibits 1 through 7 were offered without objection, and are admitted. Deposition Exhibit 2 set forth Dr. Pronko's conclusions. The report stated that the depression that Claimant claimed was not substantiated by the medical records. It was noted to be a low-level depression primarily with flattened affect. The report noted that it seemed far

more related to chronic medical problems rather than any type of sudden depression. Claimant had serious family problems and social problems that were difficult for him. He had little or no response taking Cymbalta, and medications seemed to have played little or no part in his medical status. The report noted that it was difficult to diagnose Claimant as seriously depressed and even more difficult to tie his depression into some type of work related causation. The report noted Claimant most probably had some type of ongoing personality disorder compounded by serious difficulties with diabetes mellitus and central nervous system pathology. The report stated that Claimant's current symptomatology could not be correlated with the presumed work-related injury of August 1, 2003. The report further noted that those conclusions had been reached within a reasonable degree of medical certainty.

DR. DAVID MOUILLE

Dr. David Mouille, a psychologist, evaluated Claimant at Claimant's attorney's request in August 2006. His deposition taken on September 8, 2006, Exhibit F, was admitted in evidence. All objections contained in Exhibit F are overruled. Deposition Exhibits 1, 2, 3, 4, 5, A, and B were offered at the deposition and are admitted. Dr. Mouille met with Claimant in his office. Claimant's movements were quite stiff, as if he were in pain. Dr. Mouille interviewed Claimant and his wife, apart from Claimant, and conducted a mental status examination. He also reviewed medical records. He obtained a personal history from Claimant and an educational background. He obtained an employment history, including Claimant's most recent employment for Employer. He noted that Claimant left his last position as a consequence of the injuries he received while performing his duties as an employee of Employer. He also noted that Claimant worked consistently from 1965 to 2004. He said Claimant told him that he had problems with his back and legs. Claimant also told him he had had a stroke, and had diabetes for many years. Dr. Mouille noted that Claimant had been diagnosed with depression and presently was medicated with Cymbalta. He had been hospitalized for one week in 2004 at Providence Hospital for suicidal ideation. Dr. Mouille found no records or information that suggested that Claimant had any mental illnesses prior to August 2003.

Dr. Mouille conducted a mental status assessment and found that Claimant's abstract thinking was significantly reduced. His judgment was reduced. He had deficiencies in his ability to remember. His attention/concentration was significantly reduced. He was not able to recite the alphabet. Claimant reported symptoms that were consistent with a diagnosis of depression. His depression was a consequence of the physical injuries he sustained while working for employer. Dr. Mouille stated that Claimant was sad every day and had lost interest in life. He lost a considerable amount of weight. His sleep was disturbed. He experienced agitation and lethargy. His self-esteem was significantly reduced and he felt useless. He wished that he would die but he had no plan to take his own life. Claimant clearly stated that those symptoms appeared after he left work for Employer. Claimant's wife confirmed the presence of those symptoms, but focused most intensely on Claimant's lack of self-esteem. She said he had given up. She said the symptoms were intensifying.

Dr. Mouille stated the pattern of symptoms was consistent with the criteria for a diagnosis of major depressive disorder, single episode severe without psychotic features, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, the authoritative book within the field of mental illness for diagnosing mental disorders used by psychiatrists and psychologists working in the field. Dr. Mouille noted that Dr. Huet's record indicated that Claimant had struggled with his depression for at least three years. He concluded that Claimant's depression had reached a chronic state, and that Claimant would remain impaired and unemployable by his depression for some time into the future, at least as long as his physical problems and physical pain continued. Dr. Mouille stated that Claimant was reporting no symptoms that would raise the suspicion of the presence of brain damage. He noted that the examining psychologist saw no reason to suspect the presence of brain damage. Dr. Mouille found that Claimant's memory was reduced as an impact of his depression, and not the result of a brain injury. He saw no significant residual of a stroke. He noted that depression and physical pain had significantly limited Claimant's functioning. He noted Claimant spent his days watching TV in bed. His social life was virtually nonexistent. He had no hobby. He was not able to maintain his own schedule or bathe himself. He was able to prepare meals for himself and drive. He could not manage his finances, shop, do chores, or do lawn work.

Dr. Mouille reached the following diagnoses within a reasonable degree of scientific and psychological certainty. On Axis I, major depression, a single episode, severe without psychotic features. On Axis II, no diagnosis. On Axis III, history of physical trauma and then an additional diagnosis of pain disorder associated with a general medical condition. Axis IV, no diagnosis. Axis V, rating of 45. Claimant had all nine of the symptoms under diagnostic criteria A. Their presence was confirmed by more than one source. He found no evidence of substance abuse. He found no evidence of bereavement. Dr. Mouille gave a diagnosis of chronic pain. He noted that the record clearly indicated that first Claimant went to work for Employer. Second, over a period of time, the work Claimant did while in Employer's employ caused problems with his back and legs. Third, the problem with his back

and legs caused chronic pain (sic) and unemployment. He reached the point where the pain was bad enough he could not work any longer. Fourth, the chronic pain and unemployment produced a depression and a poor financial situation. Fifth, as a consequence of his depression and limited financial circumstance, Claimant lost his self-respect and cared for himself less and received less medical care. Sixth, the loss of self respect and the limited medical care lead to an aggravation of diabetes. The aggravation of diabetes intensified the depression. Dr. Mouille stated that Claimant's injury and the unemployment was a substantial provoker of the cause of the depression, within a reasonable degree of scientific and psychological certainty. Claimant's depression was a major or a direct cause of Claimant's weight loss.

Dr. Mouille stated that Axis I is a statement of what is the acute problem. Axis II is reserved for mental illnesses that are much more long-standing, such as personality disorder or mental retardation. Axis III are the physical problems that are affecting diagnoses on Axis I. Axis IV are the current stressors that are affecting a diagnosis on Axis I. He left that blank because he was not treating Claimant. Axis V is an assessment of functioning. A number of 45 indicated that it was his opinion that the psychopathology had reached an intensity that he can no longer work.

Dr. Mouille expressed additional conclusions within a reasonable degree of scientific and psychological certainty. He stated that Claimant's ability to perform his activities of daily living was impaired. His ability to establish and to maintain relationships was impaired. His ability to understand and to perform tasks in a reasonable amount of time was impaired. His ability to concentrate, to persist, and to pace through a normal eight-hour working day with the stress of a normal working environment was impaired. His ability to maintain an adequate work schedule was impaired. He was not able to manage his own finances. Dr. Mouille stated that it was his opinion that the physical problems alone, the chronic pain alone, or the depression alone was of sufficient intensity to disable Claimant. The combination of all three, together with Claimant's limited education, clearly and definitively indicated that Claimant's working days were at a final end. He stated that Claimant was totally and permanently disabled and unemployable. He further stated that in the context of a total and permanent disability, and impairment rating became something academic or theoretical.

He also noted, however, that in an effort to be thorough and complete, he suggested an impairment rating of thirty-five percent for physical problems and an additional ten percent for psychological problems. Based on the *Fourth Edition of the Guides to the Evaluation of Permanent Impairment*, Claimant's combined rating was forty-two percent. He did not include chronic pain in the rating. The rating would be higher for the chronic pain to be included. Those conclusions were within a reasonable degree of scientific certainty. He further stated that Claimant cannot work and was one hundred percent disabled, and no employer in his right mind would think of hiring him. He said Claimant cannot work because he has too many serious impairments across the board. Claimant's depression makes him unemployable because Claimant cannot concentrate long enough, like any reasonable worker would have to concentrate and pay attention to their job when they are working a reasonable eight-hour day. Claimant could not sustain himself, did not have the energy, and so was going to fatigue over two hours.

Dr. Mouille identified Exhibit 1, his resume, and Exhibit 2, his August 24, 2006 report concerning Claimant. His overall practice was heavily weighted on the side of the clinical because he did forty of those a week. He might handle one or two forensic cases a month. He had worked for plaintiffs and defendants.

On cross examination, Dr. Mouille stated he was a psychologist, not a psychiatrist. He is not an MD. He read Dr. Ciccarelli's report, but it would not change his opinions. He said that depression will occur at a rate of about twenty to twenty-five percent of the population at any one time. He said depression can be caused by any type of failure. Some of those things could be categorized as familial stressors. There are two major categories that would cause depression. One is one's own biology, the chemistry of one's body. The other is some type of event where one's own image of oneself gets attacked and destroyed. Diabetes is known to cause depression. There is a relationship between diabetes and depression. If diabetes is dormant and all of the symptoms are contained, they do not expect people to get depressed. Death, loss of a loved one, would provide a diagnosis of bereavement first. If the depressive symptoms go beyond a certain period of time, and you cannot get rid of those symptoms, they begin to switch the diagnosis away from bereavement into depression. Loss of a child is a serious stressor. The fact that Claimant's son was going away to prison for rape for a long time after this accident was a substantial stressor. Also, being older, and having two young kids come live with you unexpectedly in a small confined area could be a stressor. Uncontrolled diabetes is a stressor. A stroke can be a stressor.

Dr. Mouille said it would not be very difficult to say what the causation of Claimant's depression was if he were to assume that Claimant, in addition to having the chronic pain, had those other stressors

in the same general time period, basically his son going away to prison, two younger children thrown into a small living space with him, a stroke, and uncontrolled diabetes. He said he considered those things and could not see sufficient indication that said that those were the stimuli that provoked the depression. He said the depression came from the unemployment and the physical pain, not from those other things. He also stated that the accident and the resulting injury were a substantial factor in causing the depression.

VOCATIONAL EXPERTS

MICHAEL DREILING

Michael Dreiling evaluated Claimant on April 20, 2005 at the request of Claimant's attorney. His deposition was admitted as Exhibit E. His curriculum vitae, Deposition Exhibit 1, was offered at the deposition without objection, and is admitted. It noted that he had thirty-one years experience in the field of vocational rehabilitation and a Masters of Science in guidance and counseling. Claimant was referred for the purpose of evaluating whether he was employable in the current labor market, and evaluating whether any employer in the usual course of business seeking persons to perform duties of employment in the usual and customary way would reasonably be expected to employ Claimant in his existing physical condition. He had reviewed the restrictions of Dr. Koprivica and Dr. Drisko. He obtained and discussed Claimant's educational background, age, social background, and work background, including work duties and tasks. Mr. Dreiling testified that Claimant did not have any transferable job skills through the performance of his work. He stated that Claimant reported that he could physically tolerate sitting for about an hour, standing for about ten to fifteen minutes, walking for about ten minutes. He limited his lifting to less than fifteen pounds. He spent about seventy-five percent of his waking hours lying down in his bed for pain relief. Activities had been significantly impacted. He no longer did yard work. He was no longer active in Boy Scouts. He limited wood carving. His family doctor took him off pain medications as he did not want him to become addicted. He used over-the-counter medications. He could drive short distances only. He had not applied for work in the labor market. He had significant problems doing any type of reading, writing, spelling, or math.

Mr. Dreiling could not recall any of his clients being placed into the competitive labor market that could only sit for about an hour, stand for ten or fifteen minutes, walk for about ten or fifteen minutes, and had to spend about seventy-five percent of his waking hours sitting down in the course of a day. He did not perform any vocational testing due to Claimant's vocational profile. He stated it was not realistic for Claimant to go back to school.

Mr. Dreiling expressed the following opinions within a reasonable degree of vocational certainty based on his review of the medical records containing functional limitations and his interview of Claimant. Claimant would not be able to go back to any of the past relevant work he had performed since quitting school. Claimant was essentially and realistically unemployable in the current labor market. He did not believe that any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ Claimant in his existing physical condition. It appeared highly unlikely that formal vocational rehabilitation services or placement services would result in any positive outcome in terms of return to work for Claimant. His vocational deficits were due to his limited academic background and the significant medical problems that he had been experiencing since August 2003.

Mr. Dreiling had been a counselor with the state of Kansas for ten years working with individuals themselves who had medical disabilities and limitations. He also worked with business and industry in helping to prepare the individual for return to work in the labor market, and then working with the employers in terms of identifying job settings to which the individuals could. He estimated he had worked with hundreds upon hundreds of different types of employers and employment settings over thirty-one years. He said all of his opinions had been rendered within a reasonable degree of vocational certainty. His report dated April 27, 2000, Deposition Exhibit 2, was offered at the deposition without objection, and is admitted.

TERRY CORDRAY

Terry Cordray evaluated Claimant on July 20, 2006 at the request of Employer's attorney. His deposition was admitted as Exhibit 3. All objections contained in Exhibit 3 are overruled. His curriculum vitae, Deposition Exhibit 1, was offered at the deposition without objection, and is admitted. Mr. Cordray is a vocational rehabilitation counselor in private practice. About sixty-five percent of his workers' compensation cases are defense and about thirty-five percent are Claimants. About one-half of his cases are evaluations for workers compensation. He has a Masters degree in counselor education with an emphasis on rehabilitation. He is a diplomat member of the American Board of Vocational

Experts.

Mr. Cordray met with Claimant, conducted an in-depth vocational interview, and conducted vocational testing. He reviewed depositions of Claimant, a deposition of Michael Dreiling, a report of Michael Dreiling, a report of Dr. Parmet, reports of Dr. Ciccarelli, and a report of Dr. Koprivica. He identified functional limitations discussed in the doctors' reports. He obtained and noted Claimant's educational background, social background, previous medical conditions, and work background with job tasks. He asked Claimant about his work injury at Employer. Claimant stated he injured his back while working for Employer. Claimant was not sure how he injured his back, but thought it was from opening the doors to the dumpsters. He had no specific incident or date of injury. He had surgery to the back in February 2004. Current medications included over-the-counter aspirin, insulin for diabetes, and medication for cholesterol. Claimant stated that he felt he had the following limitations: lift/carry approximately ten pounds, stand fifteen minutes, sit one hour, climb one flight of stairs, bend okay slowly, drive thirty minutes, sleep okay, concentration okay, mood okay. Claimant did not have a handicapped sticker for his vehicle or restrictions on his driver's license. He spent much of the day lying on his sofa watching TV and would occasionally sit on his porch. He and his wife attended church on a regular basis. He did light housework, including occasionally vacuuming and laundry. His nephew mowed the grass.

Mr. Cordray gave Claimant the Wunderlich Personnel Test, Wide Range Achievement Test, and the Career Ability Placement Survey. The Wunderlich raw score indicated that Claimant needed to be retested, but he was not retested. The Wide Range Achievement Test was consistent with a fifth grade reading level. He believed that with sufficient mentoring and tutoring, Claimant's reading skills could allow him to obtain the GED. He concluded, based on the restrictions of Dr. Parmet, Dr. Ciccarelli, and Dr. Koprivica, that Claimant retained the ability to perform light, unskilled work, and that such jobs did exist in the general labor market. He described several jobs available in the Kansas City area that were light and unskilled. Mr. Cordray stated that Claimant was employable at light, unskilled jobs in the labor market and that such jobs did exist. His opinions were within a reasonable degree of vocational certainty. His report regarding Claimant's vocational review, Deposition Exhibit 2, was offered at the deposition without objection. Deposition Exhibit 2 is admitted.

Mr. Cordray stated that Claimant did not have any energy, and appeared very flat. That would be a detriment to him in applying for jobs. He said that his opinions were all based on the reports of Dr. Parmet, Dr. Ciccarelli, and Dr. Koprivica. He acknowledged that Claimant spent much of the day lying on the sofa. When he asked Claimant why he felt like he had to lay down, Claimant said he had no energy. He noted that Claimant's reading was in the bottom two percent. He agreed that Claimant's education and intelligence would affect him adversely in terms of vocational retesting. He agreed that Claimant's medical restrictions, postural limitations, and stated need to lie down through the course of the day, would be negative factors vocationally. He did not believe Claimant would make a good presentation a job interview. He agreed that it would be very very difficult to employ a worker if he had to alternate sitting and standing and laying down (sic) through the course of the day. He had not seen Claimant's mental health records.

Mr. Cordray's report noted that he saw no medical records that would indicate that Claimant would be required to lie down throughout the day as he currently presented. He also noted that there were no medical records that indicated that Claimant would not be able to attend work on a regular basis.

DISCUSSION

ACCIDENT, OCCUPATIONAL DISEASE, MEDICAL CAUSATION

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?

Occupational diseases are compensable under the Missouri Workers' Compensation Act. [2]
The statute requires that the condition be an "identifiable disease arising with or without human fault and in the course of the employment." [3] For an injury to be compensable under the Act, the work

[4]

performed must have been a substantial factor in causing the medical condition or disability.

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:

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 that an occupational disease is compensable "if it is clearly work related and meets the requirements of an injury which is compensable as provided in subsections 2 and 3 of section 287.020. An occupational disease is not compensable merely because work was a triggering or precipitating factor." Section 287.067.7, 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 a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease."

Section 287.063, RSMo, provides:

1. 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 set forth in subsection 287.067, RSMo.
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.
3. The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. . . .

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."^[5] 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

^[6]

place." There must be medical evidence of a direct causal connection between the conditions under which the work is performed and the occupational disease.^[7] 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.^[8]

The cause of an employee's medical condition need not be a single traumatic event. An employee may obtain compensation pursuant to The Workers' Compensation Law for gradual and progressive medical conditions which result from repeated or constant exposure to hazards encountered by the employee in the workplace.^[9] Diseases resulting from the chronic traumata of repetitive occupational body movements qualify for compensation^[10] if they cause an employee to sustain a loss of earning capacity.^[11]

Gradual and progressive injuries resulting from repeated exposure to on-the-job hazards is broad enough to now treat compensable aggravations of preexisting diseases or infirmities caused by nonaccidental conditions of employment as either accidents or occupational diseases.^[12] Aggravation of a preexisting disease or infirmity caused by nonaccidental conditions of employment is compensable as either an accident or as an occupational disease.^[13]

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.^[14]

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.^[15]

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."^[16] The "injury" requirement of the Act necessitates that the employee's "injury" create a harm that tangibly affects the employee's earning ability.^[17] Requiring that the harm tangibly affect the employee's earning ability upholds the intent of the legislature in enacting the Worker's 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.^[18]

Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable.^[19] The employee must establish a causal connection between the accident and the claimed injuries.^[20] Section 287.020.2, RSMo requires that the injury be "clearly work related" for it to be compensable. An injury is clearly work related, "if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor."^[21] Injuries that are triggered or precipitated by work may nevertheless be compensable if the work is found to be a "substantial factor" in causing the injury.^[22] A substantial factor does not have to be the primary or most significant causative factor.^[23] An accident may be both a triggering event and a substantial factor in causing an injury.^[24] Further, there is no "bright-line test or minimum percentage set out in the Workers' Compensation Law defining 'substantial factor.'"^[25] The claimant in a workers' compensation case has the burden to prove all essential elements of her claim,^[26] including "a causal connection between the injury and the job."^[27]

The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee.^[28] Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail.^[29]

The quantum of proof is reasonable probability.^[30] "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt."^[31] Such proof is made only by competent and substantial evidence. It may not rest on speculation.^[32] Expert testimony may be required where there are complicated medical issues.^[33] "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."^[34] Compensation is appropriate as long the performance of usual and customary duties led to a breakdown or a change in pathology.^[35]

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.^[36] The Commission's decision will generally be upheld if it is

consistent with either of two conflicting medical opinions.^[37] The acceptance or rejection of medical evidence is for the Commission.^[38] The testimony of the Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence.^[39] The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears.^[40] The testimony of the employee may be believed or disbelieved even if uncontradicted.^[41]

A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the pre-existing condition to “escalate to the level of disability.”^[42] An employer is liable for any aggravation of a preexisting asymptomatic condition caused by the primary injury.^[43] It is sufficient to show only that the performance of usual and customary duties led to a breakdown or change in pathology.^[44] The worsening of a preexisting condition, i.e., an increase in the severity of the condition, or an intensification or aggravation thereof, is a “change in pathology.”^[45] A preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability.^[46] “If substantial evidence exists from which the Commission could determine that the Claimant’s preexisting condition did not constitute an impediment to performance of Claimant’s duties, there is sufficient competent evidence to warrant a finding that the Claimant’s condition was aggravated by a work-related injury.”^[47]

A mental injury triggered or precipitated by a work-related accident is compensable provided it can be shown that the accident was a substantial factor in causing the injury.^[48]

Based on all the evidence and the application of The Missouri Workers’ Compensation Law, I find that Claimant has met his burden to prove that he sustained an injury that was clearly work related, and that his work for Employer was a substantial factor in causing his back injury and resulting disability. I find that he sustained a compensable occupational disease from cumulative repetitive trauma through his last day of work for Employer on January 14, 2004 that resulted in injury to his back, hips, and legs, in the need his back surgery on February 4, 2004, and in his permanent total disability. I find the conclusions of Dr. Koprivica regarding causation and disability are more credible than the conclusions of Dr. Parmet.

I do not find that Claimant’s injury was from a single accident. Claimant did not attribute it to a single accident, and the medical evidence did not either. Claimant’s symptoms began in August 2003 and became more severe in the months thereafter. His paychecks decreased between August 2003 and January 2004 because he worked due to his pain. He testified that he did not have any particular incident to which he attributed this injury. It just came on over time. He first noticed it in mid-August

2003. His symptoms increased from then to January 2004 when he saw Dr. Drisko.

Claimant did not have any proven preexisting disability relating to his back. He had a twisting injury to his back in 1991 or 1992, but there was no evidence that he was hospitalized or had surgery for that, or had any permanent disability from that. Though he had spinal stenosis before it became symptomatic in 1993, there was no evidence that it was disabling, or symptomatic before then. He worked full time for Employer for four to five years before his back injury became symptomatic. His wife noted that he was a workaholic before he was hurt at work. He worked six or seven days a week, and worked ten to twelve hours each day. He did strenuous work that involved daily climbing in and out of a semi-truck on numerous occasions, tarping the truck with a twenty-five pound tarp, climbing under the dumpster and hooking a winch, and pushing and pulling heavy doors on the dumpsters. He bent frequently to pick up debris.

In January 2004, Dr. Drisko diagnosed symptomatic spinal stenosis, and noted preoperative pain in Claimant's back and legs. His notes stated that Claimant had had difficulty since August 2003. He noted that Claimant could stay on his feet only about ten minutes, he was miserable, it was affecting his mood, he could not sleep at night, and work really bothered him. Dr. Drisko performed spinal decompression laminotomies with bilateral foraminotomies at L 3-4, L4-5, and L5-S1 on February 4, 2004.

Dr. Koprivica noted that he found activities in Claimant's work that would be competent to produce the structural changes to which he referred. Claimant had to climb in and out of the truck and hook up big dumpsters to the truck using a hook and chain. The pushing and pulling, hooking, and climbing in and out of the truck stressed the spine. Claimant was exposed to a whole body vibration when he operated the truck. Jarring in and of itself causes injury to spines. Reaching and twisting, and lifting of the tarp biomechanically loaded the spine significantly that would cause aggravation. Twisting and lifting and getting things off the ground picking up debris contributed to that. He believed all of those were substantial factors leading to aggravation in the low back that produced the symptoms, and Claimant made specific association between work and the progression of his back pain. Dr. Koprivica considered those risks to be unique to Claimant's employment. They were substantial in terms of their ability to cause aggravation to the low back, and they were very significant compared to his risks away from work. He thought work was of greater significance than any other activities or factors considered in isolation. He concluded that the work activities were a substantial factor resulting in permanent aggravation, acceleration, and intensification of the degenerative process of symptomatic spinal stenosis. The work activities were noted to be a substantial factor in the development of disability necessitating the surgical intervention. He said Claimant was at maximum medical improvement. He noted that Claimant was totally disabled from his symptomatic lumbar spinal stenosis following his decompressive surgery. Claimant developed symptoms from 2003 through January 2004 as work progressed.

Dr. Koprivica noted that there was no evidence that prior to January 30, 2004 Claimant's diabetic condition, depression, or weight were disabling. He concluded there was no pre-existing disability as a result of the spinal stenosis, the depression, or the diabetes.

Dr. Ciccarelli noted that spinal stenosis was not typically caused by a single traumatic event. He stated that Claimant's symptoms were consistent with spinal stenosis. He testified that the current thought in the medical community suggested that doing heavy labor can definitely worsen spinal stenosis. He stated, "Sure, it is possible," when asked if driving a commercial truck like a dumpster truck would in and of itself aggravate spinal stenosis if that was done on a continual 40-hour a week basis. He also said that tarping could aggravate, accelerate, or intensify spinal stenosis. He testified that work would be one activity that could accelerate spinal stenosis. He also stated that it was possible that work was a substantial factor in aggravating the spinal stenosis if Claimant's work activities were producing pain and were done more at work than at home. He agreed that if Claimant did an activity that caused him pain, and aggravated, accelerated, or intensified the spinal stenosis, and it was performed over a long enough period of time, then that exacerbation could become permanent in nature. He stated that he did not feel that it was in Claimant's case, but he did not explain why it was not.

Dr. Parmet testified that Claimant's back condition was not caused or contributed by his work and that his job duties would not have substantially or materially aggravated his low back condition. He stated that the effect of exercise and activity had not been demonstrated to cause or accelerate this. He said that working was just a symptom of the problem, and was not aggravating, accelerating, or intensifying his spinal stenosis. I do not find these conclusions credible. I find that the evidence demonstrates that Claimant's back symptoms were caused by his repetitive heavy labor while working for Employer, and that his work activities performed while working for Employer resulted in increasing symptoms which led to the need for his back surgery in February 2004.

This case is governed by the provisions of the pre-2005 amendments to the Missouri Workers' Compensation Law. Claimant does not need to prove that work was the prevailing factor in causing his injury and disability, only that work was a substantial factor. I find that the medical evidence and testimony supports the conclusion that work was a substantial factor in causing Claimant's back injury and disability. I find that he was exposed to a risk that was greater than and different from that which affects the public generally. He was engaged in numerous repetitive tasks including climbing into and out of his truck, hooking the ring, attaching the winch, putting the tarp onto the truck, opening and closing the doors of the truck, and driving a large truck and being subjected to vibrations from the drives. Dr. Koprivica believed all of those were substantial factors leading to aggravation in the low back that produced the symptoms, and Claimant made specific association between work and the progression of his back pain. He considered those risks to be unique to Claimant's employment. They were substantial in terms of their ability to cause aggravation to the low back, and they were very significant compared to his risks away from work. He thought work was of greater significance than any other activities or factors considered in isolation. I find that Dr. Koprivica's conclusions are credible and prove the probability that Claimant sustained an occupational disease from repetitive trauma that was caused by conditions in Claimant's workplace.

I find that the credible evidence established that Claimant sustained a gradual and progressive back injury which resulted from repeated and constant exposure to hazards encountered by Claimant in Employer's workplace that resulted in injury his back and legs, and the need for his back surgery. I find that Claimant had pre-existing asymptomatic spinal stenosis that was aggravated by repetitive trauma sustained while he worked for Employer, and that the spinal stenosis became symptomatic as a result of this repetitive trauma, and escalated to the level of disability. I find that the performance of Claimant's usual and customary duties led to a breakdown or change in pathology. I find that his had an increase in the severity of his condition that resulted in his spinal stenosis becoming symptomatic and painful. Claimant reduced his work, suffered a decrease in his income, went to his family doctor in the fall of 2003 because of his symptoms, had an MRI and a CT, then went to an orthopedic surgeon for his pain in January 2004, and had back surgery in February 2004. Claimant's injury has affected his earning ability.

Claimant said that he developed depression because he could not work. He had been the primary wage earner in the family before his surgery. He said that not being able to work made him feel useless and worthless. He was hospitalized for depression for one week after his surgery. He was also treated for depression at Wyandotte Center after his surgery. He has been prescribed medication for depression and had numerous counseling sessions. He acknowledged that he had worried about his son facing a rape charge and other family matters, but said the main stressing factor was his not being able to work. Claimant's wife observed emotional changes in Claimant. He started losing weight and lost his appetite in October or November in the year his back trouble began. Dr. Drisko noted on January 15, 2004 that Claimant was miserable and it was affecting his mood. He could not sleep at night. Dr. Koprivica felt that Claimant's situation from his back was a substantial reason why he was depressed. Dr. Pronko, a psychiatrist, testified that Claimant had a low level depression, and that a number of factors contributed to that, including Claimant's problems arising from his back injury and work. He did not think that was as great significance as Claimant's health in terms of diabetes and whatever TIAs he was having. Employer asserts that if Claimant's depression stems from his termination from work, it is not compensable pursuant to Sections 287.120(8) and (9), RSMo. However, I find that Claimant's depression was not caused by his termination, and those sections do not apply.

Dr. Mouille, a psychologist, testified that Claimant had major depressive disorder. He said that Claimant's depression had reached a chronic state, and that Claimant would remain impaired and unemployable by his depression for some time into the future, at least as long as his physical problems and physical pain continued. He did not suspect the presence of brain damage and saw no

significant residual of a stroke. He noted that depression and physical pain had significantly limited Claimant's functioning. He diagnosed chronic pain. He said the depression came from the unemployment and the physical pain, not from other stressors. He also stated that the accident and the resulting injury were a substantial factor in causing the depression.

Based on the foregoing, and the application of the Missouri Workers' Compensation Law, I find that work was a substantial factor in causing Claimant's depression.

PERMANENT DISABILITY

What is the nature and extent of Claimant's permanent disability, if any, including whether Claimant is permanently and totally disabled as a result of an injury by accident or occupational disease arising out of and in the course of his employment for Employer?

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. [49] While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. [50] The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. [51] It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. [52] The finding of disability may exceed the percentage testified to by the medical experts. [53] The Commission "is free to find a disability rating higher or lower than that expressed in medical testimony." [54] The Court in *Sellers* noted that "[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, 'the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.'" [55] The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. [56]

Section 287.020.7, RSMo provides: "The term 'total disability' as used in this chapter shall mean 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." [57] 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. [58] Total disability means the "inability to return to any reasonable or normal employment." [59] An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. [60] The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that

person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. [\[61\]](#)

Based on all the evidence and the application of the Missouri Workers' Compensation Law, and for the reasons discussed herein, I find that Claimant is permanently and totally disabled as a result of the injury he sustained while working for Employer. I find that Claimant is not competent to compete in the open labor market, and that no employer would be reasonably expected to hire Claimant in his present physical condition. I find that Claimant is permanently and totally disabled based on consideration of his symptomatic spinal stenosis which resulted from the injury he sustained in the course of his employment for Employer, in isolation in and of itself, and without consideration of his depression. I further find that Claimant has been totally disabled continuously from the time he last worked for Employer on January 14, 2004 as a result of the injury he sustained in the course of his employment for Employer. I find that Claimant is entitled to an award of permanent total disability benefits beginning on May 24, 2004, the date that Dr. Drisko released him with restrictions, at the permanent total disability rate of \$662.50 per week. [\[62\]](#)

Claimant is entitled to an award of permanent total disability benefits is supported by the following. Claimant was fifty-four years old at the time of the hearing. His last grade completed was ninth grade. He did not have a GED. He did not have typing or computing skills. He was a poor reader. He testified that he was not able to go back to work after his surgery. He took three to four aspirin, five to six times per day. He continued to have pain in his back and legs, and numbness in his right leg. His pain in his lower back was always there. He stated he had to lie down about seventy-five percent of the day. He said he could sit less than one hour before it hurt a lot. He could stand for a while, but his knees started to hurt. He could not get through a day without lying down. Lying down helped his pain. I find that Claimant was a credible witness, and I find that Claimant is not able to get through a day without lying down to relieve his back pain caused by the injury sustained while working for Employer.

Dr. Drisko returned Claimant to modified (light) work on May 24, 2004 with carry restrictions of fifteen pounds fifty feet, and push/pull restrictions of fifteen pounds fifty feet. Employer never offered to bring Claimant back to work after his surgery or after his last visit with Dr. Drisko. The evidence demonstrates that Claimant would not have been able to perform the duties of roll-off driver within Dr. Drisko's restrictions. I find that Claimant's back injury sustained in the course of his employment for Employer has prevented him from working since May 24, 2004. Claimant stated that since he was released by Dr. Drisko, he has stayed about the same. I find Claimant's testimony credible. No evidence was offered to prove that Claimant's back and leg condition and symptoms improved after May 2004. Claimant testified in his August 13, 2004 deposition (Exhibit 5) that he was getting medical treatment for his legs from Dr. Mahmoud, his family doctor.

Dr. Koprivica noted that when he saw Claimant on March 7, 2005, Claimant was five feet eight and one-half inches tall, and one hundred seven and one-half pounds. Claimant was not demonstrating exaggerated pain behaviors. He demonstrated limited lumbar motion of a sixty percent deficit in lumbar extension. He complained of bilateral knee pain and low back pain during the examination. He had spinal stenosis. Claimant was in a severe situation due to having surgery at three levels as opposed to one level. He restricted Claimant to only occasional lifting or carrying activities, and Claimant should limit those activities to twenty pounds or less. He stated that Claimant should avoid frequent or constant bending at the waist, pushing, pulling, or twisting. He should avoid sustained or awkward postures of the lumbar spine. He should rarely squat, crawl, kneel, or

climb. He should also be allowed postural flexibility. As a general guideline, captive sitting, standing or walking intervals of one hour would be recommended.

Dr. Koprivica recommended formal vocational evaluation. He stated that hypothetically, if the vocational expert believed Claimant was permanently and totally disabled, the permanent and total disability arose based on consideration of the development of disability from symptomatic stenosis of which his work activities were a substantial contributor. Under that hypothetical, Claimant was permanently and totally disabled based on consideration of that condition in isolation in and of itself. He said it was not realistic to believe that any ordinary employer would employ Claimant. He noted that the postural limitations were so severe in terms of sitting, standing, and walking limitations that Claimant could not do sustained activities on a forty hour per week basis within those postural limitations alone. He thought that Claimant was totally disabled from his symptomatic lumbar spinal stenosis following his decompressive surgery.

Dr. Parmet stated that Claimant could not pass a driver's physical and could not do even light labor. He said that if an individual could only sit for less than thirty minutes and then had to stand, and could only stand for thirty minutes or less, then had to sit, but could not go eight hours a day without having to lay down on multiple occasions, that would probably meet the standard that that person was permanently and totally disabled. Dr. Ciccarelli stated that an Employer could not accommodate a worker that had to lay (sic) down off and on during the course of the day.

Dr. Mouille testified that it was his opinion that the physical problems alone, the chronic pain alone, or the depression alone was of sufficient intensity to disable Claimant. The combination of all three, together with Claimant's limited education, clearly and definitively indicated that Claimant's working days were at a final end. He stated that Claimant was totally and permanently disabled and unemployable.

Michael Dreiling, Claimant's vocational expert, concluded that Claimant would not be able to go back to any of the past relevant work he had performed since quitting school. He concluded that Claimant was essentially and realistically unemployable in the current labor market. He did not believe that any employer in the usual course of business, seeking persons to perform duties of employment in the usual and customary way, would reasonably be expected to employ Claimant in his existing physical condition. It appeared highly unlikely that formal vocational rehabilitation services or placement services would result in any positive outcome in terms of return to work for Claimant. His vocational deficits were due to his limited academic background and the significant medical problems that he had been experiencing since August 2003.

Terry Cordray, Employer's vocational expert, concluded, based on the restrictions of Dr. Parmet, Dr. Ciccarelli, and Dr. Koprivica, that Claimant retained the ability to perform light, unskilled work, and that such jobs did exist in the general labor market. He acknowledged that Claimant spent much of the day lying on the sofa. He did not believe Claimant would make a good presentation a job interview. He noted that Claimant's reading was in the bottom two percent. He agreed that Claimant's education and intelligence would affect him adversely in terms of vocational retesting. He agreed that Claimant's medical restrictions, postural limitations, and stated need to lie down through the course of the day, would be negative factors vocationally. He agreed that it would be very very difficult to employ a worker if he had to alternate sitting and standing and laying down (sic) through the course of the day.

NOTICE OF INJURY

Claimant was not required to prove notice of his repetitive trauma occupational disease back injury. The notice requirement in Section 287.420, RSMo does not apply to occupational diseases. [63] I also find that Claimant developed chronic pain and depression as a result of his back injury, and that those conditions flowed from his back injury and were not new or distinct injuries. Claimant was not required to provide notice of those injuries under Section 287.420, RSMo.

Further, even if Section 287.420, RSMo were applicable in this case, notice should be excused. The purpose of Section 287.420, RSMo is to give the employer timely opportunity to investigate the facts surrounding the accident and, if an accident occurred, to provide the employee medical attention in order to minimize the disability. [64] The failure to give timely written notice may be excused if the Commission finds either that there was good cause for the

[65]

failure or that the failure did not prejudice the employer. The relationship of Claimant's injury and work was not diagnosed until 2005. Employer offered no evidence that it ever offered treatment pursuant to the Workers' Compensation Law in this case. Employer's counsel deposed Claimant twice and learned then of the injuries he claimed. Employer was given the opportunity to obtain medical records, and to have Claimant evaluated before the hearing in this case. Employer did not demonstrate that it was prejudiced by lack of notice.

AVERAGE WEEKLY WAGE AND COMPENSATION RATES

What is Claimant's average weekly wage, and what are the compensation rates?

Section 287.250.1(4), RSMo provides:

If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by thirteen the wages earned while actually employed by the employer in each of the last thirteen calendar weeks immediately preceding the week in which the employee was injured. . . .

Claimant and Tom Streck for Employer both testified that Claimant was paid by the load. Claimant stated that he earned \$30.00 per load. The word "output" is defined as: "1 : something produced: as a : mineral, agricultural, or industrial production <steel *output*> b : mental or artistic production <literary *output*> c : the amount produced by a person in a given time d : power or energy produced or delivered by a machine or system (as for storage or for conversion in kind or in characteristics) <generator *output*> <solar X-ray *output*> e : the information produced by a computer."^[66] "Output" is also defined as: "1. the quantity of something produced, esp. in a specified period. 2. the material produced; product; yield."^[67] I find that Claimant's wages were fixed by his output as contemplated by Section 287.250.1(4), RSMo. I find that his delivering dumpsters from customers to the dumpsite, and returning them to customers, and being paid \$30.00 for each load or trip, constituted something produced. His work resulted in the production of a service for a customer, for which he was paid a set fee for each pickup and delivery. This statute requires a computation based upon the thirteen weeks immediately preceding the week in which the employee was injured. I find that Claimant was injured when he first began reducing the amount of work he performed for Employer. The wage record, Exhibit G, demonstrates that Claimant's average weekly wage for the thirteen weeks immediately preceding the period ending August 16, 2003 was \$1,226.81. Claimant's gross pay for the period ending on August 23, 2003 was \$860.00. It was \$716.50, less \$220.00 vacation pay, for the period ending on August 30, 2003. Claimant had gross pay exceeding \$900.00 in only one week between the period ending August 16, 2003 and his last week work that ended on January 17, 2004. His average weekly wage for the thirteen weeks immediately preceding January 17, 2004 was \$506.50.

I find credible Claimant's testimony that he worked less after August 16, 2003 because of pain in his back and legs. As discussed above, I have found that Claimant sustained an injury to his back in the course of his employment for Employer. He treated with his family doctor in October 2003 for hip and back pain, and had an MRI in October 2003 that revealed moderate lumbar spondylolysis with foraminal narrowing. Claimant's wife testified that in August 2003 the side of Claimant's stomach started bothering him. His right leg bothered him, and it started working around to the back and hip. Claimant had worked full time for Employer for several years before August 2003. He did not have a history of any prior disability to his back before August 2003. The only evidence of a prior injury to Claimant's back was his deposition testimony that he twisted his back in 1991 or 1992. No medical records relating to that injury were admitted in evidence, and there was no evidence that the prior back twisting injury resulted in any permanent disability.

Dr. Koprivica noted that he believed Claimant's onset of difficulties began around 2003 and progressed until his last day of work in January 2004. The biggest thing he found from an injury standpoint was aggravation to degenerative disease. I find that for purposes of determining Claimant's average weekly wage, Claimant was injured as a result of his work for Employer, and he began reducing his work during the week immediately after the week ending August 23, 2003. I find that he was injured as of that date for purposes of determining average weekly wage because his earning ability was affected then. I find that that his "injury" created a harm that tangibly affected his earning ability. The average weekly wage should therefore be calculated based upon Claimant's average weekly wage for the thirteen weeks immediately preceding the period ending August 16, 2003, which is \$1,226.85. The compensation rates in this case are therefore \$662.55 per week for temporary total disability and permanent total disability, and \$347.05 per week for permanent partial disability.

Further, if Section 287.250.4, RSMo [68] is applicable in this case, the same result should be reached. I have found from the evidence that Claimant's work for Employer was a substantial factor in causing injury to his back and legs. It would be unfair and unjust to base Claimant's compensation rate on the wages he earned in the last few weeks that he worked for Employer, when during that time he was treating for his back injury, he was limiting his loads driven per week because of his back and leg pain, and he was earning substantially less than what he had earned before he reduced his work for Employer as a result of his work injury.

TEMPORARY TOTAL DISABILITY

What is Employer/Insurer's liability for past temporary total disability?

The burden of proving entitlement to temporary total disability benefits is on the Employee. [69] Section 287.170, RSMo (2000) provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. [70]

Temporary total disability benefits should be awarded only for the period before the employee can return to work. [71] With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ the Claimant in his present physical condition." [72] A nonexclusive list of other factors relevant to a Claimant's employability on the open market includes the anticipated length of time until the Claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that the Claimant

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will return to the Claimant's former employment. A significant factor in judging the reasonableness of the inference that a Claimant would not be hired is the anticipated length of time until the Claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a Claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference.^[74]

Claimant did not ever return to work after he left Employer on January 14, 2004. He treated with Dr. Drisko until he was returned to light duty work on May 24, 2004. Employer did not offer to bring Claimant back to work after his surgery. The evidence demonstrates that Claimant would not have been able to perform the duties of roll-off driver after his surgery. I find that Claimant was not able to return to work during that period, and that he was temporarily and totally disabled from January 15, 2004 until he was returned to light duty work by Dr. Drisko on May 24, 2004. That period amounts to 18 3/7 weeks. I find that Employer/Insurer is responsible for temporary total disability benefits in the amount of \$12,209.85, and that amount is awarded to Claimant.

PAST MEDICAL BILLS

What is Employer/Insurer's liability for past medical bills?

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury.^[75] The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided.^[76] The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury.^[77]

§ 287.140.1, RSMo 1978, provides in part: "If the employee desires, he shall have the right to select his own physician, surgeon, or other requirement at his own expense." The Court in *Sheehan* stated:

In general, only when an employer has notice that a claimant needs treatment or demand is made on the employer to furnish medical treatment and he neglects to provide needed treatment, will the employer be held liable for medical treatment for the employee. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo.App.1984). Implicit in the above rule is knowledge by the employee that he has suffered a job related disability. Where an employee does not know at the time that he or she receives medical treatment that he or she has suffered a compensable injury, and the employee contracts for medical services without the employer's knowledge, the employer is not relieved from liability for necessary medical services. *Beatty v. Chandeysson Electric Co.*, 238 Mo.App. 868, 190 S.W.2d 648, 656 (1945). Generally, a compensable injury

under the occupational disease provision becomes apparent when an employee is medically advised that he or she can no longer physically continue in the suspected employment. *Moore v. Carter Carburetor Div. ACF Industries*, 628 S.W.2d 936, 941 (Mo.App.1982).^[78]

Claimant stated that he did not ever report his injury to Employer prior to leaving work there because he did not know that his injury was from work. He was not aware that he had suffered a compensable injury when he contracted for medical services with Dr. Drisko and North Kansas City Hospital in 2004. Employer should not be relieved from liability for these bills. Employer stipulated that the bills of Drisko, Fee & Parkins were reasonable and necessary. The medical records and billings of North Kansas City, the treatment records of Dr. Drisko, and the testimony of Dr. Koprivica demonstrate that the services provided to Claimant at North Kansas City Hospital were reasonably necessary to cure and relieve Claimant of the effects of the back injury. The North Kansas City Hospital bill for Claimant's February 2004 hospitalization for his back surgery was in the amount of \$11,182.02. I find that these medical bills were reasonable and necessary and causally related to Claimant's injury sustained in the course of his employment for Employer, and that they should be paid by Employer/Insurer. Claimant is awarded the sum of \$11,182.02 for these past medical expenses of North Kansas City Hospital.

The Administrative Law Judge takes judicial notice of the two Medical Fee Requests for Direct Payment of DFP (MFD Number 04-00394) dated 8/31/04.^[79] The Requests were for treatment by DFP on January 15, 2004, January 22, 2004, February 4, 2004, March 23, 2004, and May 19, 2004. The medical fee requests of DFP totaled \$6,028.00, and did not include charges of \$102.00 for an office visit on April 8, 2004 and \$93.00 for an x-ray of Claimant's knee on April 8, 2004. Exhibit A included an itemization of medical bills of DFP relating to Claimant from January 15, 2004 to May 19, 2004 in the total amount of \$6,223.00, and included the April 8, 2004 charges. I find that these medical bills of DFP which total \$6,223.00 were reasonable and necessary and causally related to Claimant's injury sustained in the course of his employment for Employer, and that they should be paid by Employer/Insurer. I find that DFP should be paid its Medical Fee Requests consistent with *Sheehan*.^[80] Claimant is awarded the sum of \$6,223.00 for these past medical expenses. Of that total, the sum of \$6,028.00 shall be paid directly to Drisko, Fee & Parkins, P.C., and shall not be subject to any attorney's fee of Claimant's attorney in accordance with his stipulation. Claimant is awarded the balance of \$195.00 of these DFP charges.

Claimant also seeks an award for past medical bills from Wyandotte Center in the amount of \$145.08. The treatment records of Wyandotte Center do not sufficiently show that the bills relate to the professional services rendered for treatment of the product of Claimant's injury. Most of the counseling session records make no reference to Claimant's work injury. Many describe stressors that relate to family problems. I find that Claimant did not establish the causal relationship between the Wyandotte Center bills and his work injury. Claimant's request for payment of \$145.08 for bills owed to Wyandotte Center is denied.

FUTURE MEDICAL AID

What is Employer/Insurer's liability for future medical aid?

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though

restoration to soundness [a cure] is beyond avail.^[81] Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo.^[82] The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment.^[83] Conclusive evidence is not required.^[84] It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment.^[85] “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.”^[86] Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered.^[87] The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve.^[88] Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible.^[89] Medical aid may be required even though it merely relieves the employee’s suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease.^[90] To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish.^[91] The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition.^[92]

While Employer has the right to name the treating physician, he or she may waive that right by failing or neglecting to provide necessary medical aid.^[93] Where the employer with notice of an injury refuses or neglects to provide necessary medical care, the Claimant may make his own selection and have the cost assessed against the employer.^[94]

Dr. Koprivica stated that he would expect Claimant to have ongoing treatment needs from a chronic pain management standpoint and psychological sequela standpoint, and should be provided appropriate monitoring and appropriate medications as dictated by his future clinical course.

I find that Claimant continues to suffer from pain caused by the back injury he sustained as a result of his work for Employer. I find that he will need medication in the future to cure or relieve his pain. I further find that Claimant has suffered from depression as a result of his work injury. He may need treatment in the future for that condition. Since Employer/Insurer has previously denied medical treatment, I further find that Employer/Insurer has waived its right to select and approve the treating physician. Claimant may make his own selection and have the cost assessed against Employer/Insurer.

Employer/Insurer is therefore directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his January 14, 2004 injury, in accordance with Section 287.140, RSMo.

Employer asserts in its proposed Award that Claimant's claim for depression is barred by the statute of limitations. Employer raised that defense in its Answer to Claimant's Second Amended Claim.^[95] That issue was not identified as an issue at the beginning of the hearing in this case. The medical records, medical reports, and testimony relating to Claimant's depression were admitted at the hearing without objection. Although issues not identified at a hearing generally need not be determined,^[96] the statute of limitations defense is jurisdictional, and may be raised at any time during the course of proceedings.^[97]

Section 287.430, RSMo provides in part:

Except for a claim for recovery filed against the second injury fund, no proceedings for compensation under this chapter shall be maintained unless a claim therefor is filed with the division within two years after the date of injury or death, or the last payment made under this chapter on account of the injury or death, except that if the report of the injury or the death is not filed by the employer as required by section 287.380, the claim for compensation may be filed within three years after the date of injury, death, or last payment made under this chapter on account of the injury or death.

Amended claims relate back to the date of the filing of the original complaint so as to hold an employer liable where the injuries alleged in the amended claim perfect or amplify the original claim.^[98] However, if the injuries alleged in the amended claim are "new and distinct" then the claims will not relate back to the original claim.^[99]

Claimant's Second Amended Claim was filed on October 6, 2006. It alleged part(s) of body injured: "low back, hips, both lower extremities, depression, weight loss, BAW, but full extent of injuries are unknown at this time." It also alleged the date of accident/occupational disease as "1/14/04 last exposure. Claimant's Amended Claim filed on March 15, 2006 alleged part(s) of body injured: "low back, hips, right leg, BAW, but full extent of injuries are unknown." Claimant's original Claim filed on June 7, 2004 alleged part(s) of body injured: "low back, hips, right leg, BAW, but full extent of injuries are unknown at this time." These claims both alleged date of accident/occupational disease as: "1/30/04 (End of Series)." Judicial notice is taken of the fact that Employer did not file a Report of Injury in this case.

I find that Claimant's Second Amended Claim filed on October 6, 2006 that alleged depression for the first time, was filed within the statute of limitations. I find that because Employer did not file a report of injury in this case, the statute of limitations is three years, not two years. I also note that pursuant to Section 287.063.3, RSMo, the statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained. The medical evidence demonstrated that Claimant was first diagnosed with an occupational disease caused by his work for Employer when he saw Dr. Koprivica on March 7, 2005. The statute of limitations should not begin to run until that date. Claimant's Second Amended Claim was filed less than eighteen months after that date.

I also note that Claimant's adding depression in his Second Amended Claim asserted an injury that was the natural result of the original injury. The Second Amended Claim asserted an injury that arose out of the conduct alleged to have caused the Claimant's injuries in his original Claim, and it related back to the filing of the original Claim. Further, Employer was granted a continuance of a September 13, 2006 trial setting in this case, at its request, in order to obtain medical records relating to Claimant's depression and to retain a psychological expert. Records relating to the depression were supplied to Employer's counsel, and Employer retained Dr. Pronko to perform a medical evaluation relating to Claimant's depression prior to the January 8,

2007 hearing. Employer did not request a continuance of the January 8, 2007 hearing.

CONCLUSION

For all these reasons, and based on substantial and competent evidence, and the application of The Missouri Workers' Compensation Law, I find in favor of Claimant. I find that Claimant has met his burden of proof that he sustained an injury by a cumulative repetitive occupational disease arising out of and in the scope and course of his employment for Employer to January 14, 2004 that resulted in permanent total disability. I further find that his claims for permanent total disability benefits, past medical expenses, future medical aid, and past temporary disability benefits should be allowed, and are hereby awarded in accordance with the foregoing Findings of Fact and Rulings of Law.

This Award is subject to Missouri Department of Social Services Notice of Lien IV-D Case No.: 10208014, dated June 24, 2004 (Exhibit 7), and Missouri Department of Social Services Notice of Lien IV-D Case No.: 80525900, dated October 21, 2004 (Exhibit 8).

Date: April 16, 2007

Made by: Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Patricia "Pat" Secrest, Director
Division of Workers' Compensation

[1] Of that total, the sum of \$6,028.00 shall be paid directly to Drisko, Fee & Parkins, P.C. See page 62 of this Award.

[2] Sections 287.067.1, 2, RSMo (2000). All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, --S.W.3d--, 2007 WL 817268 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively.

[3] Section 287.067.1, RSMo.

[4] *Kent v. Goodyear Tire and Rubber Company*, 147 S.W.3d 865, 867-68 (Mo.App 2004).

[5] *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*, 121 S.W.3d at 228; *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).

[6] *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226 S.W.2d 795, 797 (Mo.App. 1987)); *Dawson*, 885 S.W.2d at 716.

[7] *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *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).

[8] *Dawson*, 885 S.W.2d at 716; *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226, 230 (Mo.App. 1988).

[9] *Smith v. Climate Engineering*, 939 S.W.2d 429 (Mo.App. 1996), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Rector v. City of Springfield*, 820 S.W.2d 639 (Mo.App. 1991).

[10] *Collins v. Neevel Luggage Manufacturing Company*, 481 S.W.2d 548, 555 (Mo.App. 1972).

[11] *Coloney*, 952 S.W.2d at 759.

[12] *Kelley v. Banta & Stude Const. Co., Inc.*, 1 S.W.3d 43, 49 (Mo.App. 1999); *Smith*, 939 S.W.2d at 436.

[13] *Smith*, 939 S.W.2d at 436.

[14] *Kintz v. Schnucks Markets, Inc.*, 889 S.W.2d 121, 124 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228.

[15] *Collins*, 481 S.W.2d at 555.

[16] *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)).

[17] *Coloney*, 952 S.W.2d at 763; *Johnson v. Denton Constr. Co.*, 911 S.W.2d 286, 287 (Mo. banc 1995).

[18] *Coloney*, 952 S.W.2d at 760.

[19] Section 287.020, RSMo provides: "2. The word "accident" as used in this chapter shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. 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. An injury is not compensable merely because work was a triggering or precipitating factor.

"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. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

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

"(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

"(b) It can be seen to have followed as a natural incident of the work; and

"(c) It can be fairly traced to the employment as a proximate cause; and

"(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life."

[20] *Thorsen v. Sachs Electric Company*, 52 S.W.3d 611, 618 (Mo.App. 2001), *overruled in part on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003); *Williams v. DePaul Ctr.*, 996 S.W.2d 619, 625 (Mo.App. 1999), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Fisher v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230.

[21] *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852 (Mo. 1999).

[22] *Kasl*, 984 S.W.2d at 853; *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226.

[23] *Bloss v. Plastic Enterprises*, 32 S.W.3d 666, 671 (Mo.App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Cahall*, 963 S.W.2d at 372.

[24] *Bloss*, 32 S.W.3d at 671.

[25] *Cahall*, 963 S.W.2d at 372.

[26] *Royal v. Advantica Restaurant Group, Inc.*, 194 S.W. 3d 371, 376 (Mo.App. 2006), citing *Cook v. St. Mary's Hosp.*, 939 S.W.2d 934, 940 (Mo.App. 1997), *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

[27] *Royal*, 194 S.W. 3d at 376, citing *Williams v. DePaul Health Ctr.*, 996 S.W.2d 619, 631 (Mo.App. 1999), *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

[28] *West v. Posten Const. Co.* 804 S.W.2d 743, 745-46 (Mo. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224.

[29] *Thorsen*, 52 S.W.3d at 618; *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228.

[30] *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230.

[31] *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.

[32] *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974).

- [333] *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.
- [344] *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991).
- [351] *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mo.App. 2004).
- [361] *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), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231.
- [371] *Klietheremes v. Abb Power T & D*, --- S.W.3d ----, 2007 WL 45643 (Mo.App. W.D.); *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006).
- [381] *Klietheremes*, 2007 WL 45643; *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004).
- [391] *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199.
- [401] *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231.
- [411] *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.
- [421] *Higgins v. Quaker Oats Co.*, 183 S.W.3d 264, 271 (Mo.App. 2005); *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo. App. 1998), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228.
- [431] *Gennari v. Norwood Hills Corporation*, 322 S.W.2d 718, 722-23 (Mo. 1959); *Miller*, 890 S.W.2d at 376; *Weinbauer v. Grey Eagle Distributors*, 661 S.W.2d 652 (Mo.App. 1983).
- [441] *Winsor v. Lee Johnson Const. Co.*, 950 S.W.2d 504, 509 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Smith*, 939 S.W.2d at 434; *Wolfgeher v. Wagner Cartage Serv, Inc.*, 646 S.W.2d 781, 784 (Mo. banc 1983). The Court noted in *Winsor* at 509: "Dr. Weed testified that there was an exacerbation of Winsor's previous back injury by virtue of the August 11th incident. 'Exacerbation,' whether used in medical parlance or everyday conversation, means the same thing: an 'increase in the severity of a disease or any of its symptoms,' *Dorland's Illustrated Medical Dictionary* 589 (28th ed.1994), an 'intensification or aggravation, as of a disease, pain, etc.'"
- [451] *Winsor*, 950 S.W.2d at 509; *Rector v. City of Springfield*, 820 S.W.2d 639, 643 (Mo.App. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.
- [461] *Avery v. City of Columbia*, 966 S.W.2d 315, 322 (Mo.App. 1998), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Miller*, 890 S.W.2d at 376.
- [471] *Id.*
- [481] *Higgins*, 183 S.W.3d at 270; *Tangblade v. Lear Corp.*, 58 S.W.3d 662, 667 (Mo.App. 2001); *Bloss v. Plastic Enterprises*, 32 S.W.3d 666 (Mo.App. 2000). The Western District Court of Appeals in *Higgins* affirmed an Award of the Missouri Labor and Industrial Commission that found an Employee suffered from chronic pain disorder and major depression as a result of her cumulative back trauma, and awarded her benefits for permanent total disability.
- [491] *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230.
- [501] *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett*, 595 S.W.2d at 443; *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968).
- [511] *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773.
- [521] *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).
- [531] *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289.
- [541] *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505.
- [551] *Sellers*, 776 S.W.2d at 505.
- [561] *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

[57] *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982).

[58] *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

[59] *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App. 1990); *Kowalski*, 631 S.W.2d at 992.

[60] *Brown*, 795 S.W.2d at 483.

[61] *Higgins*, 183 S.W.3d at 272; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski* 631 S.W.2d at 922. *See also Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

[62] See pages 57-59 of this Award for a discussion of Average Weekly Wage and Compensation rates. See also page 61 of this Award in which temporary total disability benefits are awarded for the period January 15, 2004 through May 23, 2004.

[63] *Endicott v. Display Technologies, Inc.* 77 S.W.3d 612, 616 (Mo. 2002).

[64] *Messersmith v. University of Missouri-Columbia/Mt. Vernon Rehabilitation Center*, 43 S.W.3d 829, 832 (Mo. banc 2001)

[65] *Id.*

[66] *Merriam Webster Online*, www.m-w.com/dictionary/output.

[67] *Random House Webster's College Dictionary* (1991), page 961.

[68] Section 287.250.4, RSMo provides: "If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage."

[69] *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226.

[70] *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

[71] *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489.

[72] *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996).

[73] *Cooper*, 955 S.W.2d at 576.

[74] *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

[75] *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926 (Mo.App. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230; *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975).

[76] *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228; *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229.

[77] *Martin*, 769 S.W.2d at 111.

[78] *Sheehan*, 733 S.W.2d at 798.

[79] Section 287.104.13(5), RSMo provides:

If an employer or insurer fails to make payment for authorized services provided to the employee by a hospital, physician or other health care provider pursuant to this chapter, the hospital, physician or other health care provider may proceed pursuant to subsection 4 of this section with a dispute against the employer or insurer for any fees or other charges for services provided.

Section 287.104.13(6), RSMo provides:

A hospital, physician or other health care provider whose services have been authorized

in advance by the employer or insurer may give notice to the division of any claim for fees or other charges for services provided for a work-related injury that is covered by this chapter, with copies of the notice to the employee, employer and the employer's insurer. Where such notice has been filed, the administrative law judge may order direct payment from the proceeds of any settlement or award to the hospital, physician or other health care provider for such fees as are determined by the division. The notice shall be on a form prescribed by the division.

[80] *Sheehan*, 733 S.W.2d at 798.

[81] *Bowers*, 132 S.W.3d at 266.

[82] *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996).

[83] *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984).

[84] *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226.

[85] *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227.

[86] *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828.

[87] *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231.

[88] *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224.

[89] *Bowers*, 132 S.W.3d at 270.

[90] *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942).

[91] *Stephens*, 446 S.W.2d at 782; *Brollier*, 163 S.W. 2d at 115.

[92] *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

[93] *Herring v. Yellow Freight System, Inc.*, 914 S.W.2d 816, 822 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Emert v. Ford Motor Company*, 863 S.W.2d 629, 631 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228; *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 879 (Mo.App. 1984).

[94] *Herring*, 914 S.W.2d at 822.

[95] Judicial notice is taken of Claimant's original Claim for Compensation, his Amended Claim for Compensation, his Second Amended Claim for Compensation, and Employer's Answers to each Claim.

[96] ***Clark A. Gabriel v. Burlington Motor Carriers***, 1998 WL 559966 (Mo.Lab.Ind.Rel.Com.)

[97] *Marston v. Juvenile Justice Center of The 13th Judicial Circuit*, 88 S.W.3d 534, 538 (Mo.App. 2002).

[98] *Holaus v. William J. Zickell Co.* 958 S.W.2d 72, 80 (Mo. App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Hunsicker v. J.C. Industries, Inc.*, 952 S.W.2d 376, 382 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226; *Ford v. American Brake Shoe Co.*, 252 S.W.2d 649, 652 (Mo.App. 1952).

[99] *Coloney*, 952 S.W.2d at 762.