

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

Injury No.: 02-109968

Employee: William "Billy" Davis
Employer: Associated Electric Cooperative
Insurer: Self-Insured
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund
Date of Accident: October 17, 2002
Place and County of Accident: New Madrid 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 February 25, 2005, and awards no compensation in the above-captioned case.

The award and decision of Chief Administrative Law Judge Jack H. Knowlan, Jr., issued February 25, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 23rd day of November 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED

Attest: John J. Hickey, Member

Secretary

DISSENTING OPINION

I must respectfully dissent from the award and decision of the majority of this Commission affirming the award and decision of the administrative law judge. I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant

provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

The administrative law judge concluded that employee suffered a work-related accident on October 17, 2002. The administrative law judge nonetheless concluded that employee suffered no permanent disability as a result of the accident. Both medical experts who testified in this matter concluded that employee sustained a permanent disability. Neither the administrative law judge nor the majority of the Commission criticize the uncontradicted and unimpeached opinion of the physicians that employee suffers *some* permanent disability. Under these circumstances, it is error for the majority to exercise its "trier-of-fact" prerogative to ignore the doctors' opinions and reach a contrary conclusion, i.e. that employee has *no* permanent disability. See *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 180 (Mo. App. 2004).

There is ample evidence in the record to establish that employee has sustained a permanent disability. Of paramount importance is employee's credible testimony that he could work with minimal disruption related to his back before the October 2002 injury but he had to miss a significant amount of work for treatment after the injury.

The medical records and physician impressions confirm that the primary accident caused a change in employee's condition, specifically at L4/5, which change was manifested by additional symptoms. Dr. Park noted that employee, "had done quite well from his previous surgery prior to [the October 17 injury]." Dr. Schumer, who saw employee shortly before and shortly after the accident, recorded a difference in symptoms, when he noted that prior to the October 17, 2002, injury, employee's "chronic back pain had been pretty well controlled with Celebrex..." The records of Restart confirm that employee did well with his symptoms after the 2001 surgery until he suffered the October 2002 injury. After the October 2002 injury, employee's symptoms became so severe he had to miss work and seek medical treatment. It was at this point in time, when employee's condition became disabling.

Not only were the pain symptoms more difficult to control after the October 17 accident, but employee experienced pain in different areas of the body. Employee testified to a pain higher in his back than he experienced before the October 2002 injury. Dr. Park records that after the pallet pulling accident, employee experienced left leg pain that was different from the left leg pain he experienced before the accident. Employee testified to new pain on the front of his left leg, on his lower leg below the knee on his left shin, and in his foot (toes and increased heel pain). The occurrence of pain in different areas of the body evidences a new injury and not just an aggravation of a preexisting condition.

I find most credible the testimony of Dr. Palen that employee sustained a 30% permanent partial disability to the body as a whole as a result of the October 2002 accident and I would award same. I would also award to employee his past medical expenses, temporary total disability, and future medical.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission to deny compensation to this injured employee.

John J. Hickey, Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: Billy Davis

Injury No. 02-109968

Dependents: N/A

Employer: Associated Electric Cooperative

Additional Party: Second Injury Fund

Insurer: Self-insured

Hearing Date: November 17, 2004

Checked by: JK/sm

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the law? Yes
4. Date of accident or onset of occupational disease? October 17, 2002
5. State location where accident occurred or occupational disease contracted: New Madrid County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease?
Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by law? Yes
10. Was employer insured by above insurer? Self-insured
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was trying to move a pallet when a board broke and caused the employee to pull his back
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Alleged injury to low back
14. Nature and extent of any permanent disability: None
15. Compensation paid to date for temporary total disability: None
16. Value necessary medical aid paid to date by employer-insurer: \$697.00
17. Value necessary medical aid not furnished by employer-insurer: None (Employee alleged that employer is liable for an additional sum of \$93,704.11 for medical expenses)
18. Employee's average weekly wage: \$806.00
19. Weekly compensation rate: \$537.36 for temporary total disability and \$340.12 for permanent partial disability
20. Method wages computation: By agreement
21. Amount of compensation payable: Claim denied

22. Second Injury Fund liability: Claim denied based on denial of underlying claim against employer.

23. Future requirements awarded: None

FINDINGS OF FACT AND RULINGS OF LAW

On November 17, 2004, the employee, Billy Davis, appeared in person and by his attorneys, Mr. Steven Taylor and Ms. Kim Heckmeyer, for a hearing for a final award against the employer. By agreement, the employee's claim against the Second Injury Fund was left open. The employer, Associated Electric Cooperative, was represented at the hearing by its attorney, Ms. Beverly Figg. Ms. Alice Swilley, the safety coordinator for the employer, was also present at the hearing.

Prior to the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with a summary of the evidence and the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. On or about October 17, 2002, Associated Electric Cooperative was a covered employer operating under and subject to the provisions of the Missouri Workers' Compensation Act, and was duly qualified as a self-insured employer.
2. On or about October 17, 2002, Billy Davis was an employee of Associated Electric Cooperative, and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about October 17, 2002, the employer had notice of the employee's accident.
4. The employee's claim for compensation was filed within the time allowed by law.
5. The employee average weekly wage was \$806.00, and his rate of compensation is \$537.36 for temporary total disability and \$340.12 for permanent partial disability.
6. The employer furnished medical aid in the amount of \$697.00.
7. No temporary total disability benefits were paid.

ISSUES:

1. Accident.
2. Medical causation.
3. Additional medical aid.
4. Nature and extent of disability – temporary total disability and permanent partial disability.
5. Medical fee dispute.

SUMMARY OF THE EVIDENCE:

The employee, Billy Davis, started working for Associated Electric Cooperative in 1984. At the time of his accident on October 17, 2002, the employee was attempting to move a pallet when a "slat" (board) that he was pulling on broke. The employee testified that this caused an injury to his back.

Both the employee's testimony and the medical records confirm that the employee had a long history of back pain. The employee first started experiencing back pain sometime around Christmas of 1995. Medical records from Dr. Mellies and St. Francis Medical Center indicate the employee was complaining of back pain and left leg pain in January and February of 1996. An MRI confirmed the employee had degenerative changes with a disc bulge and spondylolisthesis at the L5/S1 level. Additional records from Dr. Masters demonstrate the

employee continued to have low back complaints in July and September of 1997. All of these early records indicate that the employee's low back pain and left leg pain were degenerative and were not associated with any work activity or other trauma (Employee's Exhibit A).

By October of 2000, the employee's low back pain with radiating pain into his left foot had increased to the point where he sought additional treatment. Dr. Masters, the employee's family doctor, ordered a second MRI that showed a herniated disc at the L5/S1 level. Dr. Masters initially referred the employee to Dr. Joel Ray, who is a neurosurgeon in Cape Girardeau. Dr. Ray's records from October 11, 2000, indicate the employee had a possible pars defect with mild spondylolisthesis. The employee told Dr. Ray he had a long history of back pain that had become severe in the last few weeks. A C/T scan showed a disc bulge at L4/5, a diffuse disc bulge at L5/S1 with a "probable healed bilateral pars defect" (Employer's Exhibit 3).

After Dr. Ray suggested conservative treatment, the employee had Dr. Masters refer him to Dr. Kee Park for a second opinion. Dr. Kee Park is a neurosurgeon with Cape Neurological Surgeons. Dr. Park's records from December 28, 2000 indicate the employee reported "back pain for years," but noted it got significantly worse in October. After therapy failed to improve his symptoms, the employee and Dr. Park agreed that they should proceed with surgery. A C/T scan on February 1, 2001, showed the employee had bulging at L4/5 and L5/S1 associated with degenerative changes. Prior to surgery, Dr. Park also ordered a diskogram. Although the injection at the L5/S1 level produced severe pain at the 8 out of 10 level, it is significant to note that the injection at the L4/5 level also caused pain at the 5 out of 10 level with "extravasations of dye with discordant type pain" (Dr. Park's February 1, 2002 discharge summary, Employee's Exhibit A-4).

Notwithstanding this finding at the L4/5 level, Dr. Park elected to proceed with a one level microdiscectomy and fusion at the L5/S1 level. The operative record from February 2, 2001, notes a postoperative diagnosis of "L5/S1 spondylolysis on the left with degenerative disc disease" (Employee's Exhibit A-4).

The employee's symptoms improved after the first surgery by Dr. Park, but the medical records established that the employee began to experience additional symptoms of low back and left leg pain six months after his surgery. Dr. Park's record of August 16, 2001 notes the employee "reports some return of his left heel pain and big toe pain" (Employee's Exhibit A-4). On October 15, 2001, Dr. Park noted, "he reports that he has had for about two months a return of some burning sensation in his left foot to the big toe and the top of his left foot" (Employee's Exhibit A-4). The employee was also complaining of neck and left arm pain, so Dr. Park ordered an additional MRI of the cervical and lumbar spine. The lumbar MRI performed October 25, 2001 revealed an L4-5 disc protrusion with superior migration of fractions at the central portion (Employee's Exhibit A-4).

Based on this finding, Dr. Park ordered "neuroflossing" (physical therapy) and prescribed Neurontin. The therapy record from October 29, 2001 notes, "patient reports low back and left leg pain, left heel and toes. Is consistent. At maximum legs of 8/10. History of back problems over the years" (Employer's Exhibit 9).

After one month of therapy, the records from Dr. Park and the therapist indicate the employee's leg complaints improved. Although Dr. Park released the employee to full duty on November 29, 2001, he continued the employee's prescription of Neurontin for three months (Employee's Exhibit A-4).

Although the employee testified that he continued to work after being released by Dr. Park, both the medical records and his testimony confirm that the employee continued to experience significant low back and left lower extremity pain between the time he was released by Dr. Park and his October 17, 2002 accident. During cross-examination the employee admitted that during his deposition he testified that he had taken Neurontin at the rate of one table per day up until his October 17, 2002 accident. The employee also testified that during this time period, he had missed nine days of work due to back problems.

The most significant medical record that demonstrates the problems the employee was having prior to his October 17, 2002 accident is an entry on September 30, 2002, by Dr. Schumer with Cape Physicians' Associates. Although the employee was scheduled with a follow-up visit for suspected acute prostatitis, Dr. Schumer also made the following entry related to low back and left leg pain:

Lumbar myelopathy with left lower extremity pain it persists, he went off Neurontin after titrating up to 1200

mg. dose. Complains of fatigue related to that. Does a lot of lifting, stair climbing, ladder climbing, etc. At his work that exacerbates, and had to take some time off for "back rest." Some improvement with Aleve, but lists causes GI upset.

(Employee's Exhibit A-2). Under his "Assessment/Plan," Dr. Schumer recorded:

Lumbar myelopathy, with history of L5/S1 surgery in February of 2001. Dr. Park was considering epidural steroid injections if Neurontin was not helpful, and I will offer Mr. Davis a trial of Celebrex 200 mg q day #25 samples. Prescribed #90 refill times 3. May increase to b.i.d., carefully monitoring blood pressure with that medicine.

(Employee's Exhibit A-2).

Seventeen days after this visit with Dr. Schumer, the employee testified that he suffered a new back injury removing the pallet on October 17, 2002. The employee testified that his symptoms were different following his October 17, 2002 accident because the pain in his back was higher up in his mid back and the radiating pain affected his left heel and different parts of his left leg. His position, however, is not consistent with the medical history he provided to Dr. Hunter-Pearson in his initial visit on October 18, 2002. The doctor's record states:

Mr. Davis presents today as new workers' comp visit, complaining of lower back pain. He works for AECl in maintenance. Patient actually has history of low back injury in the past and actually underwent surgery February 2001. He underwent L4/5 discectomy. He states he noticed a pull in his back while lifting a heavy pallet when the wood broke through. He believes this may have worsened his chronic back pain and may be exacerbated his symptoms. He denies any lower extremity weakness, no numbness or tingling in his lower extremities. He normally takes Celebrex 200 mg b.i.d. for his back pain.

(Employee's Exhibit A-3, emphasis added). Under the heading "A & P," Dr. Hunter-Pearson stated:

Patient has history of chronic low back pain and had undergone surgery in past with L4/L5 discectomy in February of 2001. He believes he may have exacerbated this pain recently at work. He is actually to follow-up with his personal physician since his underlying back problems are chronic and are not actually related to a specific work injury. Although again, he does believe he had maybe exacerbated the pain by pulling on the pallet recently at work.

(Employee's Exhibit A-3, emphasis added.) These entries by Dr. Hunter-Pearson make it clear that in the early treatment records, the employee was not complaining of different symptoms, but thought his accident may have exacerbated his prior injury.

In a follow-up visit with Dr. Hunter-Pearson on October 22, 2002, Dr. Hunter-Pearson stated that the employee was going to follow-up with his primary physician because at the time of his first visit, "it was determined that his most recent episode of back pain was most likely not related to work since he has chronic hurting of back pain" (Employee's Exhibit A-3).

Based on Dr. Hunter-Pearson's opinion that the employee's back problems were not work related, the employer denied treatment and the employee sought treatment on his own from Dr. Park. At the time of Dr. Park's initial evaluation of the employee on November 7, 2002, the employee gave a history of jerking his back while moving a pallet, but the date was mistakenly identified as October 10, 2002. The employee advised Dr. Park that since that accident, he had been having pain in his back going into his left leg. By the time of Dr. Park's appointment, the employee told Dr. Park that the pain "was somewhat different than his previous pain which was somewhat higher than before." Although Dr. Park commented that the employee had done "quite well" after his previous surgery, there is no indication that Dr. Park was aware of the employee's visit to Dr. Schumer 17 days prior to his accident (Employee's Exhibit A-6).

After this initial visit with Dr. Park, the employer agreed to send the employee to St. Louis for an evaluation by Dr. Russell Cantrell. Dr. Cantrell examined the employee on November 12, 2002, and prepared a report that was admitted as Employer's Exhibit 1. Based on Dr. Cantrell's examination of the employee and his review of the

medical records, Dr. Cantrell concluded, "I am unable to discern any specific distinctions in his current subject complaints relative to his prior symptoms that would suggest that his current symptoms are related to his reported work injury in October of 2002" (Employer's Exhibit 1). After noting the employee's continued use of Neurontin for left leg pain after his first surgery, Dr. Cantrell suggested that the employee's ongoing pain complaints were "not related to a recent October, 2002 injury, but rather related to chronic neuropathic pain and chronic lumbar back pain not causally related to the October 2002 injury" (Employer's Exhibit 1).

Based on this opinion, the employer again denied the employee's request for treatment and the employee scheduled a return visit with Dr. Schumer on November 20, 2002. It appears that this appointment was scheduled because the employee had attempted to work on a light duty release, and felt he needed a full release until his next appointment with Dr. Park on December 5, 2002. To justify his work release, Dr. Schumer noted "...he has aggravating left lower back pain radiating through the buttock, left leg and into the heel with moderate lifting (less than 15 pounds) and ladder climbing, just standing on a hard surface a lot of times will aggravate this." It should be noted that the employee's complaints to Dr. Schumer are nearly identical to the complaints he made to Dr. Park and the physical therapist in August and October of 2001. The employee also made similar complaints to Dr. Schumer on September 30, 2002. Dr. Schumer's record from that date confirms that 2 ½ weeks prior to his October 17, 2002 accident, the employee was also complaining that "lifting, stair climbing, ladder climbing, etc., at his work exacerbated his pain, and he had to take off for 'back rest' " (Employer's Exhibit 6).

After the employee was released from work by Dr. Schumer, he returned to Dr. Park on December 5, 2002. Dr. Park's record of that date notes the employee had been denied by workers' compensation and was proceeding under his health insurance. Dr. Park started his treatment of the employee by ordering physical therapy and an MRI (Employee's Exhibit A-4).

Dr. Park's next medical record of December 16, 2002 offers critical insight into Dr. Park's opinion on the issue of causation. Although the employer attempted to keep this record out based on a hearsay objection (see "Exhibits" below), this record is a "double-edged sword" that cuts both ways. Dr. Park first agrees that the findings of the new MRI are basically the same as the MRI he had ordered in October 2001. Dr. Park stated, "his MRI today shows a focal disc protrusion at L4/5 which is central which appears to be somewhat similar to what he had before" (Employee's Exhibit A-4). Dr. Park then offered the employee a glimmer of hope by stating, "it is possible that when he had the pallet injury that this exacerbated his preexisting condition at L4/5 and caused it to be symptomatic to the point that it is requiring additional treatment at this time" (Employee's Exhibit A-4, emphasis added).

After additional physical therapy and steroid injections failed to improve the employee's symptoms, Dr. Park and the employee agreed that he should proceed with a diskogram and additional surgery. The diskogram performed on January 23, 2003, concluded that the employee had moderately severe degenerative changes at the L4-5 with narrowing of the disc space and "extravassation" of the contrast material through the annular tear. It is significant that during this diskogram the employee experienced no significant concordant pain at the L4/5 level. As previously noted during the February 2001 diskogram, the employee had concordant pain at a level of 5 out of 10 at the L4-5 level (Employee's Exhibit A-4).

After reviewing the diskogram, Dr. Park concluded that the employee's pain was being generated at the L4/5 level, and recommended surgery (February 3, 2002 entry in Employee's Exhibit A-4). The operative record of February 11, 2003 indicates Dr. Park performed an L4/5 bilateral discectomy, interbody fusion with Osteotech spacers, posterolateral fixation using Spirus 90D and extending the previous fusion from L5/S1. The postoperative diagnosis by Dr. Park was "L4/5 degenerative disc disease, segmental instability and stenosis" (Employee's Exhibit A-4).

Both the employee's testimony and Dr. Park's medical records indicate the employee's second surgery was successful. The employee's low back pain and leg pain improved and the fusion was solid. Dr. Park released the employee with a 30 pound lifting restriction on June 9, 2003, and later gave the employee a full duty release on October 4, 2003.

At the time of the hearing the employee agreed that Dr. Park's last surgery had improved his symptoms. He emphasized, however, that he still has pain in his back every day. The employee also stated that his left leg is

weak and he has some numbness in his toes. The employee avoids squatting, bending and crawling, and does not lift over 30 pounds without help. The employee noted that after his second surgery, he took a lower paying job with Associated Electric Cooperative as a custodian to try and minimize problems with his back. The employee indicated that he still takes Hydrocodone, but only on an "as-needed basis."

To support his position on the issue of medical causation, the employee offered the deposition testimony of Dr. James E. Palen. Dr. Palen is a family practitioner who examined the employee on April 8, 2004. Based on his physical examination of the employee, his review of certain medical records, and the history provided by the employee, Dr. Palen testified that, "I felt that the injury that he suffered at work and the sudden strain in his back was the substantial cause of his back injury" (Employee's Exhibit C, page 9). Dr. Palen also testified that the employee was at MMI and concluded that the medical bills he had reviewed were reasonable and necessary (Employee's Exhibit C, page 10 and 11). Dr. Palen concluded his direct examination by testifying that he believed the employee had a 30% permanent partial disability of his body as a whole as a result of his October 17, 2002 injury (Employee's Exhibit C, page 12).

During cross-examination by the employer's attorney, Dr. Palen agreed that his opinion was based solely on the history provided by the employee (Employee's Exhibit C, page 15 and 21). On page 7 of his deposition, Dr. Palen testified that the employee had told him that he had recovered from his first surgery, and after the pallet incident, he had developed back pain that radiated down his left leg. Dr. Palen also acknowledged that he had not reviewed all of the medical records related to the employee's prior back problems, and had not been provided with Dr. Schuman's medical record of September 30, 2002 (Employee's Exhibit C, page 15 and 20). Dr. Palen also did not recall that the employee had a disc protrusion at the L4/5 level prior to his October 17, 2002 accident (Employee's Exhibit C, page 2). When questioned about the contradiction between the employee's history and these additional records, Dr. Palen responded, "Well, my opinion is based on the history given to me by the patient. I don't have access to that record" (Employee's Exhibit C, page 21).

During redirect, the employee's attorney attempted to rehabilitate Dr. Palen by asking Dr. Palen what the employee had told him about his complaints and inability to work between the first surgery and his October 17, 2002 accident. Dr. Palen responded by stating:

Well, it was my understanding from talking to him that he was able to work and that he was doing satisfactorily, not that he was necessarily totally pain free or didn't have bad days, but that he was able to work and was doing satisfactorily until he had the second injury.

(Employee's Exhibit C, page 29).

In addition to the employee's testimony, Dr. Palen's deposition and the medical records, the employee also offered medical bills and a letter from Dr. Park to the employee's attorney dated September 2, 2003. The medical bills include bills from Restart, Dr. Schumer, Dr. Stone, Cape Neurological Surgeons and St. Francis Medical Center. The total amount of these bills is equal to \$93,704.11.

The September 2, 2003 letter from Dr. Park was prepared in response to a letter from the employee's attorney dated August 25, 2003, and was offered as part of Employee's Exhibit A-4. The employer objected to the admission of this exhibit based on the fact that it is hearsay, and should not be considered as part of Dr. Park's medical records. The employer's objection to this letter has been sustained, but the exhibit has been accepted and retained as an offer of proof (See "Exhibits" below).

In the event the employer's objection is subsequently overruled, it should be noted that Dr. Park's September 2, 2003 letter is basically an expanded version of the entry he made in his office note of December 16, 2002. Dr. Park first agreed that the employee had a disc herniation at L4/5 prior to his October 17, 2002 injury. Dr. Park noted, however, that the employee's symptoms for the preexisting disc herniation were "minimal," and he was "gainfully employed despite this problem." Dr. Park then concluded that "the injury that he sustained on October 17, 2002, aggravated his preexisting condition at this level to the point where he required surgical treatment for this." It should be noted that the admission of this letter would not have changed the decision to deny the employee's claim.

At the conclusion of the employee's evidence, the employer offered a more extensive set of medical records together with two medical reports by Dr. Russell Cantrell. Dr. Cantrell's first report of November 12, 2002, was admitted as Employer's Exhibit 1. As previously noted, in his first report Dr. Cantrell concluded that the employee's low back and left leg complaints were not related to his October 17, 2002 accident.

Dr. Cantrell's second report was dated July 19, 2004, and was admitted as Employer's Exhibit 2. At the time of his second report, Dr. Cantrell had been provided with additional medical records, including the records of Dr. Park and Dr. Schumer. After reviewing these records, Dr. Cantrell concluded:

My review of these additional medical records does not suggest that Mr. Davis had sustained a significant work injury on October 18, 2002. The medical records support a history of recurrent lumbar back pain and left leg pain that predated his reported work injury and for which he underwent medical management, mainly trials of Neurontin, limitations in activity, both physician and self imposed, as well as nonsteroidal and antiinflammatory medications. The medical records further support that he was symptomatic with disc disease at both the L4/5 and L5/S1 level even prior to his first lumbar surgery and Dr. Park chose to surgically treat the L5/S1 segment based on its relative severity compared to the pain level at L4/5. There is, in my opinion, absolutely no indication that his reported work injury in October of 2002 necessitated the surgical treatment for which he underwent thereafter, and my opinion from November 12, 2002 remains unchanged. In fact, my opinions rendered in November of 2002 are further supported by the review of these additional medical records.

(Employer's Exhibit 2).

In addition to his opinion that the employee's work in October of 2002 did not cause his need for additional surgery, Dr. Cantrell was also asked to provide a rating of permanent partial disability. Dr. Cantrell felt the employee had a total permanent partial disability of 11%. Dr. Cantrell attributed 8% of that total to the employee's prior lumbar fusion, 2% to the employee's chronic complaints of low back pain and leg pain after the first surgery and 1% to a possible lumbar strain that may have occurred in October of 2002 (Employer's Exhibit 2).

At the conclusion of the hearing, both attorneys requested leave to submit briefs on the disputed issues. The employee's brief was filed on December 7, 2004, and the employer's brief was received by the Division on December 14, 2004.

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records
- B. Medical bills
- C. Deposition of James E. Palen
- D. Incident report

Employer-Insurer's Exhibits

- 1. November 12, 2002 report from Dr. Russell Cantrell
- 2. July 19, 2004 report from Dr. Russell Cantrell
- 3. Medical records of Dr. Joel Ray
- 4. Medical records of Dr. Kee Park
- 5. Medical records of Dr. Stone and Dr. Hunter-Pearson
- 6. Medical records of Dr. Matthew Schumer
- 7. Medical records of Dr. Ed Masters

8. Restart therapy records
9. St. Francis Medical Center records
10. Medical chronology of treatment received by Billy Davis

The employer's objection to the December 16, 2002 medical record of Dr. Kee Park is overruled. Under Section 287.140.7, certified copies of the records of health care providers "shall be admissible in evidence in any such proceedings." The December 16, 2002 office note of Dr. Park is clearly part of Dr. Park's medical record, and is therefore admissible as a statutory exception to the hearsay rule.

The employer also objected to the September 2, 2003 letter that Dr. Park wrote to the employee's attorney. This letter was written in response to a letter from the employee's attorney which requested an opinion on the issue of medical causation. This letter was prepared in order to assist the employee in his preparation for the litigation of his claim, and is not part of Dr. Park's medical treatment records. Section 287.140.7 is therefore not applicable, and the employer's hearsay objection has been sustained. See *Kauffman v. Tri-State Motor Transit Company*, 28 S.W.3d, 369 (Mo.App.2000). Notwithstanding this ruling, the September 2, 2003 letter from Dr. Park has been accepted as an offer of proof, and will be retained as part of Employee's Exhibit A-4 in order to allow review by the Commission or other appellate courts.

FINDINGS OF FACT AND RULINGS OF LAW:

Issue 1 and Issue 2. Accident and Medical Causation

The evidence in this case supports a finding that the employee had an accident on October 17, 2002 that arose out of and in the course of his employment. The medical evidence, however, does not support a finding that the employee's October 17, 2002 accident was a substantial factor in causing either a new injury to the employee's low back or an aggravation of his preexisting condition that raised it from a level where it was nondisabling to disabling. The evidence also fails to support a finding that the employee's October 17, 2002 accident was a substantial factor in causing the need for the second surgical procedure performed by Dr. Park and the related medical expenses submitted by the employee as Employee's Exhibit B.

Both the objection findings from the pre and post MRI's and the medical records of Dr. Park confirm that the employee's herniated disc at the L4/5 level was a degenerative problem that was present at least 11 months prior to the employee's accident. The medical records of Dr. Park, the physical therapist and Dr. Schumer also establish that the employee's L4/5 disc was both symptomatic and disabling prior to the October 17, 2002 accident. A comparison of the medical records before and after the accident confirm that the employee's symptoms and complaints after October 17, 2002, were nearly identical to the complaints he had been making to Dr. Park and Dr. Schumer. The September 30, 2002 entry of Dr. Schumer is especially significant since this visit occurred 17 days prior to his accident. This entry by Dr. Schumer supports a finding that the employee's work activities were exacerbating his low back and left leg symptoms, and the employee had been missing work on occasion to rest his back.

In addition to the similarity of his symptoms before and after his accident and the disabling nature of his symptoms prior to the date of his accident, the medical records also confirm that the employee was taking prescription medication for his low back and left leg symptoms on a daily basis prior to his October 17, 2002 accident. Dr. Schuman's September 30, 2002 entry notes that the employee had been taking up to 1200 milligrams of Neurontin each day, and the employee received samples and a three month prescription for Celebrex 17 days before his accident.

The combined effect of these medical records makes it impossible to find that the employee's accident on October 17, 2002 either caused a new injury to the employee's low back or aggravated a preexisting condition and raised it to the level where it became symptomatic and disabling. The employee's herniated disc was present prior to his accident, and his preexisting condition was both symptomatic and disabling immediately prior to his accident

The employee has attempted to overcome the problems created by the medical records through both his own testimony and the opinions of Dr. Palen and Dr. Park.

The employee testified at the hearing that the symptoms he experienced after his October 17, 2002 accident were different because they were higher up in his mid back and affected different areas of his left lower extremity. This argument is not credible. Prior to the hearing, the employee never complained of pain in his mid back. Although the L4/5 disc is one level higher than the L5/S1 level, both are part of the lumbar spine, and it is difficult to believe that the employee could have ascertained a significant difference between pain from the L4/5 disc and pain from the L5/S1 disc. This argument is also refuted by the fact that the L4/5 disc herniation was clearly present prior to his accident on October 17, 2002.

The employee's attempt to differentiate his symptoms is also not supported by the medical records. As previously noted, the employee's complaints of low back pain and left lower extremity pain, including references to his left foot and left heel, can be found in the records both before and after his October 17, 2002 accident.

In addition to his efforts to differentiate his symptoms, the employee has also relied on the opinions of Dr. Park and Dr. Palen. While Dr. Park speculated that it was possible that the employee's accident on October 17th aggravated his L4/5 disc and caused the need for additional treatment, this theory is not supported by any other credible medical evidence. The medical records indicate that Dr. Park had not seen the employee for almost a year prior to his accident, and there is no indication that Dr. Park was aware of the employee's visit to Dr. Schumer on September 30, 2002. The fact that Dr. Park apparently was not aware of the employee's complaints and limitations in the weeks immediately prior to his accident adversely affected his credibility on the issue of causation.

The employee's primary witness on the issue of causation was Dr. James Palen. Although Dr. Palen provided a boilerplate conclusion that the employee's injury and need for surgery was directly caused by his accident, Dr. Palen's conclusion is not credible because it was based on an inaccurate medical history. Dr. Palen was not aware that the L4/5 disc herniation had been discovered as a result of the MRI completed one year prior to the employee's accident. Dr. Palen was also not aware that the employee had seen Dr. Schumer with similar complaints of back pain 17 days prior to his accident. Dr. Palen acknowledged that he was basing his opinion solely on the history provided by the employee, and it appears that the history provided by the employee, both through his statements to Dr. Palen and the medical records provided, was not accurate. Given this omission, Dr. Palen's conclusion on the issue of causation is neither credible nor persuasive.

After reviewing all of the evidence, I find that the opinion of Dr. Cantrell on the issue of medical causation is more credible than the opinions of Dr. Park and Dr. Palen. Although the evidence supports a finding that the employee had an accident on October 17, 2002, which arose out of and in the course of his employment, the evidence does not support a finding that this accident was a substantial factor in either causing a new injury to the employee's low back, or aggravated a preexisting condition and raised that condition from the level where it was nondisabling to disabling. While this accident may have caused a temporary exacerbation or worsening of the employee's symptoms, the evidence does not support a finding that the October 17, 2002 accident was a substantial factor in causing the second surgery and related medical expenses as reflected in Employee's Exhibit B. The evidence also fails to support a finding that the employee's October 17, 2002 accident was a substantial factor in causing his temporary total disability while under the treatment of Dr. Park or any additional permanent partial disability.

Based on these conclusions, I find that the employee has failed to satisfy his burden of proof on the issue of medical causation. The employee's claim for compensation against the employer must therefore be denied.

Based on the denial of the employee's claim on the issue of medical causation, the remaining issues are moot and shall not be ruled upon. Although the employee's claim against the Second Injury Fund was left open by agreement, any claim against the Second Injury Fund is contingent upon a finding of a compensable claim against the employer. Based on the denial of the employee's claim against the employer, the employee's claim against the Second Injury Fund must also be denied.

In addition to the employee's claim, a medical fee dispute was filed by St. Francis Medical Center. Based on the denial of the employee's claim for compensation against the employer, the medical fee dispute filed by St. Francis Medical Center must also be denied and dismissed.

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Pat Secret
Director
Division of Workers' Compensation