

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

Injury No.: 01-014444

Employee: Robert K. Dwyer

Employer: Federal Express Corp.

Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the briefs, heard the parties' arguments and considered the whole record. Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the July 7, 2010, award and decision of the administrative law judge. We adopt the findings, conclusions, decision and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision and modifications set forth below.

**Preliminaries**

The issues stipulated in dispute at the hearing were: (1) medical causation; (2) past medical expenses; (3) employee's claim for mileage; (4) future medical treatment; (5) temporary total disability for the two week period following March 12, 2004; and (6) the nature and extent of permanent partial disability.

The administrative law judge made the following findings: (1) employee reached maximum medical improvement on July 27, 2001; (2) employee suffered a new injury in May 2002 resulting in a ruptured L3-4 disc; (3) employer is not responsible for any medical treatment, mileage or TTD after July 27, 2001; (4) employer is not responsible for any disability that did not exist on July 27, 2001; (5) employee's need for future medical treatment is a result of the new injury of May 2002 and thus employer is not liable for it; and (6) employee suffered a 17.5% permanent partial disability of the body as a whole as a result of the work-related injury on February 5, 2001.

Employee submitted a timely Application for Review with the Commission alleging the administrative law judge's award denying medical causation, additional and future medical care that post-dated July 2001, and additional permanent partial disability benefits was contrary to the overwhelming weight of the evidence in that: (1) the evidence showed there wasn't a new condition that did not exist when the employee was released in July 2001; (2) the administrative law judge failed to appropriately assess the significance of the employee's May 3, 2001, MRI; (3) the administrative law judge ignored the objective finding that employee's injured L3-4 disc was protruding significantly on the May 3, 2001, MRI; and (4) the administrative law judge failed to apply a broad and liberal interpretation of Chapter 287.

For the reasons set forth in this award and decision, the Commission modifies the award of the administrative law judge.

**Findings of Fact**

*Conflicting Expert Testimony*

We are presented with conflicting expert testimony on the issues before us. The administrative law judge implicitly found Drs. Tate and Kennedy more credible than Drs. Yingling and Volarich on the question whether the work injury is a substantial factor in employee's medical condition and disability after July 27, 2001, the last date of Dr. Yingling's initial course of treatment. We disagree with this finding.

Employee: Robert K. Dwyer

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Dr. Yingling, a board-certified neurosurgeon, was employee's treating doctor after the work injury on February 5, 2001, and thus had the benefit of appraising employee's medical condition and low back complaints from the beginning. In addition to examining employee and providing treatment for low back complaints from April 2001 through August 2008, Dr. Yingling performed the May 2002 bilateral L3-L4 decompression and discectomy. Dr. Yingling was able to evaluate employee's medical condition approximately once a month during employee's course of treatment and observed the progression of employee's low back condition on a firsthand basis. Dr. Yingling found the work injury to be a substantial factor in causing employee's worsening low back symptoms in May 2002 and need for subsequent treatment, including surgery. Dr. Yingling acknowledged that the MRI from May 11, 2002, revealed a disc rupture at L3-L4, which constituted a change in pathology from the disc protrusion shown on the May 3, 2001, MRI—but explained that the rupture was a continuation of the work injury of February 5, 2001, rather than the result of any new injury, and that employee's medical condition and all of his symptoms stem from the work injury, rather than any new injury. Dr. Yingling's opinion was corroborated by Dr. Volarich. Drs. Tate and Kennedy gave conflicting opinions, but we find their testimony less persuasive than that of Dr. Yingling.

Dr. Yingling testified that the additional treatment employee received for his low back complaints after he was initially released in July 2001 was reasonable and necessary to cure and relieve from the effects of the work injury, and we credit this opinion and so find. We also credit Dr. Yingling's opinion that employee may require additional medical care in the future.

Employer attempts to inject the issue of employee's credibility or lack thereof into the issue of medical causation, citing evidence that employee continued his hobby of growing giant watermelons after the work injury, and inviting us to speculate that employee's need for treatment after his initial release by Dr. Yingling might have been related to lifting heavy watermelons. We are not persuaded. Whether employee continues to participate in his hobbies is immaterial given the absence of any credible expert testimony that employee sustained a new low back injury. To the limited extent employee's credibility is relevant to the issue of medical causation, we specifically find credible employee's testimony that he experienced continued back pain after he was initially released by Dr. Yingling in July 2001 and that he took a number of days off work without pay in order to rest his back.

Because we are convinced Dr. Yingling provides the more convincing expert medical testimony in this matter, we conclude that the work injury is a substantial factor in employee's medical condition and disability after July 27, 2001, and that his need for medical treatment after that date, including the May 2002 surgery and his ongoing need for future medical care, flows from the work injury.

The administrative law judge did not take into account employee's medical condition after July 27, 2001, when he found that employee suffered a 17.5% permanent partial disability of the body as a whole as a result of the work injury. Dr. Volarich took into account employee's medical condition and treatment subsequent to that date and opined that employee sustained a 50% permanent partial disability of the body as a whole. We have carefully weighed Dr. Volarich's testimony in this regard, in addition to employee's testimony regarding his ongoing complaints and limitations. We find that employee suffered a 30% permanent partial disability of the body as a whole referable to the low back as a result of the work injury of February 5, 2001.

### **Conclusions of Law**

#### **Disputed past medical expenses and future medical treatment**

We have found that employee's medical condition, disability, and need for treatment after July 27, 2001, flows from the work injury of February 5, 2001. Section 287.140.1 RSMo provides, as follows:

Employee: Robert K. Dwyer

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

Given our findings, we conclude that employee met his burden of demonstrating he is entitled to the past medical expenses he incurred seeking relief from the effects of the work injury of February 5, 2001. We conclude that employer is liable for these disputed past medical expenses. We have also credited Dr. Yingling's opinion that employee may need future medical care as a result of the work injury.

In order to receive future medical benefits under the Act, a claimant is not required to present conclusive evidence that future medical treatment is needed. Rather, he only needs to demonstrate a reasonable probability that future medical treatment is necessary by reason of his work-related injury. Probable in this context means founded on reason and experience which inclines the mind to believe but leaves room for doubt. The claimant is not required to present evidence of the specific medical care that will be needed but he is required to establish through competent medical evidence that the care requested flows from the accident. An employer is required to compensate for future medical care only if the evidence establishes a reasonable probability that additional medical treatment is needed and, to a reasonable degree of medical certainty, that the need arose from the work injury.

*ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 52 (Mo. App. 2007) (citations omitted).

We conclude that employee has met his burden of establishing a reasonable probability that additional medical treatment is needed and that the need arose from the work injury. Accordingly, we conclude that employer is liable for any future medical treatment that may reasonably be required to cure and relieve from the effects of the work injury.

*Additional permanent partial disability resulting from the work injury*

The question is the nature and extent of permanent disability resulting from the work injury of February 5, 2001.

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This 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.

*Elliott v. Kan. City School Dist.*, 71 S.W.3d 652, 657 (Mo. App. 2002) (citations omitted).

We have found that employee sustained a 30% permanent partial disability of the body as a whole referable to the low back as a result of the work injury of February 5, 2001. Employee is entitled to permanent partial disability benefits consistent with this finding, and employer is liable for same.

Employee: Robert K. Dwyer

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**Award**

We modify the award of the administrative law judge. We find employer liable for employee's disputed past medical expenses and for any future medical treatment that is reasonably required as a result of the work injury. Additionally, we find that employee sustained a 30% permanent partial disability of the body as a whole referable to the low back as a result of the work injury. Employer is liable for permanent partial disability benefits in the amount of \$37,711.20 (120 weeks X \$314.26).

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.

The award and decision of Administrative Law Judge Matthew W. Murphy, issued July 7, 2010, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

Given at Jefferson City, State of Missouri, this 26<sup>th</sup> day of May 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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

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Alice A. Bartlett, Member

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John J. Hickey, Member

Attest:

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Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Robert K. Dwyer Injury No.: 01-014444  
Dependents: N/A  
Employer: FedEx  
Additional Party: N/A  
Insurer: Self  
Appearances: Mr. Lawrence Rost on behalf of Employee  
Mr. Robert Amsler, Jr. on behalf of Employer  
Hearing Date: April 7, 2010 Checked by: MM/rf

**SUMMARY OF FINDINGS**

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? February 5, 2001.
5. State location where accident occurred or occupational disease contracted: Sikeston, MO.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? 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 happened or occupational disease was contracted: Employee was pushing a heavy load of material that was to be shipped when the load stopped suddenly causing injury to Employee's back.
12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Lower back (Body as a whole).
14. Nature and extent of any permanent disability: 17.5% BODY AS A WHOLE.
15. Compensation paid to date for temporary total disability: TPD: \$3,146.75, TTD: \$6,952.01, Total: \$10,098.76.
16. Value necessary medical aid paid to date by employer-insurer: \$39,914.61.
17. Value necessary medical aid not furnished by employer-insurer: \$0.00.
18. Employee's average weekly wage: \$598.97.
19. Weekly compensation rate: \$399.31 for TTD benefits and \$314.26 of PPD benefits.
20. Method wages computation: Stipulation.
21. Amount of compensation payable: \$21,998.20
22. Second Injury Fund liability: N/A.
23. Future requirements awarded: None.

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

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

## FINDINGS OF FACT AND RULINGS OF LAW

On April 7, 2010, the employee, Robert K. Dwyer, appeared in person and by his attorney, Mr. Lawrence Rost, for a hearing for a final award. The employer was represented at the hearing by its attorney, Mr. Robert Amsler, Jr. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

### UNDISPUTED FACTS

1. **Covered Employer** - Employer was operating under and subject to the provisions of the Missouri Workers' Compensation Law, and duly qualified as a self-insured employer.
2. **Covered Employee** - On or about the date of the alleged accident, the employee was an employee of FedEx and was working under the Missouri Workers' Compensation Law.
3. **Accident** - On or about Monday, February 05, 2001 the employee sustained an accident arising out of and in the course of his employment.
4. **Notice** - Employer had notice of employee's accident.
5. **Statute of Limitations** - Employee's claim was filed within the time allowed by law.
6. **Average Weekly Wage and Rate** - Employee's average weekly wage rate was \$598.97. The rate of compensation for temporary total disability and permanent total disability was \$399.31. The rate for permanent partial disability was \$314.26.
7. **Medical Aid Furnished** - Employer/Insurer has paid medical aid in the amount of \$39,914.61.
8. **Temporary Total Disability Paid** - Employer/Insurer has paid \$6,952.01 as temporary total disability benefits and \$3,146.75 as temporary partial disability benefits for a total of \$10,098.76.
9. **Permanent Total Disability** - There is no claim for permanent total disability benefits.

### ISSUES

1. **Medical Causation** - There is a dispute as to whether the employee's injury was medically causally related to the accident.
2. **Previously Incurred Medical** - Employee is claiming previously incurred medical in the amount of \$58,452.81. There is a dispute as to casual relationship.
3. **Mileage or other medical (287.140 RSMo)** - Employee is claiming mileage in the amount of \$573.85
4. **Additional or Future Medical** - Employee is claiming additional or future medical aid.
5. **Additional TTD or TPD** - Employee is claiming additional TTD in the amount of \$798.62 for the two week period beginning on March 12, 2004.
6. **Permanent Partial Disability** - Employee is claiming permanent partial disability benefits.

**EXHIBITS**

The following exhibits were offered and admitted into evidence:

## Employee's Exhibits

Identifier	Description
A	Curriculum Vitae of David g. Yingling, M.D.
B	Medical records of David G. Yingling, M.D.
C	Dr. David G. Yingling letter dated July 5, 2002
D	Deposition of David G. Yingling, M.D.
E	Medical records of William C. Shell, M.D.
G	Medical Records of Terry L. Cleaver, M.D.
H	Medical records of Mark H. Kinder, M.D.
I	Medical records of Stephen W. Stigers, M.D.
J.	Lumber MRI's 5/3/01, 5/11/01, 10/30/03
K	5/20/02 Operative Notes
L	Dr. David G. Yingling word restrictions
M	C.V. of David T. Volarich, D.O.
N	Deposition of David T. Volarich, D.O.
P	Restart Physical Therapy Records 3/1/01 thru 7/10/01
Q	Medications paid by Robert Dwyer: \$1,987.62
R	Medical Paid by Robert Dwyer: \$705.29
S	Mileage due Robert Dwyer: \$573.85.
T	Bill 5/20/02 - Surgery \$9,492.00
U	2/20/04 - Trial Implant Spinal Cord Stimulator - \$12,482.26
V	2/20/04 - Dr. Cleaver & Dr. Brennan \$2,919.00
W	3/12/04 - Permanent implant, Spinal Cord Stimulator \$22,598.16
X	3/2/04 - Dr. Cleaver & Dr. Brennan, \$6,979.00
Y	3/4/04 - Dr. Mark Kinder Psychiatric Clearance \$487.00
Z	Unpaid St. Francis Medical Center Bills
AA	Leave Request Slip

## Employer-Insurer's Exhibits

Identifier	Description
4	Lumbar and Thoracic X-ray of Lourdes Pavilion Dated 16 June 2005
5	Abdominal Ultrasound of Lourdes Pavilion Dated 20 October 2005
7	Pain Stimulator Test of St. Francis Medical Center dated 20 Feb 2004

8	Pain Stimulator Reprogramming of St. Francis Medical Center dated 4 May 2004
13	Records of Saint Francis Medical Center for admission of 20 May 2002
14	Records of Saint Francis medical Center for Mr. Dwyer
16	Medical Records of Lourdes Pavilion from 28 April 2005 thru 26 January 2006
17	Medical Records of Daniel B. Keck, Jr., M.D. from 15 April 2005 thru 1 February 2006
20	Medical Payment list
21	Mileage Reimbursement list
22	TPD Payment list
23	TTD Payment List
24	Deposition of Dr. Tate
25	Deposition of Dr. Kennedy
27	Article from Melonman.com
28	Article from Melonman.com
29	Article from Melonman.com
30	Article from Melonman.com

## **SUMMARY OF EVIDENCE**

### Testimony of Robert K. Dwyer

Mr. Robert K. Dwyer, hereinafter referred to as “Employee”, testified on his own behalf at the hearing of this matter. Employee is 50 years old and currently resides in Paducah, Kentucky. He lived in Memphis for 33-34 years until he relocated to Sikeston in 1992. Employee has a high school diploma and completed two years of college. Prior to his employment with FedEx, hereinafter referred to as “Employer”, employee performed landscaping work. He began working for Employer in 1987. In 1992, Employee relocated to Sikeston to be a courier for Employer. The courier job description includes driving a truck and delivering packages weighing from a letter to 150 pounds.

On February 5, 2001, Employee injured himself while working for Employer. The injury occurred while Employee was unloading a container. The container was full of freight. Employee was assisted by Johnny Thomas. Employee and Mr. Thomas were pushing the container when two of the caster wheels broke, causing the container to come to an abrupt halt. Employee was not prepared for the sudden stop and this resulted in an injury to his back. Employee recalls immediately falling to his knees. This was witnessed by Mr. Thomas. Mr. Thomas helped Employee back to a standing position. Employee felt a “rip” or “tear” in his back. He immediately notified his supervisor, Ms. Cara Hamera. Employee attempted to complete his route on that day. At some time prior to completing his route, he contacted his

dispatcher, Ms. Sandy Burton, and notified her that he was going to have to cut the route short due to pain.

Employee saw Dr. Shell at Ferguson Medical Clinic on the date of the injury. He testified that the pain was an 8/10 at the time of the accident and had increased to 10/10 by the time he saw the doctor. Dr. Shell took Employee off work for a couple or few days. He prescribed medication for pain. Employee recalls seeing Dr. Shell approximately six times. He also underwent some physical therapy. Employee was then returned to work on a temporary return to work program which involved minimal hours of office and/or clerical type work.

Employee's pain did not subside. He was referred to Dr. David Yingling by Dr. Shell. Dr. Yingling obtained an MRI. Employee underwent injections which provided minimal relief. The pain was in Employee's lower back with radiating pain into his legs. Employee received more pain medication and physical therapy. In July of 2001, Dr. Yingling released Employee. Employee testified that he was still under a lot of pain at the time of his release.

In May of 2002 Employee reported collapsing when attempting to stand from a chair. Shortly thereafter, Employee underwent surgery to his back with additional physical therapy following the surgery. Dr. Yingling recommended a trial of a dorsal column stimulator. The device was implanted by Dr. Terry Cleaver. After a two week trial, it was determined that Employee was a candidate for permanent implant and underwent same.

Employee currently works for Employer in Paducah. He is employed as a senior customer services agent. He mans a counter where people drop off boxes and parcels. He works three days per week for approximately 24 hours per week. His job duties include processing documents and boxes, resolving customer complaints, and handling dangerous goods. Employee reports that he has difficulty standing and sitting for long periods. He sleeps two to four hours per night. He can cut the grass and take care of his personal needs. He is currently on several medications. He is able to drive but must stop every hour to stretch. At the time of the hearing, Employee testified that his pain was in his lower right back, radiating into his right leg and foot. He rated the pain as a 7-8 out of 10.

On cross examination, Employee testified regarding his 2001 medical records wherein he described no pain radiating down his buttock or leg. Additionally, Employee was shown several pictures of Employee which appeared to demonstrate Employee and three other people carrying a 200 plus pound watermelon. Employee grows watermelons as a hobby. Many of these watermelons exceed 200 pounds. Employee has a website on which he posts pictures and accounts of his watermelon growing activities. Many of these pictures depict Employee, with the assistance of others, pulling very large watermelons out of the back of pickups and carrying them. Employee testified that the pictures were staged for his fans and he was not actually carrying any weight.

Testimony of Terri Dwyer

Ms. Terri Dwyer, Employee's wife, testified on her husband's behalf at the hearing of this matter. She testified that she observed Employee in severe pain on a daily basis. She testified that Employee sleeps three to four hours a day. He has difficulty standing or sitting for long periods of time. He seems to have the most relief when walking. When they go out to eat at a restaurant, Employee stands next to the table until dinner is served.

Testimony of Troy Courtney

Mr. Troy Courtney testified on behalf of Employer at the hearing of this matter. Mr. Courtney works with Employee at the Paducah, Kentucky location. Employee's direct supervisor is Stephanie Jones. Ms. Jones reports to Mr. Courtney. Employee is a senior customer services agent. He must lift 75 pounds alone and 150 pounds with a partner. That is the lifting requirement for almost all employees at Employer. Mr. Courtney testified that Employee is an excellent employee and performs the lifting duties as required. Mr. Courtney was not aware of any missed time due to Employee's back. Employee does request lifting assistance however his requests for assistance are consistent with requests for assistance made by all employees. Mr. Courtney testified that Employee does have a thick cushioned pad on which he stands during his shift.

Mr. Courtney testified that Employee has complained two to three times over the last six years about his back. Mr. Courtney also testified that Employee brought a large watermelon to work. Mr. Courtney assisted Employee in lifting the watermelon out of the back of a pickup and carried it into the station. Mr. Courtney testified that the watermelon weighed in excess of 100 pounds.

Testimony by Stephanie Jones

Ms. Stephanie Jones testified on behalf of the Employer at the hearing of this matter. Ms. Jones works for Employer. She is the operations manager at the Paducah station. She is Employee's direct supervisor.

Employee is a senior customer services agent. He is required to lift 75 pounds by himself and 150 pounds with assistance. She testified that Employee obtained the Paducah position through the normal bid process used by Employer. She testified that Employee lifts the same packages that other customer services agents must lift. She does not recall any time missed by Employee due to complaints of low back pain. Ms. Jones does not recall Employee exhibiting any problems with his back or legs. She testified that he works at the same pace and same level of productivity as other similarly situated employees. She testified that Employee does accept offers to work overtime about half of the time it is offered.

### Medical Evidence

Employee initially went to Dr. William Shell on 5 February 2001 and told Dr. Shell about the accident at work. Employee also told Dr. Shell that he had right sided low back pain on an intermittent basis about a week before the injury at FedEx. The pain in the right extremity only went to the knee. Employee had no dysthesias or weakness. Dr. Shell treated Employee with pain medicine.

Employee went to Dr. Shell on 7 February 2001 and he was doing better. Pain existed in the right low back but the leg symptoms were improving.

Dr. Shell wrote that Employee was doing better and only had minimal pain in the low back and no radiating symptoms. Dr. Shell returned Employee to work on light duty as of 13 February 2001. A week later Employee told Dr. Shell he had some pain but it moved lower down into the sacral area and a very little amount in the lumbar area. Still, Employee did not provide any radiating symptoms. Dr. Shell wrote that he found nothing abnormal other than discomfort with motion.

Employee saw Dr. Shell again on 1 March 2001 but he had little pain and was continuing to improve. The pain was concentrated in the right low back just laterally to the upper natal cleft. There was a little area of tenderness mainly over the upper sacroiliac area.

On 15 March 2001, Dr. Shell noted that Employee was treating at Restart and lifting 30 pound boxes. He was reporting a slight twinge in the right sacroiliac area. On examination Dr. Shell found minimal tenderness. Employee complained of discomfort in the area with certain movements.

Employee returned to Dr. Shell on 10 April 2001 and complained of increasing low back pain since he returned to full duty. Employee said that his pain had almost completely disappeared with physical therapy and rest before he returned to work. Pain radiated into his extremities. Dr. Shell examined Employee and found tenderness in the back but normal reflexes and no weakness. He referred the claimant to Dr. Yingling.

Dr. Yingling first saw Employee on 24 April 2001 and he took a history of the castored floor failing as Employee was pushing a heavy load. Employee said he had the immediate onset of low back pain and he felt something move inside him. Employee had constant pain in his low back but returned to work on full duty. After two weeks he returned to light duty. Employee complained of severe pain in the lower back mostly on the right with intermittent radiation down the anterior posterior right leg as far as the knee. Initially, the pain went all of the way to the dorsum of the right foot. On examination the sensation was slightly diminished to pinprick circumferentially in the entire right lower extremity compared to the left. Reflexes were symmetric at 2+. The straight leg raising was negative. Dr. Yingling diagnosed Employee with right lower back pain with some radiation into the right leg but no radicular findings on examination. Dr. Yingling ordered an MRI.

The MRI, performed on 3 May 2001, showed a likely tiny central disc protrusion superimposed on disc bulge and facet hypertrophy at L5-S1. There was only a minimal flattening of the ventral surface of the thecal sac and it abutted the medial aspect of the nerve root of the lateral recesses. There was no significant mass effect. The L4-L5 level had a small focal central annular tear/disc protrusion superimposed upon a disc bulge. When superimposed upon facet hypertrophy there was at least mild central canal and lateral recess narrowing. The neural foramina remained patent. There was degenerative disc disease at L3-L4. A broad based disc bulge was superimposed upon a focal right paracentral disc protrusion. The main area of mass effect was upon the right lateral recess that was moderately effaced. The nerve roots appeared to exit the neural foramina freely.

Dr. Yingling reviewed this MRI on 3 May 2001. At that time, Employee continued complaining of low back pain and right leg pain. Dr. Yingling diagnosed Employee with degenerative disc disease at multiple levels of the lower lumbar spine and fairly severe pain and spasm in his back. The worst level is at L3-L4 with mild to moderate stenosis but it was difficult to say that this stenosis was the sole etiology of his symptoms. Dr. Yingling ordered injections.

Employee reported feeling significantly better after the lumbar epidural steroid injection during his visit with Dr. Yingling on 24 May 2001. Employee said that he had some soreness and stiffness in the back but it is less than before and the numbness in the medial left thigh was only intermittent in nature. Dr. Yingling noted that Employee had persistent spasm in the low back but no tenderness. Employee had minimal left sciatic tenderness with good strength in his legs and his gait was stable.

Dr. Stigers at the St. Francis Pain Clinic provided an epidural steroid injection as requested by Dr. Yingling on 11 May 2001. He subsequently provided a trigger point and epidural steroid injection on 15 June 2001 too.

According to Dr. Yingling, noted at the 21 June 2001 visit, Employee's pain was improving and the tingling and numbness in his legs was essentially resolved. Dr. Yingling found minimal tenderness in the low back and right sciatic area. However, he did find a mild spasm of the lumbar muscles. There was good strength in his legs and his gait was normal. Dr. Yingling returned Employee to work with a lifting restriction of fifty pounds and ordered additional physical therapy.

Dr. Yingling saw Employee again on 12 July 2001 and Employee stated he was doing reasonably well but he continued to have soreness in the right lower back in the area where he had the trigger point injections. Employee was increasing his weight limit at work and tolerating that reasonably well. Dr. Yingling only found tenderness over the right sacroiliac joint and noted good strength in the lower extremities. Employee's gait was normal. Dr. Yingling discharged Employee and returned him to work on full duty.

On 27 July 2001 Employee was doing much better and almost all of the pain was eliminated. Employee really did not have any radicular complaints of pain anymore. Employee had one trigger point in the lower lumbar area. Dr. Stiger then provided an additional epidural steroid injection.

Employee then returned to Dr. Yingling on 14 May 2002, stating that in the 10 month interval he had continued to have moderate back pain but that it was tolerable. About one month previous to the visit he noted increased pain and spasm in his lower back and an aching feeling in his legs. Then about one and a half to two weeks prior to this visit he stood up at home and developed a sudden onset of severe pain causing him to drop to the floor. The examination found a positive straight leg raising on the right and diminished sensation to pinprick throughout the right leg compared to the left with no specific dermatomal pattern. Reflexes were symmetric. Employee was tender in the right low back and sciatic area. Another MRI taken on 11 May 2002, showed continued disc dehydration and a significant protrusion that had ruptured on the right with increased stenosis on the right greater than the left. There were no significant changes at L4-S1. Dr. Yingling diagnosed Employee with a ruptured disc on the right and stated that Employee needed surgery.

On 20 May 2002, Dr. Yingling performed a bilateral L3-L4 segmental decompression with bilateral L3-L4 discectomy with a post-operative diagnosis of lumbar stenosis and disc rupture at L3-L4. Dr. Yingling opined on 5 July 2002, that work was a causal factor in the current condition of Employee.

Employee saw Dr. Yingling again on 25 July 2002 and told the doctor that he was doing much better in therapy but he had significant stiffness and soreness in the back and numbness with some electrical stimulation in the left anteromedial groin. Dr. Yingling found some spasm in the low back and tenderness with limited range of motion in the back. Dr. Yingling said that Employee could not return to work.

Employee then continued with treatment with Dr. Yingling including trigger point injections, physical therapy, and medication. Employee reported to Dr. Yingling when he drove to Tennessee and the drive took seven hours and was difficult for him. On the way home, Employee said his legs went numb. Employee denied any radiation. As a result of the visit of 22 August 2002, Dr. Yingling determined that Employee needed a TENS unit. Dr. Yingling wrote in his 19 September 2002 report that Employee had fairly significant pain, stiffness, and spasm in his back particularly in the right lower lumbar area. Employee was on light duty and using a TENS unit. Dr. Yingling palpated a spasm of the lumbar muscles and tenderness on the right side. There was no sciatic tenderness and there was good strength in his legs without foot drop. Dr. Yingling said that Employee had pain and spasm but that he was gradually improving with therapy.

On 17 October 2002 Employee was doing better but still had significant problems with the right lower back. Employee described the pain as a lightning bolt type pain in the right foot distally which radiated around to the lateral aspect of the foot.

Dr. Yingling saw Employee again on 7 November 2002, and Employee was reporting that he was still having significant problems with trigger point injections in the right low back. He described numbness in the left inguinal area and in the feet which was not particularly bothersome and he was tolerating it for four hours a day at work. On examination, Dr. Yingling found tenderness over the right sacroiliac joint but no real tenderness elsewhere. Employee had

good strength in both lower extremities but he was limited in bending. Physical therapy recommended discharge as he was lifting 75 pounds occasionally. Employee was also requesting a full duty release. Dr. Yingling thus released Employee and returned him to work on light duty for three weeks. He provided a rating of 13% permanent partial disability of the low back.

Dr. Yingling did state that Employee would not be able to return to work as a courier in a note dated 9 January 2003.

Employee contacted Dr. Yingling in July 2003 complaining of low back pain and Dr. Yingling's office referred him to the St. Francis Pain Clinic. Dr. Brennan gave Employee a trigger point injection on 1 July 2003. Then Dr. Cleaver saw him on 22 July 2003. Employee reported his symptoms as being 80% in the low back pain and 20% right lower extremity pain associated with numbness and tingling. Employee also complained of left groin pain and numbness. Employee was having spasm. Dr. Cleaver noted that Dr. Yingling did not believe that further surgery was warranted. Employee was there for consideration of a spinal cord stimulator. There was no change in subjective complaints from one year before and no re-imaging of the spine since then either. Dr. Cleaver found diffuse low back pain and right lower extremity lumbar radicular pain distribution predominantly at L5 and dermatomal distribution with moderate diminished sensation. He diagnosed him with a post-laminectomy syndrome of the lumbar spine. Dr. Cleaver ordered a spinal cord stimulator and a psychological evaluation and functional capacity evaluation.

Dr. Yingling stated on 26 August 2003, that the treatment recommendations of Dr. Cleaver were reasonable and appropriate to alleviate Employee's pain. Dr. Yingling saw Employee for the last time on 30 October 2003 and described in his report the pain complaint of Employee that he had progressive worsening of pain primarily in the right lower back with radiation into the right leg. Dr. Yingling palpated muscle spasms in the lumbar with tenderness in the right low back. Dr. Yingling reviewed Employee's films and wrote that it was difficult to determine where the pain came from. The pain could be due to the L4-L5 area or sacroiliac joint dysfunction.

Employee then returned to the St. Francis Pain Clinic and had a trial insertion of a stimulator. Employee had excellent pain relief when Dr. Cleaver examined Employee on 25 February 2004.

Due to the response, Dr. Cleaver sent Employee for a Psychological Diagnostic Interview and the psychologist found that Employee abused prescription pain medication and alcohol. The doctor noted that Employee mislabeled non-pain symptoms as somatic pain such as his sleep disturbance as a symptom of pain. There were marked contributions of non-organic factors in his pain report. The exam carried a warning that Employee's motivation was affected by his issues regarding compensation or retribution. Employee's pattern of responses indicted that he tended to present himself in a consistently favorable light and relatively free from common shortcomings. Areas of concern in the evaluation were the frequent routine physical complaints, preoccupation with physical functioning, inflated self-esteem, physical signs of depression, alcohol abuse or dependence, thoughts of death or suicide and stress in the environment. The highest scale was Employee's somatization scale. Employee had an unusual degree of concern about physical functioning and health matters. Employee is likely to report that his daily

functioning has been compromised by numerous and varied physical problems. Employee was likely to have elements of inflated self-esteem, expansiveness, and grandiosity. Employee was preoccupied with his litigation. Employee viewed himself as better than most and did not focus on his character faults. The somatization scale showed an unusual degree of concern on his physical problems. However, the result of the interview was that Employee was a candidate for permanent implantation. Interestingly, Employee stated that he worked a second job in agricultural demolition. Employee was destroying tree stumps and similar items with explosives.

Dr. Cleaver operated on Employee on 12 March 2004 and implanted a permanent pain stimulator. Employee told the doctor on 4 May 2004 that his pain pattern was changing after he slipped and fell. The doctor then reprogrammed the stimulator. The doctor returned Employee to work on full duty and told him that he would need a brace at work. Dr. Cleaver said that Employee would require physical therapy to address his low back pain on occasion and Dr. Cleaver discharged Employee.

Employee wanted additional medical treatment and went to Daniel Keck, M.D. On 15 April 2005 Dr. Keck wrote that Employee had a long history of degenerative disc disease and he noted that Employee had surgery and the implant of a dorsal column stimulator. Employee reported that he experienced about 50% pain relief due to the stimulator. Nevertheless, Employee told Dr. Keck that he had to use a high output setting to obtain the significant relief. Employee also said that there was one area in the back on the right side and low that was still painful. Employee described the pain as a dull, aching sensation that was intermittent. He also told the doctor that he experienced episodic, sharp, shooting pain with motion that he described as "locking up." Employee said that when the pain was particularly bad he would have pain down his leg but it did not extend below the knee. Employee also told Dr. Keck that the pain in the low back would lessen when he began physical activity but after a while the pain would return and the physical activity would begin to aggravate the pain. Employee was able to get up from a sitting position without difficulty and his gait was normal. Employee was able to heel and toe walk without difficulty. He was exquisitely tender to palpation over the bilateral low lumbar facet columns but more on the right. Employee had tenderness over the right sacroiliac joint. Dr. Keck diagnosed Employee with degenerative disc disease after a lumbar laminectomy and discectomy, post implantation of a dorsal column stimulator and right low back pain. Dr. Keck ordered lumbar facet injections. Employee does work in a field. Because he works during the day in a field, he had difficulty scheduling treatment.

The injection took place on 28 April 2005 and Employee returned to Dr. Keck on 11 May 2005. Employee handed Dr. Keck a "progress report" on his interim status. It appears that this was a written summation of his treatment and complaints since he last saw Dr. Keck. Employee told the doctor that after the injection he had tenderness at the injection site, a fever of 102, and edema at the site of the wires for the spinal cord stimulator. The doctor could not account for these statements. Employee also told Dr. Keck that he had decreased pain and an increase in his range of motion. Employee was even reducing his medication intake on his own initiative. The doctor examined Employee and tested the spinal cord stimulator. The doctor made some adjustments to the stimulator and Employee reported a decrease in the pain. The doctor said that if the injections helped, he wanted to try a lumbar medial branch block on the right and, if this

was successful, the doctor was considering performing a radiofrequency thermocoagulation denervation of the affected facets.

After this visit, Dr. Keck ordered x-rays of Employee's low and mid-back and the x-rays were taken on 16 June 2005. The x-rays were notable for degenerative disc disease at L4-L5, a power pack over the left side of the sacral lordosis, and leads extending into the spinal canal. The thoracic x-ray showed leads and degenerative disc disease in the lower thoracic back.

Dr. Keck saw Employee again on 24 June 2005 and Dr. Keck wrote Employee stated the injections relieved almost all of the pain in his low back. Employee provided Dr. Keck with some letters detailing his medical status. The letters are very detailed including an hour by hour analysis of his pain and activities after the third injection. Employee told Dr. Keck that he was lifting tires and loading and unloading trucks at his property. Employee told Dr. Keck that the deep aching pain and the radiation pain into the upper part of the legs and hips was completely relieved. Dr. Keck wrote that Employee had degenerative disc disease with a laminectomy and discectomy, dorsal spinal column stimulator, right low back pain and right L5 pseudoarthritis. Dr. Keck decided to proceed with a medial branch block.

There is an operative note dated 7 July 2005 which states that the doctor performed a right lumbar radiofrequency thermal coagulation rhizotomies of the medial branch nerves at L4, L5, and the sacral ala. A second such operation took place on 26 January 2006 at L3-L5 and the sacral ala.

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

### ***Issue 1. Medical Causation***

There is a dispute as to whether the employee's injury was medically causally related to the accident.

There is no dispute that Employee suffered a compensable injury that occurred on February 5, 2001. As a result of this incident, Employee suffered a back strain. An MRI performed shortly after this incident revealed L3-4 disc protrusion, slightly more on the right, causing moderate narrowing of the spinal canal; an L4-5 disc bulge, and; an L5-S1 protrusion in the midline which approached but did not appear to compress the nerves at that level. Employee was treated conservatively for these diagnoses, including, injections and physical therapy. Dr. Yingling released Employee on July 12, 2001 with a prescription of Vioxx and another trigger point injection scheduled for July 27, 2001. At that time, Dr. Yingling scheduled no additional appointments and released Employee to full duty. At the time of release, Employee was still complaining of pain but it was manageable and he was able to perform his duties at work.

The dispute in this matter stems from additional medical care that occurred on and subsequent to May 14, 2002. On that date, Employee presented to Dr. Yingling with complaints of significant back pain and radiating pain in his right leg. The significant pain followed an incident that

occurred 1.5 – 2 weeks prior when Employee rose from a chair at home. As he rose, he was struck with severe back pain that caused him to fall to the ground. Dr. Yingling ordered a second MRI which revealed that the L3-4 disc had ruptured which required surgery. Employee continued to treat for back complaints including the implantation of a dorsal column stimulator.

The issue is whether care subsequent to May 14, 2002 and the disability associated therewith is causally related to the compensable accident that occurred on February 5, 2001. I find that Employee was at maximum medical improvement on July 27, 2001; that Employee suffered a new injury in May of 2002 resulting in the ruptured L3-4 disc; that Employer is not responsible for any medical care which occurred after July 27, 2001, and; that Employer is not responsible for any disability which didn't exist on July 27, 2001.

Employee was released by Dr. Yingling on July 12, 2001 and at MMI on July 27, 2001.<sup>1</sup> When Employee returned to Dr. Yingling in May of 2002, he gave a history of tolerable pain that was stable from July 2001 through April of 2002. During the May 2002 examination, for the first time, Employee demonstrated a positive straight leg raising test. The second MRI, administered in 2002, showed new disc pathology that was not present on the MRI that was taken shortly after February 5, 2001. All of the objective and subjective evidence points to a new condition that did not exist when Employee was released in July of 2001. Even Dr. Yingling, the treating doctor and Employee's expert, opined that the L3-4 rupture could have occurred when Employee rose from his chair at home. For these reasons, the incident which occurred at home in May of 2002 found to have caused a new injury.

“Without otherwise affecting either the meaning or interpretation of the abridged clause, ‘personal injuries arising out of and in the course of such employment’, it is hereby declared not to cover workers except while engaged in or about the premises where their duties are being performed, or where their services require their presence as a part of such service.” **§287.020.5<sup>2</sup>**

There is no evidence that the act of getting up from his chair at home was conducted in the course and scope of his employment, therefore, the injury associated therewith is not compensable.

### ***Issues 2, 3, and 5. Previously Incurred Medical, Mileage, and Additional TTD***

“In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury.” **§287.140.1**

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<sup>1</sup> Dr. Yingling released Employee to fully duty on July 12, 2001. However, an appointment was made for an additional injection to occur on July 27, 2001. Dr. Yingling did not see Employee after that injection (until he returned in May of 2002). Therefore, I find that Dr. Yingling released Employee on July 12, 2001 but the date of MMI was the date that the final treatment was rendered.

<sup>2</sup> All of the relevant events that are the subject of this claim took place prior to the enactment of the 2005 revisions to the Missouri Workers' Compensation Law. Therefore, all statutory references are to Missouri Revised Statutes (2000).

As stated previously, I have found that the need for medical care that postdated July 2001 was not causally related to Employee's injury of February 5, 2001. For these reasons, Employee's claims for reimbursement of the cost of that care, mileage reimbursement for attending that care and TTD as a result of that care are denied.

***Issue 4. Additional or Future Medical Care***

Employee is claiming additional or future medical care. Dr. Yingling released Employee on July 12, 2001 and placed him at MMI on July 27, 2001. During the following 8-9 months, Employee's condition was stable and he made no request for additional medical care. Dr. Yingling gave his opinion regarding the need for future medical care during his deposition that was given in October of 2008. Dr. Yingling opined that Employee would need future medical care as a result of his then present medical condition. As found previously, his then present medical condition was as a result of a new injury. There is no evidence that Employee would need future medical care for his injury or medical condition as it existed prior to May of 2002. For this reason, Employee's claim for future medical care is denied.

***Issue 6. Permanent Partial Disability***

Employee is claiming permanent partial disability benefits. Drs. Yingling and Volarich provided their opinions regarding Employee's permanent partial disability (PPD). However, those opinions were given after considering Employee's subsequent injury that occurred in May of 2002 and the medical care that followed. Dr. Tate opined that Employee suffered a 5% PPD due to the strain and the protrusions/bulges that were related to the February 5, 2002 injury.

"For permanent partial disability, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with sections 287.170 and 287.180, respectively, the employer shall pay to the employee compensation computed at the weekly rate of compensation in effect under subsection 5 of this section on the date of the injury for which compensation is being made..." **§287.190.1**

Based on the objective findings of three protrusions/bulges and the subjective complaints of pain that existed when Employee reached MMI in July of 2001, I find that Employee suffered a 17.5% PPD of the body as a whole (400 week level) as a result of the work related injury that occurred on February 5, 2001. Based on this finding, I award Employee  $(.175 * 400 * 314.26 = )$  \$21,998.20 in PPD benefits.

**ATTORNEY'S FEE**

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

**INTEREST**

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

Made by:

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Matthew W. Murphy  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*

Date: \_\_\_\_\_