

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

Injury No.: 04-052344

Employee: Jerry Fischer  
Employer: Montgomery County  
Insurer: Missouri Association of Counties  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Dismissed)

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 24, 2009. The award and decision of Administrative Law Judge June Striegel Doughty, issued June 24, 2009, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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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

## FINAL AWARD

Employee: Jerry Fischer

Injury No. 04-052344

Dependents: N/A

Employer: Montgomery County

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**  
Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (dismissed)

Insurer: Missouri Association of Counties

Hearing Date: March 23, 2009

Checked by: JSD/scb

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: June 7, 2004.
5. State location where accident occurred or occupational disease contracted: Montgomery County, 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 contracted: Claimant was repairing tracks on crawler (small bulldozer) when the tool he was using broke and he fell off crawler striking his head and back on the bucket attached to the front of the crawler.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Parts of body injured by accident or occupational disease: Head, back, body as a whole, and psyche.
14. Nature and extent of any permanent disability: Permanent total disability.
15. Compensation paid to-date for temporary disability: \$17,196.19.
16. Value necessary medical aid paid to date by employer/insurer? \$16,592.54.
17. Value necessary medical aid not furnished by employer/insurer? Unknown.
18. Employee's average weekly wages: \$505.77.

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19. Weekly compensation rate: (PTD)/(PPD) \$337.18/\$337.18.
20. Method wages computation: By stipulation of the parties.

**COMPENSATION PAYABLE**

21. Amount of compensation payable by Employer: \$337.18 per week beginning November 21, 2005, through Claimant's lifetime.
22. Second Injury Liability: Voluntarily dismissed.
23. Future requirements awarded: As described in award.

The compensation awarded to the Claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of attorney Mark E. Moreland for necessary legal services rendered.

The compensation awarded to the Claimant is also subject to a lien filed by the MO HealthNet Division of the Missouri Department of Social Services in the amount of \$416.95.

Employee: Jerry Fischer

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

Employee: Jerry Fischer

Injury No. 04-052344

Dependents: N/A

Before the  
**DIVISION OF WORKERS'  
COMPENSATION**

Employer: Montgomery County

Department of Labor and Industrial  
Relations of Missouri  
Jefferson City, Missouri

Additional Party: Second Injury Fund (dismissed)

Insurer: Missouri Association of Counties

A final hearing was conducted in this case on March 23, 2009. Jerry Fischer was represented by Mark E. Moreland. The employer and the insurer were represented by Christine M. Kiefer. Mr. Moreland moved to dismiss the Second Injury Fund at the beginning of the hearing, and it has been voluntarily dismissed from this case.

## **STIPULATIONS**

At the hearing, the parties stipulated to the following facts.

- On June 7, 2004, Fischer was employed by Montgomery County (“Employer”).
- On that day, he sustained an injury by accident arising out of and in the course of his employment (the “accident”).
- The accident occurred in Montgomery County, Missouri.
- Fischer alleges that the accident resulted in injury to his head, neck, back, and body as whole, and that it also caused psychiatric injury.
- The parties were operating under and subject to the provisions of the Missouri Workers’ Compensation Law.
- The Missouri Division of Workers’ Compensation (the “Division”) has jurisdiction and venue is proper.
- Employer’s liability was insured by the Missouri Association of Counties.
- Employer received proper notice of the accident and the claim for compensation was timely filed.
- Fischer’s average weekly wage at the time of the accident was \$505.77, and the applicable weekly rate of compensation for purposes of temporary total disability (“TTD”), permanent total disability (“PTD”), and permanent partial disability (“PPD”) is \$337.18.
- Fischer received TTD benefits from Employer in the amount of \$17,196.19, representing 51 weeks of benefits covering the period of June 8, 2004, through October 25, 2004, and also the period of April 18, 2005, through November 20, 2005.
- Medical aid has been provided by Employer in the amount of \$16,592.54.
- The Missouri Department of Social Services, through MO Healthnet Division, has filed a lien in the amount of \$416.95 for services provided to Fischer in connection with the accident.

### ISSUES

- I. Did the accident medically cause the injuries alleged in this claim?
- II. Did Fischer sustain permanent disability as a result of the accident, and, if so, what is the nature and extent of his disability?
- III. Is Employer liable for future medical care needed to cure or relieve the effects of the accident, including but not limited to, medication, other treatment therapies, and psychiatric care?

### EVIDENCE PRESENTED<sup>1</sup>

Fischer and J. D. Miller testified on Fischer's behalf. In addition, the following exhibits were admitted without objection on Fischer's behalf:

- Exhibit A Deposition of Gregg Bassett, M.D.;<sup>2</sup>
- Exhibit B Deposition of Gary Weimholt, MS, CDMS;<sup>3</sup>
- Exhibit C Medical Records – Wellsville Medical Clinic;
- Exhibit D Medical Records – Montgomery City Medical Clinic;
- Exhibit E Medical Records – Neurology, Inc.;
- Exhibit F Medical Records – Audrain Medical Center;
- Exhibit G Medical Report – Fredric M. Simowitz, M.D., F.A.A.N.; and
- Exhibit H Psychological Testing Reports – MCMI-III and MMPI-2.

Employer cross-examined Fischer, called no additional witnesses, and offered the following exhibits, which were admitted without objection:

- Exhibit 2<sup>4</sup> Medical Records – Wellsville Medical Clinic;<sup>5</sup>
- Exhibit 3 Medical Records – Open MRI of St. Louis and St. Charles County;
- Exhibit 4 Medical Records – University Hospital;
- Exhibit 5 Medical Records – Columbia Orthopaedic Group;
- Exhibit 6 Medical Report – David M. Peeples, M.D.;
- Exhibit 7 Medical Report – Patrick A. Hogan, M.D.; and
- Exhibit 8 Deposition of Stacey Smith, M.D.<sup>6</sup>

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<sup>1</sup> Exhibits containing markings, highlighting, redactions, etc., were submitted in that manner. In addition, all objections contained in the depositions are deemed waived, and are hereby overruled, as they were not renewed when the evidence was offered.

<sup>2</sup> Including deposition exhibits 1 and 2, attached thereto.

<sup>3</sup> Including deposition exhibits 1 and 2, attached thereto.

<sup>4</sup> The record contains no Exhibit 1.

<sup>5</sup> These records are also contained in Exhibit C.

<sup>6</sup> Including deposition exhibits 1 and 2, attached thereto.

## **FINDINGS OF FACT**

### **Personal History**

1. Fischer is 44 years old. He was born in Missouri. Fischer's parents divorced when he was young. His mother remarried and Fischer was raised by his mother and stepfather. Fischer's mother had polio as a child, permanently affecting her left leg. Fischer's mother has worn a brace on her left leg since she was five years old and she also uses a cane to walk. She has no other limitations and worked as a homemaker throughout Fischer's upbringing. Fischer describes his mother as a fiery, small woman.
2. Fischer's biological father has a history of alcohol problems. Fischer saw his biological father only occasionally as a child. After divorcing Fischer's mother, his biological father remarried and had two children, both of whom had a degenerative neurological condition and both of whom died as teenagers. Fischer saw his biological father more frequently during his teenage years before he went into the military. When he was with his father and half-siblings, Fischer would help carry his siblings because they could not walk. Fischer never lived with his biological father and half-siblings.
3. Fischer completed the 12<sup>th</sup> grade of high school but did not graduate. He does not have a GED. He earned poor grades in school because he did not care about his education at that time. Fischer has no formal technical or college training. Fischer has very limited knowledge of computers. He used to have a computer, but used it only to receive email.
4. Fischer has been married four times. His fourth marriage lasted 12 years and produced two children. Fischer is very committed to his children. Fischer's ex-wife left the home in February 2007, and the children stayed with Fischer and visited their mother every other weekend. Then Fischer and his ex-wife shared custody for a period of time and the children spent equal time with each parent. Fischer and his ex-wife divorced in May 2008, and she was awarded full custody of their children at that time. Now Fischer only sees his children every other weekend and several weeks in the summer.
5. Fischer is currently single and resides alone. He has no income and relies on his mother and stepfather to pay for the utilities in his mobile home and his car insurance. His mobile home is currently in foreclosure.

### **Employment History**

6. Fischer enlisted in the United States Army following high school where he served as a telephone wire line installer. This involved climbing telephone poles and installing telephone and radio lines on poles and in buildings. Fischer served in the military for five or six years until he received an "other than honorable" discharge for drunk and disorderly conduct.
7. After his military service, Fischer held several different jobs before he went to work for Employer. Fischer's employment history includes:
  - running the cash register, reading gas pumps, and stocking shelves at a gas station;

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- welding, which included gathering, lifting, cutting, and welding pipe for Porta-King;
- cashier management with Casey's General Store, which included running the cash register, ordering supplies, stocking shelves, cleaning, scheduling workers, and filling in where needed;
- fuel running at Ray's Car & Truck Mart, which involved fueling, servicing, and parking trucks for truck driving customers; and
- working in various management capacities (relief, kitchen, and maintenance) for Flying J's Travel Plaza.

These jobs required Fischer to perform varying types of physical labor, including being on his feet for many hours at a time, bending, kneeling, reaching, lifting, carrying, sweeping, and mopping. None of these jobs involved typing or using a computer.

8. Fischer later began driving a tanker truck for Flying J's Transportation which involved transporting fuel (four loads a day) between certain Flying J's locations. This job required Fischer to obtain and maintain a commercial driver's license and also to pass a physical examination, which he did.
9. Fischer began working for Employer in 1997. He continued working part-time for Flying J's on weekend nights as a tanker driver in addition to his full-time job with Employer. Fischer also worked a third job in the winter running a snow plow for the Missouri Highway and Transportation Department (the "highway department") at night during the week as needed. In the summer, Fischer worked a third job driving a concrete truck for Mid-MO Concrete, hauling loads of gravel, usually during the day on Saturdays, and sometimes spreading the gravel at the designated site location. Fischer also painted houses for people on the side.
10. In addition to his paid employment, Fischer also volunteered as treasurer for the local Chamber of Commerce.

### **Medical History and Fitness**

11. Fischer is 5' 4" tall and weighed approximately 135 pounds at the time of the accident.
12. Fischer was very active at home and work before the accident. During the years prior to the accident when Fischer was working full-time for Employer and also two part-time jobs, Fischer worked on average between 60 and 80 hours per week. He worked long hours because he loved driving and he enjoyed the money he earned. Fischer never filed a workers' compensation claim prior to this case.
13. In addition to his many jobs, Fischer bred and raised show quality Basset Hounds and was licensed to sell the puppies. Fischer also raised and sold chickens and cared for rabbits and bottle calves on his property. Fischer maintained his entire 1 ½ acre property himself, mowing the entire property with a small riding lawnmower as needed.
14. Before the accident, Fischer enjoyed riding bicycles and jumping on the trampoline with his children. He also took his children fishing and hunting.

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15. J.D. Mitchell has known Fischer for approximately 30 years. Mitchell works for Employer running heavy equipment. Mitchell has worked for Employer since 1995. Mitchell worked with Fischer both before and after the accident. Prior to the accident, Fischer had a very good memory and knew the roads they worked on very well, as he had grown up and spent most of his life in the area. Fischer and Mitchell are long-time friends. At the hearing, Mitchell recalled that before the accident during Fischer's free time, Fischer was "constantly" doing maintenance around his home, including building fences around his property for his various animals. Fischer also regularly helped Mitchell with various jobs at his house. For example, Fischer was particularly good at climbing poles and he assisted Mitchell with antenna work and other work on top of Mitchell's house. Mitchell never knew Fischer to have any physical or work-related problems before the accident.
16. Fischer is a recovering alcoholic. He has sustained full remission since approximately 1991. He developed shakes and a bad headache when he first stopped drinking, but through the help of an AA program, Fischer has had no slip ups with regard to alcohol use since he stopped drinking. Fischer has never used street drugs or prescription medication for recreational purposes.
17. Fischer has smoked cigarettes for many years and has COPD secondary to smoking. He also has a history of kidney stones. Before he stopped drinking in 1991, Fischer was assaulted on two occasions, sustaining lacerations on his head but no loss of consciousness. Fischer was also involved in a motor vehicle accident in May 1997 and received treatment for pain in his mid back for approximately a month thereafter. For a brief period in 2003 Fischer complained of stomach problems. Two diagnostic tests were ordered, both of which were negative.
18. Fischer has no history of seizures, migraine headaches, diabetes, hypertension, irritable bowel syndrome, chronic fatigue syndrome, fibromyalgia, or broken bones. Before his work accident, Fischer had no speech or memory problems. He had no history of depression or psychiatric disorder. In November 2006, Fischer's wife reported that prior to the accident Fischer never exhibited any neurologic-type problems.

### **Accident and Initial Medical Treatment**

19. Fisher's job duties for Employer included vehicle maintenance. On the afternoon of June 7, 2004, Fischer was working for Employer, along with other co-workers, to repair the tracks on a crawler (small bulldozer with a bucket on the front end). By turning and pushing the bucket attached to the front of the crawler into the ground and also pushing the teeth located on the back of the crawler into the ground, the employees raised the track of the crawler off the ground for repair purposes. Fischer was standing on the front end of the crawler exerting all of his weight and physical strength to tighten the bolt that holds two pieces of track together when one of the tools he was using broke. Due to the sudden loss of opposing resistance, Fischer fell backward off the vehicle, striking his back and head against the bucket that was embedded in the ground.
20. Fischer was bleeding from a scalp laceration and required immediate medical attention as a result of the accident. Fischer was taken by a co-worker to the office of Dr. Eric Kondro in

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Wellsville, Missouri. Fischer had never seen Dr. Kondro before that day. Dr. Kondro cleaned and sutured the laceration on Fischer's scalp. The doctor's handwritten progress notes from that office visit report, among other things, "(struck head on bucket – no LOC). Did not fall. No other injuries."<sup>7</sup> Dr. Kondro provided Fischer with written authorization to return to work on June 9, 2004, and Fischer went home. Fischer was living with his fourth wife and children at that time.

21. The next day, June 8, 2004, Fischer's wife drove Fischer to the Audrain Medical Center emergency room because he was acting confused and didn't seem to know where he was. Fischer does not recall the events of that day. According to medical records, Fischer reported feeling weak and funny. He also reported twitching in his arms and legs. A CT Scan of Fischer's head revealed no mass effect and no evidence of skull fracture or intracranial hemorrhage. Fischer was discharged with instructions to work light duty for the next five to seven days, take Tylenol as needed, and engage in only minimal driving.
22. On June 9, 2004, Fischer returned to Dr. Kondro accompanied by his wife. Fischer complained again about twitching feelings in his arms and legs. He also complained of being light headed and dizzy. Fischer's wife reported that Fischer had slurred speech and was losing his train of thought in mid-sentence. Dr. Kondro diagnosed Fischer as having concussion syndrome.
23. One week after the accident, Fischer and his wife returned to Dr. Kondro's office and the sutures in his scalp were removed. At that appointment Fischer reported continued episodes of feeling out of it and his wife reported that Fischer stares off. Fischer also reported that he was experiencing pain in the back of his neck, into his mid-back between his shoulder blades and down his spine into his legs and arms. On June 22, 2004, Dr. Kondro diagnosed this as cervical/thoracic strain and referred Fischer for physical therapy. Fischer's pain worsened following physical therapy and the therapy was discontinued on July 15, 2004. Other post accident symptoms included headaches, insomnia, memory lapses, increased difficulty with math, sitting and walking with his shoulders hunched forward, and weakness.
24. Dr. Kondro ordered more diagnostic tests. Although most test results were normal, an MRI of Fischer's thoracic spine on July 15, 2004, revealed abnormalities which Dr. George Cyriac interpreted as: "1. Probable mild compression of T7 which may be recent or old[;and] 2. Schmorl's node along the inferior end plates of T7."<sup>8</sup> Thereafter, Dr. Kondro diagnosed Fischer with a cerebral concussion and a compression fracture of T-7. He prescribed various medications and a back brace and referred Fischer to Dr. John Miles, an orthopedic surgeon, and Dr. Allyn L. Sher, a neurologist. He also directed that Fischer remain off work until further notice.
25. Dr. Sher diagnosed Fischer as having posttraumatic/postconcussive syndrome and prescribed amitriptyline to treat Fischer's insomnia and headaches. On August 23, 2004, Dr. Sher concluded:

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<sup>7</sup> Ex. C, p.14; Ex. 2, p.10.

<sup>8</sup> Ex. C, p.5; Ex. 2, p.2.

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From my viewpoint, I see no contraindications for [Fischer] returning to work, but I would defer this to Dr. Kondro who has been treating him for his back pain.<sup>9</sup>

26. In September 2004, Dr. Miles ordered another MRI of the thoracic spine and concluded that Fischer may have suffered a subclinical compression fracture but no obvious compression fracture. Dr. Miles gave Fischer some exercises to work on and reported that as of October 14, 2004, Fischer was doing well and was ready to return to full unrestricted duty at work.
27. In his progress notes dated October 22, 2004, Dr. Kondro notes that Fischer was “finally getting some relief” and would like to try and return to work.<sup>10</sup> Despite test results to the contrary, Dr. Kondro continued to assess Fischer as having sustained, among other things, a T-7 compression fracture on June 7, 2004.
28. At his follow-up appointment with Dr. Sher on October 25, 2004, Fischer reported that he had stopped taking the amitriptyline because he was feeling better and sleeping well. Although he reported occasional memory lapses, Fischer’s neurological examination that day was within normal limits. His speech was fluent and he exhibited no dysarthria or language impairment. Dr. Sher saw no contraindication for Fischer returning to work and concluded that no further neurological workup or follow up was needed.
29. Dr. Miles released Fischer to return to work on October 25, 2004. Drs. Kondro and Sher concurred. Dr. Miles imposed a permanent 25-pound lifting restriction.

### **Subsequent Events**

30. Fischer returned to work for Employer with the lifting restriction on October 26, 2004. Employer more than accommodated that restriction and allowed Fischer to only drive the truck. Employer did not require Fischer to perform concrete work, spread gravel, or perform vehicle maintenance as he had been required to do before the accident.
31. Fischer did not return to work for Flying J’s, the highway department, or Mid-MO Concrete. He has not painted any houses on the side since the accident.
32. Mitchell observed many changes in Fischer when he returned to work for Employer in October 2004. For example, Fischer evinced memory problems. When Mitchell was working a grader and Fischer was driving a dump truck, Fischer would frequently forget where Mitchell had told him to take the load. Fischer would have to call Mitchell on the radio because he had forgotten where he was supposed to go or how to get to a particular work site. Fischer appeared to be having increasing trouble with his arms. Often Mitchell could see pain on Fischer’s face during the work day and Fischer had obvious trouble climbing in and out of his truck. By evening, Fischer’s arms would be visibly shaking and he would almost fall down. As time passed, Fischer got worse. He became more and more hunched over. Mitchell’s testimony was credible in every respect.

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<sup>9</sup> Ex. E, p.5.

<sup>10</sup> Ex. C, p.10; Ex. 2, p.7.

33. Fischer did not request or receive medical treatment for five months. On April 1, 2005, Fischer went to see Dr. Cramp for treatment of symptoms unrelated to the accident. The doctor treated Fischer for his reported complaints and noted that Fischer's antalgic gait, torticollis, and tremors were workers' compensation related.
34. Fischer stopped working for Employer in April 2005 because the County Commissioners determined Fischer was unable to do the job. On April 5, 2005, Fischer began seeing Dr. Cramp for all of his medical needs, including those related to the accident.
35. Dr. Cramp ordered extensive laboratory and diagnostic testing. Except for evidence of T-7 inferior end plate change and T7-8 degenerative disc disease, all testing results were normal. Dr. Cramp instructed Fischer to continue wearing the previously prescribed Jewett back brace and he also prescribed a cane for Fischer's use.
36. By letter dated January 1, 2006, Dr. Cramp diagnosed Fischer with: 1) closed head injury with cerebral concussion and postconcussive syndrome; 2) scalp laceration – healed; and 3) chronic mid-thoracic back pain with T7 inferior end plate change and T7-8 degenerative disc disease. In connection with his diagnoses, Dr. Cramp provided the following opinion: .

In my medical opinion and to a reasonable degree of medical certainty, I believe Mr. Fischer has reached maximal medical improvement. Also, I believe to a reasonable degree of medical certainty that the above diagnoses have been directly caused by the 6-07-04 injury.

Again, to a reasonable degree of medical certainty, I believe Mr. Fischer is not medically capable of maintaining employment in the open labor market and will remain incapable for at least the next twelve months and into the foreseeable future.

I do not believe further treatment, other than analgesia, will improve his condition.<sup>11</sup>

37. Dr. Cramp wrote a second letter dated August 17, 2006, stating Fischer required a Jewett back brace for spinal support when he sits, stands, and walks. Dr. Cramp also stated that Fischer required a cane to assist him when ambulating. He opined that Fischer has not been medically capable of gainful employment since the June 7, 2004, accident. Dr. Cramp added that to a reasonable degree of medical certainty he did not believe Fischer was medically capable of holding gainful employment for at least the next twelve months.<sup>12</sup>

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<sup>11</sup> Ex. D, p.42.

<sup>12</sup> Ex. F, p.1.

### **Current Symptoms and Abilities**

38. The symptoms Fischer developed within days of the accident continue. Fischer experiences constant back pain, beginning at the center of his spine between his shoulder blades and out to both shoulders and down his sides. He also has pain in his hips that shoots down his legs and worsens when he sits too long or walks too far. Fischer is never pain free. Fischer wears a T.E.N.S. unit for pain relief all the time when he is awake. His back brace also helps some in terms of pain. Fischer takes pain medication (hydrocodone) every six hours. Without medication, the T.E.N.S. unit and the support of his back brace, Fischer estimates his pain level at 9 on a 10-point scale. With pain medication, the T.E.N.S. unit, and his back brace, Fischer's pain is between 5 and 8.
39. Fischer continues to stutter, particularly when he is nervous, angry, or tired, although he testified that he thought he had gotten somewhat better over time. Fischer also continues to experience involuntary muscle motion in the form of twitching. Sometimes the twitching is visible to others and sometimes he can feel it but it can't be seen. Fischer continues to experience memory and concentration problems. To compensate, Fischer writes down what he needs to remember and sometime tapes conversations. He is more irritable than he used to be and has become depressed. He used to take an antidepressant, but doesn't anymore.
40. Fischer gets lost easily and hasn't driven more than 30-40 miles distance since April 2005.
41. Fischer can no longer perform maintenance jobs on his property. Since the accident, Mitchell and other friends have taken care of routine maintenance and grass cutting at and around Fischer's house. Fischer lays down periodically throughout the day to relieve his pain. He can do an occasional load of laundry, occasionally load the dishwasher and perform light housework, such as dusting.
42. Fischer no longer raises or cares for animals, except for one dog he keeps as a pet.

### **Independent Medical Evaluations**

43. In addition to the impressions and opinions of his treating doctors and specialists, Fischer was evaluated by five different doctors: Dr. David M. Peeples; Dr. Patrick A. Hogan; Dr. Fredric M. Simowitz; Dr. Gregg Bassett; and Dr. Stacey L. Smith.

#### Dr. David M. Peeples

44. On April 29, 2005, Fischer was seen by Dr. Peeples for neurologic evaluation and treatment at Employer's request. Dr. Peeples examined Fischer and reviewed MRI scans of the cervical and thoracic spine taken on April 26, 2005. Dr. Peeples' written report mentions reviewing "the provided Physician's Notes," but does not indicate whose notes were provided. Dr. Peeples concluded that Fischer "has a bizarre presentation."<sup>13</sup> He concluded that Fischer "does have an essential tremor" which Dr. Peeples opined was unrelated to his work accident. He went on to state, "I am not able to establish a reasonable diagnosis on an organic basis for the scope and extent of his subjective symptoms and bizarre, non-physiologic features on

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<sup>13</sup> Ex. 6, p.2.

examination.”<sup>14</sup> Dr. Peeples prescribed pain medication and indicated Fischer could resume his normal work activities with the previously placed 25-pound lifting restriction if Employer could accommodate that restriction. He recommended that Fischer follow up with his own doctor or a neurologist for management of his tremor. Dr. Peeples concluded that neurologically no additional diagnostic testing or treatment was needed in connection with the work accident.

Dr. Patrick A. Hogan

45. Dr. Hogan is a neurologist. He interviewed and performed a neurological examination of Fischer on November 15, 2005, at Employer’s request. The record contains no evidence suggesting Dr. Hogan received and reviewed medical records from any source in connection with his evaluation. Based upon his interview with and examination of Fischer, Dr. Hogan concluded that Fischer had no evidence of neurological disorder of the central or peripheral nervous system. “He has mild physiologic tremor and does not have essential tremor.”<sup>15</sup> Dr. Hogan found no evidence that Fischer had a concussion and no evidence that he had a compression fracture. Regarding the question of a compression fracture, Dr. Hogan added, “[Fischer’s family doctor merely attempted to make a theoretical construct to account for the patient’s symptoms which are nonorganic in nature. There is no evidence that the accident of 06/07/04 was any factor in producing the patient’s complaints at the present time.”<sup>16</sup> Dr. Hogan opined that Fischer had reached MMI three to four weeks after the accident, acknowledging that he might have had sustained a mild thoracic and upper lumbar strain. Dr. Hogan concluded that Fischer was capable of returning to work without restriction and that he needs no further medical evaluation or treatment. Dr. Hogan rated Fischer as having sustained 0% PPD as a result of the accident.

Dr. Fredric M. Simowitz

46. Dr. Simowitz is also a neurologist. He saw Fischer for purposes of conducting an independent evaluation on June 16, 2006, at the request of Fischer’s attorney. Dr. Simowitz interviewed and examined Fischer and also reviewed medical records relating to Fischer’s evaluations and treatment by Drs. Kondro, Cramp, Miles,<sup>17</sup> Sher, Peeples, and Hogan. Dr. Simowitz also reviewed reports of numerous imaging studies undertaken between June 2004 and June 2006. Dr. Simowitz listed four diagnoses relating to Fischer’s accident at work.

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<sup>14</sup> *Id.*

<sup>15</sup> Ex. 7, p.3.

<sup>16</sup> *Id.*

<sup>17</sup> Dr. Simowitz notes that he may not have received all of Dr. Miles’ records because he reviewed reports of scans ordered and performed on April 26, 2005, but saw no office entry to complement those imaging studies. The record in this case contains no reports of scans ordered and performed on April 26, 2005. There is also no office entry of Dr. Miles bearing that date. However, Exhibit 5 contains a copy of an appointment card reflecting a scheduled appointment with Dr. Miles for April 26, 2005, and an information sheet from Columbia Orthopaedic Group with that date noting Fischer’s status at MMI and his ability to return to work with the previously imposed 25-pound lifting restriction.

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47. First, Dr. Simowitz diagnosed Fischer with chronic pain syndrome originating from “the chronic thoracic strain (soft tissue injury), which began about a week after the injury.”<sup>18</sup> Regarding this diagnosis, Dr. Simowitz opined that “[t]he one-week hiatus between the injury and the onset of symptoms is unusual, but not inconsistent with his injury[, and] . . . the injury of 6/7/04 was the prevailing factor in the cause of the thoracic strain and the subsequent chronic pain syndrome.”<sup>19</sup>
48. Next, Dr. Simowitz diagnosed Fischer as having post-traumatic muscle contraction and opined that the injury Fischer sustained on June 7, 2004, was the prevailing factor in the cause of that condition.
49. Dr. Simowitz’s third and fourth diagnoses were (3) probable somatization disorder, with psychogenically generated stuttering and tremor, and (4) possible anxiety and depression. Dr. Simowitz concluded that Fischer’s work accident was the likely cause of these conditions but acknowledged that such a causation determination was beyond his area of expertise.
50. With respect to Fischer’s complaints of low back pain, Dr. Simowitz concluded it was due to sciatica, adding that because those symptoms began a year after Fischer’s fall off the crawler, Fischer’s low back pain was unlikely to be related to the accident. As for Fischer’s ongoing dizziness, the doctor suggested it might be part of a post concussion syndrome, but might also be due to some other cause, such as the medications Fischer has been taking.
51. Overall, Dr. Simowitz concluded,

It is my opinion that Mr. Fischer is currently temporarily, totally disabled from his usual employment as detailed in the job description from [Employer], which was provided me by your office.

I believe that he has not received maximal benefit from medical treatment.<sup>20</sup>

Dr. Simowitz recommended that Fischer be referred to a pain management specialist and that he be evaluated by a clinical psychologist or by a psychiatrist “to determine if there has, in fact, been an emotional injury related to the accident.”<sup>21</sup>

Dr. Gregg Bassett

52. Dr. Bassett is board certified in general psychiatry. At the request of Fischer’s attorney, Dr. Bassett performed a forensic psychiatric evaluation/independent medical evaluation on Fischer. Dr. Bassett issued his evaluation report on November 18, 2006, basing it on:
- a. a 126-minute forensic evaluation he performed on Fischer in October 2006;

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<sup>18</sup> Ex. G, p.7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at p.8.

<sup>21</sup> *Id.*

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- b. a 30-minute interview with Fischer's wife;
  - c. medical records as enumerated in his report, also in October 2006;
  - d. evaluation reports of Dr. Peeples, Dr. Hogan, and Dr. Simowitz;
  - e. the transcript of Fischer's deposition taken March 3, 2006; and
  - f. results of psychological testing requested by Dr. Bassett and administered by Dr. Richard Wetzel, a Professor of Psychiatry and of Neurology and Neurological Surgery at the Washington University School of Medicine.
53. Dr. Bassett testified regarding his report and opinions on May 23, 2008. His testimony was clear and credible.
54. Dr. Bassett diagnosed Fischer as having Conversion Disorder<sup>22</sup> with Mixed Presentation (Motor Symptoms/Deficits and Sensory Symptoms/Deficits). Dr. Bassett opined that Fischer's conversion symptoms have caused Fischer to develop Adjustment Disorder with Depressed Mood. Regarding causation, Dr. Bassett opined that the accident was a substantial factor in causing Fischer's Conversion Disorder and Adjustment Disorder. Noting that conversion symptoms are notoriously difficult to treat and that the chronic nature of Fischer's conversion symptoms was a poor prognostic sign, Dr. Bassett concluded that "[f]or practical purposes, Fischer has reached maximum medical improvement<sup>23</sup> ("MMI"). He rated Fischer's impairment in four categories: activities of daily living (25 to 50% impairment); social functioning (20 to 25% impairment); concentration/persistence/pace (75 to 100% impairment); and adaptation (75 to 100% impairment), and concluded that overall Fischer's level of impairment "significantly impedes useful functioning."<sup>24</sup> Dr. Bassett testified regarding Fischer's employability as follows:
- [S]peaking as a Psychiatrist . . . who treats people with a variety of mental disorders and who has evaluated and encountered individuals with both Somatoform and Conversion Disorders, Mr. Fischer's problems with recall, his complaints of pain, his stooped over and twisted presentation, all of it together are such that I have not yet in my 10 years of practice, plus additional five years of training, plus four years of medical school, encountered a person such as him who was able to work.<sup>25</sup>
55. Dr. Bassett offered several treatment suggestions he felt could benefit Fischer, adding that Fischer "should have regularly scheduled (i.e., not only during emergencies) visits with a primary care physician and/or neurologist for reinforcement of the 'medically safe' message" and that "[p]sychiatric sessions should take place monthly."<sup>26</sup>

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<sup>22</sup> See Findings of Fact 61-63 regarding Conversion Disorder.

<sup>23</sup> Ex. A, depo ex. 2, p.3.

<sup>24</sup> *Id.* at p.5.

<sup>25</sup> Ex. A, p.22.

<sup>26</sup> Ex. A, depo. ex. 2, pp.6-7.

Dr. Stacey L. Smith

56. Dr. Smith is board certified in psychiatry and, at Employer's request, she performed an independent medical evaluation of Fischer. Her evaluation consisted of a lengthy interview with Fischer on June 26, 2008, and a review of all of the records reviewed by Dr. Bassett, plus Dr. Bassett's report. Also, in September 2008, Dr. Smith received additional medical records that she had requested predating the accident in 2004. Dr. Smith issued her report on December 26, 2008. She testified regarding her report and opinions on February 17, 2009.

57. Dr. Smith's diagnoses of Fischer included Conversion Disorder. She also diagnosed Fischer with "Somatoform Disorder, NOS" and "R/O Somatization Disorder," both of which she characterized as preexisting, and also "Some deliberate symptom exaggeration."<sup>27</sup>

58. Regarding causation, Dr. Smith opines:

Mr. Fischer is basically a healthy man, with a pronounced preexisting personality/somatoform disorder, who developed ever-growing (subjective physical and pseudoneurologic) symptoms after the relatively minor 6/7/04 event. . . . The event of 6/7/04 (again) was relatively minor, however it occurred in an individual with significant underlying personality vulnerabilities. The 6/7/04 event was the first domino to fall on many others ready and waiting. The substantial/central problem was the pre-existing underlying psychological predilections. The 6/7/04 event itself was minor.<sup>28</sup>

59. Dr. Fischer opines that "[t]he clinical picture here is psychologically convenient for Mr. Fischer – it allows him to essentially do exactly as much as he wants to do, and to avoid everything he does not want to do."<sup>29</sup> She adds, "I would expect some gradual improvement over time, especially once the litigation has been settled."<sup>30</sup> She also states that the contribution of Fischer's primary care physician "is not altogether positive" and that Fischer should be weaned from wearing his brace.<sup>31</sup>

60. Regarding Fischer's employability, Dr. Smith offers seemingly contradictory opinions. In her report she states "[a]n independent physiatric opinion should be obtained as to whether Mr. Fischer requires any physical restrictions."<sup>32</sup> Later, she states, "I feel Mr. Fischer is capable of working – for instance, at one of his prior convenience store jobs. However, if nudged/required to do so, I would expect protestations and a flaring of subjective somatic complaints. This is based on both the conversion symptoms and on the reinforcing secondary gain inherent in this setting."<sup>33</sup> During her deposition, Dr. Smith testified that she did not

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<sup>27</sup> Ex. 8, depo. ex. 2, p.32.

<sup>28</sup> *Id.* at pp.34-35.

<sup>29</sup> *Id.* at p.35.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at p.33.

<sup>32</sup> *Id.* at p.34 (emphasis in the original).

<sup>33</sup> *Id.* at p.35.

provide any ratings or recommend any restrictions in this case because she doesn't think Fischer needs physical or psychiatric restrictions. She then adds,

Well, let me amend that. You know, I think it gets to the issue of what is the appropriate management. You know, if you're the treating – you know, this guy has a problem, and it's a tricky one, what are you going to do, okay? And so I think this gets into what is an appropriated treatment plan for him. And I do think that some kind of graded activity, graded return to activity, under optimal circumstances for him – of course, defining that might be a little tricky – but that some sort of graded return to activity and weaning of the brace would be just an obvious place to start.<sup>34</sup>

Dr. Smith goes on to testify that she thinks Fischer is not at MMI and that he needs treatment.

### **Conversion Disorder**

61. Conversion Disorder is a recognized psychiatric condition in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (the "DSM-IV"). Dr. Bassett testified that the DSM-IV is published by the American Psychiatric Association and is recognized by psychiatrists worldwide as the catalog of recognized psychiatric disorders. According to the DSM-IV, Conversion Disorder is encompassed within a group of conditions labeled Somatoform Disorders, which are characterized by physical complaints in the absence of or in excess of findings on physical exam or diagnostic testing.
62. Conversion Disorder is a recognized psychiatric disorder where the patient experiences or perceives symptoms, manifesting primarily as neurologic, which are psychological in origin and not consciously produced.
63. Conversion Disorder is a diagnosis of exclusion and is notoriously difficult to treat.

### **Vocational Rehabilitation Assessment/Evaluation**

64. Gary Weimholt is a vocational rehabilitation consultant and a certified disability management specialist. Weimholt conducted a vocational rehabilitation evaluation of Fischer at the request of his attorney for purposes of assessing Fischer's employability in the open labor market. Weimholt interviewed Fischer on April 10, 2007, reviewed medical records as outlined in his report, and administered vocational testing. Weimholt prepared a report dated June 19, 2007, describing his evaluation process, findings, and conclusions. On November 9, 2007, Weimholt testified by deposition regarding these matters.
65. Applying the standard practices and procedures for assessing employability, and based upon a reasonable degree of certainty in his profession, Weimholt concluded that Fischer has a total loss of access to the open competitive labor market and is totally vocationally disabled from employment. Weimholt opined that there is no reasonable expectation that an employer, in the normal course of business, would hire Fischer for any position.

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<sup>34</sup> Ex. 8, p.64.

66. During his deposition, Weimholt opined that Fischer's total vocational disability was related to the variety and severity of symptoms he presents with and his Conversion Disorder.

### CONCLUSIONS OF LAW

Employers are liable, irrespective of negligence, to furnish workers' compensation to employees for personal injury from accidents arising out of and in the course of employment.<sup>35</sup> Fischer alleges that he sustained injury to his head, neck, back, and body as whole as a result of the accident and that the accident also medically caused psychiatric injury. Fischer contends that he has been rendered permanently and totally disabled as a result of the accident alone. He requests that PTD benefits be awarded and that Employer be ordered to provide future medical treatment as may be necessary to cure or relieve the effects of the accident, including but not limited to, medication, other treatment therapies, and psychiatric care.

Fischer has the burden of proving all elements of his claim by reasonable probability.<sup>36</sup> "Probable" means "founded on reason and experience which inclines the mind to believe but leaves room for doubt."<sup>37</sup> Because the claim in this case predates the 2005 legislative changes to Missouri's Workers' Compensation Law (the "Law"), all relevant statutory provisions must be liberally construed, broadly interpreted in favor of Fischer and in such fashion as "to extend its benefits to the largest possible class,"<sup>38</sup> in accordance with § 287.800.

### Credibility

To carry his burden, Fischer relies in part on his own testimony and credibility as a witness. The fact finder is charged with passing on the credibility of all witnesses and may disbelieve testimony absent contradictory evidence.<sup>39</sup> Employer questions Fischer's credibility as a witness. Employer argues that Fischer's claim of memory problems is inconsistent with his ability to recall specific facts at the hearing and also inconsistent with his perfect score on the Reyes 15 item test administered by Dr. Smith during her evaluation. Employer also points to select phrases gleaned from the interpretive reports provided by Dr. Wetzel and argues that the tests administered by Dr. Wetzel "demonstrated [Fischer] as being 'untrustworthy and unreliable.'"<sup>40</sup> Finally, Employer argues that Fischer's "story" is contradictory in certain respects, such as with respect to whether he fell at the time of the accident, whether he struck his back when he fell, and whether he lost consciousness.

Fischer was treated or evaluated by ten doctors with varying specialties and a vocational expert. Even though his symptoms were bizarre and his manner was sometimes hostile, not a single expert in this case characterized Fischer as a malingerer. Fischer undisputedly sustained a head injury on June 7, 2004. Except for Dr. Kondro's abbreviated office notes that day, every description of the accident in the record contains reference to Fischer falling. On this record, it is

<sup>35</sup> § 287.120.1. Statutory references, unless otherwise noted, are to RSMo 1998.

<sup>36</sup> *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 911 (Mo. App., E.D. 2008).

<sup>37</sup> *Rana v. Landstar TLC*, 46 S.W.3d 614, 622 (Mo. App., W.D. 2001) *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 225 (Mo. 2003).

<sup>38</sup> *Brenneisen v. Leach's Standard Serv. Station*, 806 S.W.2d 443, 445 (Mo. App., E.D. 1991).

<sup>39</sup> *Fischer v. Archdiocese of St. Louis-Cardinal Ritter Inst.*, 793 S.W.2d 195, 199 (Mo. App., E.D. 1990) *overruled on other grounds by Hampton*, 121 S.W.3d at 230.

<sup>40</sup> Employer's Post Trial Brief, p.10 & 14.

Dr. Kondro's note, not Fischer's testimony, that is inconsistent with the evidence. Moreover, Fischer's perfect Reyes test score does not undermine his credibility. In fact, it bolsters it. In her report, Dr. Smith describes this test as "a test for *malingered* memory problems"<sup>41</sup> She testified that this test is used "if you think someone may be consciously feigning a memory problem."<sup>42</sup> Dr. Smith testified "[i]t didn't show any problem with memory, but it also didn't show that he was trying to fake memory problems."<sup>43</sup> Finally, select phrases from the interpretive reports of the personality tests administered by Dr. Wetzel do not support a finding that Fischer lacks credibility. In the opening paragraph, the MCMI-III interpretive report states: "The MCMI-III report cannot be considered definitive. It should be evaluated in conjunction with additional clinical data. The report should be evaluated by a mental health clinician trained in the use of psychological tests."<sup>44</sup> The experts who understand the proper use of these tests did not conclude Fischer was untruthful. Nor do I.

Based upon the medical evidence provided, Fischer is not a malingerer. I find Fischer truthful to the best of his ability given his psychiatric diagnosis of Conversion Disorder. Fischer's symptoms are real to him and he is a credible witness regarding the matters to which he testified, particularly with respect to events and the nature and extent of his pain symptoms and his physical abilities and limitations.

### Causation

There is no dispute Fischer suffered a physical injury to his head that required immediate medical attention and suturing as a result of the accident on June 7, 2004. While the degree of injury is contested, there is little dispute that Fischer sustained back strain as a result of the accident.<sup>45</sup> Moreover, the psychiatric experts on both sides of this case diagnosed Fischer as suffering from Conversion Disorder, a recognized psychiatric condition characterized by unconsciously produced physical neurologic symptoms which are psychological in origin. Missouri has long held that mental or psychological injuries, in addition to physical injuries, can fall under the coverage of the Law.<sup>46</sup> The central issue here is whether Fischer's psychiatric condition constitutes a compensable injury under the Law.

According to § 287.020.2, an injury is compensable if it is clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability.<sup>47</sup> The legislature's use of the general article 'a' before 'substantial factor' indicates a causative factor may be substantial even if it is not the primary or most significant factor. "There is no bright line test or minimum percentage defining "substantial factor" as that

<sup>41</sup> Ex. 8, depo. ex. 2, p.10 (emphasis added).

<sup>42</sup> Ex. 8, p.28 ll.14-16.

<sup>43</sup> *Id.* at ll.21-23.

<sup>44</sup> Ex. H, p.2. See also Ex. A, pp. 38-41 (Dr. Bassett's testimony regarding the significance of the psychological testing "boiler plate" computer output).

<sup>45</sup> See opinions and records of Drs. Kondro, Miles, Cramp, and Simowitz.

<sup>46</sup> *Tibbs v. Rowe Furniture Corp.*, 691 S.W.2d 410, 412 (Mo.App., S.D. 1985) *overruled on other grounds by Hampton*, 121 S.W.3d at 231. See also, *Higgins v. The Quaker Oats Co.*, 183 S.W.3d 264 (Mo.App., 2005); *Bloss v. Plastic Enterprises*, 32 S.W.3d 666 (Mo.App., W.D. 2000) (Symptom Magnification Disorder).

<sup>47</sup> A different statutory test applies when a mental injury is alleged to have resulted from work-related stress that does not arise from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action taken in good faith by an employer. §§ 287.120.8 & .9. These statutes are not implicated here.

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term is used in this context.”<sup>48</sup> “[A] mental injury triggered or precipitated by a work-related accident is . . . compensable provided it can be shown that the accident was a substantial factor in causing the injury.”<sup>49</sup> While an injury is not compensable merely because work was a triggering or precipitating factor,<sup>50</sup> the work accident may be both a precipitating factor, triggering Fischer’s psychiatric disorder, as well as a substantial factor in causing the condition.<sup>51</sup> Thus, even if Fischer was predisposed to developing Conversion Disorder and his current condition was triggered by the accident on June 7, 2004, Employer may still be liable.

Causation and work relatedness are questions of fact.<sup>52</sup> However, medical causation of injuries which are “not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.”<sup>53</sup> Therefore, whether Fischer’s mental injury is compensable turns not only on the proper application of the applicable law, but also on the credibility of the parties’ respective experts, particularly that of the psychiatric experts.

Both Dr. Bassett and Dr. Smith are board certified in psychiatry. Both spent a significant amount of time interviewing and evaluating Fischer. Dr. Bassett’s evaluation took place in 2006 and he also interviewed Fischer’s wife. Dr. Smith evaluated Fischer in 2008 shortly after Fischer was divorced and lost custody of his children. Dr. Smith also requested additional medical records dating back as far as 1990, which she reviewed several months after meeting with Fischer.<sup>54</sup> Based upon a careful review of these experts’ reports and their deposition testimony, as well as the medical records as a whole, I find Dr. Bassett’s report, opinions, and testimony more credible and persuasive.

While both psychiatrists diagnose Fischer as having Conversion Disorder, Dr. Smith also concludes that Fischer is exhibiting “some deliberate symptom exaggeration” and that because she did not observe stuttering or tremors while Fischer was in her office, “[t]hese two ‘symptoms’ were hysterical and/or feigned illness behaviors.”<sup>55</sup> She opines that “the vast majority of his complaints are subjective/voluntary in nature.”<sup>56</sup> These conclusions seem inconsistent and are not adequately explained through her testimony. Also Dr. Smith’s report contains several material mistakes that she appears to discover during the course of her deposition. In addition, her report and testimony contain a great deal of speculation and her opinions are unclear. These factors undermine her credibility. For example, on cross examination, Dr. Smith testified that if Fischer had experienced a typical day on June 7, 2004, with no physical injury at home or at work, it is unlikely he would have awakened the next morning with the symptoms that prompted his wife to take him to the hospital.<sup>57</sup> On redirect, Dr. Smith is asked, “[I]sn’t it possible that if a person was going to have some conversion behavior,

<sup>48</sup> *Cahall v. Cahall*, 963 S.W.2d 368, 372 ((Mo.App., E.D. 1998) *overruled on other grounds by Hampton*, 121 S.W.3d at 226.

<sup>49</sup> *Higgins*, 183 S.W.3d at 270, quoting *Tangblade v. Lear Corp.*, 58 S.W.3d 662, 667 (Mo.App. 2001).

<sup>50</sup> §287.020.2.

<sup>51</sup> *Cahall* at 373.

<sup>52</sup> *Id.* at 372.

<sup>53</sup> *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App., W.D. 1991).

<sup>54</sup> These medical records were not offered as evidence and are not in the record.

<sup>55</sup> Ex. 8, depo ex. 2, p.33.

<sup>56</sup> *Id.* (emphasis in original.)

<sup>57</sup> Ex. 8, p.72.

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or display signs of a conversion disorder, it could be prompted without any kind of injury?" Dr. Smith's response is, "True. I mean, I think – well, okay, true."

Dr. Smith emphasizes three office visits over a short period in 2003 when Fischer was complaining of abdominal problems. She focuses on the single doctor's note dated May 1, 2003, as evidence that Fischer had preexisting Somatoform Disorder. The underlying medical record is not in evidence, but Dr. Smith reports this note without quotations and adds her comment in parenthesis as follows:

More stomach complaints. Upper GI negative. Gall bladder ultrasound negative. Diagnosis functional abdominal bloating and pain. (This is important, as 'functional' means not due to an organic basis, and that a psychological etiology is presumed. This is pre-6/7/04.)<sup>58</sup>

Dr. Bassett's report reflects that he too was aware of a short-lived undiagnosed abdominal complaint in Fischer's past. The significance Dr. Smith attributes to this particular entry seems strained. Similarly, although Fischer's reported physical symptoms were generally the same in 2006 when he saw Dr. Bassett and in 2008 when he saw Dr. Smith, she attributes great significance to Fischer's 2008 marital and custody problems, suggesting they are the cause of his continued psychiatric disorder and may even have caused the condition itself. That suggestion is unpersuasive in the context of the record as a whole.

Dr. Bassett clearly and consistently opines that Fischer's Conversion Disorder was caused by the work accident. In his testimony, Dr. Bassett explains this condition, describing it as a complicated and vexing diagnosis of exclusion. He also explains how he arrived at his diagnosis in this case. When asked on cross examination whether his opinions were based entirely on Fischer's subjective complaints and the information he obtained during his interviews with Fischer and his wife, Dr. Bassett responded:

Well, their subjective information as filtered through the rules and criteria that I have to use as a Psychiatrist with the additional collateral information of the three neurologists - - two of whom were hired by the insurer - - and then with the additional information of the psychological testing which supports a Conversion Disorder diagnosis and yet doesn't show symptom amplifications or the broader somatization disorder diagnosis.<sup>59</sup>

Admitting there is no objective test that can be performed to determine whether Fischer's symptoms are consciously produced (Factitious Disorder) or not consciously produced (Conversion Disorder), Dr. Bassett emphasized,

But, remember, you know, I'm not just relying on what [Fischer] says.

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<sup>58</sup> Ex. 8, depo. ex. 2.

<sup>59</sup> Ex. A, pp.33-34.

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I have collateral information from neurologists who are scratching their heads - - as I read their reports.

I have psychological testing that supports this diagnosis as well.

\* \* \*

I know Dr. Peeples and I've seen Dr. Hogan's work. And I mean those two guys, in my experience, they are not, they will call malingering if they think something is malingering.

And they didn't here. That says something to me.<sup>60</sup>

Dr. Bassett also testified at length regarding his reasons for concluding the June 7, 2004, work accident was a substantial factor in causing Fischer's disorder. With respect to the basis for his causation opinion, Dr. Bassett first notes that Fischer was not a sickly person before the accident and had no preexisting psychiatric disorder. The record confirms Fischer's past general good health and no preexisting psychiatric disorders. While Dr. Smith suggests otherwise, even she did not characterize Fischer's Conversion Disorder as preexisting. At most, Dr. Smith seems to suggest that various events in Fischer's past and certain psychological test results predisposed Fischer to develop this condition. "[A] preexisting but non-disabling condition does not bar recovery of compensation if a job-related injury causes the condition to escalate to the level of disability."<sup>61</sup>

In his report and through his testimony, Dr. Bassett discusses the significance of Fischer's good work history, along with its corresponding economic benefits. He emphasizes the importance of the chronology of events beginning with the accident, followed by the onset of some symptoms the very next morning and the onset of most symptoms within a week. Regarding the connection between the condition and the accident itself, Dr. Bassett testified,

Well, he struck his back and/or head.

And it's not much of a reach that a person who really doesn't understand the body might think that if one of those parts of the body get hit, they're supposed to have a neurologic sequelae.

But I don't want to make the implication here that he's consciously saying wow, I whacked my back and/or head and now I've got to start stuttering.

It's happening as far as we understand it on a, on a non-conscious level.<sup>62</sup>

Dr. Bassett admits he cannot connect the mechanism of injury physically with all of Fischer's symptoms.<sup>63</sup> However, the fact that Fischer sustained a blow to his head and/or back is clearly

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<sup>60</sup> *Id.* at pp.22, 28, 36-37.

<sup>61</sup> *Higgins*, 183 S.W.3d at 271 (Mo.App., W.D. 2005) quoting *Miller v. Wefelmeyer*, 890 S.W.2d 372, 376 (Mo.App., E.D. 1994).

<sup>62</sup> Ex. A, pp.23-24.

<sup>63</sup> *Id.* at p.28.

significant to Dr. Bassett given the facts of this case. Regarding Fischer's deceased half-siblings, Dr. Bassett testified, "You know, [Fischer] has this exposure to his siblings. And then he whacks his central nervous system and now he's got an impairment also. But again, it's not a rational, reasoned process that now that I've hit my back, I'm going to be like my half brother and half sister. . . . [I]t's subconscious or nonconscious."<sup>64</sup> "The ultimate importance of the expert testimony is to be determined from the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient."<sup>65</sup>

In its post hearing brief, Employer quotes § 287.190.6(2),<sup>66</sup> "where inconsistent or conflicting medical opinions exist, objective medical findings shall prevail over subjective medical findings." This provision, however, was enacted as part of the 2005 legislative changes to the Law and after the accident. There are two exceptions to the rule that a statute shall not be applied retrospectively – first, where the statute is only procedural and does not affect any substantive right of the parties and, second, where the legislature manifests a clear intent for retrospective application.<sup>67</sup> Section 287.190 contains no clear manifestation for retrospective application. It does, however, add the new requirement that objective findings shall prevail over subjective findings, mandating "a biased assessment of the evidence," which in this case could "amount to a preemptive determination of whether the employee has met his or her burden of proof."<sup>68</sup> The statutory provision relied upon by Employer is inapplicable.

Fischer has met his burden of proving a causal connection between the accident and the development of his psychiatric disorder. From the time he stopped drinking in 1991 until the day of the accident, Fischer was a hard worker who enjoyed working (as much as 60-80 hours per week), earning money, working around his house, helping his friends with work at their homes, and playing with his children. He lived in the same area most of his life. He knew the roads well and had a good memory. After the accident, in which he sustained back strain and a blow to the head that required immediate medical attention, Fischer developed Conversion Disorder. Fischer did not stutter or have speech problems before the accident. These problems began for the first time the day after the accident. Within a week after the accident, Fischer was experiencing back pain, shaking, muscle spasms, twitching in his arms, tremors, and involuntary movement of his head. He was thoroughly examined and tested and not one of the 11 specialists involved in this case accused him of malingering. Although he returned to work at the end of October 2004 and sought no medical treatment between the time he returned to work and the time Employer required him to stop working in April 2005, it is clear from the record and Mitchell's testimony that Fischer was symptomatic that entire period of time. Employer required very little from him during that period. Fischer's only responsibility was to drive. Still, he had visible physical difficulty and often could not remember where he was supposed to go or how to get there. With that information in mind, it does not follow that Fischer's past history could be construed to be the single cause of his current medical condition.

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<sup>64</sup> *Id.* at pp. 28, 42-43.

<sup>65</sup> *Thorsen v. Sachs Electric Co.*, 52 S.W.3d 611 (Mo.App., W.D. 2001) *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

<sup>66</sup> RSMo Supp. 2008.

<sup>67</sup> *Fletcher v. Second Injury Fund*, 922 S.W.2d 402, 407 (Mo.App., W.D. 1996) *overruled on other grounds by Hampton*, 121 S.W.3d at 227.

<sup>68</sup> *Missouri Alliance for Retired Americans v. DOLIR*, 277 S.W.3d 670, 682 (Mo banc. 2009)(Teitelman, J., dissenting).

The preponderance of the credible medical evidence supports a finding of medical causation and, specifically, attribution of Fischer's Conversion and Adjustment Disorders to the June 7, 2004, work accident. Even if Fischer had a psychological profile predisposing him to develop Conversion Disorder, he had not previously experienced such disorder and it is more probable than not that the blow to his head and back when he hit the crawler bucket was the causal event for his psychiatric disorders. Based on the evidence as a whole, and the credible expert opinions and testimony of Dr. Bassett,<sup>69</sup> I find that Fischer's June 7, 2004, accident was a substantial factor in causing Fischer's Conversion Disorder and the Adjustment Disorder he developed as the result of experiencing conversion symptoms.

### **Permanent Total Disability**

Fischer claims to be permanently and totally disabled. In support of his claim he offers the expert opinions of Dr. Bassett, Dr. Cramp, and vocational consultant, Gary Weimholt. Section 287.020.7 defines "total disability" as "inability to return to any employment and not merely ... inability to return to the employment in which the employee was engaged at the time of the accident." The question here is whether Fischer is able to compete in the open labor market,<sup>70</sup> that is, whether any employer in the usual course of business could reasonably be expected to employ Fischer in his present physical condition.<sup>71</sup>

The psychiatric experts agree that Fischer suffers from, among other things, Conversion Disorder. Dr. Smith testified that Fischer was not at MMI and she believed that he would make some gradual improvement over time when this litigation concludes provided he receives appropriate treatment, which she admits will be "tricky." Dr. Bassett testified that in 19 years of experience in the medical field, he has never encountered an individual with symptoms like Fischer's who was able to work. Dr. Bassett rated Fischer's impairment in critical areas as extreme and testified that Fischer's symptoms are not a perception. "He really hurts. He really stammers. He really can't remember. That's what his internal experience is."<sup>72</sup> Dr. Bassett speaks to Fischer's poor prognosis in his report. When asked on cross examination whether it's possible that Fischer's disorder could suddenly go away with another event, Dr. Bassett responded, "I haven't seen that yet. But absolutely they can go away. Or the symptoms might morph over time."<sup>73</sup> He also testified that it was his opinion, based on his experience as a psychiatrist, that Fischer's condition is likely to be permanent, adding, "My comment in the report about notoriously difficult to treat is – I made that comment because I reviewed the literature and these people pretty much stay out of commission."<sup>74</sup>

Having reviewed and considered all of the expert testimony in this case, I find Fischer's symptoms are not intentionally or consciously produced, he has reached MMI, and he is totally

<sup>69</sup> See *Higgins*, 183 S.W.3d at 270, quoting *Kent v. Goodyear Tire & Rubber Co.*, 147 S.W.3d 865, 868 (Mo.App., W.D. 2004) ("A single expert's opinion may be competent and substantial evidence in support of an award of benefits, even where the causes of the occupational disease are indeterminate in nature.").

<sup>70</sup> *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo. App. E.D. 2000) *overruled on other grounds by Hampton*, 121 S.W.3d at 225.

<sup>71</sup> *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo. App., E.D. 1995) *overruled on other grounds by Hampton*, 121 S.W.3d at 228.

<sup>72</sup> Ex. A, p.35.

<sup>73</sup> *Id.* at pp.46-47.

<sup>74</sup> *Id.* at p.50.

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disabled. Fischer had no physical or psychiatric disability that prevented him from working 60-80 hours per week up until the day of the accident. Fischer is currently unable to obtain gainful employment and, without significant psychological improvement, will remain unemployable and not competitive on the open labor market as a result of the accident alone.

### **PTD Benefit Payments**

The parties stipulated that the weekly rate of compensation for purposes of PTD is \$337.18. PTD benefits are to be paid “only after the healing period and the extent of the disability can be ascertained.”<sup>75</sup> The determination of the date on which a claimant becomes permanently and totally disabled is a question of fact, and the burden of establishing that date is on the claimant.<sup>76</sup> In this case, the parties stipulated that Fischer received TTD benefits through November 20, 2005. There is no claim for additional TTD. Based on the stipulation of the parties and the evidence as a whole, I find that Fischer reached MMI the day after TTD benefits ceased. Fischer is permanently and totally disabled as of November 21, 2005. Employer is liable for, and ordered to pay, Fischer the sum of \$337.18 per week, retroactive to November 21, 2005, and continuing for Fischer’s lifetime.

### **Future Medical Care**

Based on the determination that the accident medically caused Fischer’s physical and psychiatric injury and that Fischer’s condition is permanent, it follows that Employer is liable to provide future medical treatment in this case. Section 287.140.1 entitles Fischer to such medical treatment as may be reasonably required “to cure and relieve from the effects of the injury.” Future care should not be denied simply because Fischer may have reached MMI.<sup>77</sup> “This means treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail.”<sup>78</sup>

In this case, both psychiatric experts agree that Fischer needs additional medical treatment. Dr. Smith believes that an independent psychiatric opinion should be obtained first and that Fischer should receive treatment from a “savvy” family doctor who can formulate an optimal treatment plan, which Dr. Smith admits may be “a little tricky.”<sup>79</sup> Dr. Bassett offers various treatment suggestions, noting treatment of this condition is notoriously difficult. Dr. Bassett testified that managing the disorder is a better term to use rather than treating because patients with Conversion Disorder need to be kept out of trouble (protected from “doctor caused complications”), assured of their medical safety, and also kept under enough surveillance that “heaven forbid he has a stroke or has a heart attack or gets pneumonia, someone doesn’t just say ah, heck, he’s a somaticizer, so it’s not real – as he destroyed 40 percent of his heart.”<sup>80</sup>

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<sup>75</sup> *Cardwell*, 249 S.W.3d at 911.

<sup>76</sup> *Schuster v. Mo. Div. of Employment Sec.*, 972 S.W.2d 377, 381 (Mo. App., E.D. 1998).

<sup>77</sup> *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003) *overruled on other grounds by Hampton*, 121 S.W.3d at 224.

<sup>78</sup> *Id.* at 249, quoting *Sullivan v. Masters Jackson Paving Co.*, 35 S.W. 3d 879, 888 (Mo.App. 2001)(brackets in original).

<sup>79</sup> Ex. 8, pp. 64-66.

<sup>80</sup> Ex. A, p.32.

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After a review of all the evidence adduced at the hearing, both oral and written, and based on the record as a whole, I find that there is substantial and competent evidence that Fischer requires ongoing regularly scheduled visits with a primary care physician and/or neurologist to listen to Fischer's complaints, reinforce the "medical safety" message and independently assess his physical condition. I further find Fischer requires monthly psychiatric sessions and such other treatment, including medications, pain management, and such other therapies as may be recommended by Fischer's treating doctor and psychiatrist.

**CONCLUSION**

Fischer is permanently and totally disabled as a result of his accident at work on June 7, 2004. Employer is to pay PTD benefits in the amount of \$337.18 per week retroactively effective as of November 21, 2005, and continuing for the remainder of Fischer's lifetime. In addition, Employer is ordered to provide future medical care as set forth above.

Fischer's attorney, Mark E. Moreland, is entitled to attorney fees in the amount of 25% of all payments hereunder awarded for necessary legal services rendered.

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

Made by: \_\_\_\_\_

June Striegel Doughty  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Naomi Pearson  
*Division of Workers' Compensation*