

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

Injury No.: 04-146260

Employee: Thomas James Fischer

Employer: Schultz Electric, Inc.

Insurer: Builders' Association Self-Insurers' Fund

Date of Accident: June 1, 2004

Place and County of Accident: St. Joseph, Buchanan County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated July 22, 2008. The award and decision of Administrative Law Judge Robert B. Miner, issued July 22, 2008, 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 14th day of January 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Thomas James Fischer

Injury No.: 04-146260

Employer: Schultz Electric Inc.

Insurer: Builders' Association Self-Insurers' Fund

Hearing Date: May 5, 2008

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: June 1, 2004.
5. State location where accident occurred or occupational disease was contracted: St. Joseph, Buchanan County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was moving a heavy machine when he wrenched his back and injured his back.
12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Back, right lower extremity, left lower extremity, and body as a whole.
14. Nature and extent of any permanent disability: Thomas James Fischer ("Claimant") is

permanently and totally disabled.

15. Compensation paid to-date for temporary disability: \$28,984.94 paid at the rate of \$469.71 per week representing 61 6/7 weeks.
16. Value necessary medical aid paid to date by employer/insurer? \$67,041.00.
17. Value necessary medical aid not furnished by employer/insurer? \$1,294.00.
18. Employee's average weekly wages: \$836.48.
19. Weekly compensation rate: \$557.65 for temporary total disability and permanent total disability and \$347.05 for permanent partial disability.
20. Method wages computation: By agreement of the parties.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: \$1,294.00.

Past temporary disability benefits:

Temporary total disability underpayment from Employer in the amount of \$5,439.72 based on 61 6/7 weeks at \$87.94 per week for the periods February 17, 2005 to August 2, 2005 and August 18, 2006 to May 9, 2007, and

Temporary total disability benefits from Employer in the amount of \$30,113.10 for 54 weeks for the period August 3, 2005 through August 17, 2006 at the rate of \$557.65 per week.

No weeks of disfigurement from Employer.

Permanent total disability benefits from Employer at the rate of \$557.65 per week beginning May 10, 2007 for Claimant's lifetime.

22. Second Injury Fund liability: N/A.

23. Future requirements awarded: Employer/Insurer is directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his June 1, 2004 work injury, in accordance with Section 287.140, RSMo.

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

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all

payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: John E. McKay.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Thomas James Fischer

Injury No.: 04-146260

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PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer on May 5, 2008 in St. Joseph, Missouri. Employee, Thomas James Fischer, ("Claimant") appeared in person and by his attorney, John E. McKay. Employer, Schultz Electric, Inc., ("Employer") and Insurer, Builders' Association Self-Insurers' Fund ("Insurer") appeared by their attorney, Jeff F. Stigall. John E. McKay requested an attorney's fee of 25% from all amounts awarded. The Second Injury Fund is not a party in this case.

STIPULATIONS

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

- On or about June 1, 2004, Thomas James Fischer ("Claimant") was an employee of Schultz Electric, Inc., ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
- On or about June 1, 2004, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by Builders' Association Self-Insurers' Fund, ("Insurer").
- On or about June 1, 2004, Claimant sustained an injury by accident in St. Joseph, Buchanan County, Missouri arising out of and in the course of his employment.
- Employer had notice of Claimant's injury.

- Claimant's Claim for Compensation was filed within the time allowed by law.
- Claimant's average weekly wage was \$836.48, and the rate of compensation for temporary total disability and permanent total disability is \$557.65 and the rate of compensation for permanent partial disability is \$347.05.
- Employer/Insurer had paid \$28,984.94 in temporary total disability at the rate of \$469.71 per week for the period February 17, 2005 through August 2, 2005.
- Employer/Insurer had paid \$67,041.00 in medical aid.
- The amount of \$1,294.00 in unpaid medical expenses incurred to treat Claimant's injury was fair, reasonable and necessary, and shall be paid by Employer/Insurer.

ISSUES

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

- What is Employer/Insurer's liability, if any, for underpayment of temporary total disability from February 17, 2005 through August 2, 2005?
- What is Employer/Insurer's liability, if any, for past temporary total disability benefits?
- The nature and extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled.
- What is Employer's liability, if any, for past medical aid?
- What is Employer/Insurer's liability, if any, for future medical aid?

- Who were the dependents of Claimant on June 1, 2004 for purposes of *Schoemehl v. Treasurer of State*, 217 S.W.3d 900 (Mo. 2007)?

Claimant testified in person. Claimant also called as witnesses Michael Dreiling, Julie Fischer, Debbie Dolman, and Jenny Petrovick. In addition, Claimant offered the following exhibits which were admitted in evidence without objection:

- OHS Compcare records.
- Dr. Bailey/Heartland Hand & Spine records Vol. I.
- Dr. Bailey/Heartland Hand & Spine records Vol. II.
- Health South medical records.
- St. Joseph Imaging records.
- Heartland Hospital records Vol. I.
- Heartland Hospital records Vol. II.
- Dr. Gondring records.
- RS Medical nerve stimulator records.
- Heartland Hospital bill: \$1,294.00.
- Dr. Neighbor medical report dated 12/14/05.
- Verification of no light duty.
- Neurology Associates EMG report.
- Heartland Health radiology report.
- Dr. Neighbor medical report dated 6/27/06.
- Dr. Bailey reports dated April 28, 2006 and May 2, 2006.
- Dr. Amundson medical report.
- Rehabilitation Institute records.
- Health South records Vol. II.
- Dr. Amundson records.
- Dr. Neighbor report dated 9/13/07.
- Dr. Neighbor resume.
- Dr. Neighbor report dated November 26, 2007.
- Dr. Neighbor deposition dated 2/7/08.
- Attorney/Client contract.
- Birth Certificate: Jansen Fischer 7/9/86.
- Birth Certificate: Jarent Fischer 8/3/88.
- Birth Certificate: Jelissa Fischer 9/2/89.
- Marriage Certificate.
- Report of Michael Dreiling dated March 4, 2008.

Employer/Insurer called Robert McClellan as a witness. Employer/Insurer offered the following exhibits which were admitted in evidence without objection:

- Correction page on March 7, 2006 deposition.
- Second correction page on March 7, 2006 deposition.

- Amended Claim & Amended Answer.
- Dr. Bailey's reports of August 2, 2005, February 27, 2006, and May 2, 2006.
- FCE dated July 27, 2005.
- FCE dated April 25, 2007.
- Dr. Terrie Price report of November 17, 2006.
- Dr. Amundson's report of May 15, 2007.
- Claimant's first deposition dated March 7, 2006.
- Claimant's second deposition dated February 4, 2008.
- Vocational Counselor's report of Robert McClellan dated April 30, 2008.

SUMMARY OF THE EVIDENCE

Testimony of Claimant

Claimant testified that he was born on July 25, 1960 and will be 48 years old. He said that his wife and three children were living with him and were all financially dependent on him. He said he had worked for Employer for 22 years. His average weekly wage was \$836.48. He was a union expediter, not an electrician. His job required heavy lifting of between 50 and 100 pounds every day. He had help with lifting at times. His job required him to carry, stoop and walk. He had no medical restrictions before his work injury. He averaged 45 hours per week at work.

On June 1, 2004 Claimant was moving a threading machine. He was setting it down when he felt a wrenching pain in his back. The machine weighed between 800 and 1,000 pounds. He was trying to move it by himself with a dolly. He was diagnosed with a two-level ruptured disc and had two back surgeries. The first surgery was on one disc and the second surgery was on both discs. He had three epidural steroid injections, physical therapy, a myelogram, CT testing, traction, ice and heat therapy, and a TENS unit and therapy at home. He said he takes Tramadol for pain as needed one to two times per week.

Claimant testified that presently he has right leg pain daily that is between a seven and an eight out of ten. At best, the pain is between four and five during an ordinary day. Claimant testified that he is in some pain every day all day. He said his pain starts at his low back and goes down his buttocks and then down his right leg to his calf and to his four small toes, and, occasionally, to his big toe. He stated that he has had a pins and needles feeling with numbness and tingling in his right leg. His right foot falls asleep. When that happens, he said he should not drive. He said he limps. He said his numbness at the worst is between a seven and eight out of ten and at best is a four to five.

Claimant also said that he has left leg pain that was between four and five, and at best two. He said he is never pain-free in his left leg. He also said that he has numbness and tingling in his left leg that is between four and five, and at best, two. He said in an average 24 hour day, he feels some pain or numbness in his left leg and that it is mostly in his calf. He said the pain starts in his back, goes down his back, and down his calf to his foot and toes. Claimant said he has weakness in both legs that is more on the right than the left. He also said he has pain in his low back in an average day. The pain in his back is seven to eight at its worst and four to five at the least. He feels the pain in the middle and the

tailbone at the belt line down the buttocks. He said the pain is sharp and burning and he feels it consistently through a 24-hour day. Sitting too long, standing too long and walking makes his back pain worse. It helps him best to lie down. He said he takes Tramadol occasionally. He said he tolerates a lot of pain. He also said he uses a TENS machine one or two times per week, mostly at night when he sleeps.

Claimant stated that he last worked for Employer on May 16, 2005. He worked until he had his first surgery. Employer did not make special accommodations for him after his first surgery. He had been off work for more than three years. He said that during an eight hour day he could sit up to 45 minutes before he needed to take a break. After a break, he could sit between 30 and 35 minutes before he needed another break. After his second break, he could sit between 10 and 20 minutes before needing another break. After that break he could not sit very long at all. Claimant said he could walk for 45 minutes. He walks with his wife after supper for 30 to 45 minutes. After a break, he could walk another 20 to 25 minutes. After the second break, he could walk for another 10 to 20 minutes. After the next break, he could only walk about five minutes before needing another break.

Claimant said that when he sits, stands or walks too much he pays for it and has to lie down. Sometimes he cannot do anything. Claimant drives frequently in town. He drives about fifteen minutes to get to his Dad's. His wife does most of the highway driving because he loses feeling in his foot. Before his injury, he rode a riding lawnmower one to two hours to cut grass. Since the back injury, he spreads the mowing out over two days. Sitting on the mower and steering causes pain. He has difficulty sitting in church. Claimant said that he used to play golf before his injury. He sold his golf clubs one or two years ago. He also played on a softball team before the injury. He does not play softball because he cannot run or swing the bat or kneel to catch grounders. Before the injury he took care of the family's Labrador. Since the injury, his wife helps care for the dog. He said it is hard to fill the food and water bowls. His wife walks the dog since the injury.

Before his injury, he deer hunted. He generally got a deer and field dressed it and carried it out. Since the injury, someone else sights in his rifle because he is afraid of the recoil. Since his second back surgery on January 25, 2007, he had gone deer hunting three or four times for thirty or thirty-five minutes at a time. Before his surgery, he sat in a tree stand. He now sits on the ground because he cannot get into the tree stand. He said he had not fired his rifle since his injury because he is afraid of the recoil. Before the injury he decorated his home with Christmas decorations. He used to decorate the roof and sides of the house. Since the injury, he does not put lights on the roof. He remodeled with his brother and father before his injury. Since his injury, he has not done that. He assisted laying out his water garden and did some seeding.

Claimant said that when he worked for Employer, he did not fill out forms or work on a computer. He was not a supervisor or manager. He did not take any computer classes. When he types, he uses one finger most of the time. He thinks he can type about ten words per minute with errors. He said that before his injury, he slept between six and seven hours per night. He now sleeps between three and four hours per night. His sleep is interrupted. He said he is constantly up-and-down repositioning himself. He said that his sleep and pain affect his ability to concentrate. He said he gets drowsy from pain medication. He said he needed to lie down a lot if he did too much.

Claimant said that he looked at a job in security at a casino before his second surgery. He was

not hired. He said he had not applied for work since his second surgery in January 2007. He said he did not feel that he could do an eight hour day 40 hours a week. He said he had done some odd jobs since his second surgery including changing light bulbs, spot painting, and repairing a door. He said he was paid between \$200.00 and \$300.00 and that he worked at his own pace.

Claimant stated that on an ordinary day, he gets up, showers with a brush because he cannot bend over, and gets dressed while sitting on a couch. He fixes breakfast for his wife. After his wife leaves for work, he folds laundry in the basement. His wife washes and dries laundry. He calls his Dad and watches TV. He fixes a light lunch for his wife. His wife returns from work about 12:25 p.m. He then lies down for one to one and one-half hours. He watches TV and calls his Dad. He fixes simple dinners. He walks after supper for thirty-to-forty minutes. He said that in an ordinary day, he lies down or reclines between five and seven times including the one to one-half hour time after lunch. He sometimes sleeps after lunch. He had taken one vacation since the accident. He went to Arkansas for three nights. He traveled 500 miles in a minivan that had a back seat that reclined. He took breaks during the trip.

Claimant said that he felt he was permanently and totally disabled from all employment. He said he cannot baby-sit for his grandchildren by himself because he cannot lift them and cannot get down on the floor.

Claimant testified on cross examination that he did not look for a job since his second surgery. He acknowledged that his deposition was taken in March 2006 and again in February 2008. He said he had reviewed both depositions. He said he understood that he had been under oath. Claimant acknowledged that Exhibits 1 and 2 contained thirty-nine corrections to his March 7, 2006 deposition (Exhibit 9) and were in his writing. He said he misunderstood the questions.

Claimant said that he misunderstood several of the questions asked of him in his March 2006 deposition. He said he had not had treatment for memory problems. He said he walks in the evenings, deer hunts, takes care of his personal hygiene, and fixes meals. He said he can read and write. He said he can hang Christmas lights, and he acknowledged assisting in the garden work, sweeping, and doing odd jobs for neighbors. He also said he cuts grass. He also visits his wife's grandmother. He said he lies down between five and seven times each day. Claimant said he went deer hunting last year but did not get a deer. He said he did not read his second deposition. He said that he was not on any active medical treatment for his back or legs now except for pain medication. He drove to Arkansas in one day when he took his vacation. Claimant stated that he had no plans to look for work. He said he would like to work.

On redirect examination, Claimant said that the longest amount of time he spent doing odd jobs was two hours. He said he had done no other odd jobs other than for family and neighbors. He said Dr. Dominguez prescribes his pain medication.

In addition to his testimony, Claimant was observed during the course of the hearing. It is noted that during the hearing, Claimant exhibited behavior patterns that demonstrated a significant level of pain and discomfort. During the hearing Claimant stood up several times for between approximately fifteen and thirty minutes and then sat back down. He also moved around in his seat and appeared to be in pain.

Claimant's deposition taken on February 7, 2006 was admitted as Exhibit 9. Claimant's deposition taken February 4, 2008 was admitted as Exhibit 10. Correction pages related to Claimant's March 7, 2006 deposition were admitted as Exhibits 1 and 2. Thirty-nine corrections to Claimant's March 7, 2006 deposition were identified in Exhibits 1 and 2.

Claimant testified in his March 7, 2006 deposition (P. 33) that that day was a bad day for him memory-wise because of what was going on there. Claimant testified in his February 4, 2008 deposition that he sometimes had a memory problem. He also testified that his symptoms were worse after his second surgery. He further testified in his February 4, 2008 deposition that after his wife goes back to work after lunch, he likes to lie down for an hour or two to relieve his back. He further testified that he was not planning on looking for any type of job because he was not sure what he was capable of doing. He said he was afraid of hurting himself or someone else with his condition.

Claimant made numerous changes to his March 9, 2006 deposition. For example, Claimant corrected his answer relating to whether he had hurt his low back before, (p. 6, l. 3) from "I don't believe so," to "Yes, I have." He corrected his answer regarding whether he continued to treat for his neck after a motor vehicle accident, (p. 7, l. 7) corrected from "I don't know about that," to "No." He testified in his deposition that he had not hurt his low back before June 4, 2004. He changed his answer from "I don't believe so," to "Yes." He changed his answer to a question regarding whether he had any treatment to his low back before this injury from "I don't believe so, no," to "Yes, I have." He testified in his deposition that he might have seen a chiropractor. He stated on the correction page that he had seen a chiropractor. Claimant testified on page 10 that before June 21, 2004, he had not missed any time on account of low back problems. The correction page noted that he was not sure at the present time. He answered on page 11 that he did not believe he had been convicted of any misdemeanors or felonies. His response was changed to "No" on the correction page.

Claimant changed another answer on page 13 that stated that he had hunted in the fall of 2005 with his brother, to with "my brother, his future son-in-law, my friend and his son." He answered on page 16 that he did not go to his daughter, Jellisa's soccer games in 2005, to stating on the correction page, "Yes, had to leave at half time couldn't set to [sic] long." He made a similar change on page 23 relating to his son's football games. He changed a response on page 17 to a question about whether he had gone on a vacation or trips from "I don't believe so, no," to "Yes." He also changed other responses regarding his condition since his first surgery. For example, as to a question on page 34 regarding whether he recalled telling his physical therapist that he was improving in March and April 2005, the deposition answer was "No, I don't believe so." The correction page stated, "Yes, but some point, there was improvement, but then started to get worse as time went."

Testimony of Julie Fischer

Julie Fischer testified that she was Claimant's wife, and that on June 1, 2004, she was living at home with Claimant and their three children. She said that she and their three children were the only financial dependents of Claimant. She said that she was working four hours per day on June 1, 2004, but later went to work full-time 40 hours per week. She said she does the lifting at the home since Claimant's injury. She says she carries groceries and the 50 pound bags of fertilizer. She does the tilling in the garden. Claimant does a little raking. She picks up and carries firewood. She cleans and moves

plants around their in-ground pond. She stated that before Claimant's injury, he did those jobs. She and Claimant have two grandchildren. Claimant cannot pick up the grandchildren or get on the floor with them. The younger grandchild is six months old and weighs about 20 pounds. The older is two years old. Julie Fischer testified that she does the washing and drying of the clothes, the vacuuming, and the mopping. Before Claimant's injury, he helped with those chores. He does not now help with those. Claimant does not help change beds.

Julie Fischer stated that at times during the night, Claimant uses a hot pad and TENS unit. He turns to different positions. They have bought a different mattress. Before the injury, Claimant deer hunted and sighted in his rifle. Now, another person sights in the rifle. They used to go to Wal-Mart, but now they go to a different grocery store where there is less walking. Claimant leans on the cart. Mrs. Fischer stated that after the accident, Claimant does not always remember everything. He is more confused than he was before the accident. Since the injury, Claimant is short and it does not take much for him to go off the handle. He was not depressed before the injury. Since the injury, he has been in and out of depression. I find that Julie Fischer's testimony was credible.

Testimony of Debbie Dolman

Debbie Dolman testified that she was a neighbor of Claimant. She said that on Labor Day 2007, Claimant voluntarily let her dog out twice a day when she was out of town for three days. He requested no fee, but she insisted on paying him \$30.00. She had not seen him doing yard work or car work. I find Ms. Dolman's testimony was credible.

Testimony of Jenny Petrovick

Jenny Petrovick testified she was a neighbor of Claimant. Claimant had done some odd jobs around her house for her since October 2005. He had worked on a drawer on her kitchen cabinet, had put a kick plate on her basement door, had touched up paint on her garage door, had replaced a light in her basement, and had let her dog out. She paid him between \$100.00 and \$200.00. Claimant did not do heavy lifting. He did not have time deadlines to complete the work. She let him have a key to her house. I find Ms. Petrovick's testimony was credible.

Summary of Medical Treatment

Exhibit A included records of OHS Comp Care. Claimant treated at OHS from June 28, 2004 through October 8, 2004. He was first treated for complaints of pain in the low back that radiated out into the right leg. An MRI was noted to have been done October 6, 2004 which showed L4-L5 ruptured intervertebral disc causing both spinal stenosis in neuroforaminal stenosis. Claimant was referred to Dr. Alex Bailey in Kansas City for an appointment on October 13, 2004. He was allowed to remain working at restrictive duty with frequent position changes as needed for comfort and a five-pound weight restriction.

Exhibit G contained records of Heartland Hospital and Dr. Norman Baade relating to lumbar epidural injections performed in December 2004 and January 2005 on Claimant.

Exhibit E included an MRI report of the lumbar spine of St. Joseph Imaging Center dated

October 6, 2004. The Opinion noted that Claimant had degenerative changes in the lumbar spine manifested primarily as degenerative disc disease. There was a broad based disc herniation at L4-5 that was eccentric towards the right side. It was noted to be causing both the spinal stenosis and narrowing of the right lateral recess due to the large size of the disc protrusion.

Exhibit C was Heartland Spine and Specialty Hospital Work Release Form dated February 18, 2005 that recommended Claimant be off work for two weeks beginning February 17, 2005.

Exhibit J included a medical bill of Heartland Health in the amount of \$1,294.00 for an emergency room visit with ultrasound and x-ray on February 22, 2005. Also included in Exhibit J was Heartland Health Emergency Department Record noting chief complaint of Claimant of right calf pain and severe cough. The record noted Claimant had disc surgery on February 17, 2005 and since that time had developed a cough. The record noted Claimant had called the office of the surgeon who did the surgery and they recommended that Claimant come to the emergency room to make sure he did not have a blood clot in his leg. Exhibit J also included Claimant attorney's September 9, 2005 letter to Linda Hotmer of Builder's Association Self-Insurer's Fund requesting payment of the Heartland Regional Medical Center bill in the amount of \$1,294.00. The letter to Ms. Hotmer noted that Dr. Bailey had referred Claimant to the emergency room due to the symptoms indicating a risk of a clot after surgery.

Exhibit B included treatment records and reports of Dr. Alexander Bailey's for the period October 13, 2004 until June 29, 2005. Dr. Bailey treated Claimant for low back and lower extremity complaints. On October 13, 2004, Dr. Bailey diagnosed low back pain with radiculopathy, herniated nucleus pulposus, right side at L4-5, and herniated nucleus pulposus, left side at L5-S1 (nonconcordant). He managed Claimant conservatively in the beginning with medication and epidural steroid injections. He performed herniated nucleus pulposus excision and lateral recess decompression surgery on February 17, 2005. Claimant continued to have complaints of back pain and right and left leg pain after the surgery. Dr. Bailey rated Claimant's permanent disability at 10% on June 15, 2005.

Exhibit I included a prescription dated June 9, 2005 for Claimant from Dr. Bailey for a one month prescription for a sequential stimulator.

Exhibit D included records of Heartland Hand and Spine Orthopedic Center. These included records of Dr. Alexander Bailey dated June 29, 2005 that noted that Claimant had a very well performed, easy lumbar decompression discectomy and had done extremely poorly. The notes stated that Claimant had complete resolution of back pain, complete resolution of leg symptoms for two months after surgery, and had been twenty times worse after surgery at that time. The assessment was low back pain with radiculopathy and extremely poor post-operative result despite complete resolution of symptoms two months after surgery. The doctor noted that one could consider a dorsal column stimulator and another option would be MMI and rate and release given if CT findings. The report noted that at that time, Dr. Bailey did not foresee Claimant returning to gainful employment, at least at his current level of functioning, and he thought Claimant was not motivated at that time to do any return to work. He also noted a second opinion was indicated. Exhibit B also included Dr. Bailey's operative note dated February 17, 2005. Preoperative and post-operative diagnoses were right-sided L4-5 herniated nucleus pulposus and right-sided lateral recess and neural foraminal stenosis of the L4-5. Operations performed were right-sided L4-5 hemilaminotomy decompression discectomy and right-sided L4-5 lateral recess and neural foraminal decompression.

Exhibit D contained the medical records of Health South relating to Claimant's physical therapy and functional capacity evaluation there in 2005. Claimant had physical therapy at Health South from March 25, 2005 until July 14, 2005. He had an FCE there on July 26, 2005. Health South's Functional Capacity Evaluation dated July 27, 2005 was admitted as Exhibit 5. It noted that Claimant had been employed for 23 years with his employer as an electrician but was no longer employed at that time. The report noted that Claimant reported that his employer went out of business the past spring. The report noted that Claimant performed in the light work physical demand category for an eight-hour day. Light work was noted to be exerting up to 20 pounds force occasionally, and/or up to 10 pounds force frequently, and/or a negligible amount of force constantly to move objects. The report noted that Claimant gave a consistent effort, however, self-limited with dynamic lifting and non-material handling activities for fear of further re-injury which indicated that maximal effort was not achieved.

Exhibit 4 also included medical reports of Dr. Alexander Bailey. The highlighted portions were on the exhibits at the time they were admitted in evidence. The Administrative Law Judge did not make any marks on any of the exhibits admitted at the hearing in this case.

Dr. Bailey's August 2, 2005 report contained in Exhibit 4 noted that on February 17, 2004, Claimant underwent a successful right-sided L4-5 herniated nucleus pulposus excision. The report noted further that since surgical intervention, Claimant received, initially, very good post-operative results with almost complete resolution of his symptomatology. Two-to-three months after surgery, Claimant had progressive difficulties with leg pain. He continued to do relatively poorly, but Dr. Bailey found no evidence to support additional surgical intervention. The report noted they felt at the present time, Claimant was at maximum medical improvement. The report noted that Claimant had obtained a functional capacity exam that reported Claimant to be at a light physical demand level or less, which would limit his lifting to twenty pounds or less. In general, he should avoid any sustained or awkward postures of the lumbar spine. The doctor recommended that Claimant avoid repetitive bending, pushing, pulling, twisting, or lifting activities on a permanent basis.

Exhibit L is a letter dated August 18, 2005 from Greg Logan, Business Manager, International Brotherhood of Electrical Workers local Union No. 545, stating that due to the restrictions placed on Claimant by his doctor, he would not be able to work in the capacity of his job description of Stockman Driver.

Dr. Bailey's February 27, 2006 report contained in Exhibit 4 noted that on physical examination, Claimant was found to be strongly Waddell positive and despite extensive coaching, had extensive give-away strength that would be incompatible with ambulation. Claimant was noted to have walked into the clinic from his car into the office and to the examination room. The report noted that Claimant's physical examination was completely inconsistent with his known functional level. The report noted there was mild disc bulging, but no frank herniation, no significant pressure on his neural structures, and there was evidence of epidural fibrosis. A small disc bulge at L5-S1, with mild neurologic impingement was noted, but the report noted that was not an operative level. The report noted that at Claimant's last visit on June 29th, 2005, Claimant was more concerned about permanent disability and had several questions about not working again. Revision spinal surgery, including a lumbar decompression at L4-5 and L5-S1 with probable instrumented fusion was an operative intervention that was given as one alternative treatment modality. The report noted that Claimant seemed more concerned

with not working and permanent disability. The report stated that in summary Claimant had some mild spinal stenosis, but the doctor believed epidural fibrosis was the majority of his problem.

Exhibit N is a CT scan of Claimant's lumbar spine dated April 14, 2006. The impression noted was: 1. Mild ventral impressions visualized on the thecal sac most likely secondary to broad-based intervertebral disc herniations or symmetric bulges. 2. Truncation of the right nerve root that may be secondary to intervertebral disc versus an enlarged facet joint. 3. On reflection and extension views, no inducible spondylolisthesis was identified. 4. Mild central canal compression at the L4-five level secondary to a mild to moderate broad-based intervertebral disc protrusion. There was also neural foraminal stenosis bilaterally at that level.

Dr. Bailey wrote on February 27, 2006 (Exhibit 4) that Claimant had some minor spinal stenosis, but ultimately he believed epidural fibrosis was the majority of Claimant's problem. He noted that CT/myelogram and EMG and nerve conduction study test would assist them in operative planning with a probable surgical intervention. Dr. Bailey's May 2, 2006 report contained in Exhibit 4 noted that Claimant was last evaluated by Dr. Bailey on April 28, 2006. The report stated they felt at the present time Claimant was at maximum medical improvement. Dr. Bailey released the Claimant to light-duty status permanently and limited his lifting to 20 pounds or less on a permanent basis and recommended that Claimant avoid any sustained or awkward postures of the lumbar spine and that he avoid repetitive bending, pushing, pulling, twisting, or lifting activities on a permanent basis within those guidelines. Dr. Bailey noted that based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, Claimant had a residual 10% permanent partial impairment to the body as a whole as a result of his injury in June 2004.

Exhibit T included treatment records of Dr. Glenn Amundson. Dr. Amundson's September 8, 2006 report in Exhibit T pertaining to Claimant's August 18, 2006 visit (also admitted as Exhibit Q), described in detail the history of Claimant's injury, the history of treatment, and his review of medical records. Dr. Amundson performed a physical examination and reviewed MRI scan and myelography and CT. The September 8, 2006 report concluded with the Impression of low back pain, spinal stenosis, left L5-S1 subarticular with left S1 nerve root impingement, residual L4-5 bulge without significant residual stenosis, and L2 right-sided facet arthrosis. An Addendum to the August 18, 2006 note discussed a myelogram/CT read by Dr. McMillan who felt there was a persistent consistently demonstrated L5-S1 disc herniation with intraforaminal component. Dr. Amundson noted that although there was mild disc bulging, the suggestions of residual tightness were more related to posterior annular enhancement in surgical scar with some mild bulge. The Addendum noted that there did appear to be clear impingement at left L5-S1.

The report of Terrie L. Price, Licensed Psychologist, dated November 17, 2006, was admitted as Exhibit 7. Claimant reported on November 3, 2006 that he was a bit depressed and felt helpless at times, though not hopeless. Claimant reported pain in his buttocks, back of the legs, and tingling in his feet that was constant. He described the pain as aching, burning in the lower back, and feeling compressed. He stated the pain ranged from six-to-seven to ten. He stated the Claimant should participate in behavior pain management counseling to work on behavior strategies for managing pain. The report noted also that a majority of chronic pain patients generally report significant depression and, subsequently, an antidepressant may be useful as well.

Exhibit T also included Dr. Amundson's operative note dated January 25, 2007. Dr. Amundson's preoperative and post-operative diagnoses were left L5-S1 stenosis, degenerative disc disease and low back pain. The operations performed were right L4 partial laminectomy with facetectomy, redo; right L5 partial laminectomy with facetectomy, redo; left L5 laminectomy with partial facetectomy; left S1 laminectomy with partial facetectomy; and left L5-S1 herniated nucleus pulposus excision. Dr. Amundson's discharge summary noting date of discharge of January 26, 2007, noted a discharge diagnosis of right-sided L4-5 herniated nucleus pulposus recurrence and left L5-S1 spinal stenosis and herniated nucleus pulposus.

Dr. Amundson's April 18, 2007 note in Exhibit T noted that Claimant returned that day and remained a five on a ten pain scale. Dr. Amundson did not believe the January 25, 2007 surgery made much effect on Claimant's chronic nerve root injury at the right L5 nerve root level, though the left S1 nerve root had responded nicely. The note stated that Claimant's pain was constant and worse with prolonged sitting and standing. Dr. Amundson prescribed a TENS unit for residual low back pain.

Health South's Functional Capacity Evaluation dated April 25, 2007 was admitted as Exhibit 6. That report noted that Claimant was currently demonstrating the ability to perform work in the sedentary category in an eight-hour time period. Sedentary was noted to be exerting up to 10 pounds force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects, including human body. The report noted that Claimant had kept up his union dues in hope to return to another job after his employer closed. Claimant's return to work goal was the same occupation. The report noted that Claimant reported moderate pain at an intensity of five on a scale of zero to ten. Claimant stated that prolonged sitting or walking, standing, bending, stooping, twisting, kneeling, and squatting aggravated his symptoms and that laying on his stomach provided relief. Perceived abilities included sitting 60 minutes, standing 60 minutes, walking 60 minutes, driving 60 minutes, and lifting 15 pounds. The report noted that Claimant demonstrated constant weight shifting to remain seated for the 20 minutes. With standing, Claimant required shifting of body weight often and decreased stance time on the lower right extremity. Increased antalgic gait was demonstrated as walking distance increased. Claimant was unable to maintain any position to do floor level reaching. Claimant was noted to have demonstrated consistency with validity testing and was consistent in his movement patterns and pain behaviors. Claimant demonstrated decreased lumbar range of motion, decreased strength, decreased core strength, decreased endurance, and subjective complaints of radiating pain and numbness. Claimant demonstrated a consistent and maximal effort throughout the material and non-material handling and testing. He was unable to perform a floor to knuckle lift, frequent shoulder to overhead, crouching and floor level lifting. He required bilateral upper extremity assistance to get into and out of positions.

Dr. Amundson's May 15, 2007 report was admitted as Exhibit 8. The report noted that Claimant was seen in the doctor's clinic on August 18, 2006 with a diagnosis of low back pain, spinal stenosis on the left at L5-S1 subarticular with left S1 nerve root impingement, residual L4-5 bulge without significant residual stenosis, and L2 right-sided facet arthrosis. Claimant was noted to have undergone a right L4 partial laminectomy with facetectomy, right L5 partial laminectomy with facetectomy, left L5 laminectomy with partial facetectomy, left S1 laminectomy with partial facetectomy, and left L5-S1 herniated nucleus pulposus excision. The surgery was done for diagnosis of left L5-S1 stenosis, degenerative disc disease and low back pain. Claimant post-operatively had been progressed through physical therapy including a TENS trial and weaned from his medication. He was known then

only to be on Tylenol. When last evaluated, there was evidence of back pain and radiculopathy that was stable and unchanged. It was Dr. Amundson's opinion that Claimant was at maximal medical improvement when seen on May 9, 2007.

Dr. Amundson's report dated May 15, 2007 also noted that Claimant should follow the work restrictions of a sedentary physical demand level or less. The doctor felt that Claimant could lift knuckle to shoulder of 15 pounds on an occasional basis, shoulder to overhead 10 pounds, and carry two handed 25 pounds on an occasional basis. The doctor felt Claimant could push, pull, and sit 20 minutes per episode, and stand, walk, climb, stoop, kneel, crawl, reach, use foot controls, and trunk rotation on an occasional basis permanently. The doctor felt that Claimant could balance and reach at desk level on a frequent basis. He felt Claimant was unable to crouch. The doctor felt those limitations were permanent. The doctor noted that evidence of radiculopathy was present. Dr. Amundson stated in his report that Claimant had a residual 10% permanent partial impairment to the body as a whole. The doctor referred to the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. His report noted that the opinions had been given with a reasonable degree of medical certainty.

Medical Evaluation of Dr. Ernest Neighbor

Dr. Ernest Neighbor's Curriculum Vitae was admitted as Exhibit V. Dr. Neighbor received his M.D. degree in 1966 and his J.D. degree in 1971. He was board certified by The American Board of Orthopedic Surgery in 1975. His CV noted membership in several medical societies and affiliations with several hospitals.

Dr. Neighbor's December 14, 2005 medical report was admitted as Exhibit K. That report was typed on letterhead of Drisko, Fee & Parkins, P.C., Orthopedic Surgery. Exhibit K stated that Dr. Neighbor examined Claimant at the request of John McKay on November 4, 2005. The report summarized a history of Claimant's injury in June 2004 at work to his back and right leg, and his subsequent medical treatment. The report noted that Claimant had surgery on February 17, 2005, and had been on light duty all the time until then. His report noted Claimant's treatment after surgery. Dr. Neighbor performed a physical examination and reviewed the x-rays of the lumbar spine and the medical record. The report summarized the medical records. It noted that on February 17, 2005, Claimant had a hemilaminectomy and a discectomy at the L4-5 level with lateral recess and neuroforaminal decompression. Claimant's leg symptoms had resolved for two months and then significantly worsened. An MRI on May 3, 2005 was noted to have shown the disc displacing a dural area at the L5-S1 level of the disc. Dr. Neighbor noted that there appeared to be recurrent herniated disc material quite lateral out in the foramina on the right hand side. He recommended that Claimant have an EMG/nerve conduction and probably a myelogram with subsequent CAT scan. He stated it was likely that Claimant would need to be re-explored at the L4-5 and L5-S1 levels. He believed that Claimant was currently having a significant radicular type pain that created a situation that, should nothing else be done, Claimant would not be employable. He stated that at the present time, Claimant was a permanent total disability.

Dr. Neighbor's June 27, 2006 medical report was admitted as Exhibit O. The report noted that Dr. Neighbor had reviewed radiological studies including an MRI done on October 6, 2004, an MRI done on May 3, 2005, and a myelogram with a subsequent CT scan done on April 14, 2006. He stated those studies showed a significant lateral recess stenosis and mild to moderate spinal stenosis in the

lower canal. He stated that he continued to believe that Claimant was going to require additional surgery with a decompression of L4 through S1. He stated that he thought that might return Claimant to a place where he could be sedentary, but he did not think Claimant could be restored to the level of activity which he enjoyed prior to his injury.

Dr. Neighbor's September 13, 2007 medical report typed on letterhead of Drisko, Fee & Parkins, P.C., Orthopedic Surgery, was admitted as Exhibit U. That report stated that Dr. Neighbor had seen Claimant for a second time and had reviewed his history following his most recent surgery. Claimant reported that he would not have either surgery done now because he did not think they had helped that much. Dr. Neighbor noted that Claimant had been released from care and had undergone a functional capacity test that showed Claimant was suited for sedentary work. The report noted Claimant's maximum lifting would be 10 pounds, and he had to have the ability to change positions frequently at least every 20 minutes. Claimant reported his left leg was not really a problem at that time, but he still had numbness into the calf and toes with weakness in the right leg and a dull ache from the buttock to the calves. He was not currently taking any medications. Dr. Neighbor stated that he believed Claimant's surgery had helped to relieve some of his pain, but he did not think Claimant had improved enough to change his mind so far as his capacity to be employed. Dr. Neighbor stated that Claimant was not employable in the ordinary course of business.

Dr. Neighbor's November 26, 2007 report was admitted as Exhibit W. Dr. Neighbor stated in Exhibit W that Claimant was only capable of sedentary type work, and even then he would have to change positions every 20 minutes or so and quite possibly lie down in the middle of the day to relieve some of the pressure in his back. He believed that Claimant's maximum lifting would be restricted to 10 pounds, and he only thought that Claimant would probably be able to do that about three times per hour. Repetitive lifting was out of the question. Claimant would not be able to ride in a car for any significant distance or time. He thought the pain that Claimant experienced for prolonged periods of sitting would be significantly distracting to any work activities that he would be trying to pursue at that time, and he would therefore have to interrupt those work activities to either move around or lie down before he could return to them.

The deposition of Dr. Neighbor taken on February 7, 2008 was admitted as Exhibit X. The objections contained in Dr. Neighbor's deposition are overruled. Dr. Neighbor testified on February 7, 2008 that he was licensed to practice medicine in Kansas and Missouri. He testified he had probably performed at least fifty preemployment physical examinations to determine whether a person was physically able to work. He stated he had also probably performed at least 150 post accident physical exams to determine whether a person was physically able to return to work after injury. He is a general orthopedic surgeon. Dr. Neighbor testified that he was board certified in orthopedic surgery and was on the hospital staff at North Kansas City and Center Point. He stated that less than 5% of his medical practice was spent doing medical-legal evaluations. Of that, probably 60-65% was for the defense or an insurance client. He had been president of the medical staff at St. Mary's Hospital. He had given lectures on orthopedic topics to other doctors and had published articles on orthopedic topics.

Dr. Neighbor examined Claimant on November 4, 2005 and on May 18, 2007. Dr. Neighbor discussed Exhibits K, O, and U. He noted that the range of motion testing done on May 18, 2007 showed that Claimant bent to 45 degrees, whereas normally, a person can bend to 70 to 90 degrees when bending forward. He said Claimant did not have any preexisting work disability before the work injury

of June 1, 2004.

Dr. Neighbor testified based on reasonable medical certainty that Claimant had a strain of his low back and had herniated discs at both the L4-5 and the L5-S1 as a result of the June 1, 2004 work accident. He stated those injuries caused a partial disc space collapse, and also caused nerve root impingement at the L5 and S1 level. He stated the work injury caused Claimant radiculopathy in L5 and S1. He stated that some of Claimant's symptoms can be caused by arachnoiditis, which is scarring of the soft tissue around the sac that holds the nerve. He said both of Claimant's surgeries, on February 17, 2005 and January 27, 2007, were the result of his work injury of June 1, 2004.

Dr. Neighbor provided the following restrictions for Claimant as a direct result of the June 1, 2004 work injury, considered alone and of itself. Claimant probably should limit his lifting to next to nothing, ten pounds if he really has to lift it. He should limit his sitting particularly. He said that Claimant cannot be up for very long. He thought Claimant needed to be able to lie down fairly frequently during the day to get relief, as well as change his position on an even more frequent basis. He should be allowed to lift no more than ten pounds once or twice an hour. He would not recommend any repetitive lifting by Claimant. He would not recommend any sustained or awkward postures of the spine for Claimant. He would not recommend any repetitive bending, pushing, pulling, or twisting as a result of this work injury. Dr. Neighbors stated that based on reasonable medical certainty, as a direct result of the June 1, 2004 work injury, Mr. Fischer was not able to compete in the open labor market. He furthered stated that as a direct result of the June 1, 2004 work injury, he did not believe that any employer in the ordinary course of business would reasonably be expected to employ Claimant in his present physical condition. He also stated that Claimant was not able to work 8 hours a day, 40 hours a week, 52 weeks a year. He stated that Claimant could not be rehabilitated so that he could perform another job. He stated that Claimant was permanently totally disabled as a result of the June 1, 2004 work injury. He said there would be no substantial improvement in Claimant's medical condition in the foreseeable future. He said that "permanent" probably meant for the rest of Claimant's life, and basically the future from here out for at least 10-to-15 years.

Dr. Neighbor testified that the medical bill from Heartland Hospital in the amount of \$1,294.00, Exhibit J, was reasonable, necessary, and the direct result of the work injury of June 1, 2004.

Dr. Neighbor said that Claimant would probably need future medical treatment only in the form of medications and things like that as a direct result of the work injury. He stated that he thought Claimant would need medications for his pain, discomfort and muscle spasms. Dr. Neighbor further testified that the only thing he would recommend for future treatment would be medication for Claimant's pain, nerve injury and spasms.

Dr. Neighbor, on cross-examination, stated that he did not consider Claimant to have been a successful surgical candidate after the second surgery that he recommended. He stated that from a functional capacity standpoint, Claimant had gotten worse. After the first surgery, he was light duty. After the second surgery, he was sedentary duty. But he noted that Claimant's condition had worsened after the first functional capacity test and before the second surgery. He said that he found Claimant to be credible and noted that Claimant's Waddell's signs were negative, as they were in the functional capacities tests where Claimant was worse off. He stated that he did not make any attempt to try to place Claimant in the job market. He did not contact any employer or any member of any industry to see

whether they would hire Claimant. He said that was not in his field of expertise and not something he does.

Vocational Evaluations

Michael Dreiling

Michael Dreiling testified in person at the hearing in this case. He stated that he was a vocational rehabilitation counselor and had performed over 1,000 pre-employment assessments and over 1,000 post-accident evaluations to determine employability, in more than 15 states. He met with Claimant on March 3, 2008. He reviewed Exhibits A through W. He reviewed the medical records that identified Claimant's functional limitations. He reviewed Dr. Neighbor's restrictions. Mr. Dreiling's report was admitted as Exhibit DD. He noted Dr. Neighbor's restrictions. He noted that Claimant was a high school graduate with average grades. He noted that Claimant did not have typing or computer skills. He said both of those would be a vocational disadvantage to qualify one for work. He stated that Claimant did not have transferable job skills. He noted that Claimant had last worked in 2004 and that would be a vocational barrier to reemployment. He noted Claimant reported still having pain following two back surgeries. He said Claimant told him he used a TENS unit and had difficulty sleeping. He said Claimant could sit for between 20 and 30 minutes before he needed to get up and move around. He said Claimant could stand for between 20 and 30 minutes and could lift up to 10 pounds. Claimant reported trouble with stairs. Claimant stated that he lay down between one and two hours during the day. He said he could use a riding mower for 30 minutes.

Mr. Dreiling performed vocational testing including the Wonderlich test. Mr. Dreiling said that Claimant was not a realistic candidate for vocational training because he did not have the ability for prolonged sitting. He was not a realistic candidate for college because of the fact that it had been thirty years since Claimant attended high school, Claimant had significant medical problems, and Claimant had problems with prolonged sitting.

Mr. Dreiling testified that based on a reasonable degree of vocational certainty, Claimant was not able to compete in the open labor market. He stated Claimant was not able to work 40 hours per week and no Employer would reasonably employ Claimant. He stated that Claimant was permanently and totally disabled.

Mr. Dreiling said that he was a member and past President of the American Board of Vocational Expert. He is board certified by the American Board of Vocational Experts.

Mr. Dreiling testified on cross examination that he generally performed between 70% and 80% of his evaluations for Claimants or plaintiffs and 20% to 30% for Employers and insurers. He said his practice did not involve placement of employees. He did not try to place Claimant in a job. He said he had been retained by Claimant's attorney. He said he had not been supplied with a copy of Claimant's depositions. He agreed that Claimant's credibility was important and that honesty was important regarding what Claimant could or could not do. He agreed that the functional capacity evaluation done on April 25, 2007 stated that Claimant could return to sedentary work level. He agreed that Dr. Neighbor's report stated that Claimant was only capable of sedentary work. He noted Claimant's problems with sitting, standing and walking. He said there was no jobs Claimant could do if he had to

change from sitting, standing, and walking.

Mr. Dreiling testified on redirect examination that the April 25, 2007 functional capacity evaluation supported his opinion that Claimant was not employable. He discussed the report's reference to occasional sitting, standing, and walking of twenty minutes. He noted that Claimant would need to alternate through the day. He stated that ninety percent of labor exceeded sedentary, and of the remaining ten percent, three percent were for unskilled sedentary jobs. When lack of computer skills was factored in, there would be between one percent and two percent of jobs in the unskilled sedentary job category. He stated that based upon Claimant's work history, education level, lack of job skills, and Dr. Neighbor's restrictions, Claimant was permanently and totally disabled. He said that the functional capacity evaluation showed that Claimant had consistent effort throughout. He said the Waddell's test supported that Claimant was being honest. He said the medical records supported Claimant's honesty.

Mr. Dreiling stated that Claimant's ability to do odd jobs where he had no deadline and could take breaks was consistent with Claimant being permanently and totally disabled.

I find Mr. Dreiling to be a credible witness.

Michael Dreiling's March 4, 2008 report was admitted as Exhibit DD. His report described the records he reviewed, Claimant's social background, prior medical information, military history, work background, Claimant's perspective of injury, results of the Wonderlic Personnel Test administered to Claimant, and his conclusions. His report was consistent with his testimony at the hearing.

Robert McClellan

Robert McClellan testified for Employer. He stated he had reviewed the records described on page 2 of his report contained in Exhibit 11. He began his career in counseling in 1970. He has a Masters in counseling from the University of Missouri at Kansas City. He is certified as a licensed professional counselor. He testifies mostly in Social Security matters regarding person's employability. He estimated he had handled between 10,000 and 14,000 cases. He said he had done very little testifying in Missouri workers' compensation cases and had been retained by Employer's law firm 12 times over the years. He did not examine Claimant and did not see the report of Michael Dreiling. He had read Claimant's testimony regarding what Claimant said he could and could not do. He said Claimant's credibility was paramount and that Claimant's motivation was critically important in placing him in the labor market.

Mr. McClellan testified that if you took Dr. Neighbor's reports, there were no jobs if Claimant had to lie down frequently during the day. Mr. McClellan said that he could not get a feeling as to what Claimant felt he could do based on his deposition. He stated that based on Claimant's second functional capacity evaluation, Claimant could do sedentary work, and there were jobs out there in the sedentary category. He stated that 5% to 10% of jobs were unskilled sedentary. He said there were 4000 unskilled sedentary jobs in the Kansas City area and 36,000 semiskilled jobs in the Kansas City area that required reading and writing. He said that an employer will not hire someone who has to lie down five to seven times during the day. He stated that based on the functional capacity evaluation done after Claimant's second surgery, there would be jobs Claimant could perform.

Mr. McClellan testified on cross examination that fear of pain can combine with pain to contribute to a false positive in a Waddell's. He agreed that Claimant had a negative Waddell's test during the last functional capacity evaluation. He agreed that Claimant's failure to work over the last three years was a disadvantage to his reemployment.

Mr. McClellan's April 30, 2008 report included in Exhibit 11 noted that the medical opinion given by Dr. Neighbor on 11-4-05 and 1-27-07 would not allow for work due to the need to lie down frequently during the day. His report also stated that the FCE on 4-25-07 allowed for sedentary jobs, and there are jobs in that functional capacity in the Missouri economy. He also noted that the functional capacity allowance given by Dr. Amundson was a release to sedentary level of work.

DISCUSSION

Temporary Total Disability

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

Prior to August 28, 2005, Section 287.800, RSMo provided in part: "Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . ." The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.* 804 S.W.2d 743, 745-46 (Mo. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224. Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen*, 52 S.W.3d at 618; *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228.

The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227; *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198. Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229. "Medical causation of injuries which are not within common knowledge or experience, must be established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause." *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991). Compensation is appropriate as long the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mo.App. 2004).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. The Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231. The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229. "While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine. *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App. 1993). Credibility means the capacity for being believed or credited. *Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo.App. 1993)." *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 855 (Mo.App. 1996).

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226. Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's

employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

Underpayment of Temporary Total Disability

The parties stipulated that Claimant was paid temporary total disability benefits at the rate of \$469.71 per week for the periods February 17, 2005 to August 2, 2005 and August 18, 2006 to May 9, 2007. The agreed temporary total disability rate is \$557.65 per week. Claimant requests an award for an underpayment of temporary total disability benefits for those periods at the rate of \$87.94 per week. Employer and Insurer do not dispute that Claimant was entitled to be paid temporary total disability benefits for those periods. I find that the evidence establishes that Claimant was temporarily and totally disabled during those periods, and was entitled to be paid temporary total disability benefits during those periods at the rate of \$557.65 per week. The Court calculates that there are 433 days, or 61 6/7 weeks, during those periods. Claimant was therefore underpaid at the rate of \$87.94 per week for the 61 6/7 weeks represented in those periods. Claimant is therefore entitled to an award of \$5,439.72 for the underpayment of temporary total disability compensation for those periods. I hereby order Employer/Insurer to pay the temporary total disability underpayment in the amount of \$5,439.72 based on 61 6/7 weeks at \$87.94 per week for the periods February 17, 2005 to August 2, 2005 and August 18, 2006 to May 9, 2007.

Liability for Past Temporary Total Disability

Claimant seeks an award for unpaid past temporary total disability for the period August 3, 2005 to August 17, 2006 at the rate of \$557.65 per week. Claimant testified that he last worked at Employer on May 16, 2005. He worked until he had his first surgery. Employer did not make special accommodations for him after his first surgery which was done on February 17, 2005. He had been off work for more than three years at the time of the hearing.

Dr. Bailey noted in his June 29, 2005 report that he did not foresee Claimant returning to gainful employment, at least at his current level of functioning. Dr. Bailey's assessment was low back pain with radiculopathy and extremely poor post-operative result. He noted then that a second opinion was indicated. Dr. Bailey wrote on August 2, 2005 (the last date TTD was paid until it resumed on August 18, 2006) that Claimant continued to do relatively poorly. Dr. Bailey found no evidence to support additional surgical intervention. The report noted they felt Claimant was at maximum medical improvement. The report noted that Claimant had obtained a functional capacity exam that reported Claimant to be at a light physical demand level or less, which would limit his lifting to twenty pounds or less. In general, he should avoid any sustained or awkward postures of the lumbar spine. The doctor recommended that Claimant avoid repetitive bending, pushing, pulling, twisting, or lifting activities on a permanent basis.

Dr. Neighbor stated in his December 15, 2005 report that Claimant saw him on November 4, 2005. Claimant had continuing complaints in his back and legs. Dr. Neighbor stated in his December 15, 2005 report that it was likely that Claimant would need to be re-explored at the L4-5 and L5-S1 levels. He believed that Claimant was currently having a significant radicular type pain that created a situation that, should nothing else be done, Claimant would not be employable. He stated that at the present time, Claimant was a permanent total disability.

Claimant continued to have significant complaints. Dr. Bailey wrote on February 27, 2006 (Exhibit 4) that Claimant had some minor spinal stenosis, but ultimately he believed epidural fibrosis was the majority of Claimant's problem. He noted that CT/myelogram and EMG and nerve conduction study tests would assist them in operative planning with a probable surgical intervention. Claimant saw Dr. Bailey on April 28, 2006. Dr. Bailey released Claimant again on May 2, 2006 to light-duty status with restrictions of 20 pounds lifting, and to avoid repetitive bending, pushing, pulling, twisting, or lifting. On April 14, 2006, a CT disclosed mild ventral impressions visualized on the thecal sac most likely secondary to broad-based intervertebral disc herniations or symmetric bulges. Dr. Neighbor stated on June 27, 2006 that he continued to believe that Claimant would require additional decompression surgery of L4-S1. Ultimately, Claimant had a second back surgery by Dr. Amundson on January 25, 2007.

I find that as a result of his work injury on June 1, 2004, and the February 17, 2005 surgery that was necessary to treat his injury, Claimant was not able to return to work, and had not reached the point of maximum medical progress, and no employer in the usual course of business would reasonably be expected to employ Claimant in his physical condition, and Claimant was temporarily and totally disabled, from August 3, 2005 until August 17, 2006, or 54 weeks. I further find that Claimant has been totally disabled continuously from the time he last worked for Employer on May 16, 2005 as a result of the injury he sustained in the course of his employment for Employer. The parties stipulated that the temporary total disability rate in this case is \$557.65 per week. Claimant is therefore entitled to an award in the amount of \$30,113.10 in past temporary total disability benefits against Employer/Insurer for the period August 3, 2005 to August 17, 2006. I hereby order Employer/Insurer to pay temporary total disability benefits in the amount of \$30,113.10 for 54 weeks for the period August 3, 2005 through August 17, 2006 at the rate of \$557.65 per week.

Permanent Disability

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

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230. While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and

percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas City, Mo., School District*, 71 S.W.3d 652, 656 (Mo.App. 2002), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett*, 595 S.W.2d at 443; *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Fogelson v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Claimant asserts that an award should be entered for permanent total disability benefits. Section 287.020.7, RSMo provides: “The term ‘total disability’ as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.” The phrase “inability to return to any employment” has been interpreted as “the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment.” *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919, 922 (Mo.App. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley v. Charleswood Corp*, 211 S.W.3d 629, 635 (Mo.App. 2007); *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 225; *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795 S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483 The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that

person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski* 631 S.W.2d at 922. *See also Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

Competent and substantial evidence supports the conclusion that Claimant is permanently and totally disabled as a result of the June 1, 2004 accident. Claimant is 47 years old. He sustained a serious back injury on June 1, 2004 in the scope and course of his employment for Employer. He has had extensive medical treatment since the injury including epidural steroid injections, physical therapy, a myelogram, CT testing, traction, ice and heat therapy, a TENS unit and therapy at home, and two back surgeries. He had right-sided L4-5 hemilaminotomy decompression discectomy and right-sided L4-5 lateral recess and neural foramenal decompression by Dr. Bailey on February 17, 2005. On January 25, 2007, Dr. Amundson performed a right L4 partial laminectomy with facetectomy, redo; right L5 partial laminectomy with facetectomy, redo; left L5 laminectomy with partial facetectomy; left S1 laminectomy with partial facetectomy; and left L5-S1 herniated nucleus pulposus excision. Claimant takes Tramadol for pain as needed one to two times per week and uses a TENS unit once or twice per week. Claimant does not want to take prescription pain medicine on a daily basis because he does not want to become addicted and he does not want the side effects.

I find that Claimant has significant daily pain in his low back, buttocks and legs that prevents him from being able to work full time, eight hours a day, forty hours a week. He also has weakness, numbness, and tingling in his legs. He has difficulty sleeping. Claimant has not worked since May 15, 2005, except for doing a few odd jobs for neighbors and family in which he worked at his own pace and earned a few hundred dollars. Claimant is not able to sit, stand or walk for extended periods without changing positions because of the pain caused by the work injury and subsequent surgeries. I find that Claimant is required to lie down several times throughout an average day to relieve pain, including one to one and one-half hours after lunch. Claimant has had to cease or reduce recreational activities and work around his house because of his condition. Claimant has limited education and job skills. He only has a high school degree. He lacks computer and typing skills. Claimant is not a realistic candidate for vocational training because he does not have the ability for prolonged sitting. Claimant worked for Employer for twenty-two years before the June 1, 2004 accident. Claimant would like to work, but he does not feel that he could do an eight-hour day, forty hours a week.

In addition to his testimony, Claimant was observed during the course of the hearing. It is noted that during the hearing, Claimant exhibited behavior patterns that demonstrated a significant level of pain and discomfort, and which support a finding of permanent total disability. During the hearing Claimant stood up several times for between approximately fifteen and thirty minutes and then sat back down. He also moved around in his seat and appeared to be in pain.

Claimant's wife substantiated Claimant's reduced activities around the house and his use of a TENS unit. She now works full-time, though before the work accident, she worked part-time. Employer/Insurer did not produce witnesses to contradict Claimant's description of the restrictions on his activities since his last surgery.

Health South's Functional Capacity Evaluation dated April 25, 2007 noted that Claimant demonstrated the ability to perform work in the sedentary category in an eight-hour time period.

Sedentary was noted to be exerting up to 10 pounds force occasionally, and/or a negligible amount of force frequently to lift, carry, push, pull or otherwise move objects, including human body. The Evaluation also noted that Claimant reported moderate pain at an intensity of five on a scale of zero to ten. Claimant stated that prolonged sitting or walking, standing, bending, stooping, twisting, kneeling, and squatting aggravated his symptoms and that lying on his stomach provided relief. With standing, Claimant required shifting of body weight often and decreased stance time on the lower right extremity. Increased antalgic gait was demonstrated as walking distance increased. Claimant was noted to have demonstrated consistency with validity testing and was consistent in his movement patterns and pain behaviors.

Dr. Amundson's April 18, 2007 note in Exhibit T noted that Claimant returned that day and remained a 5 on a 10 pain scale. Dr. Amundson did not believe the January 25, 2007 surgery made much effect on Claimant's chronic nerve root injury at the right L5 nerve root level, though the left S1 nerve root had responded nicely. The note stated that Claimant's pain was constant and worse with prolonged sitting and standing.

Dr. Amundson's May 15, 2007 report noted that Claimant should follow the work restrictions of a sedentary physical demand level or less. The report noted that when Claimant was last evaluated, there was evidence of back pain and radiculopathy that was stable and unchanged. Dr. Amundson felt that Claimant could lift knuckle to shoulder of 15 pounds on an occasional basis, shoulder to overhead 10 pounds, and carry two handed 25 pounds on an occasional basis, push, pull, and sit 20 minutes per episode, and stand, walk, climb, stoop, kneel, crawl, reach, use foot controls, and trunk rotation on an occasional basis permanently. He felt that Claimant could balance and reach at desk level on a frequent basis. He felt Claimant was unable to crouch. The doctor felt those limitations were permanent. Dr. Amundson noted that evidence of radiculopathy was present. He stated that Claimant had a residual 10% permanent partial impairment to the body as a whole based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Amundson was not deposed. He did not specifically express an opinion regarding Claimant's permanent disability.

On November 26, 2007, Dr. Neighbor provided the following restrictions for Claimant as a direct result of the June 1, 2004 work injury considered alone and of itself. Claimant probably should limit his lifting to next to nothing, ten pounds if he really has to lift it. He should limit his sitting particularly. He said that Claimant cannot be up for very long. He thought Claimant needed to be able to lie down fairly frequently during the day to get relief, as well as change his position on an even more frequent basis. He should be allowed to lift no more than ten pounds once or twice an hour. He would not recommend any repetitive lifting by Claimant. He would not recommend any sustained or awkward postures of the spine for Claimant. He would not recommend any repetitive bending, pushing, pulling, or twisting as a result of this work injury. Dr. Neighbors stated that based on reasonable medical certainty, as a direct result of the June 1, 2004 work injury, Claimant was not able to compete in the open labor market. He furthered stated that as a direct result of the June 1, 2004 work injury, he did not believe that any employer in the ordinary course of business would reasonably be expected to employ Claimant in his present physical condition. He also stated that Claimant was not able to work 8 hours a day, 40 hours a week, 52 weeks a year. He stated that Claimant could not be rehabilitated so that he could perform another job. He stated that Claimant was permanently totally disabled as a result of the June 1, 2004 work injury. He said there would be no substantial improvement in Claimant's medical condition in the foreseeable future. He said that "permanent" probably meant for the rest of Claimant's life, and basically

the future from here out for at least 10-to-15 years. I find that Dr. Neighbor's conclusions are credible.

I find that Dr. Neighbor's opinion regarding Claimant's disability is more credible than Dr. Amundson's opinion regarding Claimant's impairment. Dr. Neighbor stated that Claimant cannot be up for very long. He thought Claimant needed to be able to lie down fairly frequently during the day to get relief, as well as change his position on an even more frequent basis. Dr. Amundson did not address Claimant's need to lie down during the day. I find that Claimant does need to lie down during the day because of his pain.

Claimant's vocational expert, Michael Dreiling, performed vocational testing of Claimant. He has substantial experience performing vocational evaluations in workers' compensation cases. He testified that based on a reasonable degree of vocational certainty, Claimant was not able to compete in the open labor market. He stated Claimant was not able to work 40 hours per week and no Employer would reasonably employ Claimant. He stated that Claimant was permanently and totally disabled. He based his opinion on a number of factors including Claimant's age, education, work history, job skills, Dr. Neighbor's restrictions, the April 25, 2007 functional capacity evaluation, Claimant's need to get up and move around during the day, and his need to lie down during the day. I find Mr. Dreiling's opinions are credible. Further, Employer/Insurer's vocational expert, Robert McClellan, agreed that there were no jobs Claimant could do if he needed to lie down frequently during the day.

Employer/Insurer challenges Claimant's credibility because of thirty-nine corrections Claimant made to his March 9, 2006 deposition (Exhibit 9). Claimant's correction pages, Exhibits 1 and 2, note that the reasons given for the corrections were either "misunderstood the question" or "wasn't sure at that time." Employer/Insurer's attorney deposed Claimant a second time on February 4, 2008 (Exhibit 10) and asked Claimant about his corrections to the first deposition. Employer/Insurer's attorney also cross-examined Claimant about the corrections at the hearing in this case. Claimant generally testified at the hearing that he corrected the deposition because he misunderstood the questions. In some instances it is unclear to the Court what was ambiguous about certain questions or why Claimant misunderstood certain questions. Claimant did not provide a credible explanation for misunderstanding all the questions that he said he misunderstood. Nevertheless, I do not find that Claimant's testimony regarding what he can and cannot do, regarding his lying down during the day to relieve his pain, and regarding his difficulty sitting, standing, and walking for more than a few minutes at a time before needing to change, is untruthful. Employer/Insurer offered no witnesses to impeach Claimant's testimony.

The deposition that Employer/Insurer's attorney took of Claimant on February 4, 2008 made reference to surveillance reports. (Page 30.) But Employer/Insurer offered no surveillance reports or surveillance video into evidence at the hearing in this case. Employer/Insurer did not produce any evidence that Claimant did not lie down during the day, that Claimant farmed, that Claimant did more yard work than the occasional mowing he said he could do, or that Claimant installed Christmas lights on the roof of his house. Claimant's neighbors who testified did not testify that Claimant did any of the things that he said he could not do. In his second deposition, Claimant identified several persons he had helped with various limited tasks. Employer/Insurer did not produce any of those persons at the hearing to contradict Claimant's testimony.

Employer/Insurer argues that Claimant is not credible regarding what he can and cannot do, and that the court should therefore give more credibility to its experts. The changes in Claimant's testimony

could indicate that Claimant's answers to certain questions in the first deposition were not truthful and that the truthfulness of Claimant's testimony is subject to doubt. I find that Claimant's changes in his correction pages demonstrate an intention to be forthright. The changes were provided to Employer/Insurer's attorney prior to the hearing in this case. He was given an opportunity to again examine Claimant about this in a second deposition prior to trial, and at trial, and he did.

Even though Claimant's credibility has been challenged because of the changes he made to his first deposition, and because of the explanations for the changes, I nevertheless find that Claimant was a credible witness. I find that Claimant was not exaggerating his complaints. I find that Claimant is unable to compete in the open labor market and that he is unable to work full time, eight hours a day, forty hours a week. I find that Claimant has established that he is in fact permanently and totally disabled.

Based on all the evidence and the application of the Missouri Workers' Compensation Law, and for the reasons discussed herein, I find that Claimant is permanently and totally disabled as a result of the injury he sustained on June 1, 2004 while working for Employer. I find that Claimant is not competent to compete in the open labor market, and that no employer would be reasonably expected to hire Claimant in his present physical condition.

Dr. Amundson concluded that Claimant was at maximal medical improvement on May 9, 2007. I find that Claimant was at maximum medical improvement on May 9, 2007. I find that Claimant was in his healing period through May 9, 2007. I find that as of May 9, 2007, no employer in the usual course of business would reasonably be expected to employ Claimant in his physical condition, and reasonably expect Claimant to perform the work for which he was hired, and therefore was no longer able to compete in the open labor market and was permanently and totally disabled. I find that Claimant is entitled to an award of permanent total disability benefits beginning on May 10, 2007, at the permanent total disability rate of \$557.65 per week.

I order and direct Employer to pay to Claimant for permanent total disability the sum of \$557.65 per week commencing May 10, 2007 and continuing for Claimant's lifetime. These payments for permanent total disability shall continue for the remainder of Claimant's lifetime or until suspended if Claimant is restored to his regular work or its equivalent as provided in Section 287.200, RSMo.

Pursuant to Section 287.200.2, RSMo, Employer and the Division shall keep the file open in this case during Claimant's lifetime.

Future Medical Aid

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

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers*, 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132

S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 226. It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 227. “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 231.

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo.banc 2003), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224. Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers*, 132 S.W.3d at 270. Medical aid may be required even though it merely relieves the employee’s suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease, comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brollier*, 163 S.W. 2d at 115. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

Dr. Neighbor testified in his deposition, over objection of Employer/Insurer’s counsel, that Claimant would probably need future medical treatment. Employer/Insurer’s counsel objected to this testimony because the opinion regarding future medical treatment had not been contained in Dr. Neighbor’s reports. Employer/Insurer’s counsel did not cross-examine Dr. Neighbor immediately after direct and reserve time for additional later cross-examination if necessary, or postpone all cross-examination until there was an opportunity to review the testimony. Nor did Employer/Insurer’s counsel request a continuance of the hearing in this case. I find that Employer was not prejudiced because of the failure to ask for relief under the statute. *Orr v. City of Springfield*, 118 S.W.3d 215, 221 (Mo.App. 2003). Employer/Insurer’s objections to Dr. Neighbor’s testimony in his deposition relating to Claimant’s need for future medical treatment are overruled.

Claimant testified that he takes Tramadol and uses a TENS unit about twice a week for his pain. Dr. Amundson prescribed a TENS unit for residual low back pain on April 18, 2007. Dr. Neighbor said that Claimant would probably need future medical treatment as a direct result of the work injury only in the form of medications and things like that as a direct result of the work injury. He stated

that he thought Claimant would need medications for his pain, discomfort and muscle spasms. I find that Claimant continues to suffer from pain caused by the back injury he sustained as a result of his work for Employer. I find that he will need medications and use of a TENS unit in the future to cure or relieve the effects of his injury. Employer/Insurer is therefore directed to authorize and furnish additional medical treatment to cure and relieve Claimant from the effects of his June 1, 2004 work injury, in accordance with Section 287.140, RSMo.

Past Medical Aid

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926 (Mo.App. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 230; *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 228; *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229; *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 229. The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. *Martin*, 769 S.W.2d at 111.

Claimant submitted Exhibit J, an unpaid medical bill in the amount of \$1,294.00 and medical records for treatment on February 22, 2005 from Heartland Health relating to Claimant. The medical bill and the medical treatment records demonstrate that this bill was incurred by Claimant to treat his back injury. Dr. Neighbor testified that the medical bill from Heartland Hospital in the amount of \$1,294.00, Exhibit J, was reasonable, necessary, and the direct result of the work injury of June 1, 2004. The parties stipulated at the hearing that the amount of \$1,294.00 in unpaid medical expenses incurred to treat Claimant's injury was fair, reasonable and necessary, and shall be paid by Employer/Insurer.

I find that the medical bill of Heartland Health identified in Exhibit J in the total amount of \$1,294.00 was reasonable and necessary and causally related to Claimant's injury sustained in the course of his employment for Employer, and that it should be paid by Employer/Insurer. Claimant is awarded the sum of \$1,294.00 from Employer/Insurer for this past medical expense.

Dependents under *Schoemehl*

Under Section 287.240, RSMo, a dependent is defined as a relative by blood or marriage of a deceased employee, who is actually dependent for support, in whole or in part, based upon his wages at the time of the injury. Under Section 287.240, RSMo, a wife upon a husband with whom she lives or who is legally liable for her support is conclusively presumed to be totally dependent for support. Under

Section 287.240, RSMo, a child under the age of eighteen years is also conclusively presumed to be totally dependent for support if the employee is legally liable for his or her support or of the child is living with the parent.

It is uncontradicted, and I find, that on June 1, 2004, Claimant's only dependents were Claimant's wife, Julie Fischer, his child, Jelissa Lorel Fischer, born September 2, 1989; his child, Jarent Thomas Fischer, born August 3, 1988, and his child, Jansen Denee' Fischer, born July 9, 1986, all of whom lived together with Claimant at the time of the work injury, and I find that all were conclusively presumed total dependents at the time of Claimant's June 1, 2004 accident and injury. *Schoemehl v. Treasurer*, 217 S.W.3d 900 (Mo. 2007).

Attorneys Fees

Exhibit Y is a copy of Attorney/Client Contract dated July 5, 2005 signed by Claimant only. Claimant agreed to pay John E. McKay 25% of the gross proceeds relating to his back injury at Schultz Electric in 2004 for which he had surgery about 2/17/05. Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). During the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The amount of the attorney's fee shall constitute a lien on the compensation awarded herein.

Interest

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

CONCLUSION

For all these reasons, and based on substantial and competent evidence, and the application of The Missouri Workers' Compensation Law, I find in favor of Claimant. I find that Claimant has met his burden of proof that he sustained an injury by an accident arising out of and in the scope and course of his employment for Employer June 1, 2004 that resulted in permanent total disability. I further find that his claims for permanent total disability benefits, past medical expense, future medical aid, and past temporary disability benefits should be allowed, and are hereby awarded in accordance with the foregoing Findings of Fact and Rulings of Law. Claimant's attorney, John E. McKay, is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant.

Date: **July 17, 2008**

Made by /s/ Robert B. Miner

Robert B. Miner

Administrative Law Judge

Division of Workers' Compensation

A true copy: Attest:

/s/ Jeffrey W. Buker

Jeffrey W. Buker, Director

Division of Workers' Compensation

All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).