

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

Injury No.: 98-098680

Employee: Francisco Gomez  
Employer: Output Technologies  
Insurer: Travelers Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated September 13, 2011. The award and decision of Administrative Law Judge Kenneth J. Cain, issued September 13, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 15<sup>th</sup> day of March 2012.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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James Avery, Member

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Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

## AWARD

Employee: Francisco Gomez

Injury No. 98-098680

Employer: Output Technologies

Insurer: Travelers Insurance Company

Additional Party: N/A

Hearing Date: August 1, 2011

Briefs Filed: September 1, 2011

Checked by: KJC/lh

### 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: August 25, 1998.
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson 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, while in the course and scope of his employment as a machine operator for Output Technologies was removing a 20 pound motor from a machine when he twisted and injured his back.
12. Did accident or occupational disease cause death? No. Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back.
14. Nature and extent of any permanent disability: 25 percent body as a whole.

15. Compensation paid to-date for temporary disability: \$21,318.21.
16. Value necessary medical aid paid to date by employer/insurer? \$38,450.10.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$578.40.
19. Weekly compensation rate: \$385.60/\$294.73.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: None.

100 weeks of permanent partial disability @ \$294.73 = \$29,473  
55 2/7 weeks of temporary total and temporary partial disability benefits for a total of \$21,318.21  
(previously paid)

**TOTAL \$29,473**

22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Said payments to begin as of the date of the award 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 percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mr. Hans Van Zanten.

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

Employee: Francisco Gomez

Injury No. 98-098680

Employer: Output Technologies

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Additional Party: N/A

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Prior to the hearing, the parties entered into various admissions and stipulations. The remaining issues were as follows:

1. The nature and extent of the disability sustained by the employee;
2. Liability of the employer for additional medical treatment, past and future; and
3. Liability of the employer for additional past and future temporary total disability benefits.

At the hearing, Mr. Francisco Gomez (hereinafter referred to as Claimant) testified that he was born on June 2, 1957 in Mexico. He stated that he became a United States citizen in 1985.

Claimant testified that he obtained his high school diploma in 1987. He stated that he had also received training in welding and that in 1995 he earned an associate's degree in applied science.

Claimant testified that in 1985 he was hired by Output Technologies as a machine operator. He stated that his job required him to maintain and install machines, do paperwork and to understand warehouse operations. He stated that he sustained two injuries while at work at Output.

Claimant testified that his first injury occurred on January 1, 1998, while he was installing a roll of floor mats. He stated that the roll which was "standing up" began to fall as a co-worker passed in front of it. He stated that he grabbed the roll and that in so doing he felt pain in his back between his shoulder blades. He stated that he could not move his arms.

Claimant testified that he immediately reported the injury to his employer. He stated that although he received some treatment for his injuries; it did not relieve his back pain. He described his alleged back pain as stabbing, and indicated that it radiated down his arms, but not into his neck area. He stated that his arms felt weak and numb and with electric shock type sensations.

Claimant testified that on August 25, 1998, he sustained another injury at work. He stated that the injury occurred as he was removing a 50 to 60 pound motor from a machine. He stated that while holding the motor it "pulled" him and that he felt severe pain in his low back. He indicated that he immediately reported the injury and that his employer referred him for treatment. He stated that while in therapy for his low back pain, he injured his neck. He stated that he last worked in 2000.

Claimant indicated that in 2005 he had a laminectomy and fusion at the L4-L5 disk level. He stated that he had neck surgery in 2002 and that in 2010 another neck surgery to "fix it".

Claimant admitted that in 2000 he was involved in a motor vehicle accident. He stated that the accident occurred when his pick-up truck was rear ended on the highway by another truck. He stated that in the accident his head struck the rear window of his truck and that he did not receive any permanent injuries, although he did get a bump on his head.

Claimant testified that he was later rear ended in another highway motor vehicle accident. He stated that the accident occurred while he was in the turn lane and that he did not sustain any injuries.

Claimant complained that his current problems involved severe neck and back pain, pain from his hip to his toes, difficulty in grabbing and reaching, an inability to walk, leg pain when going up and down stairs and feeling unstable. He stated that he used a cane to walk. He stated that his two neck surgeries did not relieve his neck pain. He stated that he had no problems with his neck or upper back until the 1998 injuries at work.

Finally, Claimant testified that he was getting social security and UNUM disability benefits. He stated that he had not looked for work since he lost his job at Output Technologies.

On cross-examination by his employer, Claimant admitted that no doctor had prescribed a cane for him to use in walking. He admitted that Dr. Blatt, his treating neurosurgeon, released him from treatment for his injuries in 1998. He admitted that Dr. Blatt did not recommend any surgery.

Claimant described his motor vehicle accidents in more detail on cross-examination. He admitted that his pickup truck was totaled in the August 2000 accident. He admitted that the accident occurred on the highway. He admitted that his vehicle was stationary when the accident occurred and that it was struck with such force that his seat broke and that he was thrown backwards with such force that the back of his head struck and broke the rear window. He admitted that after his head struck and broke the rear window, that he was thrust forward with such force that his chest struck and bent the steering wheel. He admitted that the force of the impact with his vehicle caused his truck to strike the vehicle in front of him. He admitted that his headrest on his vehicle was pushed down against the seat at the time of the impact and that it did not prevent his head from going backwards and into the rear window.

Claimant admitted that he was not wearing a seat belt at the time of the accident. He admitted that he had increased symptoms involving his head and neck after the accident. He admitted that his alleged headaches increased in frequency and intensity after the accident. He admitted that the alleged soreness in his neck increased. He admitted that he received a monetary settlement due to the accident. He admitted that he had neck surgery after the motor vehicle accidents. He admitted that his back surgery was after the motor vehicle accidents.

Claimant admitted that his employer did not authorize or pay for either of his neck surgeries. He acknowledged that Dr. Koprivica, his rating physician, had indicated that his neck pain and his severe headaches were related to the motor vehicle accident and not the alleged work-related accidents.

Claimant admitted that subsequent to 1998 he was diagnosed with depression, diabetes and hypertension. He admitted that he still mowed his lawn. He admitted that he used a push and not a self-propelled mower. He admitted that he was still able to drive. He admitted that he cooked in his microwave oven. He admitted that he was still able to do his own grooming. He admitted that his GED and community college classes were taught in English. He stated that he maintained a 4.0 grade point average at the community college.

### Medical evidence

Claimant offered into evidence two reports of P. Brent Koprivica, M.D., as well as reports from Daniel D. Zimmerman, M.D. and Bernard Abrams, M.D. and numerous reports and records. Exhibit P contained Dr. Koprivica's January 4, 2002 report. Dr. Koprivica, whose specialty was in emergency medicine, noted that on examination Claimant had "disparity" findings. He concluded that Claimant had sustained a herniated disk to the left at L5-S1 in the "August 22, 1998" accident at work.<sup>1</sup> He concluded that Claimant was not at maximum medical improvement. He concluded that Claimant's "December 1997 or January 1998" work related accident had not resulted in any "significant" permanent injuries.

Dr. Koprivica did render a disability rating for the alleged August 1998 accident, although as noted above, he believed that Claimant was not at maximum medical improvement.<sup>2</sup> He also stated that Claimant's need for treatment to his cervical spine was caused by the August 2000 motor vehicle accident and not the alleged August 1998 work-related accident.

Claimant's Exhibit X was Dr. Koprivica's May 8, 2007 report. Again, Dr. Koprivica indicated that Claimant's two cervical spine surgeries and the other treatment for Claimant's alleged neck problems after August 2000 was caused by the motor vehicle and not the alleged work-related accident. He related the treatment for Claimant's lumbar spine complaints to the alleged work-related accident.

Dr. Koprivica noted that on examination in May 2007 that Claimant did not exhibit the "exaggerated" pain behaviors Claimant had demonstrated during the prior examination. He noted in 2007 that Claimant's Waddell's testing was appropriate in all five categories for symptom magnification.

Dr. Koprivica concluded that Claimant's alleged August 1998 accident at work had resulted in a failed back syndrome. He concluded that based on Claimant's alleged lumbar and cervical spine injuries that it was not "realistic" to believe that any ordinary employer would hire Claimant. He stated that using the AMA Guides to the Evaluation of Permanent Impairment that Claimant had sustained a permanent partial impairment of 5 to 8 percent of the whole person due to the cervical spine impairment and 25 to 28 percent due to the lumbar spine impairment.

Dr. Koprivica further stated that, "Assuming a vocational expert supports that Mr. Gomez is permanently and totally disabled, it would be my opinion that the permanent and total disability arises when one looks at the residuals following the work injury claim date of August 25, 1998, considered in isolation, in and of itself."

Claimant's Exhibit N contained the March 22, 2000 report of Daniel D. Zimmerman, M.D. Dr. Zimmerman concluded that Claimant had sustained a permanent partial disability of 10 percent to the body as a whole due a permanent aggravation of Claimant's cervical disk disease. He stated that Claimant had sustained a permanent partial disability of 30 percent to the body as a whole due to a permanent aggravation of Claimant's lumbar disk disease at L5-S1. He recommended aspirin, heat, hot tub baths and a heating pad locally as treatment, which he stated could be self-directed.

Claimant's Exhibit O was a February 5, 2001 report from Bernard Abrams, M.D. a neurologist. Dr. Abrams indicated that "if" Claimant's symptoms and history were accurately related to him, that it

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<sup>1</sup> Dr. Koprivica indicated that the records showed that the alleged injury actually occurred on August 22, 1998 and not August 25, 1998.

<sup>2</sup> Dr. Koprivica indicated that he agreed with Dr. Abrams rating of a permanent partial disability of 25 percent to the body as a whole for Claimant's lumbar spine injury. He stated that Claimant had aggravated pre-existing cervical spine conditions as a result of treatment for his low back injury and that Claimant had sustained a permanent partial disability of 25 percent to the body as a whole due to his cervical spine problems.

was his opinion that Claimant's cervical spine problems were aggravated by Claimant's therapy for his low back injury. He concluded that Claimant had sustained a permanent partial disability of 25 percent to the body as a whole for Claimant's low back injury and 15 percent to the body as a whole for Claimant's cervical spine injury for a total of 40 percent to the body as a whole.

Claimant also offered numerous other medical reports and records into evidence. Claimant's Exhibit A showed that on August 25, 1998 Claimant indicated to the Business & Industry Health Group that on August 22, 1998 he had felt a sharp pain in his low back while he was pulling on a motor at work. The diagnosis was lumbar radiculitis.

On October 8, 1998 it was noted that Claimant complained that traction for his low back had "aggravated" his neck. Claimant had epidural steroid injections in his low back. On November 17, 1998, Claimant was diagnosed with a "small" herniated disk at L5-S1.

In May 1999, Ira H. Fishman, D.O., a specialist in physical medicine and rehabilitation, released to Claimant to return to work with permanent restrictions. On June 7, 1999, Dr. Fishman indicated that Claimant had sustained a permanent partial disability of 10 percent to the body as a whole due to a lumbar radiculopathy secondary to an unoperated herniated disk.

On January 14, 2000, Claimant told Robert Drisko, II, M.D., an orthopedic surgeon, that he believed that the treatment for his low back had "triggered" pain in his neck. Dr. Drisko stated that "I think he has a chronic cervical strain with occipital neuritis." Claimant also sought treatment with Dr. Drisko on August 31, 2000, or three days after his motor vehicle accident in which he was rear-ended and his vehicle was totaled.

Claimant's Exhibit E showed that he had epidural steroid injections in his low back on September 27, 2000, or approximately one month after his motor vehicle accident. Exhibit F contained the records of Jeffrey M. Kaplan, M.D. of Northland Neurological Associates, P.C. On January 5, 2001, Dr. Kaplan noted that Claimant's rear end motor vehicle accident in August 2000 had led to a "significant" increase in Claimant's neck pain and a "new form of headaches." He noted that Claimant's MRI after the August 2000 motor vehicle accident showed a left-sided central disk herniation at C6-7.

Dr. Kaplan later noted that Claimant had cervical spine surgery in 2002. The records showed that In December 2002, Dr. Jenny performed a decompressive semi-hemilaminectomy and foraminotomy on Claimant at C6-C7 on the left and at C7-T1. Dr. Jenny's diagnosis was left cervical radiculitis secondary to spondylosis/stenosis. Claimant in his history to Dr. Jenny dated his symptoms back to 1998. The history contained no mention of the August 2000 motor vehicle accident in which Claimant's head was jerked violently backwards and forward.

Dr. Kaplan noted that Claimant had "significant" improvement in his cervical range of motion after the December 2002 surgery. He noted that Claimant's alleged headaches were related to the cervical spine problems.

Claimant's Exhibit R contained objective test results prior to the August 2000 motor vehicle accident. Claimant's May 2000 MRI of his lumbar spine showed a minor disk bulge at L5-S1 and no areas of high grade stenosis. Results from Claimant's June 2000 lumbar myelogram were normal with no evidence of a neural compromise.

Claimant's Exhibit I showed that on June 6, 2000, Philip Hylton, M.D., a neurosurgeon, noted that Claimant had a two year history of back and neck pain. Dr. Hylton concluded that Claimant did not have a surgically correctable condition.

Patrick D. Griffith, M.D., a pain management specialist, noted on June 26, 2000 that Claimant's primary problem involved low back pain. He stated that Claimant's second problem involved neck and shoulder pain. He stated that Claimant told him that his neck and shoulder problems "originally occurred in July of 1998, a month prior to the injury that occurred to his lower back."<sup>3</sup> See Exhibit R

On July 26, 2000, Dr. Griffith's primary diagnosis was a left S1 radiculitis with a probable L5 component and possibly a right L5 or S1 component. He recommended epidural injections at the L5-S1 level.

Dr. Griffith saw Claimant on September 8, 2000, less than two weeks after the motor vehicle accident. Dr. Griffith's records did not reflect that Claimant had provided any history of the motor vehicle accident. Dr. Griffith's impression was again mechanical low back pain and bilateral lumbar radiculitis. He did not diagnose any cervical spine problems.

In October 2000, Dr. Griffith noted that Claimant continued to complain of severe low back pain. He noted that Drs. Blatt and Hylton, neurosurgeons, did not see surgery as an option. In July 2003, Dr. Griffith noted that Claimant's chief complaint was now neck pain radiating down both shoulders. In May 2004, Dr. Griffith's impression was failed back syndrome with lumbar and cervical disk degenerative disease and cervical radiculitis.

Headache & Pain Center records dated December 28, 2001 showed that Claimant's primary complaints involved cervical pain and radiating pain from the neck into the left shoulder and arm. In January 2004, Doug Burton, M.D., an orthopedic surgeon with Kansas University Physicians, Inc. Orthopedic Surgery, noted that Claimant did not need any additional back or neck surgery.

On March 3, 2006, Dr. Hess noted that Claimant was approximately seven months post an anterior lumbar interbody fusion with BAK cages implantation at L5-S1.

### **Employer's evidence**

On February 3, 1999, Geoffrey L. Blatt, M.D. of Midwest Neurosurgery Associates, P.C stated that Claimant provided a history of an injury at work on August 25, 1998. He stated that the injury occurred when Claimant was bent over on his knees and leaning forward to remove a small electrical motor from a machine. He stated that Claimant described the motor as weighing approximately 20 pounds and that he was holding it with his left hand and using his right hand to remove a screw. He stated that Claimant indicated that when the screw came loose the "motor dropped down into his hand and he twisted, feeling a sharp pain in his back and left buttocks."

Dr. Blatt indicated that Claimant's September 21, 1998 MRI showed a moderate sized disk herniation at L5-S1 on the left. He noted that Claimant was a widower and that Claimant blamed his wife's 1995 death from cardiac arrest on medications prescribed by a physician.

Dr. Blatt noted that on examination, Claimant had some tenderness to palpation at approximately L5 and some decreased range of motion. He noted that straight leg raising was positive on the right for

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<sup>3</sup> Claimant testified that his neck pain and problems began in October 1998 after he received traction for his low back following the August 1998 accident at work. Dr. Griffith's records while stating that Claimant's neck complaints began in July 1998 also indicated that the neck complaints began when Claimant grabbed a roll of mats at work to prevent the roll from falling on a co-worker. Claimant testified that the incident with the roll of floor mats happened in January 1998.

radicular pain. The record contained no explanation as to why straight leg raising would be positive on the right for radicular pain when the mild to moderate disk herniation was on the left.

Dr. Blatt concluded that Claimant had a left S1 radiculopathy secondary to a L5-S1 disk herniation resulting from a work-related injury in August 1998. He recommended conservative treatment. On March 8, 1999 Dr. Blatt stated that "I do not feel that surgical intervention was warranted." He noted that Claimant was complaining of "significant" neck pain and that myelogram test results showed two small to moderate sized disk herniations at C5-6 and C6-7.

On March 10, 1999 Dr. Blatt stated that Claimant could return to work with no restrictions. He concluded that Claimant had sustained a permanent partial disability of 2 percent due to the low back injury.

On April 2, 1999 Dr. Blatt stated that Claimant complained that his alleged neck pain had begun after he had lumbar traction for his low back injury. He stated that Claimant complained of increased headaches subsequent to his myelogram.

Dr. Blatt noted that Claimant's cervical range of motion was decreased, although "clearly" part of the decrease was voluntary. Similarly, he noted that there was a voluntary component to Claimant's decreased lumbar range of motion. Dr. Blatt indicated that Claimant was at maximum medical improvement for his low back injury and that Claimant could return to work with no restrictions. He stated that Claimant had no definite radicular symptoms involving his neck.

Dr. Blatt further stated that "Clearly, his complaints have shifted from his low back to his neck. My gut reaction is that he is searching for a problem and possibly disability. If I have to classify his neck complaints, I would say they are due to spondylosis and arthritis rather than a specific injury."

In addition, Dr. Blatt stated that "I see no way that traction of any kind, but particularly on his back, could result in a cervical disk herniation." Dr. Blatt stated that "Other than his complaints, I do not see any evidence of a significant underlying injury, and as a result I would give him a permanent partial disability of 0 % as a result of his work-related injury."

Employer's Exhibit 4 was the deposition testimony of James S. Zarr, M.D. Dr. Zarr testified that he had practiced medicine since 1981. He stated that he first examined Claimant on August 25, 2008.<sup>4</sup> He stated that the examination was to assess Claimant's complaints of low back pain radiating into his left leg.

Dr. Zarr indicated that results from his clinical evaluation of Claimant were essentially normal. The testing included straight leg raising, sensory examination and muscle testing. He stated that Babinski's indicated that no spinal cord or central nervous system injury had occurred.

Dr. Zarr testified that Claimant did have some range of motion limitations of his low back. His diagnosis was low back pain with left lower extremity radiation. He did not recommend any surgery. He concluded that Claimant had sustained a permanent partial impairment of five percent to the body as a whole.

Dr. Zarr testified that he re-examined Claimant on May 2, 2008. His diagnoses at that time were persistent neck and low back pain, status post decompressive laminectomies at C6-7 and C7-T1, and

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<sup>4</sup> The deposition appears to contain a typographical error. It states that Dr. Zarr indicated that he first saw Claimant on August 25, 2008. On page 7 of the deposition, Dr. Zarr in response to a question indicated that he next saw Claimant on September 25, 2000.

status post L5-S1 discectomy and fusion. He stated that he did not believe that traction could have injured Claimant's neck. He stated that traction would not permanently injure a person neck because "Cervical traction doesn't pull that hard to cause permanent injury."<sup>5</sup> He stated that Claimant's neck might have been temporarily injured by the traction.

Dr. Zarr concluded that Claimant's rear end motor vehicle accident was the cause of Claimant's neck problems. He noted that the impact in Claimant's rear end motor vehicle accident was so severe that it broke Claimant's seat and caused Claimant's head to fall back with such force that his head broke out the back window.

Dr. Zarr concluded that Claimant did not need any additional medical treatment. He concluded that Claimant had sustained a disability of 20 percent due to his low back injury and that as noted above, that Claimant's alleged neck injury was not work related. He stated if a rating were needed for Claimant's alleged neck problems that he would assign a 10 percent rating.

On cross-examination by Claimant, Dr. Zarr explained the difference in his opinion between impairment and disability. He described impairment as the amount of physical bodily injury and disability as the impact of the injury on the person's working capabilities. He stated that it was possible, but not probable that a person could sustain an injury during cervical traction.

On redirect examination, Dr. Zarr described the mechanism involved in lumbar traction. He stated that more force was involved in lumbar traction as opposed to cervical traction. He stated that in lumbar traction the harness was applied around the hips and waist and that a cable usually with an electrical device pulled on the harness. He stated that lumbar traction could not injure a person's neck. He indicated that the head and neck were not involved in lumbar traction.

### **Vocational evidence**

Michael J. Dreiling, a vocational consultant, evaluated Claimant on August 1, 2007. He noted that Claimant could speak English. He noted Claimant's work history and indicated that based on the most current restrictions as rendered by Dr. Koprivica, it was suspect as to whether Claimant had any transferable skills to other employment.

Mr. Dreiling indicated that Claimant's 21 score on the Wonderlic test was consistent with the average score on the test and with that of a high school graduate. He noted that Claimant was 50 years old at the time of the evaluation and that given Claimant's age, vocational profile, ongoing medical problems and pain, and current level of functioning; he believed that it did not "appear" realistic for Claimant to pursue any further formal vocational technical type training or college.

Mr. Dreiling stated that based on Claimant's initial medical restrictions that Claimant could have performed lighter work. He stated that based on Claimant's ongoing medical difficulties and Dr. Koprivica's 2007 restrictions that Claimant was "essentially and realistically unemployable in the labor market." He stated that he would not expect any employer in the usual course of business seeking workers to perform the duties of employment in the usual and customary way to reasonably employ Claimant in his existing physical condition.

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<sup>5</sup> Claimant alleged that he injured his neck due to low back traction. It could not be determined from the deposition whether Dr. Zarr actually referred to cervical traction or whether the deposition again contained a typographical error.

### **Other exhibits**

Claimant's employer offered into evidence two deposition transcripts of Claimant's testimony. In the August 2003 deposition, Claimant testified that the motor he was removing from the machine when he injured his back at work in August 1998 weighed about 50 pounds. He told Dr. Blatt in February 1999, shortly after the accident that the motor weighed about 20 pounds.

Claimant testified at his 2003 deposition that he was holding the motor in his left hand when he removed the last bolt with his right hand and "I guess it was too much for it. And it threw me inside of the machine, and that created the very sharp pain in the lower back." Claimant did not explain how removing a bolt attached to a motor in a machine "threw" him into the machine. He did not tell any of his treating doctors or any other doctor that he had injured his back when he was thrown into a machine. He admitted at his deposition that he did not hear a pop in his back when the accident allegedly occurred.

Claimant testified at his deposition that when the accident occurred "It made me stay in that position for close to  $\frac{3}{4}$  an hour before I was able to move. It actually paralyzed me." Claimant testified that due to his back problems he could not sit, stand or walk for prolonged periods. He testified at his December 2007 deposition that in winter of 2007 he spent about two months in Mexico. At his 2003 deposition he stated that he had spent three months in Mexico during the winter of the preceding year. He stated that it took a day to get to his destination in Mexico and that the flight was 4  $\frac{1}{2}$  hours.

Claimant testified at his deposition that he was getting \$1,200 per month with annual cost of living adjustments in social security disability benefits and \$800 per month in long term disability through his employer.

The remaining exhibits were cumulative of the testimony and the other evidence.

### **Law**

After considering all the evidence, including the testimony at the hearing, the medical reports and records, Dr. Zarr's deposition testimony, Mr. Dreiling's vocational report, the other exhibits and after observing Claimant's appearance and demeanor, I find and believe that Claimant did not prove that he was rendered permanently and totally disabled due to the injury he sustained in the August 1998 accident at work. I find that he did prove that he sustained a permanent partial disability of 25 percent to his body as a whole due to the low back injury he sustained in the accident at work. At a rate of \$294.73 per week for 100 weeks his employer is liable for \$29,473. Claimant's employer is ordered to pay that amount to Claimant.

Claimant had the burden of proving all material elements of his claim. Fischer v. Arch Diocese of St. Louis – Cardinal Richter Inst., 703 SW 2<sup>nd</sup> 196 (Mo. App. E.D. 1990); overruled on other grounds by Hampton vs. Big Boy Steel Erections, 121 SW 3<sup>rd</sup> 220 (Mo. Banc 2003); Griggs v. A.B. Chance Company, 503 S.W. 2d 697 (Mo. App. W.D. 1973); Hall v. Country Kitchen Restaurant, 935 S.W. 2d 917 (Mo. App. S.D. 1997); overruled on other grounds by Hampton. Claimant met his burden of proof as set out above.

### **Credibility**

There were numerous conflicts in Claimant's testimony and the other evidence. At the hearing, Claimant alleged that his injury occurred when he was working with a 50 pound motor. He told his rating physicians that the motor weighed between 55 and 60 pounds. He told Dr. Blatt, however, his initial treating neurosurgeon that the motor weighed about 20 pounds. The history he provided to Dr.

Blatt was in closer in time to the alleged injury than the history he provided to his rating physicians or in his testimony at the hearing.

Claimant testified at the hearing that the accident occurred when he was “pulled” into the machine while trying to remove the motor from it and that he felt severe pain in his low back. He told Dr. Blatt that the accident occurred when he was on his knees, which meant that his back was braced and that when he removed the last screw the motor dropped into his hand and he twisted and he felt a sharp pain in his back. Thus, not only did he give different versions as to the weight of the motor, his descriptions as to how his alleged injury occurred were also inconsistent.

Claimant alleged that the accident at work resulted in severe back and later neck pain which rendered him permanently and totally disabled. He alleged that he sustained no disability as a result of a subsequent motor vehicle accident in which he was rear ended while his vehicle was stationary on the highway. His allegation that he was rendered permanently and totally disabled due to the minor incident at work and that he sustained no disability due to the motor vehicle accident was not credible.

Claimant did not have neck or back surgery until after the motor vehicle accident. The motor vehicle accident occurred two years after the alleged accident at work. Claimant was not wearing a seat belt in the motor vehicle accident. The motor vehicle accident involved such force that Claimant’s driver’s seat was broken and he was thrown back with such force that his head struck and broke the rear window of the vehicle. Afterwards, he was thrust forward with such force that his chest struck and bent the steering wheel of his vehicle. He admitted that his truck was totaled in the accident. He admitted to his doctors after the motor vehicle accident that his alleged neck pain and headaches increased in frequency and intensity after the motor vehicle accident.

Claimant alleged problems in communicating in English. He argued that he needed an interpreter at the hearing. The evidence did not support his allegations. Claimant moved to this county in 1985. He speaks English very well and he did not need an interpreter.

Claimant’s deposition was taken on two occasions. He did not use an interpreter at either deposition. He did not appear to have any problems with the English language at either deposition. He did not use an interpreter at any of his numerous medical examinations or evaluations. His own vocational expert noted that Claimant could speak English. At the hearing, there were instances where he answered questions without the aid of the interpreter. At one point, the hearing was stopped to inquire as to whether he needed an interpreter because he was answering questions on his own without any assistance by the interpreter.

Claimant admitted that he had taken courses in English as a second language. He admitted that he obtained his GED in this country. He admitted that his GED courses were taught in English. He admitted that he had taken trade and community college courses taught in English. He stated that he had a 4.0 grade point average in the courses he took to obtain his associate’s degree.

Claimant’s subjective complaints were not credible. He complained of severe excruciating pain going from his head down to his toes. He alleged that he could not sit, stand or walk without experiencing severe pain. He stated that the pain was constant.

Dr. Koprivica, Claimant’s rating physician, noted that at the first examination that Claimant had exaggerated pain behaviors. Dr. Blatt noted that “clearly” there was a voluntary component to Claimant’s alleged decreased range of motion of both the cervical and lumbar spine. Dr. Blatt noted that Claimant was searching for a problem and possibly disability. Dr. Blatt noted that Claimant’s straight leg raising test results were positive on the right side. The uncontroverted evidence showed that Claimant’s small disk herniation was on the left side. There was no explanation as to why Claimant’s straight leg

raising test results would be positive on the right side when his disk impairment was on the left side and should have affected his left lower extremity.

In addition, Claimant was deposed on two occasions during the thirteen years between the alleged accident at work in 1998 and his hearing in 2011. He testified at each deposition that he had recently traveled to Mexico to spend the winters in a warmer climate. He admitted that it took a whole day of travel time to get to his destination in Mexico. He admitted that the flight was 4 ½ hours. He did not explain how he was able to make such physically demanding trips on at least two occasions, when allegedly he could not sit, stand or walk without experiencing severe pain which was excruciating and constant. He was not asked whether he had made the trip on an annual basis or whether it was just a coincidence that he had made the trip at the time of each deposition.

Claimant alleged that his neck pain was caused by traction he received for his low back problems. Again, that allegation was not credible. Drs. Blatt and Zarr, two of Claimant's treating physicians, concluded that low back traction could not have caused a cervical spine herniated disk or Claimant's alleged neck pain. The evidence supported their opinions. The evidence showed that Claimant was not a credible witness.

### **Permanent total disability**

Total disability is defined in the statute as an inability to return to any employment and not merely . . . inability to return to the employment in which the employee was engaged in at the time of the accident. See § 287.020 (6) RSMO.2005; Fletcher v. Second Injury Fund, 922 S.W.2d 402 (Mo. App.1995); Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919 (Mo. App. 1982); Crums v. Sachs Electric, 768 S. W. 2d 131 (Mo. App. 1989).

Missouri Courts have made it clear that the test for permanent total disability is whether any employer in the usual course of business would reasonably be expected to employ the injured worker in his present physical condition. Boyles v. USA Rebar Placement, Inc., 25 S.W.3d 418 (Mo. App. W.D. 2000); Cooper v. Medical Center of Independence, 955 S.W.2d 570 (Mo. App. W.D. 570); Brookman v. Henry Transportation, 924, S.W.2d 286 (Mo. App. 1996).

Claimant clearly failed to prove that he was unable to return to any employment, or that no employer in the usual course of business would be reasonably expected to hire him due to any injury he allegedly sustained in the August 1998 accident at work. First, Claimant was only 41 years old when he sustained the alleged August 1998 accident at work. None of his treating doctors advised him to stop working. Each of his treating doctors who addressed the issue concluded that he could continue to work.

None of Claimant's objective test results prior to his August 2000 motor vehicle accident showed that he had any injuries or impairments that would have precluded him from working. Claimant's May 2000 MRI showed that he had a minor disk bulge at L5-S1. There was no credible evidence showing that he was rendered permanently and totally disabled due to a minor disk bulge. His June 2000 lumbar myelogram results were essentially normal. His two treating neurosurgeons who examined him prior to the August 2000 motor vehicle accident, Drs. Hylton and Blatt, concluded that he did not need any surgery. Dr. Blatt released Claimant to return to work in March 1999.

The most credible evidence supported Dr. Blatt's opinion that Claimant was not permanently and totally disabled due to any injury Claimant allegedly sustained in the alleged August 1998 accident at

work.<sup>6</sup> Dr. Fishman, a D.O., and a specialist in physical medicine and rehabilitation, also treated Claimant for the injuries Claimant allegedly sustained in the alleged August 1998 accident at work. Dr. Fishman concluded in May 1999 that Claimant could return to work. Drs. Zimmerman and Abrams wrote reports on Claimant's behalf in March 2000 and February 2001, respectively. Both concluded that Claimant was permanently and partially disabled. Dr. Zarr concluded that Claimant was permanently and partially disabled. No physician who rendered an opinion prior to the August 2000 motor vehicle accident concluded that Claimant was permanently and totally disabled.

Also, as noted above, Claimant had his back and neck surgeries after the August 2000 motor vehicle accident. He did not have back surgery until 2005, which was seven years after the alleged accident at work and after numerous physicians had recommended against any such surgery. No doctor had recommended back surgery prior to the August 2000 motor vehicle accident. There was no credible evidence that Claimant's need for back surgery was caused by the alleged August 1998 accident at work.

Similarly, Claimant did not have neck surgery until December 2002, which was after the August 2000 motor vehicle accident during which his neck was violently jerked backwards and then forward with such force that his head and struck and broke the rear window and his chest struck and bent the steering wheel of his vehicle. There was no credible evidence that any injury Claimant allegedly sustained in the alleged August 1998 accident at work rendered him permanently and totally disabled.

### **Conditions complained of by Claimant**

Claimant failed to prove that his alleged neck impairment was caused, aggravated or related in any way to his alleged August 1998 accident at work. He failed to prove that his work was a substantial factor in causing his alleged neck problems. Claimant admitted that he did not injure his neck in the alleged August 1998 accident at work. Instead, he claimed that his alleged neck impairment resulted from his low back traction in October 1998. He offered no evidence, however, showing how low back traction could cause an injury to his cervical spine. Drs. Koprivica, Zimmerman and Abrams who wrote reports on Claimant's behalf admitted that Claimant had preexisting neck problems. None explained how low back traction could have caused, aggravated or resulted in any of Claimant's cervical spine complaints. Their conclusory opinions were entitled to little weight.

Dr. Blatt, Claimant's treating neurosurgeon, indicated that Claimant did have a small to moderate herniated disk at C5-6 and C6-7. Dr. Blatt stated that lumbar traction could not cause a cervical spine herniated disk.

Dr. Blatt's opinion was credible. His opinion as a treating neurosurgeon who performs cervical spine surgery was more credible than those of Dr. Koprivica, a specialist in emergency medicine, Dr. Zimmerman, an internist, and Dr. Abrams, a neurologist. In addition, Dr. Zarr, a specialist in physical medicine and rehabilitation, explained in detail why lumbar traction could not cause a cervical spine injury. He explained that in lumbar traction a harness was placed around the hips and waist and that the

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<sup>6</sup> The vocational report of Mr. Dreiling was considered. Mr. Dreiling, however, admitted that he only relied on the restrictions rendered by Dr. Koprivica, a specialist in emergency medicine. He disregarded the restrictions rendered by Dr. Blatt, a neurosurgeon. He did not explain why he chose to rely on the restrictions of a specialist in emergency medicine to the exclusion of a neurosurgeon, a physician with much more expertise on issues involving the causes and effects of alleged back and neck impairments. Mr. Dreiling's opinions were also based on Claimant's alleged neck complaints being work-related. The most credible evidence failed to support that position. Mr. Dreiling did not evaluate Claimant until nine years after the alleged work accident. During that nine year period Claimant was involved in two highway motor vehicle collisions and he had developed chronic medical conditions such as diabetes and hypertension. Instead of giving due weight to those facts, Mr. Dreiling unduly concluded that as a 50 year old man at the time he evaluated him and with a high school education, Claimant could not work. The evidence did not support Mr. Dreiling's conclusory opinion.

harness was pulled by an electrical device. He explained that no pressure was placed on the head or neck in lumbar traction and that it could not have caused Claimant's cervical spine complaints.

Finally, Dr. Blatt commented that "I see no way that traction of any kind, but particularly on his back, could result in a cervical disk herniation." He indicated that "Clearly his complaints have shifted from his low back to his neck. My gut reaction is that he is searching for a problem and possibly disability. If I have to classify his neck complaints, I would say they are due to spondylosis and arthritis." Claimant, as noted above, failed to prove that his neck complaints were caused, aggravated or related in any way to his alleged August 1998 accident at work.

### **Permanent partial disability**

Claimant injured his low back in the August 1998 accident at work. At most, he sustained a mild herniated or bulging disk at L5-S1 as demonstrated by his May 2000 MRI. Results from his June 2000, myelogram, however, were normal. In August 2000, as noted above he was involved in the motor vehicle accident.

In March 2000, Claimant obtained a disability rating from Dr. Zimmerman, an internist. Dr. Zimmerman concluded that Claimant had sustained a permanent partial disability of 30 percent to the body as a whole due to Claimant's alleged low back injury in the August 1998 accident at work. The evidence did not support that rating.

Claimant also obtained three disability ratings after the August 2000 motor vehicle accident. Dr. Abrams, a neurologist, concluded in 2001 that Claimant had sustained a permanent partial disability of 25 percent to the body as a whole due to Claimant's alleged low back injury in the August 1998 accident at work. Dr. Abrams' report contained no history of Claimant's August 2000 motor vehicle accident.

Dr. Koprivica examined Claimant in 2002 and in 2007. In 2002, he stated that Claimant was not at maximum medical improvement, but acknowledged that he agreed with Dr. Abrams' disability rating. In 2007, Dr. Koprivica rendered an impairment rather than a disability rating. In 2007, Dr. Koprivica concluded that Claimant had sustained a 25 to 28 percent impairment to the body as a whole due to Claimant's alleged low back injury in the August 1998 accident at work.

Drs. Blatt, Zarr and Fishman rendered disability ratings for Claimant's employer. Dr. Blatt concluded prior to the August 2000 motor vehicle accident that Claimant had sustained a permanent partial disability of 2 percent to the body as a whole due to Claimant's alleged August 1998 low back injury. Dr. Zarr concluded prior to Claimant's August 2000 motor vehicle accident that Claimant had sustained a permanent partial impairment of 5 percent to the body as a whole due to the alleged low back injury. The evidence did not support either rating.

In 2008, ten years after the alleged accident at work and after Claimant's two motor vehicle accidents, Dr. Zarr changed his rating and concluded that Claimant had sustained a permanent partial impairment of 20 percent to the body as a whole due to Claimant's alleged low back injury in the August 1998 accident at work. Dr. Fishman, a specialist in physical medicine and rehabilitation, concluded prior to the August 2000 motor vehicle accident that Claimant had sustained a permanent partial impairment of 10 percent to the body as a whole due to Claimant's alleged low back injury at work.

Based on all the evidence, including the physicians' ratings as set out above, Claimant proved that he sustained a permanent partial disability of 25 percent to his body as a whole due to the alleged low back injury he sustained in the August 1998 accident at work. At a rate of \$294.73 per week, for 100

weeks, his employer is liable for \$29,473. Claimant's employer is ordered to pay that amount to Claimant.

### **Liability for additional temporary total disability benefits**

Claimant, as noted above, sustained at most a mild bulging or herniated disk at L5-S1 as a result of the alleged August 1998 accident at work. His two treating physicians, Drs. Blatt and Fishman, released him to return to work in the spring of 1999. Claimant was paid temporary disability benefits, but not on a continuous basis, and with the last payment covering a period ending on October 19, 2000.

Claimant offered no credible evidence showing that he was temporarily and totally disabled due to the alleged August 1998 accident at work for any period for which he did not receive temporary total disability benefits. Claimant sustained the motor vehicle accident in August 2000. He had back surgery in 2005, or seven years after the alleged accident at work. Two neurosurgeons, including his treating neurosurgeon had concluded prior to the August 2000 motor vehicle accident that Claimant did not need any surgery. Dr. Burton, an orthopedic surgeon, concluded in 2004 that Claimant did not need any more surgery. Claimant failed to prove that his alleged August 1998 accident at work caused his need for the 2005 back surgery or that his employer was liable for temporary total disability benefits as a result of the 2005 surgery.

Similarly, not only did Claimant fail to prove that his neck complaints were work related, he did not have neck surgery until December 2002, more than four years after his alleged injury at work and two years after his motor vehicle accident. Dr. Kaplan, a neurologist, noted in January 2001 that the 2000 motor vehicle accident had led to a "significant" increase in Claimant's alleged neck pain and a "new form of headache." Dr. Koprivica concluded that Claimant's neck complaints after the August 2000 motor vehicle accident were caused by it and not the alleged work-related accident. Claimant clearly failed to prove his employer's liability for any additional temporary total disability benefits based on his neck complaints.

### **Liability for additional medical benefits, past and future**

Claimant failed to prove his employer's liability for any additional medical benefits.<sup>7</sup> Claimant's employer paid \$38,450.10 in past medical aid. As noted above, prior to the August 2000 motor vehicle accident, Drs. Blatt and Hylton, neurosurgeons, had indicated that Claimant did not need surgery. The evidence supported their opinions. Claimant did not prove his employer's liability for any costs associated with his low back surgery in 2005 or for any other treatment for his low back he obtained on his own when the authorized treating specialists had released him from treatment and when the treatment he obtained did not cure nor provide any relief of his low back complaints.

Also, as noted above, Claimant failed to prove that his work was a substantial factor in causing his neck complaints. Therefore, he did not prove his employer's liability for any medical benefits related to treatment for his neck complaints. Moreover, Dr. Koprivica, Claimant's own expert, concluded that the treatment rendered for Claimant's neck complaints subsequent to the August 2000 motor vehicle accident was due to that accident and not the alleged August 1998 accident at work. The evidence

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<sup>7</sup> Claimant alleged that \$440 of the \$10,598.85 in unpaid bills was for treatment rendered by Dr. Zarr. The treatment comprising the \$440 was rendered from August through October 2000. Claimant failed to inform Dr. Zarr about his August 2000 motor vehicle accident. The bill submitted by Claimant did not show whether the treatment was for his back or neck complaints. Claimant did not prove his employer's liability for Dr. Zarr's or any of the other disputed medical bills. The other bills were for treatment rendered after the August 2000 motor vehicle accident.

supported Dr. Koprivica's opinion on that issue. Claimant failed to prove his employer's liability for any additional medical benefits.

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

Kenneth J. Cain  
*Administrative Law Judge*  
*Division of Workers' Compensation*