

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

Injury No.: 98-176407

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, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Kenneth J. Cain, issued September 13, 2011, is attached and incorporated by this reference.

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:

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Secretary

## AWARD

Employee: Francisco Gomez

Injury No. 98-176407

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? No.
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: January 1, 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 installing a roll of floor mats. The roll was in an upright position and beginning to fall as a co-worker walked past it. Employee grabbed the roll of floor mats to keep it from falling on the co-worker and in so doing felt pain in his back between his shoulder blades.
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: Upper back.
14. Nature and extent of any permanent disability: -0-

15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? None.
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/\$278.42.
20. Method wages computation: By agreement.

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses: None.  
-0- weeks for permanent partial disability  
-0- weeks of temporary total and temporary partial disability benefits

**TOTAL: None**

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 N/A percent of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: N/A

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

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

1. Accident;
2. Notice;
3. Nature and extent of any disability sustained by the employee; and
4. Liability of the employer for past and future medical aid.

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 by another truck on the highway. 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 of the 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 prove that he sustained an accident as defined by Missouri law and that he provided sufficient notice of the accident. He did not, however, prove that he sustained any permanent disability due to the accident or that his employer was liable for any additional medical benefits, past or future.

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.

### **Accident**

The applicable statute in effect in January 1998 defined accident as follows:

2. The word "accident" as used in this chapter shall unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen identifiable event or series of events happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury. An injury is compensable if

it clearly work related. An injury is clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability. An injury is not compensable merely because work was a triggering or precipitating factor.

3. (1) In this chapter the term "injury" is hereby defined to be an injury which has arisen out of and in the course of employment. The injury must be incidental to and not independent of the relation of employer and employee. Ordinary, gradual deterioration or progressive degeneration of the body caused by aging shall not be compensable, except where the deterioration or degeneration follows as an incident of employment.

(2) An injury shall be deemed to arise out of and in the course of the employment only if:

(a) It is reasonably apparent, upon consideration of all the circumstances, that the employment is a substantial factor in causing the injury; and

(b) It does be seen to have followed as a natural incident of the work; and

(c) It can be fairly traced to the employment as a proximate cause; and

(d) It does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal nonemployment life; . . .

§ 287.020 RSMo. 1994.

Claimant testified that he sustained an injury at work on January 1, 1998 while he was installing a roll of floor mats for his employer. He stated that the injury occurred when a roll of mats, which were "standing up" began to fall as a co-worker walked in front of it. He stated that he grabbed the roll of floor mats to prevent it from falling on his co-worker and that in so doing he felt pain in his back between his shoulder blades.

Claimant was credible in his testimony as to how the alleged injury occurred. No evidence was offered which contradicted his testimony. Based on the most credible evidence offered, Claimant proved that his work was a substantial factor in causing his alleged injuries sustained in the alleged January 1998 accident at work.

#### **Notice**

The applicable statute pertaining to notice provides as follows:

No proceedings for compensation for any accident under this chapter shall be maintained unless written notice of the time, place and nature of the injury, and the name and address of the person injured, has been given to the employer as soon as practicable after the happening thereof but not later than thirty days after the accident, unless the division or commission finds that there was good cause for failure to given the notice, or that the employer was not prejudiced by the failure to receive the notice. No defect or inaccuracy in the notice shall invalidate it unless the commission finds that the employer was in fact, misled and prejudiced thereby.

§ 287.420 RSMo. 1994.

Claimant testified that he immediately reported the injury to his employer. Again, Claimant was credible in his testimony that he reported the injury to his employer. Claimant's employer offered no contradictory evidence. Based on the most credible evidence presented, Claimant proved that he provided timely notice of the accident to his employer.

Claimant did not provide written notice of the accident and injury as set out in the statute. He proved, however, that his employer had actual notice of the alleged accident and injury on a timely basis and that his employer was not prejudiced by any defects in the notice. Clearly, his employer which had notice on the day of the injury was not prejudiced in its investigation as to whether and how the alleged injury occurred or in its right to direct the medical treatment. Claimant proved that his employer had sufficient notice of the accident.

#### **Permanent partial disability**

Claimant did not prove that he had sustained any permanent partial disability due to any injury he allegedly sustained in the January 1998 accident at work. Dr. Koprivica, Claimant's own rating physician, concluded in 2002 that Claimant's "December 1997 or January 1998" work-related accident had not resulted in any "significant" permanent injuries. No physician concluded that Claimant had sustained any permanent disability due to any injury Claimant allegedly sustained in the January 1998 accident at work. Based on the evidence presented, Claimant clearly failed to prove that he had sustained any such disability.

#### **Past and future medical aid**

Claimant offered no evidence showing that his employer was liable for any past or future medical aid due to any injury he allegedly sustained in the January 1998 accident at work. Claimant failed in his burden of proof.

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

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