

Issued by THE LABOR AND INDUSTRIAL RELATIONS  
COMMISSION

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

Injury No.: 02-069157

Employee: Robert Hampson  
Employer: ABC Atlas Van Lines  
Insurer: Missouri Movers Risk Management Trust  
Date of Accident: June 19, 2002  
Place and County of Accident: St. Louis City, 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, heard oral argument and considered the entire 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 September 25, 2007, with this supplemental opinion. The award and decision of Administrative Law Judge John Howard Percy, issued September 25, 2007, is attached hereto and incorporated by this reference.

We offer this supplemental opinion in order to allay any possible ambiguity as to benefits payable pursuant to the Workers' Compensation Act.

First, workers' compensation benefits payable from the employer to the employee are a lump sum amount of \$79,060.80, representing 60% permanent partial disability of the body as a whole referable to the lumbar spine (400 x 60% x \$329.42).

Second, due to the third party recovery effected by the employee, and pursuant to the provisions of section 287.150.3 RSMo, the balance of the third party recovery due the employer is \$61,978.72, which the employee is to pay to employer forthwith.

Accordingly, the award and decision of Administrative Law Judge John Howard Percy, issued September 25, 2007, is affirmed and 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 6th day of March 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

Attest:

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Secretary

## AWARD

Employee:	Robert Hampson	Injury No. 02-069157
Dependents:	N/A	Before the
Employer:	ABC Atlas Van Lines	<b>Division of Workers'</b>
		<b>Compensation</b>
		Department of Labor and Industrial
Additional Party:	Second Injury Fund (previously dismissed)	Relations of Missouri
		Jefferson City, Missouri
Insurer:	Self-insured	
Hearing Date:	June 21 and 22, 2007	Checked by: JHP

### FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
  - 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
  - Date of accident or onset of occupational disease: June 19, 2002
  - State location where accident occurred or occupational disease was contracted St. Louis City, 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
  - Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Self-insured
11. Describe work employee was doing and how accident occurred or occupational disease contracted:  
While helping a co-worker back up employer's truck, employee was struck by a pickup truck.
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, neck, right shoulder

- Nature and extent of any permanent disability: 60% permanent partial disability of the body referable to the low back

15. Compensation paid to-date for temporary disability: \$71,990.46

16. Value necessary medical aid paid to date by employer/insurer? \$132,501.20

Employee: Robert Hampson

Injury No. 02-069157

17. Value necessary medical aid not furnished by employer/insurer? None

- Employee's average weekly wages: \$522.03

19. Weekly compensation rate: \$348.02 TTD/PTD \$329.42 PPD

20. Method wages computation: Stipulation

#### COMPENSATION PAYABLE

21. Amount of compensation payable:

Subrogation reimbursement due Employer: <\$61,978.72>

240 weeks of permanent partial disability from Employer \$79,060.80

22. Second Injury Fund liability: No

Total: \$17,082.08

23. Future requirements awarded: See Award

Said payments to begin retroactive to June 19, 2006 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 the net amount awarded in favor of the following attorney for necessary legal services rendered to the claimant:

Stephen T. Hamby

### FINDINGS OF FACT and RULINGS OF LAW:

Employee: Robert Hampson

Injury No. 02-069157

Dependents: N/A

Employer: ABC Atlas Van Lines

Additional Party: Second Injury Fund (previously dismissed)

Insurer: Self-insured

Before the  
**Division of Workers'  
Compensation**

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

Checked by: JHP

### **PROCEDURAL HISTORY**

A temporary award finding that Robert Hampson, employee herein, was entitled to further medical care to cure and relieve him of the effects of a work-related injury on June 19, 2002 to his low back was issued in this case on April 18, 2005 by ALJ Cornelius T. Lane. The principal issue tried by Judge Lane was whether a proposed second back surgery was reasonable and necessary treatment for an employee, who had undergone a laminotomy at L4 and L5 on the left and microdiscectomy at L5-S1 on the left on October 29, 2002. Based on the medical opinion of Dr. John E. Krettek, a neurosurgeon, who had performed the first surgery, and the credible testimony of employee, Judge Lane determined that further surgery was necessary to help relieve and cure employee's injuries. Judge Lane further found that claimant was temporarily and totally disabled from September 13, 2004 to April 18, 2005 and ordered employer to pay future temporary total disability compensation until it was determined that employee was no longer temporarily disabled.

A hearing in this proceeding was held on June 21 and 22, 2007. Both parties are seeking a final award. Both parties submitted proposed awards on August 9, 2007.

I decline to make any findings with respect to the facts or issues determined by Judge Lane, except only those findings which are required for a determination of the issues in this award. This award assumes the correctness of the findings in the Temporary Award dated April 18, 2005.

### **STIPULATIONS**

The parties stipulated that on or about June 19, 2002:

1. the employer and employee were operating under and subject to the provisions of the Missouri Workers' Compensation Law;
2. the employer's liability was self-insured;
3. the employee's average weekly wage was \$522.03;
4. the rate of compensation for temporary total disability was \$348.02 and the rate of compensation for permanent partial disability was \$329.42; and
5. the employee sustained an injury as a result of an accident arising out of and in the course of employee's employment occurring in St. Louis City, Missouri.

The parties further stipulated that:

1. the employer had notice of the injury and a claim for compensation was filed within the time prescribed by law;
2. compensation has been paid in the amount of \$71,990.46 representing 207-4/7 weeks of benefits covering the period from June 22, 2002 to June 19, 2006;
3. employer has paid \$132,501.20 in medical expenses; and
4. employee reached maximum medical improvement and a state of permanency with respect to the work-related injuries on June 19, 2006.

### **ISSUES**

The issues to be resolved in this proceeding are:

1. whether the employee should be provided with any future medical treatment for the work-related injuries June 19, 2002;
2. the nature and extent of any permanent disability sustained by the employee as a result of the work-related injuries of June 19, 2002; and
3. the extent of any subrogation credit due the employer pursuant to Section 287.150.3 Mo. Rev. Stat. (2000).

### **FUTURE MEDICAL CARE**

Employee is requesting an award of future medical care for his low back, neck and right shoulder.

Section 287.140 Mo. Rev. Stat. (2000) 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." Future medical care can be awarded even though claimant has reached maximum medical improvement. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 278 (Mo. App. 1996). It can be awarded even where permanent partial disability is determined. 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. However, evidence which shows only a mere possibility of the need for future treatment will not support an award. It is sufficient if claimant shows by reasonable probability that he or she will need future medical treatment. Dean v. St. Luke's Hospital, 936 S.W.2d 601, 603 (Mo. App. 1997); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996); Sifferman v. Sears, Roebuck and Co., 906 S.W.2d 823, 828 (Mo. App. 1995). "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.

Where the sole medical expert believes that it is "very likely" that the claimant will need future medical treatment, but is unable to say whether it is more likely than not that the claimant will need such treatment, that opinion, when combined with credible testimony from the claimant and the medical records in evidence, can be sufficient to support an award which leaves the future treatment issue open. This is particularly true where the medical expert states that the need for treatment will depend largely on the claimant's pain level in the future and how well the claimant tolerates that pain. Dean, supra at 604-06.

The amount of the award for future medical expenses may be indefinite. Section 287.140.1 does not require that the medical evidence identify particular procedures or treatments to be performed or administered. Dean, supra at 604; 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, 393-394 (Mo. App. 1983). The award may extend for the duration of an employee's life. P.M. v. Metromedia Steakhouses Co., Inc., 931 S.W.2d 846, 849 (Mo. App. 1996). The award may require the employer to provide future medical treatment which the claimant may require to relieve the effects of an injury or occupational disease. Polavarapu v. General Motors Corporation, 897 S.W.2d 63 (Mo. App. 1995). It is not necessary that such treatment has been prescribed or recommended as of the date of the hearing. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. 1996). Where future medical care and treatment is awarded, such care and treatment "must flow from the accident before the employer is to be held responsible." Modlin v. Sun Mark, Inc., 699 S.W.2d 5, 7 (Mo. App. 1985); Talley v. Runny Meade Estates, Ltd. at 694. 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). However, where preexisting conditions also require future medical care, the medical experts must testify to a reasonable medical certainty as to what treatment is required for the injuries attributable to the last accident. O'Donnell v. Guarantee Elec. Co., 690 S.W.2d 190, 191 (Mo. App. 1985).

### **Findings of Fact**

Based on the evidence adduced at the hearing, some of which comes from the claimant's testimony and some

of which is based on the medical records, I make the following findings of fact. Based on my observations of claimant's demeanor at the hearing, I find that he is only partially credible.

### Description of Accident

Robert Hampson, employee herein, began working for ABC Atlas Van Lines approximately three years prior to the accident date. He worked as a loader, loading and unloading trucks and packing houses for ABC Atlas Van Lines. (Claimant's Testimony)

On June 19, 2002 while standing in a street and helping to direct a co-worker, who was backing up employer's moving truck, employee was struck on his left side by a pickup truck and knocked to the ground. He landed on his right side. (Claimant's Testimony)

Though experiencing pain in his right shoulder and back, he initially declined medical treatment and drove himself home. As Mr. Hampson's symptoms worsened while driving home, his wife later drove him to St. Joseph's Health Center emergency room in St. Charles, Missouri. (Claimant's Testimony)

### Medical Treatment

On the evening of June 19, 2002, employee was examined at St. Joseph's Health Center. He complained of right-sided neck, shoulder, and hip pain, and numbness and tingling into the right leg. He was diagnosed with a contusion of the right hip and shoulder and a neck strain. He received an injection of Toradol and was prescribed Vioxx and Flexeril and advised to follow up with "work comp" in 2 to 3 days. (Claimant's Exhibit U, Pages 5-7)

Dr. Timothy Soncasie at Unity Corporate Health examined claimant on June 21. Mr. Hampson reported right shoulder, hip and lower back pain and headaches. X-rays taken of the right shoulder and low back were negative for fracture. Dr. Soncasie diagnosed claimant with a right shoulder/neck strain and a lumbar strain. Employee was told to continue taking Vioxx and Flexeril and was prescribed Vicodin and advised to start gentle stretching. (Claimant's Exhibit W, Pages 65-68) Dr. Soncasie reexamined claimant on June 25. He reported right shoulder, hip, and lower back pain and tingling in the fingers of the right hand. Dr. Soncasie diagnosed claimant with a right shoulder strain and a lumbar strain and told him to take Naprosyn when he finished the Vioxx. (Claimant's Exhibit W, Pages 70-72) He prescribed physical therapy for claimant's low back and right shoulder strains. (Claimant's Exhibit X, Page 199)

Mr. Hampson was evaluated by a therapist at St. Charles Sports and Physical Therapy on July 3. He reported pain in his right upper trapezius, shoulder, hip and low back. Claimant attended 6 sessions of physical therapy through July 15. He progressed slowly with cervical range of motion and continued to have mild to moderate pain with activities of daily living and shoulder retraction. (Claimant's Exhibit X, Pages 190-192 & 200-203) Dr. Soncasie reexamined employee on July 16. Mr. Hampson reported right shoulder pain and right hip pain and popping. Dr. Soncasie referred employee to an orthopedic surgeon. (Claimant's Exhibit W, Pages 73-75)

Dr. James E. Walentynowicz at Chesterfield Orthopedics examined claimant on June 24, 2002. Mr. Hampson complained of lower back and right hip pain. On examination employee had some spasm in the right trapezius and tenderness in the low back, soreness in the region of his neck and right shoulder, and tenderness without spasm in the lower lumbar spine region. (Claimant's Exhibit FF, Page 3) Dr. Walentynowicz diagnosed employee with cervical, right trapezius, and lumbar strains and prescribed additional physical therapy for claimant's back, neck and right shoulder. (Claimant's Exhibit X, Page 198)

Mr. Hampson resumed physical therapy at St. Charles Sports and Physical Therapy on July 31. He attended 2 sessions of physical therapy through August 6, 2002. (Claimant's Exhibit X, Pages 193-94 & 203-04) Dr. Walentynowicz reexamined claimant on August 6, 2002. Employee reported that his neck and back pain was improving. He walked stiffly. Dr. Walentynowicz prescribed additional physical therapy. Claimant had apparently undergone a whole body scan which Dr. Walentynowicz felt was normal. (Claimant's Exhibit FF, Page 573)

Mr. Hampson attended 10 additional sessions physical therapy through August 28. The therapist noted that

employee had achieved pain free full cervical range of motion with only infrequent episodes of right shoulder pain during movement and overhead activity. However, he continued to experience increasing warmth and numbness into both hip joints and the lumbar spine. (Claimant's Exhibit X, Pages 195-96 & 204-210)

Dr. Walentynowicz examined claimant again on August 28, 2002. Employee complained primarily of back pain with radiation into both legs with occasional numbness. He had some soreness in his right shoulder. His cervical range of motion was normal. He ordered an MRI of the lumbar spine. (Claimant's Exhibit FF, Pages 3-4) It was performed on September 9, 2002.

Mr. Hampson attended 3 additional physical therapy sessions through September 10, 2002. The therapist noted that employee had achieved pain free full cervical range of motion with only infrequent episodes of right shoulder pain movement and overhead activity. He had full range of motion of the neck and right shoulder in all planes. However employee's bilateral hip and low back pain had increased during functional movement patterns during the final two sessions and he continued to experience increasing warmth and numbness into both legs and the lumbar spine with prolonged walking on the treadmill. (Claimant's Exhibit X, Pages 197 & 210-11)

On September 11, Dr. Walentynowicz reexamined claimant who reported back pain with radiation into the buttocks and posterior thighs. Dr. Walentynowicz reviewed the MRI with Mr. Hampson and advised him that it showed a left-sided disk protrusion. He recommended referral to a neurosurgeon. (Claimant's Exhibit FF, Page 4)

On September 15, 2002 claimant sought treatment from the St. Joseph Health Center emergency room for low back pain. Claimant told the physician that he had two herniated disks and could not take the pain; he requested something until his doctor's appointment. He was given an injection of Dilaudid and Phenergan and prescribed Vicodin and Lortab, and Soma. (Claimant's Exhibit U, Pages 16-21)

Dr. John E. Krettek, a neurosurgeon, examined claimant on September 16, 2002. Mr. Hampson reported low back and bilateral hip pain posteriorly and numbness over the anterior thighs. Dr. Krettek reviewed the MRI and opined that it showed a central and left herniation at L4-5 and a central herniation at L5-S1. He diagnosed claimant with neck pain, depression of the right biceps with complaint of right shoulder pain, low back pain and bilateral leg numbness. He prescribed a Medrol DosePak followed by Naprosyn and physical therapy. (Claimant's Exhibit C, Pages 1 & 5) Dr. Krettek ordered an MRI of claimant's cervical spine which was performed on September 18. The radiologist reported that it showed a central disc protrusion at C4-5, a mild central disc protrusion at C5-6, and mild degenerative changes. (Claimant's Exhibit C, Page 32)

After claimant reported increasing back symptom, Dr. Krettek arranged for claimant to received an L4-5 epidural steroid injection on October 8. On October 25 claimant reported that his back pain had become so severe and incapacitating that he was not able to sit or stand. He was more comfortable in bed. He also reported tingling in both legs. Dr. Krettek recommended a two-level lumbar discectomy. (Claimant's Exhibit C, Pages 1, 5 & 6)

On October 29, 2002 Dr. Krettek performed a laminotomy of S1 and noted a large broad bulging disk at L5-S1. He removed most of the disk material. After performing an inferior laminotomy at L4 on the left and a superior laminotomy at L5 on the left, he noted that the L5 nerve root had a very high take-off. He removed the inferomedial facet and decompressed the nerve root in the lateral recess. He noted that the disk was bucked back, but not herniated. No disk material was removed at L4-5. (Claimant's Exhibit C, Pages 9-10)

Dr. Krettek reexamined claimant on December 9, 2002. Claimant reported that his back pain was not as severe, that his greatest pain was over the left buttock, that the right leg symptoms had resolved, and that he had occasional left leg paresthesia. He also reported that two weeks earlier he experienced an episode of not being able to move his left arm or leg. Dr. Krettek opined that it was related to the brain and recommended that he see his private physician. Dr. Krettek did not record any complaints regarding the right shoulder or neck. He switched employee's pain medication from Vicodin to Robaxin. (Claimant's Exhibit C, Pages 11-12)

Dr. Krettek reexamined claimant on January 20, 2003. Claimant reported that he had minimal back soreness, but continued left hip pain. Dr. Krettek did not record any complaints regarding the right shoulder or neck. Sensory

examination revealed some decrease in the L5 and S1 dermatomes. Claimant reported that he was not taking pain medication. He also told Dr. Krettek that he had suffered a small stroke, was hospitalized at Barnes Hospital in late December, was found to have bilateral carotid stenosis and underwent a right carotid endarterectomy. (Claimant's Exhibit C, Pages 13-14) On March 6, 2003 Dr. Krettek noted that claimant's physical therapy was being delayed because of the stroke. (Claimant's Exhibit C, Pages 15-16) On March 20, 2003 Dr. Krettek noted that claimant's physical therapy was being delayed because of his carotid artery disease. Claimant reported no back pain and occasional left hip aching. He was taking an occasional Vicodin. Dr. Krettek did not record any complaints regarding the right shoulder or neck. Claimant underwent x-rays of the hip and pelvis, which were normal, an MRI of the left hip, which was normal, and a bone scan, which showed degenerative changes in his feet. (Claimant's Exhibit C, Pages 17-18 & 33-36)

Dr. Krettek reexamined claimant on April 21, 2003. Claimant reported left hip pain but no back pain. He told Dr. Krettek that he had undergone a left carotid endarterectomy and suffered a stroke postoperatively. Physical therapy was again delayed to allow his stroke residual to clear. Dr. Krettek recommended orthopedic evaluation of the hip. On May 19, 2003 Dr. Krettek prescribed physical therapy. Dr. Krettek did not record any complaints regarding the right shoulder or neck during either examination. (Claimant's Exhibit C, Pages 20-21)

Claimant began physical therapy on May 24, 2003 at Team-Work Rehabilitation, Inc. He attended 13 sessions through June 18. Exercises included the use of both upper extremities. The therapist documented complaints of low back and left hip pain, but did not record any complaints regarding the right shoulder or neck. Exercises included the use of both upper extremities. (Claimant's Exhibit DD, Pages 213-18 & 232-33)

On June 19, 2003 Dr. Krettek indicated that claimant told him and the physical therapy records documented that he had suffered an increase in low back pain on June 18, while doing a stand-up lift. Dr. Krettek discontinued that exercise, but continued physical therapy for another month. He had a "very frank discussion with [employee] about his ability to return to a labor occupation." On July 17 Dr. Krettek noted that claimant continued to have left hip pain. He did not record any complaints regarding the right shoulder or neck during either examination. He prescribed a sacroiliac stabilization brace and work hardening activities. (Claimant's Exhibit C, Pages 22-23)

Claimant attended 19 additional sessions through August 1. Exercises included the use of both upper extremities. The therapist documented complaints of low back and left hip pain, but did not record any complaints regarding the right shoulder or neck. (Claimant's Exhibit DD, Pages 218-224 & 235-37)

On August 4, 2003 claimant reported that he experienced more back pain two weeks earlier after walking up a steep hill and that he continued to have significant pain in his left hip. Dr. Krettek again recommended an orthopedic evaluation. He prescribed Ultracet for pain and additional physical therapy. He also recommended a return to light duty. On August 29 Mr. Hampson complained that lifting and weightbearing activities increased his left hip pain. Dr. Krettek noted hyperreflexia and sensory dysfunction on the left side from the small stroke. He did not record any complaints regarding the right shoulder or neck during either examination. Dr. Krettek opined that claimant had reached maximum medical improvement from the lumbar disk surgery and released him to return to work "with permanent restrictions of no lifting greater than 50 pounds, no lifting from below waist level, and no repetitive bending, lifting, or twisting." (Claimant's Exhibit C, Pages 24-26)

Claimant attended 14 additional sessions through September 10. Exercises included the use of both upper extremities. The therapist documented complaints of low back and left hip pain, but did not record any complaints regarding the right shoulder or neck. (Claimant's Exhibit DD, Pages 218-230 & 239)

Dr. Joseph R. Ritchie, an orthopedic surgeon, examined Mr. Hampson on September 12, 2003 for complaints of left hip pain which radiated down his left leg to his foot and ankle. Dr. Ritchie concluded that there was no evidence on diagnostic testing or physical examination of any problem coming from the claimant's hip or leg. He opined that claimant's pain was coming from his back and might be due to continued compression or to residual from his pre-surgery radiculopathy. (Claimant's Exhibit Y, Pages 28-29)

On December 12, 2003 claimant sought treatment from the St. Joseph's Health Center emergency room for

complaints of stabbing pain in the center of his low back and radiculopathy into the left leg. He was out of Vicodin. He was diagnosed with chronic back pain with left radiculopathy, given an injection of Dilaudid and Vistaril and prescribed Vicodin. (Claimant's Exhibit U, Pages 25-31)

Due to ongoing pain complaints claimant returned to Dr. Krettek on February 2, 2004. Mr. Hampson told Dr. Krettek that he had developed pain extending over the entire leg to the heel and sole of the foot and into the toes. He had no right leg pain. Dr. Krettek did not record any complaints regarding the right shoulder or neck. Sensory examination showed mild decrease to touch and pin over L4 and L5 and marked decrease over the S1 dermatome in the foot. He ordered lumbar x-rays, a lumbar MRI and a myelogram which were performed on February 3, 2004. The radiologist reported that the MRI showed post-operative changes on the left at L5-S1 consistent with scar tissue and a central disk protrusion to the right and posterior disk bulging and central protrusion to the left at L4-5. X-rays showed degenerative disk disease and degenerative disk disease at L4-5 and L5-S1. The CT post-myelogram showed some disk protrusion lateralizing to the left at L5-S1 and degenerative disk disease at L4-5 with a diffusely bulging disk and osteophyte formation lateralizing to the left. (Claimant's Exhibit C, Pages 27-29 & 37-43)

On February 20, 2004 Dr. Krettek reviewed the various diagnostic studies and opined that claimant had an anterior extradural defect, a bulge suggesting a disk herniation at L4-5 and a prominent defect of the left S1 nerve root probably related to the osteophyte. He opined that S1 nerve root impingement could explain employee's symptoms. Though he recommended another surgical decompression, he also suggested a second opinion. (Claimant's Exhibit C, Pages 30-31)

On March 15, 2004 claimant sought treatment from the St. Joseph's Health Center emergency room for complaints of sharp and burning pain in the center of his low back. He was diagnosed with chronic back pain and acute myofascial strain, given an injection of Dilaudid and Vistaril and prescribed Flexeril. (Claimant's Exhibit U, Pages 35-40)

Employer requested Dr. Michael C. Chabot, an orthopedic spine surgeon, to evaluate Mr. Hampson. He did so on March 17, 2004. Employee complained of back and left hip pain radiating into the left foot. He indicated that he was taking 3 to 4 Vicodin a day. He did not complain any pain in his neck or right shoulder. Dr. Chabot reviewed the medical records and the recent diagnostic studies. Dr. Chabot impression was lumbar radiculopathy and disc degeneration. Dr. Chabot's recommended a lower extremity EMG and nerve conduction study and selective nerve root injections. He noted that he found no clear evidence of neural compression to account for his complaints. He stated the employee could return to limited work duties, with no lifting of more than 30 or 40 pounds. (Claimant's Exhibit FF, Pages 2-8)

On April 21, 2004, Dr. Patricia Hurford performed an EMG and nerve conduction study. She concluded that the studies showed chronic left L5-S1 radiculopathy primarily in the L5 nerve root distributions with no evidence of ongoing denervation in any of the L5-S1 supplied muscles. (Claimant's Exhibit FF, Pages 9-16)

On April 23, Dr. Chabot reviewed Dr. Hurford's studies and recommended selective nerve root injections. (Claimant's Exhibit FF, Page 17) Claimant underwent L5 and S1 nerve root injections on May 27, 2004. (Claimant's Exhibit FF, Page 577)

Dr. Chabot reexamined Mr. Hampson on May 28, 2005. Claimant told him that he had not obtained any significant improvement in his symptoms with the selective nerve root injections. Dr. Chabot opined that claimant had chronic post-laminectomy symptoms which were unlikely to improve with further surgery. He recommended referral to a pain management specialist. (Claimant's Exhibit FF, Page 19)

Dr. John D. Graham, a pain management specialist, examined claimant on July 14, 2004. His assessment was chronic sciatica. He noted that a self-administered psychologic test was given to the patient, the results of which showed a mild elevation in the somatization scale into the clinical range. He prescribed Naprosyn, Neurontin, and Ultram for pain and Elavil as a sleep aid and discontinued the Vicodin. (Claimant's Exhibit FF, Pages 23-25) On August 11 Claimant reported that his pain had not increased, but he still had trouble sleeping at night. He was advised not to take naps during the day. Dr. Graham discontinued the Elavil and prescribed Trazadone. (Claimant's Exhibit FF,

Dr. Graham reexamined claimant on September 1, 2004. He reported that claimant had gone to the emergency room on August 25, 2004 and received an injection of Dilaudid and Vistaril without first contacting him. Dr. Graham indicated that claimant was not taking his medications as directed by him and had been adjusting them on his own. Dr. Graham decided to discontinue treating him. (Claimant's Exhibit FF, Pages 27-28)

Dr. Chabot reexamined claimant on September 30, 2004. Dr. Chabot's impression was chronic back pain with radiculitis and failed back syndrome. He recommended that Dr. Schmidt, a pain management specialist, examine employee. He returned claimant to limited work duties and no lifting of more than 35 to 40 pounds. (Claimant's Exhibit FF, Pages 29-30)

On April 18, 2005 ALJ Cornelius T. Lane issued a temporary award in which he ordered employer to retain a neurosurgeon with Neurosurgical Associates to perform the surgery recommended by Dr. Krettek. (Claimant's Exhibit J)

Employer retained Dr. Michael Boland, a neurosurgeon, to treat claimant's lumbar spine. Dr. Boland examined Mr. Hampson on July 11, 2005. Employee reported that he was experiencing a burning, sharp pain in the center of his back across his hips and down the left leg. He reported that it occurred daily and lasted all day and night. He indicated that it worsened with standing, walking, and sitting, and was relieved with lying down on his right side with a pillow between his knees. He did not complain any pain in his neck or right shoulder. Dr. Boland's impression was back and left buttock pain related to a lumbar radicular syndrome. On reviewing his diagnostic studies, Dr. Boland ordered an MRI. (Claimant's Exhibit Y, Pages 47-51 & 53)

Claimant underwent an MRI of the lumbar spine on August 1, 2005. It showed prominent diffuse degenerative change of the L5-S1 disk with no definite evidence of recurrent disk herniation and prominent diffuse degenerative change of the L4-5 disk with evidence of slight focal lateralization to the left. (Claimant's Exhibit Y, Pages 55-58) Dr. Boland reviewed the MRI films on August 8 and concluded that there were degenerative changes at L5-S1, but no recurrent disk herniation, and that there was a left-sided disk herniation at L4-5 and severe left L5-S1 neuroforaminal stenosis. Dr. Boland recommended a revision decompressive laminectomy at L4-5 and L5-S1 with a facetectomy on the left at L5-S1, accompanied by a posterior spinal fusion at L4-5 through S1. When he discussed the films with Mr. Hampson he described degenerative disk disease at L4-5 and L5-S1 and recurrent disk herniations at both levels with osteophytic narrowing of the lateral recess on the left, all of which was causing his back and left leg pain. Claimant opted for surgery. (Claimant's Exhibit Y, Pages 59-61)

On September 9, 2005, Dr. Boland performed surgery on claimant's back. During the surgery he noted that there was abundant scar tissue, mostly at L5-S1, and a large bone spur coming off of the facet joint at L5-S1 compounding the neuroforaminal stenosis. He noted that the ligamentum flavum was calcified and indenting the margin of the S1 nerve root. This was resected. He incised the disk spaces at L4-5 and L5-S1, removing all of the nuclear material. He then completed the bilateral interbody fusion with grafts and pedicle screw instrumentation from L4-5 and L5-S1. (Claimant's Exhibit Y, Pages 65-67)

Claimant followed up with Dr. Boland on October 17, 2005. He was noted to be doing well. On December 6, 2005, he followed up again with Dr. Boland and reported that he was able to stand upright much longer periods of time. He had been walking about half a block before the onset of pain in his left hip. However, he reported increased pain and morning stiffness. Dr. Boland prescribed Norflex and Vicodin. (Claimant's Exhibit Y, Pages 73 & 75)

Dr. Boland reexamined claimant on January 18, 2006. This time employee denied any lower extremity pain. He noted some intermittent stiffness in the back, with occasional pain in the left hip, especially if he tried to walk more than two blocks. At this time Dr. Boland referred him for physical therapy. (Claimant's Exhibit Y, Page 76 & 78)

Mr. Hampson was evaluated at Team-Work Rehabilitation, Inc. on January 23, 2006. The therapist noted that claimant rated his pain as 2 to 3 out of 10 and up to 7 to 8 out of 10 with activity. He reported morning stiffness and a burning pain in his hip. The pre-surgery numbness and tingling in his legs had improved. (Claimant's Exhibit Y, Pages

Dr. Boland reexamined claimant on February 23, 2006. Claimant complained of discomfort in low back and pain in his left hip extending down to the foot with extended walking. He was taking Norflex twice a day and Vicodin 0 to 3 per day. Dr. Boland noted that claimant walked well on his heels and toes; his gait was nonantalgic. There was no tenderness in the paralumbar musculature. He prescribed additional physical therapy. (Employer's Exhibit 2, depo ex 2)

Claimant returned to Dr. Boland on April 3, 2006. Dr. Boland reported that claimant had completed 30 physical therapy sessions. He noted that employee's range of motion had improved. Employee was still having pain in the low back, especially in the left buttock; the pain extended into the leg if he walked too long or stood too long. Employee reported taking 5 to 6 Vicodin per week. On examination Dr. Boland noted some tightness in the paraspinal muscles on the left. Heel to toe walking was normal. Straight leg raising showed some hamstring tightness at 45 degrees with some pain in the left buttock. Dr. Boland ordered a CT scan to check the integrity of the fusion. (Employer's Exhibit 2, depo ex 2)

On April 4, 2006, Dr. Boland noted that while claimant was not at maximum medical improvement, he could return to work with lifting restrictions of 20 pounds maximum and no highly repetitive bending, stooping or twisting. (Employer's Exhibit 2, depo ex 2)

Dr. Boland reported that the CT scan performed on claimant's lumbar spine on April 5, 2006 showed evidence of bridging healing bone between the L4-5 and L5-S1 vertebral bodies. He opined that this was consistent with the development of fusion at both levels. He prescribed work hardening for the next 8 weeks. (Employer's Exhibit 2, depo ex 2)

On June 15, 2006, Dr. Boland reported that claimant had undergone a functional capacity evaluation on June 8. Team-work Rehabilitation, Inc. had scheduled two days for the evaluation. Although claimant completed the first day of testing, he was unable to complete any testing on the second day because of pain complaints. Based on the results of the functional capacity evaluation, Dr. Boland concluded that claimant had reached maximum medical improvement. He gave employee permanent restrictions of 20 pounds lifting frequently, 10 pounds lifting occasionally with no repetitive bending and no overhead work. (Employer's Exhibit 2, depo ex 2)

#### Medical Opinions

Dr. Jerome F. Levy testified by deposition on behalf of employee on February 12, 2007. Dr. Levy examined employee on September 14, 2006. He took a history and reviewed some of the medical records of employee. (Claimant's Exhibit S, Pages 7-16) On physical examination of employee, Dr. Levy noted a slight discomfort in the neck and a markedly limited range of motion in his back, which included a 44% loss of flexion, 66% loss of extension, 25% loss of lateral bending, and 33% loss of rotation. Dr. Levy further found muscle spasms in the lower back. (Claimant's Exhibit S, Pages 16-17) Dr. Levy further testified that employee had almost no motion of the right shoulder and could only move it 50% even when Dr. Levy was moving it for employee. (Claimant's Exhibit S, Pages 17-18) Dr. Levy also found moderate discomfort on motion of the left hip. (Claimant's Exhibit S, Page 18)

Dr. Levy opined that the loss of motion in the back and shoulder were partly objective and partly subjective findings. He further testified that the muscle spasm and the operations endured by employee were obviously objective. (Claimant's Exhibit S, Pages 18-19). Dr. Levy diagnosed employee with: 1) status post-laminectomies L4-5 and L5-S1, 2) status post-discectomy L5-S1, 3) status post additional surgery i.e. fusions L4-S1 with plates and screws, 4) chronic lumbosacral strain, 5) partial frozen right shoulder, 6) chronic strain of the right shoulder, 7) chronic cervical strain. (Claimant's Exhibit S, Pages 19-20) He further opined that these conditions were caused by the June 19, 2002 accident.

Dr. Levy opined that claimant would benefit from pain management for the ongoing pain symptoms that he is having in his back. Dr. Levy also opined that from the records which he reviewed claimant had not had much treatment for the right shoulder and that he had a terrible right shoulder and needed immediate care of the right

shoulder. (Claimant's Exhibit S, Pages 22-23)

Dr. Boland testified by deposition on behalf of employer on January 24, 2007. He opined that when he last saw claimant in May of 2006, Mr. Hampson needed the pain medications that he was taking at that time. He added that once he discharges a patient, he refers the patient back to the patient's personal physician for continuing medications. He recommended that claimant continue taking pain medications only if they are helping him. If his pain level is the same with and without medication, he should not continue taking the medications. (Employer's Exhibit 2, Pages 17-18)

#### Claimant's Testimony

Claimant testified that continues to experience significant back pain and a Dr. Vernon, his personal physician, is currently prescribing Vicodin for his back pain. He is requesting future medical treatment and pain medication and management of his back and neck.

#### Additional Finding

As both Drs. Levy and Boland agree that claimant should continue taking pain medications if they are helping to reduce his back pain, I find that it is reasonable and necessary for employee to continue to take pain medication to relieve the effects of the work-related back injury. Accordingly, it is hereby ordered that Employer pay for all pain medications and anti-inflammatories prescribed for claimant's back pain by his personal physician or by any other physician who may in the future treat claimant's back pain.

Turning to claimant's right shoulder, my detailed findings with respect to claimant's medical treatment show that claimant was diagnosed with a right shoulder sprain and was treated for that sprain by Dr. Timothy Soncasie and Dr. James E. Walentynowicz and received physical therapy for his shoulder sprain at St. Charles Sports and Physical Therapy through September 10, 2002. The therapist noted that employee had achieved pain free full cervical range of motion with only infrequent episodes of right shoulder pain movement and overhead activity. He had full range of motion of the neck and right shoulder in all planes. The only subsequent complaint pertaining to the right shoulder was to Dr. Krettek on September 16, 2002. He prescribed a Medrol DosePak followed by Naprosyn. Claimant did not subsequently complain about right shoulder pain following his first back surgery, the post-surgery physical therapy, which required him to use both upper extremities, or during his many treatment visits to Dr. Chabot or Dr. Boland.

Dr. Levy diagnosed claimant with a partially frozen shoulder on September 14, 2006. On June 19, 2002 and for three months ensuing claimant was diagnosed and treated for a right shoulder strain which appears to have resolved on September 16, 2002. While employee may now have a partially frozen right shoulder, Dr. Levy failed to explain how that diagnosis could relate back to an injury which occurred more than 4 years earlier and which appears to have resolved four years earlier following significant treatment. He also failed to explain how claimant's partially frozen shoulder could relate back to an injury which occurred more than 4 years earlier when employee's failed to complain about any right shoulder symptoms during any of his numerous medical visits and physical therapy sessions after September 16, 2002. Accordingly, I find the opinion of Dr. Levy concerning the causal connection between claimant's partially frozen right shoulder and the accident of June 19, 2002 is not credible. Accordingly, the request for an award of future medical treatment for the right shoulder is denied.

#### ALLEGED PERMANENT TOTAL DISABILITY

Employee claims that he is permanently and totally disabled as a result of the work-related injuries of June 19, 2002.

An employer is liable for permanent total disability compensation under Section 287.200 Mo. Rev. Stat. (2000) only where there is evidence in the record that the primary accident alone caused employee to be permanently and totally disabled. Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 276 (Mo. App. 1996); Feldman v. Sterling Properties, 910 S.W.2d 808, 810 (Mo. App. 1995); Moorehead v. Lismark Distributing Co., 884 S.W.2d 416, 419 (Mo. App. 1994); Kern v. General Installation, 740 S.W.2d 691, 692 (Mo. App. 1987); accord, Terrell v. Board of Education, City of St. Louis, 871 S.W.2d 20, 23 (Mo. App. 1993); Roby v. Tarlton Corp., 728 S.W.2d 586, 589 (Mo. App. 1987).

Section 287.020.7 Mo. Rev. Stat. (2000) defines total disability 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." The words "inability to return to any employment" mean "that the employee is unable 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 words "any employment" mean "any reasonable or normal employment or occupation; it is not necessary that the employee be completely inactive or inert in order to meet this statutory definition." Id. at 922; Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990); Crum v. Sachs Elec., 769 S.W.2d 131, 133 (Mo. App. 1989). "[W]orking very limited hours at rudimentary tasks [is not] reasonable or normal employment." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995). The primary determination with respect to the issue of total disability is whether, in the ordinary course of business, any employer would reasonably be expected to employ the claimant in his or her present physical condition and reasonably expect him or her to perform the work for which he or she is hired. Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Talley v. Runny Mead Estates, Ltd., 831 S.W.2d 692, 694 (Mo. App. 1992); Brown v. Treasurer of Missouri, at 483; Fischer v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502, 504 (Mo. App. 1989). The test for permanent and total disability is whether given the employee's condition, he or she would be able to compete in the open labor market; the test measures the employee's prospects for obtaining employment. Reiner at 367; Brown at 483; Fischer at 199. A claimant who is "only able to work very limited hours at rudimentary tasks is a totally disabled worker." Grgic v. P & G Const., 904 S.W.2d 464, 466 (Mo. App. 1995).

The employee must prove the nature and extent of any disability by a reasonable degree of certainty. Downing v. Willamette Industries, Inc., 895 S.W.2d 650, 655 (Mo. App. 1995); Griggs v. A. B. Chance Company, 503 S.W.2d 697, 703 (Mo. App. 1974). Such proof is made only by competent and substantial evidence. It may not rest on speculation. Idem. Expert testimony may be required where there are complicated medical issues. Goleman v. MCI Transporters, 844 S.W.2d 463, 466 (Mo. App. 1993); Griggs at 704; Downs v. A.C.F. Industries, Incorporated, 460 S.W.2d 293, 295-96 (Mo. App. 1970). The fact finder may accept only part of the testimony of a medical expert and reject the remainder of it. Cole v. Best Motor Lines, 303 S.W.2d 170, 174 (Mo. App. 1957). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. Hawkins v. Emerson Electric Co., 676 S.W.2d 872, 877 (Mo. App. 1984). 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. Webber v. Chrysler Corp., 826 S.W.2d 51, 54 (Mo. App. 1992); Hutchinson v. Tri-State Motor Transit Co., 721 S.W.2d 158, 163 (Mo. App. 1986).

However, where the facts are within the understanding of lay persons, the employee's testimony or that of other lay witnesses may constitute substantial and competent evidence. This is especially true where such testimony is supported by some medical evidence. Pruteanu v. Electro Core Inc., 847 S.W.2d 203 (Mo. App. 1993); Reiner v. Treasurer of State of Mo., 837 S.W.2d 363, 367 (Mo. App. 1992); Fisher v. Archdiocese of St. Louis, 793 S.W.2d 195, 199 (Mo. App. 1990); Ford v. Bi-State Development Agency, 677 S.W.2d 899, 904 (Mo. App. 1984); Fogelsong v. Banquet Foods Corp., 526 S.W.2d 886, 892 (Mo. App. 1975). The trier of facts may even base its findings solely on the testimony of the employee. Fogelsong at 892. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony is given. Hutchinson v. Tri-State Motor Transit Co., *supra* at 161-2; Barrett v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980). The uncontradicted testimony of the employee may even be disbelieved. Weeks v. Maple Lawn Nursing Home, 848 S.W.2d 515, 516 (Mo. App. 1993); Montgomery v. Dept. of Corr. & Human Res., 849 S.W.2d 267, 269 (Mo. App. 1993).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. 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. Sellers v. Trans World Airlines, Inc., 776 S.W.2d 502 (Mo. App. 1989); 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 v. Bentzinger Brothers, Inc., 595 S.W.2d 441, 443 (Mo. App. 1980); 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. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences from such testimony. 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 v. Incarnate Word Hospital, at 238; Barrett v. Bentzinger Brothers, Inc., at 443; McAdams v. Seven-Up Bottling Works, at 289. 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 v. Jefferson City School Dist., 801 S.W.2d 486 (Mo. App. 1990). The fact finding body may reject the uncontradicted opinion of a vocational expert. Searcy v. McDonnell Douglas Aircraft Co., 894 S.W.2d 173, 177-78 (Mo. App. 1995).

### **Findings of Fact**

Based on that portion of claimant's testimony which I find to be credible, I make the following findings of fact.

#### **Educational and Employment History**

Mr. Hampson graduated from Francis Howell High School in 1977. He was in special classes. He cannot read very well, He can do some arithmetic. He did not serve in the military. He is not able to type on a keyboard and has no computer skills or training.

He worked as a laborer for quite a few years putting in concrete forms. He has also worked installing poles. He worked for two years as a carpenter and was a member of the Carpenter's Union. He was primarily involved with laying flooring, framing housing and installing studs and trusses. There was a lot of bending and lifting. He has worked primarily as a mover throughout his life. He worked for North American Van Lines from 1993 to 1998 and then ABC Atlas Van Lines for approximately 3 years between 1998 and the date of the accident.

Claimant was 49 years old on June 19, 2006 when he reached maximum medical improvement regarding his back injury.

#### **Claimant's Testimony**

Mr. Hampson testified he does not drive much; his wife does most of the driving. Normally, his pain varies between 4 to 8 during the day. He stated that if he stands or sits for more than 20 minutes, he has to move around or his back pain gets really bad. He testified that he takes Xanax for anxiety and Vicodin for pain. He admitted that his symptoms are no better now than they were before the second surgery.

Employee testified that between 10:00 and 11:00 in the morning he back hurts so back that he goes upstairs and lies down for an hour to a hour and a half. He has found no other way to relieve his back pain. He stated that around supper time his back and shoulder begin to hurt and he goes upstairs and lies down for 45 minutes. He has found no other way to relieve his back pain. Some days he lies down the whole day.

Claimant testified that he spends most of his day sitting around and watching television. He stated that his wife waits on him.

Mr. Hampson complained of difficulty sleeping. He goes to bed at 10:00 p.m., but does not fall asleep until 2:00 a.m. He testified that he wakes up two or three times due to pain and that 90% of the time he does not sleep well. He claimed that his sleeplessness affects his ability to focus on tasks and makes him moody and impatient.

Mr. Hampson admitted that he has not looked for a job since the date of the accident. He admitted that he is receiving Social Security Disability. He has never felt like he has been able to work since the date of the accident.

#### **Medical Opinions**

Dr. Levy testified that claimant's current complaints were low back pain and his back bothered him about half the time. When employee did a lot of bending and lifting, his pain was worse. Claimant told Dr. Levy that he did drive a little, but his wife did most of the driving. Dr. Levy stated that claimant told him that the pain would sometimes go into his left hip and down his left leg. He complained of pain in his right shoulder, but did not have loss of motion presumably of the right shoulder. (Claimant's Exhibit S, Page 8)

Dr. Levy noted a slight discomfort in employee's neck and a markedly limited range of motion in his back. He found muscle spasms in the lower back. (Claimant's Exhibit S, Pages 16-17) Dr. Levy further testified that employee had almost no motion of the right shoulder and could only move it 50% even when Dr. Levy was moving it for employee. (Claimant's Exhibit S, Pages 17-18) Dr. Levy also found moderate discomfort on motion of the left hip. (Claimant's Exhibit S, Page 18)

Dr. Levy testified that claimant could walk and squat without difficulty. There was no atrophy or weakness of his legs. Sensation, circulation and reflexes were all normal. Employee had normal range of motion of his neck. His straight leg raising was negative bilaterally and there was no evidence of radiculopathy. (Claimant's Exhibit S, Pages 25-27)

Dr. Levy agreed with the restrictions placed by Dr. Boland. (Claimant's Exhibit S, Page 28)

Dr. Levy did not mention that claimant needed to lie down twice a day to relieve his back pain. There was no discussion of how claimant felt regarding personal limitations on sitting and standing.

Dr. Levy opined that claimant had sustained 60% permanent partial disability of the body as a whole referable to his back, 10% permanent partial disability of the body as a whole referable to his neck, and 35% permanent partial disability of his right shoulder as a result of the June 19, 2002 accident. He opined that a loading factor should be added because the combination of the injuries is greater than the simple total of each. (Claimant's Exhibit S, Pages 20-21)

Dr. Levy further opined that employee is permanently and totally disabled from a medical standpoint and is unable to compete in the open labor market. (Claimant's Exhibit S, Pages 21-22)

Dr. Boland testified that the CT scan showed that the fusion was solid. (Employer's Exhibit 2, Page 11) He testified that as of his last examination of claimant, which was on May 24, 2006, employee told him that the work conditioning was killing him; the lifting and carrying was causing more pain in his back and numbness and tingling in his left leg. On examination Dr. Boland noted that employee had good strength and was able to walk on his heels and toes and that his reflexes were symmetric. He did have some hamstring tightness bilaterally and some decreased pin prick over the top of his left foot. (Employer's Exhibit 2, Page 12) He agreed that the decreased pin prick was the only objective sign of neurological deficit involving his low back. He described the range of motion of employee's back as significantly restricted due to pain. (Employer's Exhibit 2, Page 13)

Dr. Boland testified that the fusion surgery addressed the structural problems in claimant's back, but did not provide him with pain relief. (Employer's Exhibit 2, Page 15)

Dr. Boland stated that following the functional capacity evaluation, it was obvious to him that claimant needed to have some restrictions. He testified the restrictions were 20 pounds lifting infrequently, 10 pounds lifting occasionally, and no repetitive bending and no overhead work. (Employer's Exhibit 2, Page 16) Dr. Boland noted that the functional capacity evaluation indicated that claimant had a self-limiting exam which Dr. Boland attributed to pain. (Employer's Exhibit 2, Page 17)

On cross examination, Dr. Boland admitted that he thought that Mr. Hampson's complaints, for which he treated him, related back to the June 2002 accident. (Employer's Exhibit 2, Page 29) He denied that there was any risk of Mr. Hampson's hardware coming loose as the fusion had healed. (Employer's Exhibit 2, Page 31) Dr. Boland agreed that the May 5, 2006 update from the physical therapist reported that employee showed good motivation and compliance with all activities and thus employee was trying on all activities. (Employer Exhibit 2, Pages 33-34) He

admitted that when Mr. Hampson started to do work hardening, claimant started having more problems with pain. Dr. Boland stopped the work conditioning on May 24, 2006 because it was not helping employee. (Employer's Exhibit 2, Page 34)

Dr. Boland agreed that the functional capacity evaluation report indicated that on day two claimant indicated that he drove himself to the facility, but he hit a bump in the road and was in so much pain that he just could not do anything. He wanted to go home and lie down. (Employer's Exhibit 2, Page 36) Dr. Boland agreed that the evaluator found employee was able to tolerate sitting for 30 minutes, but had complaints of increased lower back pain after 24 minutes, and noted that employee was able to stand and walk for 30 minutes, but requested to sit down four times. The evaluator reported that standing caused employee to complain of lower back pain and walking 500 feet caused increased back pain that "hurts like hell." (Employer's Exhibit 2, Page 39)

Dr. Boland denied that the medication that claimant is taking would cause drowsiness or lethargy. He stated that the side effects are usually not significant. (Employer's Exhibit 2, Page 37) He admitted that all of claimant's Waddell signs were negative for symptom magnification. (Employer's Exhibit 2, Pages 38-39)

Dr. Boland opined that claimant sustained 35% permanent partial disability of the body as a whole referable to the low back as a result of the work-related injury. (Employer's Exhibit 2, Page 20)

### Vocational Opinions

Timothy G. Lalk, a vocational rehabilitation counselor, testified on behalf of employee by deposition on February 23, 2007. Mr. Lalk was asked to evaluate employee's employability in the open labor market. He interviewed employee on September 5, 2006. (Claimant's Exhibit T, Pages 8-9)

Mr. Lalk reviewed most of employee's medical records. (Employee's Exhibit T, Pages 13-25) During the interview, Mr. Lalk observed employee to move somewhat slowly and in a guarded fashion. (Claimant's Exhibit T, Page 12) Employee told Mr. Lalk that he has a problem walking and difficulty bending over. He further added he was unable to do repetitive activities. Employee described pain in his lower back and left hip which develops from walking 40 to 50 feet, bending at the waist and performing other activities. He reported that he had a decreased range of motion in the right shoulder due to pain and experienced numbness in his right fingertips which comes and goes. Employee reported occasional stiffness in his neck and soreness in his neck with movement. (Claimant's Exhibit T, Page 25-27) Employee is left handed. He is unable to move his right arm away from his side more than 10 to 15 degrees. Employee has no problem moving his left upper extremity and is able to handle and finger items. Employee stated that he has no problem lifting items and that he can stand 30 to 45 minutes and then he needs to sit down due to pain in his lower back and left hip. After walking a half a block employee starts hurting really bad and needs to sit down due to the pain in his lower back and left hip. Employee is unable to climb stairs repetitively. He reported no problems with his balance. Employee has limited ability to bend at the waist and when he is standing can only reach to knee level. Employee has no difficulty kneeling and squatting and estimated that he can sit for about one hour and then needs to get up and move around because of pain in his lower back and left hip. Employee experiences stiffness and pain with movement of his neck. Employee reported no difficulty in operating a car, but usually allows his wife to drive because he gets stiff and sore. Employee finds it easier to be in a car as a passenger where he can stretch and move around. (Claimant's Exhibit T, Pages 27-28)

Mr. Lalk testified that employee told him that when his lower back pain increases, he needs to lie down and take pain medication. Employee stated that he needs to lie down 30 to 60 minutes twice each day in order to control his back pain. (Claimant's Exhibit T, Pages 28-29) Mr. Lalk stated that employee confirmed that he is unable to get through a day without lying down. (Claimant's Exhibit T, Page 33)

As to his educational background, employee reported that he graduated from Francis Howell High School in 1977 and received no additional vocational or technical training. Employee described his work history to Mr. Lalk. (Claimant's Exhibit T, Pages 30-32) Employee confirmed that he has never typed and only uses his computer to play poker. Employee told Mr. Lalk that he knows the basics of carpentry and has developed no other skills using any other type of equipment or tools. Employee has never been required to learn any type of business practice, such as

bookkeeping or inventory control. (Claimant's Exhibit T, Page 32)

Mr. Lalk conducted vocational testing. On the reading and arithmetic courses of the Wide Range Achievement Tests, Revision 3, employee scored at the fourth grade level in reading and the sixth grade level in arithmetic. On the reading comprehension portion of the Adult Basic Learning Examination, Level 2, employee scored at the 6.2 grade equivalency, which was consistent with his history of seeking only labor positions taught through simple demonstration. Employee was not involved in recreational reading or any required reading. These test scores indicate employee would not be an appropriate candidate for training at the post-secondary level. Mr. Lalk also felt employee might have some difficulty in performing all of the duties of some jobs which rely upon taking detailed messages, preparing reports, and regularly reading information as part of the job. (Claimant's Exhibit T, Pages 33-34)

Mr. Lalk found employee's descriptions of his daily activities to be consistent with his prior statements. (Claimant's Exhibit T, Pages 34-36)

Mr. Lalk testified that if claimant is able to work up to the level of restrictions set by Dr. Boland, claimant could work in an assembly or packaging positions, as long as he was only working with small items or with a work station set up that he could work between the waist and shoulder level. He could consider a job like a cashier or convenience store, desk clerk or motel clerk or some food service. (Claimant's Exhibit T, Page 39) He further testified that if the claimant was having problems remaining on his feet, is able to stand only 30 to 45 minutes, then he would not be able to work in many of the jobs that he described. Employee would need to work as a cashier in a convenience store, a desk clerk, or a customer service position where he could sit down. (Claimant's Exhibit T, Pages 39-40)

Based on the history that was given, the records reviewed and the tests performed, his observations, the vocational history and educational level, Mr. Lalk opined within a reasonable degree of vocational certainty that employee is unable to compete in the open labor market and is totally disabled from a vocational standpoint. He stated that employee's need to lie down during the day would keep him from working in sedentary jobs. Mr. Lalk testified he did not expect any employer to hire employee for any kind of competitive position in any reasonable manner. Lastly, it was Mr. Lalk's opinion that employee was not a good candidate for vocational rehabilitation services. (Claimant's Exhibit T, Pages 40-42)

On cross examination, Mr. Lalk admitted that in his review of the medical records, no one had placed any restrictions on the claimant's right shoulder. (Claimant's Exhibit T, Page 41) He admitted that the distinction between employee being able to do some jobs and not being able to do any jobs was his limitations of having to lie down a couple times a day. (Claimant's Exhibit T, Page 44) He admitted that this limitation is a subjective complaint. He admitted that no physician stated that employee had to lie down twice a day. (Claimant's Exhibit T, Page 45) He admitted that he had not seen the report of Dr. Jerome Levy. He agreed that it is very difficult to find a job if an employee is not engaged in searching for a job. (Claimant's Exhibit T, Page 45) He agreed that being on social security disability is considered a disincentive to employment. (Claimant's Exhibit T, Page 46)

Donna Abram, a vocational rehabilitation counselor and consultant, testified by way of deposition on behalf of employer on February 6, 2007. She interviewed claimant on October 31, 2006. She reviewed employee's deposition, the pertinent treatment records, and the vocational assessment of Mr. Lalk. (Employer's Exhibit 1, Pages 8-9 & 61)

Ms. Abrams testified that employee had been receiving social security for over two years. He used his home computer but did not use it for anything other than playing poker. Ms. Abram stated that being on social security can affect the recipient's motivation to look for work. (Employer's Exhibit 1, Pages 14-16)

Ms. Abram testified that employee was a high school graduate. He told her that he had been diagnosed with dyslexia and was in special education classes throughout his schooling. He told her that he felt he still had dyslexia. (Employer's Exhibit 1, Pages 17-19)

Ms. Abram tested employee and thought that his education level reading was around the 5th grade. She said claimant told her that he did not feel smart and looked at jobs where there would not be a lot of reading and mathematics. (Employer's Exhibit 1, Pages 19-21)

Ms. Abram took an identical work history as related to Mr. Lalk with the exception that for six years, he told her he was not in the work force as he was a stay-at-home dad raising the kids. (Employer's Exhibit 1, Pages 21-22)

Ms. Abram noted the restrictions placed by Drs. Boland and Krettek. She noted that Dr. Levy had not placed any specific restrictions on claimant. (Employer's Exhibit 1, Pages 26-27) She testified that she thought that employee had transferable skills. Based upon his past history and education, she looked at jobs with semi-skilled range. (Employer's Exhibit 1, Pages 30-34)

Ms. Abram indicated that Mr. Hampson scored in the average range on the Wexler Adult Intelligence Scale. He was in the 60% range. On the SRA reading index, she transcribed his testing at the 5th grade level. (Employer's Exhibit 1, Page 35). On the oral direction test, she noted he was significantly below average. (Employer's Exhibit 1, Page 36)

Ms. Abram opined based upon the restrictions placed Dr. Boland that claimant was employable in the open labor market. (Employer's Exhibit 1, Page 46) However, she expressed doubts about his placeability. He has anxiety about driving. He needs to lie down several times during the day. His anxiety level interferes with his ability to function. (Employer's Exhibit 1, Page 55) Ms. Abram further testified that if employee put forth a good, diligent effort and his need to lie down and transportation and other things were addressed, he could be placeable. (Employer's Exhibit 1, Page 58) She added that Mr. Hampson's assessment was more restrictive than Dr. Boland's restrictions. She did not know which assessment was a more credible. She concluded by opining that if claimant could obtain pain relief without the necessity of lying down during the day, it would be possible to find him a job. (Employer's Exhibit 1, Page 59)

On cross examination, Ms. Abram admitted as things stand today for employee, she would not be successful in returning employee to the work force. (Employer's Exhibit 1, Pages 62-63) Ms. Abram agreed that employee's work history had been somewhat limited. (Employer's Exhibit 1, Page 64) Ms. Abram admitted that she did not have any specific information about any specific employer or any current opening that employee could access. She agreed that if Dr. Levy's findings were credible, then employee would be unemployable in the open labor market. (Employer's Exhibit 1, Page 72)

Ms. Abram testified that she was not aware that on May 24, 2006 Dr. Boland had to stop the work hardening because it was giving employee more pain. (Employer's Exhibit 1, Page 90) Ms. Abram agreed the person who completed the Functional Capacity Evaluation indicated employee's functional limitations were consistent with the physical impairments and diagnosis. She was aware that during the test on the first day employee reported discomfort and lower back pain and hip pain. She was aware that when employee came back for the second day of the test, he reported that he had taken two Vicodin and one muscle relaxer after the one day of activity and it was not even touching his pain. Ms. Abram further testified that she knew the Functional Capacity evaluator opined that, due to employee's severe pain at this time, a return to work would be difficult. Ms. Abram knew employee indicated he needed to change positions often to relieve his pain and that employee's pain affected his ability to sleep. (Employer's Exhibit 1, Pages 91-92)

Ms. Abram agreed the limitations and pain problems for employee as reported in the Functional Capacity Evaluation would be barriers to employee competing in the open labor market. (Employer's Exhibit 1, Page 95)

On re-direct examination, Ms. Abrams noted that the evaluator at the functional capacity evaluation reported that when alternative jobs were discussed with claimant, he stated that he had limited reading and writing abilities which would be a barrier to his return to work in any capacity. Claimant also stated that he was already on disability. (Employer's Exhibit 1, Page 119)

### **Findings on Permanent Disability**

Dr. Boland released the claimant to return to work on June 15, 2006 with restrictions of 20 pounds lifting infrequently, 10 pounds lifting occasionally, no repetitive bending and no overhead work. He opined that claimant had

permanent partial disability of 35% of the body as a whole. He specifically noted in his final report that he based his restrictions on the functional capacity evaluation. Though claimant told Dr. Boland on July 11, 2005 that he was able to relieve his severe back pain by lying down on his right side with a pillow between his leg, this statement was made prior to the fusion surgery performed by Dr. Boland. Nowhere else in Dr. Boland's notes is there a notation of claimant having to lie down twice a day to alleviate his complaints. Dr. Boland did not believe that the medications claimant was taking would be a barrier his return to work.

Dr. Levy testified that claimant had 60% permanent partial disability as the body as a whole. He agreed with Dr. Boland's restrictions. Other than a marked loss of range of motion of the back and muscle spasm, there were few objective findings on his examination. Straight leg raising was negative bilaterally. There was no evidence of radiculopathy that had been present prior to the second surgery. There was no atrophy of claimant's legs. Dr. Levy noted normal strength of both lower extremities. Employee had normal sensation in both lower extremities, meaning the earlier loss of sensation that had been appreciated by his treating doctors had resolved. His reflexes were normal. He was able to walk without a limp and squat without difficulty.

When Dr. Levy asked claimant about his subjective complaints, Mr. Hampson complained of back pain, but only about half of the time. He did admit to increase of pain with bending or lifting. On occasion the pain would go down his left hip and left leg. As with Dr. Boland, he did not mention having to lie down twice a day to alleviate his back complaints.

After a careful review of all of the records, there is no notation of claimant complaining to any of his physicians that he had to lie down twice a day. It is not noted in the physical therapy notes either.

The first time claimant mentioned to anyone that he needed to lie down twice a day in order to relieve his back pain was on September 5, 2006 when he was interviewed by Timothy Lalk, an expert who was retained to assess employee's employability in the open labor market.

Taking into account my observations of claimant's demeanor during his testimony, the medical records, and the testimony of the physicians, I find that claimant does not need to lie down twice a day to relieve his back pain.

With regard to the two vocational experts, Mr. Lalk conceded that there were jobs in the open labor market within the restrictions recommended by Dr. Boland. In fact, Mr. Lalk conceded that other than claimant's subjective complaint that he had to lie down twice a day, there were jobs available to claimant in the open labor market. Mr. Lalk identified several jobs available to the claimant within Dr. Boland's restrictions, factory positions such as assembly or packaging positions, customer service jobs such as a cashier at a self service store or convenient store, desk clerk, and a motel clerk. Ms. Abram identified many more, and further testified, credibly, that she identified a number of jobs for which claimant would be able to work within Dr. Boland's restrictions, and further indicated that they exist in statistically significant numbers such that he would be able to find employment.

Based on the credible opinions of Dr. Boland and the vocational opinions of Mr. Lalk and Ms. Abram, and taking into account claimant's educational employment background, his age of 49 years when he reached maximum medical improvement, and the permanent restrictions recommended by Dr. Boland, I find that claimant was not rendered permanently and totally disabled as a result of claimant's back injury of June 19, 2002.

Taking into account all of the evidence, I further find that claimant sustained 60% permanent partial disability of the body as a whole referable to the low back as a result of the July 19, 2002 work-related accident. As claimant appeared to have recovered from his neck and right shoulder sprains following almost three months of treatment and did not thereafter complain of neck or right shoulder symptoms to any of his treating physicians or physical therapists until he saw Dr. Levy on September 14, 2006, I find that claimant sustained no permanent partial disability to his neck or right shoulder from the June 19, 2002 work-related accident.

### **EMPLOYER/INSURER'S SUBROGATION CREDIT**

Claimant settled a third-party tort claim pertaining to the work-related accident for \$100,000. (Claimant's

Exhibit M) Employer is seeking reimbursement of workers' compensation benefits which it previously paid and for a credit against the additional benefits awarded herein.

Employer's right of subrogation is set forth in Section 287.150 Mo. Rev. Stat. (2000). Subsection 1 of Section 287.150 provides:

Where a third person is liable to the employee or to the dependents, for the injury or death, the employer shall be subrogated to the right of the employee or to the dependents against such third person, and the recovery by such employer shall not be limited to the amount payable as compensation to such employee or dependents, but such employer may recover any amount which such employee or his dependents would have been entitled to recover. Any recovery by the employer against such third person shall be apportioned between the employer and employee or his dependents using the provisions of subsections 2 and 3 of this section.

The method for calculating the amount of the credit due the employer is set forth in subsection 3 of Section 287.150 which provides:

Whenever recovery against the third person is effected by the employee or his dependents, the employer shall pay from his share of the recovery a proportionate share of the expenses of the recovery, including a reasonable attorney fee. After the expenses and attorney fee have been paid, the balance of the recovery shall be apportioned between the employer and the employee or his dependents in the same ratio that the amount due the employer bears to the total amount recovered if there is no finding of comparative fault on the part of the employee, or the total damages determined by the trier of fact if there is a finding of comparative fault on the part of the employee. Notwithstanding the foregoing provision, the balance of the recovery may be divided between the employer and the employee or his dependents as they may otherwise agree. Any part of the recovery found to be due to the employer, the employee or his dependents shall be paid forthwith and any part of the recovery paid to the employee or his dependents under this section shall be treated by them as an advance payment by the employer on account of any future installments of compensation in the following manner:

- (1) The total amount paid to the employee or his dependents shall be treated as an advance payment if there is no finding of comparative fault on the part of the employee; or
- (2) A percentage of the amount paid to the employee or his dependents equal to the percentage of fault assessed to the third person from whom recovery is made shall be treated as an advance payment if there is a finding of comparative fault on the part of the employee.

In Ruediger v. Kallmeyer Brothers Service, 501 S. W. 2d 56 (Mo. 1973), the Supreme Court held that Subsection 3 of Section 287.150 requires the following calculation:

1) the expenses of the third party litigation should be deducted from the third party recovery; 2) the balance should be apportioned in the same ratio that the amount paid by the employer at the time of the third party recovery bears to the total amount recovered from the third party; 3) the amounts due each should be paid forthwith; 4) the amount paid the employee should be treated as an advance payment on account of any future installments of compensation; and 5) in a case such as presented here, the employee should be entitled to future compensation benefits in the event that the amount paid to him as an advance is exhausted under the provisions of the statute.

The parties have stipulated that the employer had paid the following amounts prior to the third party recovery: \$132,501.20 in medical bills and \$71,990.46 in temporary total disability for a total of \$204,491.66.

The expenses of the third party litigation total \$38,021.28. (Claimant's Exhibits N, O & P) After deducting that amount from the third party recovery of \$100,000, the balance of recovery is \$61,978.72.

The ratio which the amount paid by the employer at the time of the third party recovery bears to the total amount recovered from the third party is calculated at \$204,491.66 divided by \$100,000. The ratio is 2.0449166.

The balance of the third party recovery is allocated 100% to the employer and 0% to the employee. The amount due to the employer is \$61,978.72.

Based on the applications of Section 287.150.3 to the recovery from the third party litigation, I find that the employer is entitled to be reimbursed \$61,978.72. Employee is to pay that amount to employer forthwith.

**ATTORNEY'S FEES**

This award is subject to a lien in the amount of 25% of the net amount awarded to claimant in favor of the employee's attorney, Stephen T. Hamby, for necessary legal services rendered to the employee.

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

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

**JOHN HOWARD PERCY**

*Administrative Law Judge*

*Division of Workers' Compensation*

A true copy: Attest:

\_\_\_\_\_  
Jeffrey W. Buker

*Director*

Division of Workers' Compensation

Dr. Walentynowicz's records were not offered into evidence. They were summarized by Dr. Michael C. Chabot, who reviewed them when he began treating Mr. Hampson in March of 2004.

As the records in Claimant's Exhibit FF were a disorganized mess, I arranged them in chronological order and renumbered them.

The report of the radiologist was not offered into evidence.

As the records in Claimant's Exhibit Y were a disorganized mess, I arranged them in chronological order and renumbered them.

These physical therapy records were not offered into evidence.

The report of the functional capacity evaluation was not offered into evidence.

Employee's attorney made numerous objections under Section 287.210.3 Mo. Rev. Stat. (2000) to opinions expressed by Ms. Abrams on the basis that they were not contained in her written reports. As Section 287.210.3 does not apply to vocational reports, all such objections are overruled.

This statement was repeated verbatim by Dr. Boland in the Admission History and Physical on September 9, 2005. (Claimant's Exhibit Y, Page 63)

Dr. Levy's findings regarding the right shoulder are not pertinent as I previously found that he failed to credibly causally connect them to the June 19, 2002 right shoulder sprain. See page 14 supra.

He did tell Dr. Krettek on October 25, 2002 that he was more comfortable in bed. (Claimant's Exhibit C, Page 6)