

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

Injury No.: 03-138394

Employee: Mark Howard
Employer: General Electric Company
Insurer: Electric Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund (open)

Date of Accident: September 4, 2003

Place and County of Accident: St. Louis County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated March 10, 2005, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Karla Ogrodnik Boresi, issued March 10, 2005, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 26th day of September 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

Attest: _____
John J. Hickey, Member

Secretary

FINAL AWARD

Employee: Mark Howard

Injury No.: 03-138394

Dependents: N/A

Before the
Division of Workers'

Employer: General Electric Company

Compensation

Department of Labor and Industrial

Additional Party: Second Injury Fund

Relations of Missouri

Jefferson City, Missouri

Insurer: Electric Insurance Company

Hearing Date: December 4, 2004

Checked by: KOB:tr

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? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of accident or onset of occupational disease: Alleged to be September 4, 2003
5. State location where accident occurred or occupational disease contracted: St. Louis County
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Not determined.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: Claimant was working, despite his painful low back, when he twisted, experienced a pop in his low back, felt an odd sensation down his legs, and began to experience an increase in pain.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: N/a
14. Compensation paid to-date for temporary disability: \$0
15. Value necessary medical aid paid to date by employer/insurer? \$0
16. Value necessary medical aid not furnished by employer/insurer? \$0

Employee: Mark Howard

Injury No.:

03-138394

17. Employee's average weekly wages: Not determined.
18. Weekly compensation rate: Not determined.
19. Method wages computation: N/a.

COMPENSATION PAYABLE

20. Amount of compensation payable:

\$0

21. Second Injury Fund liability: No.

TOTAL:

\$0

22. Future requirements awarded: None.

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Mark Howard	Injury No.: 03-138394
Dependents:	N/A	Before the Division of Workers' Compensation
Employer:	General Electric Company	Department of Labor and Industrial Relations of Missouri
Additional Party:	Second Injury Fund	Jefferson City, Missouri
Insurer:	Electric Insurance Company	Checked by: KOB:tr

PRELIMINARIES

A hearing was held in the matter of Mark Howard ("Claimant") to determine whether Claimant is entitled to workers' compensation benefits. Attorney Elizabeth Ituarte represented Claimant. Attorney Chris Pat represented General Electric Company ("Employer") and its Insurer, Electric Insurance Company. The Second Injury Fund is a party to the claim, but did not participate at hearing as Claimant sought a temporary award.

The parties agree that on or about September 4, 2003, an event involving Claimant occurred at the workplace. The parties agree that Claimant was an employee of Employer, venue is proper in the City of St. Louis, and Claimant filed a timely claim. However, the parties dispute Claimant's average weekly wage, and therefore do not agree on the applicable rates of compensation. Employer has not paid any benefits.

The issues to be determined are:

1. Did Claimant sustain an accident arising out of and in the course of his employment that resulted in injury;
2. Is Claimant's medical condition causally related to his alleged accidental injury;
3. Did Claimant provide appropriate notice of his injury;
4. What are the appropriate rates of compensation;
5. Is Employer liable to reimburse Claimant for past medical expenses in an amount up to \$56,711.83;
6. Is Employer responsible for providing continued medical care due to Claimant's alleged work related accidental injury;
7. Is Claimant entitled to recover temporary total disability benefits beginning on the date of accident up to the current date;
8. Shall Employer pay costs and fees pursuant to §287.560 for an unreasonable defense?

SUMMARY OF THE EVIDENCE

Claimant's Testimony

Claimant is a 29-year-old high school graduate who has trade training in masonry. His previous work history includes working in a mill, operating equipment for a lumber company, for a construction company, and as a farm laborer on a cattle ranch. Claimant worked for Employer from November 1996 through October 1999, and then from March 2001 through the date of his alleged accident on September 4, 2003. His initial job was as a packaging mechanic, which required him to lift, squat, and be on his feet most of the time. At some point during his second tenure with Employer, he transferred into the assembly mechanic department, which represented an increase in pay, but also required him to be exposed to higher stress and heat. Claimant worked for the lumber company in between his employments with Employer. He testified he left Employer in 1999 because he was looking for a less stressful, less labor-intensive job, and because he could sit down at the lumber company. This change also coincided with his first back surgery, which occurred in 1999 and is detailed later in the award.

On September 4, 2003, Claimant was working from approximately 3:30 to 12:00 midnight. On that shift, it was very hot and they were understaffed, so things were "chaotic" and Claimant was responsible for multiple machines. His only co-worker was Shannon Patterson, who was not in Claimant's field of sight at the time he hurt himself. Claimant testified that he was working behind a machine when he turned quickly to answer a bell, felt a pop in his back, and experienced a warm sensation down his legs. Claimant found his supervisor, Dave Hunt, who took him to the supervisor's office. Claimant never specifically told Dave Hunt that the symptoms in his leg were work related. While in the office, Claimant's legs went out from under him and he fell to the floor. Dave picked Claimant up. Claimant testified that he did not want to go to St. Mary's, which is why he refused the offer of Frank Neel to call an ambulance. Claimant called his wife and went to St. Luke's instead, where he has a family connection. Claimant testified that initially, only his right leg was symptomatic, but within three or four weeks, the left leg started to hurt and now both legs hurt.

After receiving treatment in the emergency room, the next day Claimant went to see his primary care physician, Dr. Kelly Bain. She obtained an MRI, which had not been previously scheduled. Although her records indicate it, Claimant did not recall a visit to Dr. Bain one week before the accident with complaints of back pain. Claimant then went to see Dr. Chabot who said nothing was wrong. He then went to Dr. Esther at St. Luke's who ran tests which were all negative for alternative sources to his back pain. Claimant then saw Dr. Benzaquen, a neurologist, whose nerve conduction testing revealed permanent nerve damage in his right leg. Claimant then saw Dr. Duntemann, a pain specialist, who provided nerve blocks, epidurals, and pain shots. Under Dr. Duntemann's direction, Claimant underwent his first CT myelogram and began a strong regimen of pain medicine including Methadone, Tizanidine, and pain cocktails. Claimant ultimately came under the treatment of Dr. Youkilis, a neurosurgeon, who performed fusion surgery.

Claimant spoke with Employer's nurse (Pam) regarding treatment. His only current source of income is long-term disability. Claimant was terminated from Employer one year after his accident. With respect to Claimant's personal file and issue of rate, Claimant explained that during the month of July 2003, there was a plant wide vacation scheduled the week of July 7th. Other employees were off work the week of the 14th, although Claimant worked maintenance. The indication "low wp" is possibly a symbol for lack of work. Claimant thinks the plant was shut down during this time. Claimant's net pay, to the best of his recollection, was \$1,800 every two weeks.

On cross-examination, Employer's attorney highlighted many inconsistencies in Claimant's testimony. On direct, Claimant was fairly sure he had little or no pain in his back following his 1999 back surgery. He admitted that as someone who has undergone back surgery, he did have some symptoms and was never 100 percent, but he downplayed the severity of any symptoms and claimed they caused him no problems. He also downplayed the existence of any back pain prior to 1999. However, there were many inconsistencies between what Claimant testified to on direct, and what he had previously testified to in a deposition, which Claimant attempted to explain by saying he was under a lot of medication and that his mind was clouded. For example, he denied being severely hurt by cattle, although in his deposition he testified he was laid up in bed, and had symptoms in his low back and legs including shooting pain and numbness. There are also inconsistencies between Claimant's testimony at hearing and the medical records. On August 27, 2003, Dr. Bain noted that Claimant's pain got a lot worse in May 2003, and on November 3, 2003, Dr. Benzaquen, noted that Claimant developed pain and other symptoms one year after his 1999 surgery. Claimant said the doctors who recorded significant complaints of pain between 1999 and his accident were wrong. On redirect, Claimant did admit that he has a very bad memory and that he tried to testify as best he could. He feels he has a bad memory due to the medication he takes.

Fact Witnesses

Dave Hunt, assembly shift leader, and Frank Neel, work leader, testified by deposition on behalf of Employer. Both were Claimant's supervisors the night of the incident, and observed Claimant after he had made his way from the plant floor to Mr. Hunt's office to report his injury, which occurred sometime in the first half of the shift. These witnesses agreed Claimant was in obvious pain that that night, which caused him to fall to the floor. Claimant never indicated to either man that he had an accident at work, or that his pain was related to work. Both Mr. Hunt and Mr. Neel testified that in the few weeks leading up to the incident at work, Claimant had complained of back pain, and had mentioned he would have to miss work in the near future to have some sort of diagnostic test. Mr. Hunt offered to call an ambulance, but Claimant wanted his

wife to take him home.

Medical Records

Claimant has a history of back troubles that predate his work incident. In early November 1998, Claimant came under the care of **Dr. Michael Chabot** (Exhibit J) for evaluation of a two-year history of back pain that had become significantly worse in the previous month. He also had complaints of lower extremity and occasional left hand numbness. Diagnostic studies revealed severe multi-level degenerative disc disease and grade II spondylolisthesis. Conservative measures failed, and Claimant underwent a lumbar decompressive laminectomy and fusion L4 to S1 on January 6, 1999. Claimant did extremely well with his recovery until July 14, 1999, when he slipped on oil on the floor, twisted and almost fell. Dr. Chabot diagnosed a lumbrosacral strain with left sacroiliitis, and provided an injection to the sacroiliac region, which afforded relief.

On August 27, 2003, one week before his incident at work, Claimant went to **Dr. Kelly Bain** (Exhibits 6 & 7) for the first time with complaints of back pain. He gave a history of having surgery for back pain in 1999. According to Dr. Bain's records, his current complaints were pain in the mid-back with radiation down the back of both thighs, sometimes to the feet. Although his back pain had been getting worse since May 2003, the bilateral radiation had been present for two or three weeks. Claimant asked the doctor whether he should seek disability, and Dr. Bain counseled he should get some tests done first.

Claimant appeared at the **St. Luke's Hospital Emergency Room** (Exhibit E) late at night on September 4, 2003. The records contain the following entry^[1]:

Patient complains of severe low back pain (radiation)^[2] both legs with tingling* this evening while at work after twisting/lifting. Has had chronic low back pain after back surgery 6 years ago. Primary medical doctor in process of setting up MRI. No relief with Tylenol over the past 1 ½ weeks of increasing low back pain.

Claimant received four different medications to address his pain. He was discharged to home with instructions to follow up with Dr. Bain. On September 5, 2003, Claimant returned to Dr. Bain after having an incident the previous night where he turned, felt a pop in his back, and experienced numbness. The **MRI** (Exhibit F) of September 5th showed post operative changes and foraminal stenosis, but was otherwise difficult to evaluate due to the surgical hardware.

On September 17, 2003, Claimant returned to Dr. Chabot "with a 6 month history of lower lumbar back pain, which is localized and does not radiate into the lower extremities. His symptoms have progressively worsened...(and) tend to be aggravated with most activities." There is no mention of a work incident, and the physical exam was essentially unremarkable except for inconsistencies in range of motion testing, and decreased sensation involving the left lower extremity. Dr. Chabot reviewed the MRI and found no evidence of a disc herniation or significant stenosis. He recommended physical therapy. Claimant did not return for his follow up visit.

Claimant saw **Dr. James Esther** (Exhibit I) on September 24 and October 6, 2003. While Dr. Esther's records are difficult to decipher, it is clear Claimant had complaints of back pain, and answered "yes" to the intake question if he had "weakness, numbness or tingling in arms and/or legs" and "swollen or painful joints." Dr. Esther ordered a bone scan, which was unremarkable, and provided referrals for other problems, including his back pain. **Dr. Max Benzaquen** (Exhibit H) saw Claimant on November 3, 2003 for severe pain and tension in the low back without radicular symptoms. He recorded a history that Claimant did well for one year after his 1999 back surgery, but thereafter developed chronic pain with aches, stiffness, and numbness/tingling in both legs. The nerve conduction studies of late November showed denervation in the right short head of the hamstrings, most likely sciatica, not involving L5.

When he saw **Dr. Edwin Dunteman** (Exhibit G), a pain specialist, on January 2, 2004, Claimant complained that the tolerable back pain that followed his 1999 surgery became worse in September and began moving into the legs, right worse than left. In addition to back pain, his pain diagram indicated numbness down the entire back of the right leg with aching down the front, plus some aching under the left knee. Dr. Dunteman's impressions included failed back syndrome, spondylosis, possible arachnoiditis, chronic radiculopathy, and recurrent disc herniation. He prescribed several medications and provided bilateral lumbar facet joint and right sided nerve root injections. A CAT scan performed on January 8, 2004 (Exhibit D – part 1) was read to show a solid fusion, disc degeneration, and a left foraminal disk herniation at L3-4.

On March 4, 2004, **Dr. Andrew Youkilis** (Exhibits B & C) saw Claimant for a second opinion. The history recorded indicates Claimant had some improvement following his 1999 back surgery, but, beginning in 2001, he started to have progressive symptoms of worsening back pain with lower extremity numbness and twitching, which "worsened to their apex in July of 2003." Following a complete exam, Dr. Youkilis concluded "has (right) neuroforaminal stenosis by an overgrown facet. On the left, he appears to have a foraminal disc herniation." Dr. Youkilis prescribed medication, diagnostics, and a selective nerve root block before proceeding with surgery. At follow up visits in April and June, Dr. Youkilis encouraged Claimant to get a second opinion, was reluctant to perform another fusion, because "extending the fusion to one level above would likely lead to further degenerative changes in the upper lumbar spine down the road," and suggested further conservative treatment or a less invasive surgery.^[3] On July 15, 2004, Dr. Youkilis performed the more invasive surgery

removing hardware and further fusing Claimant's lumbar spine. Although both the pre- and post-operative diagnosis included "left-sided L3-4 far lateral disk herniation," the operative findings were that of "overgrown bone and ligaments in the foramen on the left at L3-4," and no other mention was made of a herniated disk in the operative report or discharge summary. He developed post-surgical complaints in the upper extremities. As of July, Dr. Youkilis felt Claimant would be medically disabled from work until January 2005, according to the Long-Term Disability form he completed on Claimant's behalf. The charges generated with respect to the treatment provided by Dr. Youkilis total \$56,711.83 (Exhibit M).

Expert Testimony

Dr. Thomas Musich (Exhibit A) evaluated Claimant once, on June 14, 2004, reviewed records, issued a report, and testified by deposition on his behalf (Exhibit A). In the history recorded by Dr. Musich, Claimant reported constant lumbar discomfort between mid-1999 and September 2004, and bilateral lower extremity problems that developed between 2000 and September 2004. It was Dr. Musich's opinion, within a reasonable degree of medical certainty, that Claimant suffered a work injury on September 4, 2003, which was a substantial factor in the development of his severe back symptoms, and which is causally related to his need for additional surgery.^[4] Dr. Musich based his causation opinion on the assumption that despite his preexisting back disability, Claimant was able to work regularly until September 4, 2003, when "something happened (that) initiated all this additional treatment and resulted in intractable low back pain." Dr. Musich was not aware that Claimant visited Dr. Bain with back pain one week before his work incident, understood Claimant to have denied any significant leg symptoms immediately before September 4, 2003, did not know Claimant had left his job with Employer for over one year because of his preexisting back pain, and did not examine Claimant after his second surgery.

As Employer's evaluating physician, **Dr. David Lange** (Exhibit 3) also examined Claimant once, on June 22, 2004, before his second surgery, but he reviewed the operative records and issued a follow up report. With respect to the events of September 4, 2003, Dr. Lange had a history that is partially consistent with the evidence – Claimant was at work, twisted, felt a pop, and felt pain – although Claimant told Dr. Lange he was holding "some weight" at the time, which he did not mention at any other time. The exam was remarkable for Claimant's visible discomfort, heightened reflexes, involuntary movement of the ankle, and other signs of a central nervous system problem, but showed no signs of symptom magnification. Dr. Lange felt Claimant needed additional thoracic spine workup before undergoing surgery, and that he looked too uncomfortable to work. Because the early medical records were silent as to a work accident, it was unclear to Dr. Lange if Claimant actually had an incident at work. If there was an incident at work and it was reported, "then potentially that might have triggered symptoms." However, Dr. Lange "kind of punted on (the issue of causation) not knowing what was the correct way of looking at it." He was concerned, and felt Claimant needed treatment.

After reviewing additional medical records, including Dr. Bain's August 27, 2003 report as well as the operative documents, Dr. Lange issued a follow up report on October 14, 2004. Dr. Lange noted that the report showed potential abnormalities in the exam and contradicted Claimant's claim he had no left leg symptoms prior to the work incident. Dr. Lange also noted that despite the pre-and post-op diagnosis of a herniation at L3-4, the operative notes and discharge do not mention a herniation, but rather abnormalities such as thickened ligaments and bony stenosis, which could explain the findings suggested on the pre-op diagnostic studies. In other words, there was no medical evidence of a traumatic lesion. However, Dr. Lange testified that, given Claimant's drastically increased level of pain following the work incident, something happened that triggered his increased symptoms on September 4, 2003.

FINDINGS OF FACT AND RULINGS OF LAW

Based on the substantial and competent evidence, including the testimony of fact and opinion witnesses, the medical records, my credibility determinations, and the application of Missouri Workers' Compensation Law, I find that Claimant did not sustain an accident arising out of and in the course of his employment that resulted in an injury.

In a workers' compensation proceeding, the "claimant has the burden of proving all the essential elements of the claim and must establish a causal connection between the accident and the injury." *Cook v. Sunnen Products Corp.*, 937 S.W.2d 222, 223 (Mo. App. E.D. 1996) (overruled on other grounds). In this case, it is Claimant's burden to prove that his September 4, 2003 injury did "arise out of and in the course of his employment," as required by § 287.020.3,^[5] in that the event at work was a "substantial factor" with regard to the cause of his injury. § 287.020.3(2)(a); *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App.1998). An injury is compensable only if it is clearly work-related, and an injury is "clearly work related" only if work was a "substantial factor" in the cause of the injury and the resulting medical condition. §287.020.2; *Cahall*, at 372. An injury is not compensable, however, if work was merely a "triggering or precipitating factor." *Id.* On the other hand, "[a]wards for injuries 'triggered' or 'precipitated' by work are nonetheless proper if the employee shows that the work is a 'substantial factor' in the cause of the injury." *Kasl v. Bristol Care, Inc.*, 984 S.W.2d 852, 853 (Mo. banc 1999). A work-related accident can be both a triggering event and a substantial factor. *Cahall*, at 372. In general, if a claimant can show that the performance of his usual and customary duties leads to a breakdown or **change in pathology**, the injury is compensable. *George v. City of St. Louis*, 2005 WL 147090, 4 (Mo.App. E.D.2005)(citations omitted and emphasis added). Determinations with regard to causation and work-relatedness are questions of fact to be ruled upon by the fact finder, *Id.*; *Bloss v. Plastic Enterprises*, 32 S.W.3d 666, 671 (Mo.App. W.D.2000)

I find that Claimant's activities at work on September 4, 2003 were not a substantial factor in his low back condition, and he did not sustain an injury arising out of and in the course of his employment. It is undisputed that at some point mid-

shift on September 4, 2003, Claimant incurred an increase in pain. However, Claimant's evidence does not establish that he had a change in pathology as a result of the work incident, or that his actions at work that night did anything more than a merely trigger or precipitate an intense increase in pain symptoms.

Of all the facts, there are two in particular that support the finding Claimant's work activity was not a substantial factor in his back condition and surgery. First, I find that Claimant had considerable indications of a non-work related lumbar injury or disease prior to the alleged work injury. The chronic symptoms that followed his 1999 back surgery began to get worse sometime in the spring of 2003. In the weeks leading up to September 2003, Claimant's symptoms had been getting markedly worse, and included symptoms radiating into *both* lower extremities. The symptoms were so bad Claimant consulted with his primary care doctor, who found potential abnormalities on exam and suggested an MRI. Claimant mentioned back problems to his co-workers, and indicated he would need time off for tests. Claimant even asked his primary care physician one week before his accident if he should seek disability. Claimant's testimony regarding the nature and extent of his preexisting disability was questionable, and his attempts to explain the inconsistencies implausible. I find the medical records support the fact that Claimant had real, steadily increasing symptoms of pain in his back with numbness and tingling in both lower extremities prior to his work incident.

The second significant factor supporting the finding that Claimant's work activity was not a substantial factor in his back condition and surgery is the fact that Claimant failed to establish a change of pathology or other objective sign of injury. The testimony of Dr. Lange and the operative/discharge reports of Dr. Youkilis establish that what appeared pre-operatively to have been a herniated disc at L3-4 was not a traumatic lesion, but rather thickened ligaments and bony stenosis that developed over time following Claimant's 1999 surgery. While both Dr. Lange and Dr. Musich agree that something happened at work that lead to the sudden increase in symptoms of pain, Dr. Musich fails to offer any further explanation than "something happened." Dr. Lange paid much closer attention to the medical records, and offered an explanation based on the pathology documented in the operative notes. He was of the opinion that the movements Claimant made at work potentially that might have triggered symptoms, but he never stated that work was a substantial factor in the development of symptoms and need for additional treatment. Dr. Musich's opinion is conclusory, and therefore is not as helpful or credible as Dr. Lange's.

The activity Claimant was carrying out when his pain level increased was that of walking and turning. No one witnessed this event, and he did not fall – the fall happened afterwards in Mr. Hunt's office. Furthermore, even though Claimant's reported to his supervisors that he had an injured, painful back, he denied that he injured his back at work. This could be due to the fact that the motion was so basic, even Claimant did not consider it work related - he denied he had an accident or injury at work to Mr. Hunt. Or, it could be that Claimant's level of pain had so increased that whatever the work activity, he did not associate it with an injury. Claimant's initial denial he had suffered a work-related injury is not binding in and of itself, but whatever the reasons, it is further anecdotal evidence that his work activities were not a substantial factor in, or medical cause of, his lumbar spine injury.

I find that from 1999 to 2004, Claimant's underlying lumbar disease process was progressing and becoming more symptomatic with radiation of symptoms into the lower extremities. Although he was able to continue to work, his symptoms had become so significant that, in late August 2003, one week before his work incident, Claimant asked his doctor if he could apply for disability. Dr. Lange explained the surgical pathology did not show a traumatic lesion, but was rather a chronic process. Even Claimant did not associate his actions on the evening of the incident with the onset of increased symptoms. Whatever movement Claimant made that evening was not a substantial factor in his current medical condition – it *merely* triggered an increase in symptoms.

CONCLUSION

Claimant's alleged work injury is not compensable only because work was not a substantial factor in the cause of the injury and the resulting medical condition. Claimant's claim for benefits is denied, and all other issues are moot. The claim against the Second Injury Fund is also denied. Because the claim is denied, this Award is final, and is subject to immediate appeal

Date: _____

Made by: _____

Karla Ogrodnik Boresi
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secrest
Director
Division of Workers' Compensation

[\[1\]](#) Abbreviations in record are translated, and any words that are unclear in the record marked with an *.

[\[2\]](#) The handwritten notes contain an arrow from the printed word "radiation." The Initial Pain Assessment also indicates Claimant had constant pain that radiated.

[\[3\]](#) Claimant's attorney made a formal demand for treatment in a letter dated May 14, 2004 (Exhibit R).

[\[4\]](#) When Dr. Musich examined Claimant, he had not yet undergone his second fusion.

[\[5\]](#) Section 287.020.3 states:

(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....

(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 can 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....