

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

Injury No.: 04-050098

Employee: Ben W. Jones
Employer: Mark Wallace Incorporated, d/b/a Dumplins of Poplar Bluff
Insurer: Sagamore Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, heard the parties' arguments, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 3, 2010, as supplemented herein.

Employee, in his brief, expressed concern that the administrative law judge's award needs clarification as to what party is responsible for employee's medical expenses. The answer is that employer is responsible under § 287.140.1 RSMo, for both employee's past and future medical expenses, but because employer was uninsured as of March 20, 2004, funds must be withdrawn from the Second Injury Fund under § 287.220.5 RSMo, to cover those expenses.

Accordingly, we order the Second Injury Fund to cover the fair, reasonable, and necessary expenses to cure and relieve the effects of the injury sustained on March 20, 2004.

The award and decision of Administrative Law Judge Gary L. Robbins, issued November 3, 2010, as supplemented herein, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 14th day of October 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

VACANT
Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Ben W. Jones Injury No. 04-050098
Dependents: N/A
Employer: Mark Wallace Incorporated, dba Dumplins of Poplar Bluff
Additional Party: Second Injury Fund
Insurer: Sagamore Insurance Company
Hearing Date: August 4, 2010 Checked by: GLR/rf

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease? March 20, 2004.
5. State location where accident occurred or occupational disease contracted: Butler County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by law? Yes.
10. Was employer insured by above insurer? No, the employer was uninsured.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee emptying a trash container into a dumpster and injured his back.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: Twenty-five percent permanent partial disability to the back and body as a whole.
15. Compensation paid to date for temporary total disability: \$0.
16. Value necessary medical aid paid to date by employer-insurer: \$0.
17. Value necessary medical aid not furnished by employer-insurer: \$83,660.01.
18. Employee's average weekly wage: \$251.01.
19. Weekly compensation rate: \$167.42 for all purposes.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: See. Award.

The Compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Ronald L. Little.

FINDINGS OF FACT AND RULINGS OF LAW

On August 4, 2010, Ben W. Jones, the employee, appeared in person and by his attorney, Ronald L. Little, for a hearing for a final award. Sagamore Insurance Company, also referred to as the employer-insurer was represented at trial by Dennis R. Lassa. The Second Injury Fund was represented by Assistant Injury General Frank A. Rodman. Mark Wallace Incorporated dba Dumplins of Poplar Bluff, hereinafter referred to as "Dumplins" was represented by Matthew D. Leonard. At the time of trial, Mr. Wallace was deceased and Dumplins had ceased to operate as a business. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. On or about the date of the alleged accident or occupational disease the employee was an employee of Dumplins and was working under the Workers' Compensation Act.
2. The employee's claim was filed within the time allowed by law.
3. The employee's average weekly wage is \$251.01 per week. His compensation rate for all purposes is \$167.42 per week.
4. The parties agreed that the employer-insurer paid \$0 in medical aid.
5. The parties agreed that the employer-insurer paid \$0 in temporary disability benefits.

ISSUES

1. **Employer** - Whether the employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act and whether Sagamore Insurance Company provided any insurance coverage at the time of the accident?
2. **Accident** - Whether on or about March 20, 2004 the employee sustained an accident or occupational disease that arose out of and in the course of his employment?
3. **Notice** - Whether the employer had notice of the employee's accident?
4. **Medical Causation** - Whether the employee's injury was medically causally related to his accident or occupational disease?
5. **Prior Medical Bills** - Whether the employer-insurer is responsible to pay \$83,660.01 in previously incurred medical bills?
6. **Mileage** - Whether the employer-insurer is responsible to pay the employee \$506.28 as reimbursement for mileage?
7. **Future or Additional Medical Care** - Whether the employer-insurer is responsible to provide additional or future medical care?
8. **Temporary Disability** - Whether the employer-insurer is responsible to pay the employee \$7,031.66 in temporary total disability compensation covering the period from April 20, 2004 to February 7, 2005?
9. **Permanent Partial Disability** - Whether the employer-insurer is responsible for permanent partial disability compensation?

10. **Permanent Total Disability** - Whether the employer-insurer is responsible for permanent total disability compensation?
11. **Liability of the Second Injury Fund for either Permanent Partial or Permanent Total Disability** - Whether the Second Injury Fund has any liability for either permanent partial or permanent total disability compensation?
12. **Liability of the Second Injury Fund due to the employers status as an uninsured employer** - Whether the Second Injury Fund has any liability for unpaid medical bills due to the employer not having workers' compensation insurance at the time of the accident?

EXHIBITS

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- | | |
|-----------|----------------------------------------------------------------------|
| Exhibit A | Medical records of Raymond F. Cohen, D.O. |
| Exhibit B | Deposition of Raymond F. Cohen, D.O. |
| Exhibit C | Report of James M. England, Jr. |
| Exhibit D | Deposition of James M. England, Jr. |
| Exhibit E | Medical records and bills from Poplar Bluff Regional Medical Center. |
| Exhibit F | Medical records and bills from Cape Neurological Surgeons. |
| Exhibit G | Medical records and bills from Southeast Missouri Hospital. |
| Exhibit H | Medical records and bills from Plunkett Family Care. |
| Exhibit I | Medical records and bills from Bluff Radiology Group. |
| Exhibit J | Medical records and bills from Poplar Bluff Neurology Center. |
| Exhibit K | Medical records and bills from Advanced Pain Center. |
| Exhibit L | Medical bills from Cape Radiology Group. |
| Exhibit M | Medical bills from K-Mart Pharmacy. |
| Exhibit N | Medical bills from Super D Drugs. |
| Exhibit O | Paycheck stubs and compensation rate calculations. |
| Exhibit P | Attorney contract. |
| Exhibit Q | Offer of Proof of items removed from Employee Exhibit H. |

Employer's Exhibits

- | | |
|-----------|------------------------------------------|
| Exhibit 1 | Deposition of Robert Bernardi, M.D. |
| Exhibit 2 | not admitted |
| Exhibit 3 | Medical record of Naushad dated 4/22/04. |
| Exhibit 4 | Excerpt from Employee Deposition. |
| Exhibit Q | Items removed from Employee Exhibit H. |

Employer-insurer Exhibits

- | | |
|-------------|--------------------------------------------------------------------------|
| Exhibit I | Deposition Charles Hadley with Exhibits 1, 2 & 3. |
| Exhibit II | Documentation from the records of the Division of Workers' Compensation. |
| Exhibit III | Medical records from Cape Neurological Surgeons, P.C. |

Second Injury Fund Exhibits

None

RULINGS OF THE COURT FOR ALL ISSUES THAT WERE TAKEN UNDER ADVISEMENT AT THE PRETRIAL CONFERENCE

During the pretrial conference the employer-insurer marked the deposition testimony of Charles Hadley as Employer-Insurer Exhibit I and offered it as an exhibit. The attachments to the exhibit contained documentation including the insurance papers between Sagamore Insurance Company and Mark Wallace dba Dumplins. The employee filed a twenty-two page document entitled "Employee's Objections To Deposition Testimony of Charles Hadley". Mr. Hadley lived in Indianapolis, Indiana when his deposition was taken. The deposition of Mr. Hadley was taken on September 18, 2008. During the deposition the parties agreed that the deposition of Mr. Hadley could be used in lieu of his live testimony at trial. At the request of the employer-insurer the records were left open so they could respond to the written motion of the employee as it came as a complete surprise on the morning of trial. On August 11, 2010, the employer-insurer filed a document entitled "Insurer Sagamore Insurance Company's Motion To Strike Employee's Objections And Response To Employee's Objections To The Testimony Of Charles Hadley".

The Court has reviewed the materials offered by the parties and finds that the employee's objections are not well founded. The Court specifically overrules and denies the employee's written and oral objections to Employer-Insurer's Exhibit I and said attachments and admits same into evidence.

Other objections made by the parties were taken under advisement by the Court. The Court overrules these objections with the intent of letting in those exhibits that the Court did not admit at the time of trial.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:**STATEMENT OF THE FINDINGS OF FACT-**

Ben W. Jones, the employee and Mike Moss testified personally at trial. All other evidence was presented in written form either by various medical records, written records and contracts or deposition testimony.

Testimony of Mike Moss

Mr. Moss met Mr. Jones through his father and has been his friend for seventeen to eighteen years. Mr. Moss indicated that he has been a close friend of Mr. Jones for the past twelve years. In addition to their friendship, they have worked together woodcutting, scrap ironing and tearing down houses. Mr. Moss testified that Mr. Jones had physical problems that prevented him from doing any heavy work; therefore he did the heavy work. He indicated that the employee had

trouble with his hands and could not use them real well. In addition, there were problems with the employee's neck and he was not able to lift things above his head very well. Mr. Moss also indicated that sometimes the employee just rode around with him in the truck and did not work at all. Mr. Moss indicated that sometimes he paid Mr. Jones for working and at times Mr. Jones worked for no pay.

Mr. Moss generally saw the employee every day of the week but indicated that he did not see him quite as much when he started working for Dumplins. Mr. Moss was aware of the accident that the employee had at Dumplins and was the person who took him to all of his doctor's appointments. He testified that Mr. Jones changed after the accident in that he complained about being hurt, had trouble getting in and out of the truck and could not help with the work anymore.

Testimony of the employee

At the time of the trial, Mr. Jones was a little uncertain but thought he was seventy-five years old. He testified that he was born in 1935. He was slim built and walked with a cane. Mr. Jones stated that he did not have to use a cane until after his accident at Dumplins. He is married and currently lives with his wife of thirty years. At one point during his trial testimony the Court observed that the court reporter physically moved the microphone as the employee had difficulty turning in his chair to face the attorney that was conducting a cross examination. Mr. Jones testified that he smoked about one-half a pack of cigarettes a day for fifty years.

Mr. Jones grew up on a farm in Mississippi and did not attend school as he was required to work on the farm. Mr. Jones reported that he never went to school at all, cannot read or write, can't add or subtract, can't type and never used a computer. His first jobs involved picking and chopping cotton by hand and plowing with a mule. His first job away from the farm was delivering groceries in Chicago when he was about sixteen years old. After that his work history generally entailed jobs that involved manual physical labor. Over his work history he worked delivering liquor for a liquor store, worked in a hospital as a janitor, worked in construction pouring concrete, worked for the railroad laying railroad ties, worked at a stove foundry, worked for the City of Mount Vernon Illinois, worked at a business polishing silver, and performed janitorial work for JC Penny. All of these jobs were done before the employee returned to Missouri in about 1991-1992.

When Mr. Jones moved to Poplar Bluff his first job was junking houses with Mr. Moss. He also worked for the forestry service for a short while. His first real job was when Pro Staff placed him at Briggs and Stratton. He also worked for the VA washing dishes. Pro Staff placed Mr. Jones at Dumplins under an employment contract until he was hired full time by Dumplins. Mr. Jones testified that he started at Dumplins around 1999 when he was sixty-three years old. He indicated that he worked at Dumplins for four to five years prior to his accident and one month after his accident. His main jobs duties involved washing dishes, mopping, sweeping and cleaning around the restaurant. He testified that while he was at Dumplins he did the same type of work the whole time he worked there. He was on his feet most of the time, had to bend and twist his body, had to lean over counters and used his arms a lot.

Pre-existing injuries

Mr. Jones was injured several times prior to his accident at Dumplins on March 20, 2004. In the 1970's he had neck surgery due to an accident while working for a stove foundry. He did not return to work for the foundry as they went out of business. He had a second neck surgery in 1987 due to his employment with the City of Mount Vernon driving a garbage truck. Mr. Jones testified that he could not return to his job driving as he could not turn his head due to the surgery, could not do overhead or heavy lifting jobs and has experienced neck pain ever since the surgery. He stated that he filed an Illinois workers' compensation claim and settled this case for \$62,000.00. He also fractured his left thumb in the 1980 that required surgical repair. He testified that he has gripping problems and indicated he has trouble bending his left thumb and trouble lifting with his left hand. In addition, he indicated he would have trouble doing any factory work in that he has pain if he tries to bend his thumb too far. He testified that these problems have existed ever since he had his hand surgery.

Mr. Jones testified as to the physical effects that these preexisting surgeries had on body and explained the activities that were hard for him that he had to deal with when performing his job. He pointed out that he had movement problems and pain with his neck that prevented him from being able to do some jobs such a driving a commercial vehicle and affected everything he did since he had his surgeries. In addition he described problems he had with his right hand that has affected his ability to work and bend and grasp with his hand since he had the surgery. Mr. Jones even described how the preexisting problems and disabilities affected how he did his job at Dumplins such as reaching and grasping and moving his head to look up to work with pots and pans that were hung overhead.

Accident

Mr. Jones testified that as part of his duties at Dumplins he emptied trash. He testified and the medical records indicate that prior to March 20, 2004, he had no back problems that disabled him from completing his job assignments in any way. On March 20, 2004 Mr. Jones was emptying a heavy trash container into a trash dumpster and hurt his back. He testified that on March 20, 2004, the restaurant had more than five employees. He stated that he was an employee and he named four other employees: Linda, Oliver, George and Suzie. Mr. Jones noted the restaurant also employed waitresses but he could not remember their names.

At the time of the work accident/injury, Mr. Jones had removed scraps from the dishwasher into a container for disposal in the big garbage dumpster outside. He carried the container and scraps, weighing between 40 to 45 pounds, outside. In order to dump the container into the garbage dumpster, he had to lift it up over the top edge of the dumpster. When he lifted the container, he felt a sudden pain in the middle of his back like someone had poked him with a pin. He also felt pain down into his right leg. He stood outside by the dumpster for a little bit and then went back inside to find his supervisor, Linda.

Mr. Jones testified that he told Linda that he had picked up the garbage to dump it when he felt like someone had poked him in the back and he had pain down his right leg. She asked him if he wanted time off and he said no he probably just pulled a muscle. Mr. Jones continued to work his regular duties at Dumplins for another month following the injury of March 20, 2004. For that month he was having lots of problems with pain in his low back and pain and cramping in his right leg. He told Linda when he decided to see Dr. Plunkett about his back and leg pain. She did not say anything to suggest that he could or could not see Dr. Plunkett and she did not offer to send him anywhere else.

Mr. Jones testified the medications prescribed for his back pain/injury were filled at the Poplar Bluff K-Mart pharmacy or the Super D Pharmacy in Poplar Bluff. Mr. Jones testified that the bills for medical treatment of his low back and leg pain following the March 20, 2004 work accident were submitted to Medicare for payment. Medicare has not informed him whether or not he will be required to reimburse Medicare the amounts paid for this medical treatment of his low back injury. He stated he was also required to make co-payments to the medical providers but he was unable to say for certain how much he had paid to date out of his own pocket. More recently he has been receiving a bill from the pain clinic for an outstanding balance and he has not been able to see the doctor because he cannot afford his co-payments. He testified that the only reason he had for being seen by Dr. Plunkett, Dr. Cheung, Bluff Radiology, the pain clinic or Poplar Bluff Neurology etc. was the injury to his back of March 20, 2004 and that he filled the prescriptions of Dr. Plunkett, Dr. Cheung and the doctor at the pain clinic at the K-Mart pharmacy or Super D Pharmacy in Poplar Bluff.

He also testified of having to make several trips to Cape Girardeau for his injury-related medical treatment and that his visits with Dr. Cheung or hospital admissions will be documented in the medical records admitted into the evidence at this trial. (The parties stipulated that Mr. Jones would have been required to travel 184 miles round-trip for each date of service).

Mr. Jones last worked on April 20, 2004. He had back surgery in June 2004 and has not been able to return to work since. Following his back injury and subsequent surgery, Mr. Jones has persistent pain in his back and pain in his legs. The pain in his back is worse than the pain in his legs. He testified that with his level of back pain and the pain medication, he can't work, can't lift or do much of anything. He has back pain every day and finds that he has to lie down at some point every day to help ease that pain. Although he has not tried to work since his back surgery, he does not think he could handle a job now because of his back.

On a typical day he sits around and talks to his wife. Sometimes he will try to do the dishes or run the vacuum sweeper. Although he does not have the responsibility of keeping up a lawn, he wouldn't be able to if he did. He is no longer able to do scrap work and can't do any lifting. Mr. Jones thought of all the jobs he has had and stated that with all the pain he has now, he couldn't do any of them since he hurt his back in 2004.

He testified that Mr. Moss still calls to see if he feels like getting out and sometimes he will take his pain medications and ride around with him for a while. If he takes his medicine he can sometimes handle it but he also has to lie off of the pain medicine so his bowels will move - the

medicine causes constipation. There are other times when Mr. Moss calls but he won't go because he is already having a lot of back and leg pain. Mr. Jones stated that his back, legs and neck pain will sometimes keep him up at night and disturb his sleep.

Records of Plunkett Family Care/Dr. Plunkett

The first medical care that the employee received after the March 20, 2004 accident was at Plunkett Family Care on April 1, 2004. The record generated from that visit was prepared by a nurse and is the first medical record in this case. That record indicates "c/o lower back pain that radiated down (rt.) leg, tingling, numbness and charlie horses". It also indicates "Started/Since: 2 weeks". The report also indicates "...works at Dumplins. Works 7 days /w/?". It reported that the employee was a smoker and diagnosed sciatica.

A nurse also saw the employee on April 3, 2004 and April 5, 2004. Dr. Plunkett saw the employee on April 9, 2004. That report indicates "(rt. leg) and low back pain", "since mid March". Mr. Jones was seen on April 16, 2004. That record mentions the MRI results and contains a referral to a neurosurgeon and mentions Dr. Ray and Dr. Naushad. Additional records exist that reflect the treatment that the clinic provided after the employee had back surgery with Dr. Cheung in June 2004. Those records begin December 12, 2004. Records indicate the clinic saw the employee into 2009.

Mr. Jones testified that he is presently getting treatment at the Pain Center. He said that the pain center prescribes his pain relieving medications and every other month they give him a shot called a "burn out" shot. Mr. Jones said he could not pronounce the doctor's name but upon prompting, he agreed the pain doctor is Dr. Naushad. Mr. Jones has been treating at the pain center for the last two years or so and is not receiving treatment at any other facility. Mr. Jones said that he currently takes three medications all prescribed by Dr. Naushad and they are all to treat his persistent back pain.

Records of Dr. Naushad

Dr. Plunkett referred the employee to Dr. Naushad. Dr. Naushad first saw the employee on April 22, 2004 and prepared a letter about this visit. In the letter he stated that "He presented with lower back pain for the last six months". Dr. Naushad reviewed an MRI that was done on April 13, 2004 and indicated that:

- The employee has degenerative disc space narrowing at L1-2 and L5-S1.
- He has a concentric disc bulge that is moderate at L2-3.
- He has facet hypertrophic changes at L5-S1.

The MRI of April 13, 2004 as read by the radiologist reported:

1. Minimal first degree spondylolisthesis of L5 on S1 anteriorly secondary to exuberant hypertrophic facet disease bilaterally. No spondylosis. ...
2. Multilevel severe degenerative disc space narrowing from L1-2 to L5-S1 with vacuum phenomenon at L3-4 and L4-5. ...
3. ...Less than 1 cm lateral luxation of L4 relative to L5 on the left. ...

4. L2-3. There is moderate concentric bulge of the annulus, with minimal encroachment into the neural foramen but no involvement of the exiting L2 nerve roots. No formal disc protrusion. Mild facet hypertrophy and thickening of the ligamenta flava. Combined, this produces mild to moderate central canal and lateral recess stenosis.
5. L3-4. There are two bubbles of extruded gas into the right lateral recess at L3-4 consistent with old extruded disc material. There is also mild concentric bulge of the annulus with some extension into the foremen but no obvious involvement of the exiting L3 nerve roots. The extruded old disc material and gas in the right lateral recess has some mass effect on the developing L4 nerve root on the right.
6. L4-5. There is essentially collapse of the disc space with vacuum phenomenon and marked hypertrophic changes of the opposing vertebral endplates, particularly along the right side and posteriorly. This produces some significant neural foraminal stenosis at L4-5 on the right with probable involvement of the exiting L4 nerve root. The exiting L4 nerve root on the left does not appear to be involved. There is some concentric bulge of the annulus but no focal disc protrusion is seen. No significant spinal stenosis although there is significant bilateral facet hypertrophy bilaterally.
7. L5-S1. There is exuberant hypertrophic facet changes bilaterally, collapse of the disc space and concentric bulge of the annulus. The hypertrophy off the end plates extends into both neural foramen. There does not appear to be significant stenosis and there is no nerve root entrapment from the first degree listhesis. No focal disc protrusion identified. The bulging annulus, however, in bone, does seem to produce some flattening of the S1 nerve root bilaterally. No lateral recess stenosis, however, is identified at this level.
8. No other significant abnormality.

Records of Dr. Cheung

Dr. Cheung first saw Mr. Jones on May 3, 2004. He prepared a medical report about the evaluation. In that report, he reported a "History of Present Illness" which stated, "This is a 68-year-old dishwasher who apparently was injured on the job. This occurred on March 20th. He was carrying some garbage can which weighs about 50-60 pounds and he hurt his back and he has pain coming down his right lower extremity mainly of the side and in the back and in the calf area".

Dr. Cheung reviewed a CAT scan and said:

- The employee has quite significant degenerative changes.
- He has a collapsed disc space at L4-5 with foraminal stenosis worse on the right than the left. There might be a questionable HNP in the foramen on the right side.
- The employee has moderately severe spinal stenosis at L2-3 and to a lesser extent at the L3-4 area.
- The employee also has foraminal stenosis at L4-5 on the right from collapsed disc space and osteophyte formation.

His impression was that the employee had neurogenic claudication and might have some nerve stretch injury also.

Dr. Cheung ordered an MRI that was completed on May 21, 2004. He said it shows:

- Significant stenosis and 2-3 moderately severe and 3-4 and to a lesser extent at 4-5 on the right but he also has a significant 4-5 foraminal stenosis.
- There is also what appears to be a foraminal disc at 4-5 also as well as a medical foraminal disc at L5-S1 on the right but it spares both the L5-S1 nerve root.
- The employee has a positive foraminal stretch on both sides worse on the right than the left.

Mr. Jones consented to surgery. Dr. Cheung planned to decompress the 2-3 and 3-4 level and do a foraminotomy on 4-5 on the right to help him. Surgery was done June 3, 2004.

Dr. Cheung saw the employee through September 17, 2004. At that time the doctor reported that Mr. Jones was doing fine and as the employee wanted to go back to work he was released to wash dishes.

Records of Dr. Choudhary

Dr. Plunkett continued treatment with Mr. Jones after his surgery and referred him to the care of Dr. Choudhary. Dr. Choudhary saw the employee on February 28, 2005. The history in Dr. Choudhary's report is that the employee started to have back problems on March 20, 2004 when he bent down to pick something up.

Testimony of Dr. Bernardi

Dr. Bernardi testified by deposition on February 10, 2010. He is a neurosurgeon that was obtained by Dumplins to examine the employee. Dr. Bernardi saw the employee one time on September 9, 2008, reviewed medical records, examined the employee, took a history from the employee and prepared a report dated September 9, 2008. Dr. Bernardi testified that he reviewed the records of Dr. Plunkett after he saw the employee. He indicated that the employee told him that he hurt himself at work, however the records of Dr. Plunkett and Dr. Cheung do not really state that the employee's symptoms were the result of a work incident.

Dr. Bernardi testified that the first diagnoses of the employee included lumbar spondylosis. He indicated that lumbar spondylosis is probably best considered an age phenomenon-like losing your hair as you get older. Dr. Bernardi testified that this is a degenerative condition as opposed to a posttraumatic condition. Dr. Bernardi opined that the employee's lumbar spondylosis was not caused by the March 20, 2004 accident. He indicated that he also diagnosed Mr. Jones with L2-3 and L3-4 stenosis based on his understanding of the imaging studies. His opinion was that the stenosis was also of a degenerative variety that preexisted the accident and was not post traumatic. In addition, he testified that the stenosis was not caused by the employee's work accident.

Mr. Jones was seventy-one years old when Dr. Bernardi examined him. Dr. Bernardi testified that age is a factor in the development of spondylosis and stenosis. The doctor was asked if trauma could aggravate degenerative disc disease to the point where it becomes chronically

symptomatic. He indicated that the question was a difficult question to answer but the short answer is yes. He testified that the key is whether a traumatic incident can aggravate it in such a way that it becomes chronically disabling symptomatic. He says you can irritate/aggravate your back and make your back hurt and the pain can persist. He reported that most people who once had a bad episode of back pain have residual pain, it comes and goes. He testified that there is not a great deal of explanation for how a traumatic event can cause chronic, persistent, severe disabling low back pain, it's just not how it behaves. He also indicated that smoking is a factor in the development of arthritis in your back.

Dr. Bernardi testified that he did not have the diagnostic studies for the L4-5 level and therefore was unable to reach a conclusion. He reported that from Dr. Cheung's notes he is unclear as to whether the employee had a disc herniation at L4-5. He testified that if Mr. Jones had a disc herniation that is a potentially acute traumatic event, while a degenerative disc bulge or a bone spur is a pre-existing problem. He said that he would like to see the imaging but that it is highly unlikely that Mr. Jones will need additional treatment for his back problem.

Dr. Bernardi also reviewed the records of Dr. Naushad. Dr. Naushad treated Mr. Jones after Dr. Cheung performed his back surgery. Dr. Bernardi's opinion was that the treatment provided by Dr. Naushad/Advanced Pain Center was not related to the alleged incident of March 20, 2004.

Dr. Bernardi testified that he saw no objective reason why the employee shouldn't be able to perform some type of work, but indicated that he would have to have work restrictions. Dr. Bernardi rated Mr. Jones with a fifteen percent permanent partial disability of the whole person.

During cross examination by Sagamore, Dr. Bernardi provided several other opinions:

- He cannot say whether the work restrictions are related to the work incident or something else, but indicates that the work restrictions are related to the surgical procedure the employee had and to his ongoing complaints. However, since he did not see the L4-5 imaging, he testified that he cannot say whether that was work related or not.
- When the doctor was asked whether the employee's current symptoms are caused from the degenerative process in his back or from the work incident, he responded that he has no explanation for the severe back pain and the leg pain that Mr. Jones describes. His opinion was that the pain from the incident should be transient in nature-pain this long and this bad defies explanation.
- He indicated that there are two things going on in the employee's back, this make things complicated and he did not have all the information that would be desirable to reach a conclusion. He said that he could not explain the employee's symptoms based on the information he had available.
- Dr. Bernardi summarized and indicated that as to the extent that any of the employee's symptoms in his back are related to the chronic degenerative process, then work was not a substantial factor in those symptoms, and work, if it did aggravate, is merely a precipitator and triggering factor.
- With regard to the herniated discs, that is unclear in his mind.

In further questioning by employee's counsel, Dr. Bernardi agreed that Dr. Cheung did a three level surgery and his records indicate he found disc pathology at L4-5. He testified that Dr. Cheung described a disc bulge and described a very strange relationship between the bulge and the nerve root, suggesting that it was impinging on the nerve. Dr. Bernardi agrees that Dr. Cheung described improvement after the surgery and that suggests a cause and effect relationship. He further agreed that he is not a vocational specialist and that he does not know the impact of the employee's physical restrictions, age, education and intellectual abilities have on his ability to work.

In evaluating the employee's case, Dr. Bernardi agreed that there is temporal relationship as far as the timing of the beginning of pain and attributing causation. He testified that if a person has degenerative disc disease and doesn't have pain, and then has a lifting incident and immediately starts to have pain, the temporal relationship between the beginning of pain and the lifting incident is significant in attributing causation. He also stated that if the pain goes on unabated it would be suggestive of the continuing pain being related.

Testimony of Dr. Cohen

Dr. Cohen was retained by employee's counsel to evaluate the employee. Dr. Cohen saw the employee on July 31, 2007. At that time, Dr. Cohen reviewed medical records, took a history from the employee and conducted a physical examination of the employee. By history, Mr. Jones reported that he hurt himself when he was lifting a sixty pound trash container up to empty it into a dumpster and felt pain in his back. Mr. Jones advised Dr. Cohen of his current physical problems and also advised the doctor of his physical problems that preexisted March 20, 2004. In addition the employee reported that he had no prior back problems before March 20, 2004. After receiving further medical records, Dr. Cohen prepared a second report dated May 18, 2009.

Dr. Cohen provided diagnoses regarding the March 20, 2004 accident:

1. Right lumbar radiculopathy due to disc herniation on the right at L4-5.
2. Status post lumbar surgery for bilateral spinal stenosis at the L2-3 and L3-4. Right L4-5 foraminal disc.
3. Aggravation of lumbar degenerative spine disease.
4. Chronic lumbosacral back pain secondary to the above.
5. Recent onset of left lower extremity pain.

He provided a rating of forth-five percent permanent partial disability of the whole person due to the March 20, 2004 accident. He stated that five percent is pre-existing due to the age-related degenerative changes, and the other forty percent is due to the work related injury. In addition he recommended restrictions of:

1. No lifting greater than ten pounds.
2. No sitting or standing greater than twenty minutes.
3. No crawling, kneeling, squatting, climbing or walking on uneven surfaces.

He also identified the employee's preexisting conditions or disabilities:

1. Status-post right thumb fracture with pinning procedure.
2. Status-post two cervical surgeries-one in 1970 and the second in 1987.

Dr. Cohen rated the employee's pre-existing conditions:

1. Twenty percent permanent partial disability at the right hand. He should not do any forceful grasping and avoid cold weather and should not bump or strike the right thumb.
2. Forty percent permanent partial disability of the whole person at the cervical spine. Neck restrictions of being restricted from any activity in which the employee repetitively turns his head and neck, avoid all awkward positions involving the neck, no lifting greater than ten pounds.

Dr. Cohen testified that his diagnoses concerning the primary work related injury are as a direct result of injuries that Mr. Jones sustained at work to his lumbar spine on or about March 20, 2004, and that the substantial factor in his injury as well as his disability is due to that work related injury. In addition, his opinion is that it is reasonably probable that the employee will need future medical care that will include pain management such that he is receiving including appropriate medications. He also indicated that the employee needed a new MRI due to the onset of recent left leg pain.

Dr. Cohen was of the further opinion that Mr. Jones' preexisting conditions or disabilities combine with the primary work related injury to create a greater overall disability than their simple sum and that due to this combination of disabilities, the employee is permanently and totally disabled and not capable of gainful employment. As a caveat, Dr. Cohen indicated that he would like to see the treatment records of Dr. Beyranvand and the formal MRI reports in order to supplement his initial report. Dr. Cohen prepared his supplemental report date May 18, 2009, and after reviewing additional records, including records form Advanced Pain Management and the MRI reports of April 13, 2004, and May 12, 2004 he indicated that his previous opinions remain unchanged.

Dr. Cohen testified that Mr. Jones disc herniation at L4-5 is based on the history that Mr. Jones was lifting and had trauma followed in close proximity with a neurologic symptom that is consistent with a pinched or trapped nerve. He also indicated that this is consistent with the abnormalities that Dr. Cheung identified. Dr. Cohen testified that lifting a trash can aggravate a preexisting condition and spinal stenosis. He indicated that he has situations where a patient has preexisting spinal stenosis that is asymptomatic, and therefore, not disabling. Then due to a lifting incident, or some other type of trauma, the stenosis is aggravated and becomes symptomatic and disabling. He would conclude that the accident was at least a substantial factor in causing aggravation of that preexisting condition. Dr. Cohen testified that he believes this is what happened in Mr. Jones' case. In addition, Dr. Cohen testified that the accident aggravated the employee's preexisting degenerative condition to the level that it became disabling.

Dr. Cohen testified that:

- Mr. Jones was not getting any treatment for his low back prior to March 20, 2004 and he was not having any complaints re his low back before that date.
- The employee's preexisting conditions were a hindrance and obstacle.

- All of the medical care that the Mr. Jones received was necessary to cure and relieve him from the affects of his low back injury.
- Mr. Jones is permanently and totally disabled due to a combination of his preexisting disabilities, the neck and the right hand and the back due to the accident. He specifically indicated that Mr. Jones' last injury alone would not preclude him from working altogether; total disability is caused by a combination of the problems with the right hand, neck and back.

During cross examination by Dumplins, Dr. Cohen agreed that smoking contributes to the degenerative disc process and it also could affect spondylosis. He also agreed that Mr. Jones' back was asymptomatic prior to the accident, he had surgery and pain management, has not worked since April 2004 and that he was working before the accident full time. He indicated that when Dr. Cheung did his surgery he addressed the L4-5 disc bulge, but did not address the stenosis at other levels. Dr. Cohen provided his reasoning as to why Mr. Jones pain was related to the accident and is a substantial factor.

Testimony of James M. England, Jr.

Mr. England saw the employee on November 27, 2007, prepared a report dated January 9, 2008 and testified by deposition on July 9, 2008.

Mr. England's opinion is that "Mr. Jones is an elderly man with virtually no education who is functionally illiterate and who certainly comes across as rather slow mentally. He also looks physically uncomfortable and tired. Considering his combination of problems I do not believe that he is capable of successfully competing for employment nor do I feel that he could sustain any type of work in the long run. I believe that his unemployability is due to a combination of his physical problems and his age and very limited academic ability.

Mr. England testified that from a vocational standpoint his lack of employability would be due to a combination of factors. He indicated that the restrictions imposed by Dr. Cohen would limit the employee to sedentary work but would not knock him out of all work. He also indicated that there were restrictions regarding his right hand and neck/head and this is another important factor as is the fact that the employee can't read and write and handle math. His testimony was that something more than the last injury alone prevents the employee from working.

Testimony of Charles Hadley

Mr. Hadley testified by deposition on September 18, 2008. He was the Marketing Manager for Sagamore Insurance Company who oversaw the issuance of all workers' compensation policies written by Sagamore in 2004. His deposition testimony is contained in Insurer's Exhibit I, along with a copy of the insurance policy that was issued to Dumplins effective May 29, 2003 that is identified as SWO20839, and a second insurance policy that was issued to Dumplins effective April 6, 2004 that is identified as SWO29383. It is policy SWO20839 that is central to the issue of whether the Dumplins had workers' compensation coverage in effect March 20, 2004 when the employee had his accident.

Mr. Hadley indicated that SWO20839 was a policy that was written for Dumplins that became effective on May 29, 2003. The policy period was to be from May 29, 2003 to May 29, 2004. The agent who wrote the insurance policy forwarded Sagamore a deposit, one month's premium and the Second Injury Fund premium. Dumplins chose the method of premium payment and chose to pay his premiums in monthly installments. The monthly installments were due on the twenty-ninth of each month with the first premium payment being due on June 29, 2004.

Mr. Hadley testified about the provisions of the insurance policy and discussed the procedure that Sagamore follows for late or missed premium payments. If an insured misses an installment payment beyond the scheduled due date, four days after the due date an invoice is mailed to the insured titled "Notice to Cancel for Nonpayment". This document indicates to the insured that the original payment is now four days past due. It also informs them that if the individual payment is not received within eight following days, the insurer will start the process of cancellation for nonpayment of premium. If payment is not received by the date of the Notice of Intent to Cancel policy, the insurer will issue a Notice of Cancellation for nonpayment of premium. This Notice of Cancellation is sent to the named insured, the agent and NCCI. If the insured goes beyond the cancellation effective date as indicated on the cancellation, then the policy terminates for nonpayment. There is an effective date on the Notice of Cancellation for nonpayment that is sent out. Sagamore's policy with regard to receiving payments from the insured is that it is not received until it is received in Sagamore's office. In addition, if Sagamore should receive a late payment beyond the date set out in the Notice of Cancellation for nonpayment of premium, Sagamore's policy is to return the check to the insured along with a letter indicating that the policy has been terminated for nonpayment of premium and that there is no coverage in place.

Sagamore received the first payment from Dumplins on June 26, 2003 in the amount of \$238.42. It was due on June 29th and therefore was made timely. The July and August payments were also received timely.

As per the agreement in the insurance policy, the next payment was due on September 29, 2003. **Timely payment was not made to Sagamore.** Per policy, Sagamore sent Dumplins a Notice of Intent to Cancel if payment was not received by October 12, 2003. The effective date of cancellation was October 28, 2003, however Sagamore received payment on October 16, 2003 so the policy was reinstated with no lapse in coverage. Per the policy agreement and the monthly installment that Dumplins selected to pay premiums, the next premium was due on October 29, 2003. **Dumplins did not pay this premium timely.** Sagamore did not receive another payment until November 14, 2003 in the amount of \$501.83. This payment was applied to the premiums for the months of October and November 2003. Sagamore received another payment on December 5, 2003 before the December premium notice was sent out on December 5, 2003. Because the insured made a payment on December 5, 2003 before the December premium notice was sent out and was due, that payment was applied to the entire balance bringing down the premium payments to \$185.73 per month. The December premium notice went out on December 9, 2003 and was due on December 29, 2003. **This was not paid.** A Notice of Intent to Cancel was generated on January 5, 2004 with an outstanding balance of \$185.73.

Additionally, the January invoice was sent out on January 9, 2004. The next payment was received on January 12, 2004 in the amount of \$185.73. This payment was applied to the December outstanding balance invoice. **Sagamore did not receive a payment for the January invoice.** A February invoice was sent out of February 9, 2004. **When no payment was made, a Notice of Intent to Cancel was generated. Sagamore never received a payment under the Notice of Intent to Cancel.** At that time, Dumplins was behind for the months of January and February. **After not receiving a payment** by the due date of the Notice of Intent to Cancel, a Notice of Cancellation for nonpayment of premium was mailed on February 10, 2004. This was the final notice. The Notice of Cancellation for nonpayment of premium notified Dumplins of the effective date of cancellation. The date was February 24, 2004. The effective date of February 24, 2004 was the effective date of cancellation such that the policy would terminate for nonpayment of premium if not paid in full by 12:01 a.m. on February 24, 2004. Notice advising Dumplins of the effective date of cancellation was sent to Dumplins at their mailing address. **Sagamore did not receive any payment before February 24, 2004. Because Sagamore did not receive payment before February 24, 2004, Sagamore terminated the policy for nonpayment of premium on February 25, 2004.** According to Sagamore policy, because timely payment was not made under the final notice, policy SWO02839 with Dumplins was cancelled. On March 1, 2004, Sagamore did receive a payment from the insured but it was after the final cancellation date of February 24, 2004. **As per the policy provisions, Sagamore promptly returned the check to Dumplins along with a letter indicating that the policy had been terminated for nonpayment of premium. That letter was sent out on March 2, 2004, 18 days before Mr. Jones accident.** Sagamore advised Dumplins that the policy had been cancelled on February 24, 2004 and as of that date Dumplins had no coverage on the policy. Dumplins was also advised that if they wished to rewrite their workers' compensation policy with Sagamore, they would have to contact Sagamore and submit an application for a brand new insurance policy. Sagamore did not receive any communication that their notices, letters or correspondence came back to them as undeliverable to Dumplins.

Dumplins did reapply for a new policy on April 2, 2004. A second policy, SWO029383 was issued and became effective April 6, 2004. This left Dumplins not covered for the period from February 24, 2004 to April 6, 2004 because Dumplins never paid a premium for the months of January through March and the policy was terminated according to policy for nonpayment of premium.

Mr. Hadley testified that Sagamore received premiums of \$1,990.73 from Dumplins for the period of May 29, 2003 to February 24, 2004 when the policy was cancelled. The total amount that was due through February 24, 2004 was \$2,474.00. Dumplins still owed Sagamore at the time the insurance policy was cancelled.

Sagamore never received any correspondence or verbal communication from Dumplins contesting the cancellation of the first policy. Notice of that cancellation was completed over two weeks before Mr. Jones had his accident.

RULINGS OF LAW-**Covered Employer and Liability of the Second Injury Fund for Uninsured Employer**

Sagamore Insurance Company, the employer-insurer maintains that Dumplins was not an employer operating under the provisions of the Workers' Compensation Act on March 20, 2004. They maintain that policy SWO029383 was properly cancelled under the provisions of the policy due to nonpayment of premiums; therefore, Dumplins had no workers' compensation coverage on March 20, 2004 when the employee had his accident. The employee, Dumplins and the Second Injury Fund all maintain that Dumplins had workers' compensation coverage on March 20, 2004. They maintain that Sagamore improperly cancelled the policy and misapplied premium payments made by Dumplins.

The Court has carefully set out the testimony of Mr. Hadley concerning the procedures Sagamore followed in the process of cancelling policy SWO02983 and reviewed the policy provisions of said contract. The Court notes that Dumplins, not Sagamore selected the monthly installment method of paying premiums as opposed to paying the yearly premium at one time. Dumplins paid several months installment on time, according to the policy provisions they were accepted under the insurance contract, and there were no problems. Problems began to happen in September 2003 when Dumplins did not follow the predetermined terms of payment and did not pay its monthly installment timely. Mr. Hadley set out month by month, notice by notice the events that happened after September 2003. The Court finds his testimony to be credible. The Court further finds that Sagamore operated in good faith and in compliance with the terms of the insurance policy that are predetermined in order to cancel an insurance policy due to nonpayment of premiums.

The policy clearly sets out the procedures to be followed if an insured fails to make timely premium payments per the policy. Sagamore followed policy by sending out the proper notices in a timely manner and acted accordingly when Dumplins did not make timely payments. Dumplins knew at least two weeks prior to Mr. Jones accident that Sagamore had cancelled their coverage, yet took no action to reinsure until after April 1, 2004.

The Court has reviewed the law and has reviewed the briefs that were filed by the parties. The Court is mindful that the preference in the law is that insurance policies remain in effect. The burden is on the insurer to show a cancellation of an insurance contract before the date of an accident. In addition, cancellation of an insurance policy requires strict compliance with the conditions provided in the policy for cancellation. In reviewing this case, consideration has to be given to the fact that Dumplins chose the installment method of paying its insurance premiums. More importantly, this problem would not have occurred if Dumplins had followed the terms of the policy and paid the insurance premiums on time as they agreed to do. In reviewing the evidence it appears that Sagamore acted in good faith and followed the provisions of the insurance policy that were necessary to cancel a policy due to nonpayment of premiums.

The Court finds that Dumplins was an employer acting under the provisions of the Missouri Workers' Compensation Act, but after considering all of the evidence the Court further finds that

Dumplins did not have workers' compensation insurance on March 20, 2004. In addition the Court finds that as Dumplins has been found to be an uninsured employer; under the provisions of Section 287. 220 RSMo, the Second Injury Fund has the responsibility to step in and pay appropriate medical bills that were incurred by the employee to cure and relieve him from the effects of his March 20, 2004 accident as Dumplins was an uninsured employer on March 20, 2004.

Notice

The parties disagree on the issue of Notice. The employee testified that he injured his back on March 20, 2004 when he was dumping a container of trash into a dumpster. No one questions that such an act is a legitimate accident; however the parties disagree as to whether the event took place at all or whether the employee reported the event to Dumplins. The employee testified that he told his supervisor "Linda" of the incident the day that it happened but declined any time off on that day. The employee also testified that a short time later he went to Plunkett Family Care for medical care due to problems that he says developed from the March 20, 2004 lifting event. He indicated that he went on his own. After he went to Plunkett Family Care, the employee testified that he then asked Linda for treatment. He testified that Dumplins did not provide any medical care so he proceeded to obtain his medical care on his own. He also testified that Linda told him that Dumplins did not have workers' compensation insurance. The parties dispute the employee's testimony as to what was said to Linda, what Linda said and what authority she may or may not have had. However, no one produced Linda to testify at trial concerning these matters; therefore, the employee's testimony is not disputed by any other live testimony.

Based on a consideration of all of the evidence the Court finds that the employee's testimony was credible, was not disputed by any other live testimony and therefore finds that the employee did give proper notice to Dumplins about his accident that occurred on March 20, 2004.

Accident

The parties disagree on the issue of Accident. The employee testified that he injured his back on March 20, 2004 when he was dumping a container of trash into a dumpster. No one questioned that such an act is a legitimate accident; however the parties disagree as to whether the event took place at all. A review and comparison of all of the evidence presented points to a work accident occurring on March 20, 2004 when the employee was dumping trash into the garbage dumpster in the course and scope of his employment with Dumplins.

In part, Sagamore, the Second Injury Fund and Dumplins rely on the medical records of Plunkett Family Care and Dr. Naushad to support their position that the employee did not have an accident that arose out of and in the course of his employment at Dumplins on March 20, 2004. The initial records from Plunkett Family Care do not definitely state that the employee reported that he hurt himself at Dumplins on March 20, 2004 when dumping trash. However, on April 1, 2004, the employee first sought medical treatment at Plunkett Family Care for his injuries resulting from the March 20, 2004 work accident. He testified that he told the nurse practitioner of his specific accident at that time. His testimony is challenged only by the notations made by

the provider (or those not made by the provider) in the record of that first visit. The employee cannot control what is written by the medical provider in the medical chart, he can only relay information to the provider. A review of the record from the April 1, 2004 office visit notes that the employee works at Dumplins, that he had back pain, and most importantly that the pain started two weeks prior. These notations made by the nurse practitioner are entirely consistent with the employee's testimony concerning when and where and what caused his symptoms to begin. They are also consistent with the history contained in the initial record of Dr. Cheung from May 3, 2004. Temporally, the early reports are all consistent with the employee's accident on March 20, 2004 with the exception of the April 22, 2004 letter of Dr. Naushad where the doctor reports that the employee had lower back pain for the last six months. The Court has weighed this inconsistency with all of the evidence in this case, including the testimony of the employee, the medical records that report the physical problems with the employee's back that are consistent with his accident and concludes that the testimony of the employee is supported by the greater weight of the evidence, that the employee's testimony was overall consistent and credible and supports his position that on March 20, 2004 he hurt his lower back while working for Dumplins. To determine otherwise in light of the evidence does not make common sense.

Based on all of the evidence the Court is not prepared to state that the employee lied about his accident when in fact the Court found the employee's testimony to be credible and his physical actions indicative of a person who would have physical complaints that the employee described.

Based on a consideration of all of the evidence the Court finds that the employee sustained an accident arising out of and in the course of his employment at Dumplins on March 20, 2004 wherein he injured his lower back.

Medical Causation

The parties in opposition to the employee's claim have argued that employee's lumbar spine problems are unrelated to the accident of March 20, 2004 and actually result from preexisting degenerative disc disease. There is really no dispute by the physicians, including Dr. Plunkett, Dr. Cheung, Dr. Cohen and Dr. Bernardi that the employee had degenerative disc disease in his low back that preexisted the March 20, 2004 work accident. However, the credible and uncontradicted evidence was that prior to March, 20, 2004, the employee had no low back pain or problems and that any preexisting degenerative disc disease in his lumbar spine was not symptomatic or disabling.

It is Dr. Cohen's opinion that the employee's lumbar injury resulted from the work accident of March 20, 2004. In his report and his deposition, Dr. Cohen stated his diagnosis regarding the primary work-related injury of March 20, 2004:

1. Right lumbar radiculopathy due to disc herniation on the right at L4-5.
2. Status-post lumbar surgery for bilateral spinal stenosis at L2-3 and L3-4. Right L4-5 foraminal disc.
3. Aggravation of lumbar degenerative spine disease.
4. Chronic lumbosacral back pain secondary to the above.

He also provided his conclusions regarding the primary work-related injury:

It is my medical and neurological opinion that within a reasonable degree of medical certainty that the above noted diagnoses listed under the primary work-related injury are as a direct result of injuries this man sustained at work to his lumbar spine on or about 3-20-04 and that the substantial factor in his injury as well as his disability is due to the injury at work on or about that date.

Even Dr. Bernardi stated that the work accident that the employee described to him, lifting a heavy object while twisting and flexing forward at the waist, could plausibly result in a disc herniation, and that if the employee truly had a disc herniation at L4-5, it may well be that his work was a substantial factor in its development. Dr. Bernardi goes on to state that, based on the diagnosis of lumbar radiculopathy requiring a three level decompressive procedure, I think the employee most likely has a fifteen percent whole person permanent disability. But he was unable to state whether that disability is related to his employment at Dumplins or whether it is related to his preexisting lumbar degenerative disease.

Dr. Cohen's opinions are supported by the medical records that are in evidence. Even though he was hired by employee's counsel, his opinions and conclusions are the most credible and consistent with all evidence in this case. The Court finds his opinions, conclusions, findings and testimony to be credible. When you consider and compare all the evidence in this case, the evidence is compelling and supports a finding that the work accident of March 20, 2004 was a substantial factor in causing the employee's lumbar spine injury. Even Dr. Bernardi, the medical expert retained by the employer-insurer, could not rule out the work accident as a substantial factor in causing the injury to the employee's lumbar spine. It is uncontroverted that the employee had no accidents or medical care for his back prior to March 20, 2004. The position that the employee's back problems and the need for medical care were degenerative in nature is disputed by a reading of the evidence and has no merit. Dr. Cheung was the treating surgeon in this case. His records and reading of the diagnostic testing also support this finding.

The Court specifically finds that the medical causation opinion of Dr. Cohen regarding the employee's lumbar spine injury is credible and supported by substantial competent evidence within the record. The Court further finds that prior to the March 20, 2004 work accident, the employee had no low back pain or problems and that any preexisting degenerative disc disease in his lumbar spine was not symptomatic or disabling.

The Court further finds that the work accident of March 20, 2004 was a substantial factor in causing the employee's injury to his lumbar spine with resulting lower extremity pain and symptoms and that the medical care that he received was causally related to that accident and was reasonable and necessary.

Past Medical Bills

The employee is asking that his previously incurred medical bills amounting to \$83,660.01 be paid. His opponents claim that any medical care that the employee received was not authorized,

was not reasonable, was not necessary and was not causally related to the employee's accident of March 20, 2004. There is no question that the medical bills that the employee is claiming were not paid by either Sagamore or Dumplins. The Court has already determined that the employee gave notice to Dumplins when he told Linda of the event on March 20, 2004, and that he had to secure medical care on his own as the employee asked Dumplins for medical care and none was provided. As no care was provided, the employee initially sought medical care from Plunkett Family Care and then received additional care on referral due to the problems generated by his March 20, 2004 accident. That care resulted in surgery by Dr. Cheung and follow up maintenance/pain management care that the employee is still receiving.

The Missouri workers' compensation law was created to provide a simple and nontechnical method of compensation for injuries sustained by employees through accidents arising out of and in the course of employment and to place the burden of such losses on industry. **Bethel v. Sunlight Janitor Serv., 551 S.W.2d 616, 618 (Mo. banc 1977)**. This purpose is effectuated in part by requiring the employer to provide medical care to the injured employee for the treatment of his or her injury or occupational disease. **Farmer-Cummings v. Future Foam, Inc., 44 S.W.3d 830, 836 (Mo. App. W.D. 2001)**.

The employee has incurred medical bills as a result of the March 20, 2004 work accident that have not been paid or reimbursed. The medical bills incurred by the employee and the associated medical treatment records have been admitted into the evidence at trial.

The employee testified that the treatment provided and prescribed by Dr. Plunkett, Dr. Cheung, and Dr. Naushad, and provided at Southeast Missouri Hospital, The PARC, Bluff Radiology, Cape Radiology, Poplar Bluff Neurology, K-Mart Pharmacy and Super D Pharmacy, resulted from the injuries he sustained at work on March 20, 2004. He said that the medical bills of those providers result from those visits for necessary medical treatment related to and the product of his work injuries. Medical evidence supports this position. When the itemized charges for the medical services are compared with the corresponding treatment records, a sufficient factual basis is established to justify an award of compensation to the employee for the payment of these medical expenses. **Martin v. Mid America Farm Lines, Inc., 769 S.W.2d 105 (Mo. banc 1989)**. The only bills that could be in question would be any medical bills that the employee incurred at Plunkett Family Care before he asked Linda for medical treatment. The employee is claiming \$574.00 for medical bills from Plunkett Family Care. The bill in question indicates that the charges of \$574.00 are for services that occurred due to visits from April 1, 2004 to November 11, 2006

Under Section 287.140.1 RSMo, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be required after the injury or disability, to cure and relieve from the effects of the injury. An employee's right to medical aid is a mandatory component of the compensation due an injured worker. **Sullivan v. Masters Jackson Paving Co., 35 S.W.3d 879, 888 (Mo. App. S.D. 2001)**.

In opposition, the parties argue that this treatment was never authorized for the employee, that the employee elected to treat with these providers on his own at his own expense and therefore there is no obligation to pay for these services. This argument fails.

Under Section 287.140.10 RSMo., the employer is given the right to select the employee's authorized treating physician. The employer, however, may waive the right to select the treating physician by failing or neglecting to provide necessary medical aid. **Herring v. Yellow Freight System, Inc., 914 S.W.2d 816, 822 (Mo. App. W.D. 1995) (citing Emert v. Ford Motor Co., 863 S.W.2d 629 (Mo. App. E.D. 1993) and Shores v. General Motors Corp., 842 S.W.2d 929 (Mo. App. E.D. 1992)).**

The evidence clearly reveals that except for the initial care at Plunkett Family Care, the employee did not seek medical treatment until after he notified Dumplins of his need for medical treatment and after Dumplins failed to provide the employee with any medical treatment. When this happened, the employee was permitted to select his own health care providers and the Employer/Insurer is still otherwise obligated. **Schuster v. State Div. of Employment Sec., 972 S.W.2d 377 (Mo. App. E.D. 1998).**

The medical expenses for which the employee is seeking reimbursement are:

Cape Neurological Surgeons	\$	2,128.37
The PARC	\$	2,114.00
Southeast Missouri Hospital	\$	23,638.23
Plunkett Family Care	\$	574.00
Advanced Pain Center	\$	47,564.77
Bluff Radiology	\$	3,570.00
Cape Radiology	\$	1,000.00
K-Mart Pharmacy	\$	39.89
PB Neurology	\$	543.00
Super D Pharmacy	\$	2,487.75
Total	\$	<u>83,660.01</u>

As stated, Sagamore has also disputed the foregoing medical expenses on the basis of reasonableness and medical causation.

Dr. Cohen testified that the medical treatment the employee received was medically necessary and reasonable. Dr. Cohen's medical opinion was found to be the most credible and consistent with the medical records that exist in this case.

Based on my above rulings regarding medical causation as to the employee's low back injury, the opinion of Dr. Cohen regarding the employee's medical treatment, the testimony of the employee regarding the medical treatment he was provided from each of the above listed medical providers and the medical records in evidence, the Court finds that the medical treatment provided to the employee by all of the providers except Plunkett Family Care was causally related to the employee's work accident of March 20, 2004. The Court rejects the bill of \$574.00 from Plunkett Family Care as it is not clear which charge occurred before or after the employee

requested medical care. The Court further finds that the medical treatment represented by the medical bills from the identified providers was reasonable and necessary and related to the employee's injuries resulting from the March 20, 2004 work accident and that employee is entitled to an award for payment of these injury-related medical expenses totaling \$83,086.01.

The Court finds that Dumplins is responsible for and is directed to pay to the employee the sum of \$83,086.01 for previously incurred medical expenses.

Temporary Total Disability

The employee is claiming an award for temporary total disability benefits for the period April 20, 2004 to February 7, 2005 in the amount of \$7,031.66.

Following his work accident, the employee sought care with his personal care provider, Plunkett Family Care. On April 20, 2004 the nurse practitioner at Plunkett Family Care took the employee off work and referred him to a neurosurgeon for specialized treatment of his spine. Dr. Cheung began treating the employee on May 3, 2004, performed lumbar surgery on June 2, 2004, provided care after surgery and released the employee from care on September 17, 2004 to return to work washing dishes.

Based on a consideration of all of the evidence, the Court finds that from April 21, 2004 through September 17, 2004 the employee was not able to return to work, had not reached the point where further progress was not expected, and no employer in the usual course of business would reasonably be expected to employ him in his physical condition.

The Court finds that the employee is entitled to temporary total disability compensation from April 21, 2004 to September 17, 2004. Dumplins is ordered to pay the employee benefits for that period at a rate of \$167.42 per week. Dumplins therefore shall pay to the employee \$3,587.58 for temporary total disability benefits.

Mileage

The employee is seeking reimbursement for mileage expenses he incurred when he drove his vehicle to receive medical care due to his March 20, 2004 accident. He testified that these expenses were incurred as he drove from Poplar Bluff, Missouri to Cape Girardeau, Missouri to receive medical care from Dr. Cheung and at Southeast Missouri Hospital. Records support his position. He received care in Cape Girardeau on May 3, 2004, May 5, 2004, May 21, 2004, June 1, 2004, June 2, 2004, June 18, 2004, July 2, 2004, July 6, 2004 and September 17, 2004.

The Court finds that the medical treatment corresponding to the dates of travel were reasonable and necessary due to the injuries that the employee sustained at work on March 20, 2004. The Court has calculated the mileage liability at \$554.76 using the rates set by the Division of Workers' Compensation for the appropriate date. (\$.33 per mile up to July 1, 2004 and \$.345 per mile after July 1, 2004). The Court therefore orders Dumplins to pay the employee \$554.76 as reimbursement for mileage costs.

Future Medical Care

The employee is requesting future or additional medical care to cure and relieve him from the effects of his March 20, 2004 accident. He is asking for an award of future medical treatment, to include but not be limited to, the treatment recommendations of Dr. Cohen which is currently being provided by Dr. Naushad. This treatment appears to be pain management,

The right to medical treatment does not end when an employee reaches maximum medical improvement. **Williams v. City of Ava, 982 S.W.2d 307, 312 (Mo. App. S.D. 1998)**. Medical aid may be available even though an employee may have reached maximum medical improvement as a finding of maximum medical improvement is not inconsistent with the potential need by an Employee for additional medical care. *Landman*, 107 S.W.3d at 248.

Medical aid may be required even though it merely relieves the employee's suffering and neither cures it nor restores the employee to soundness after an injury. **Landman v. Ice Cream Specialties, 107 S.W.3d 240, 248-249 (Mo. banc 2003); Stephens v. Crane Trucking, Inc., 446 S.W.2d 772, 782 (Mo. 1969); Mathia v. Contract Freighters, Inc., 929 S.W.2d 271, 277 (Mo. App. S.D. 1996)**. To relieve a condition is to give ease, comfort or consolation, or to aid, help alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish the condition, without necessarily healing it. **Brollier v. Van Alstine, 163 S.W.2d 109, 115 (Mo. App. W.D. 1942)**.

The employee continues to have substantial pain in his low back for which he is prescribed pain medications and given periodic injection therapy. These prescriptions and injections provide some relief of his constant pain. Dr. Cohen has testified that employee will continue to require pain management to reduce his symptoms. The evidence of the employee's chronic back pain is well documented in the medical records and reinforced by his consistent and credible testimony. Such evidence provides support for the opinion of Dr. Cohen with respect to the employee's need for future medical aid as a result of the work injury of March 20, 2004. The Court specifically finds that the employee has met his burden of proof and has offered the credible testimony and medical opinion of Dr. Cohen to support his claim for future medical care for the injury he sustained to his low back on March 20, 2004.

The Court finds that the treatment Dr. Cohen has recommended for the employee's chronic low back pain is reasonable. The Court further find that the employee's work accident of March 20, 2004 was a substantial factor in causing his back injury, resulting medical condition, disability and need for future medical aid. Based on this finding, Dumplins is ordered to provide all future medical treatment that is necessary to cure and relieve the employee from the effects of his low back injury.

The Court further finds that Dumplins has failed to provide necessary medical treatment to the employee. This failure by Dumplins to provide employee medical treatment necessitates a finding that Dumplins has waived the right to select the health care professionals who will provide the employee medical treatment. The Court finds that Dumplins has waived the right to

select the employee's medical providers and that the employee is entitled to choose the medical professionals with whom he will treat. Dumplins shall be responsible for such future medical costs as are reasonable and necessary to cure and relieve the employee from the effects of his March 20, 2004 accident. Without otherwise limiting this award for future medical care, it is intended that such care shall include appropriate medications for the employee's chronic low back pain and leg symptoms which will require that he be followed by a physician to prescribe these medications and such other care as may be reasonably necessary to either cure or relieve the employee from the effects of his work-related injury to his lumbar spine.

The Court or the Division of Workers' Compensation shall retain control over the issue of future medical.

Permanent Partial Disability, Permanent Total Disability and Liability of the Second Injury Fund for Permanent Total Disability

The employee is claiming that he is permanently and totally disabled due to a combination of the disabilities resulting from his March 20, 2004 accident and his preexisting disabilities. Dumplins and Sagamore are claiming that the employee is not permanently and totally disabled, but if so, then that disability is due to a combination of the injury from the employee's accident and his preexisting injuries. The Second Injury Fund claims that the employee is not permanently and totally disabled and even if he is it has no liability for permanent and total disability.

The term "total disability" in Section 287.020.7 RSMo, means inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident. The phrase "inability to return to any employment" has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration in the manner that such duties are customarily performed by the average person engaged in such employment. See Kowalski v. M-G Metals and Sales, Inc., 631 S.W.2d 919, 922 (Mo. App. 1992). The test for permanent total disability is whether; given the employee's situation and condition, he or she is competent to compete in the open labor market. See Reiner v. Treasurer of the State of Missouri, 837 S.W.2d 363, 367 (Mo. App. 1992). Total disability means the "inability to return to any reasonable or normal employment." An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. See Brown v. Treasurer of State of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990).

The key question is whether any employer in the usual course of business would reasonably be expected to employ the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she entered. See Reiner at 367, Thornton v. Haas Bakery, 858 S.W.2d 831, 834 (Mo. App. 1993), and Garcia v. St. Louis County, 916 S.W.2d 263 (Mo. App. 1995). The test for finding the Second Injury Fund liable for permanent total disability is set forth in Section 287.220.1 RSMo.

The first question that must be addressed is whether the employee is permanently and totally disabled. If the employee is permanently and totally disabled, then the Second Injury Fund is only liable for permanent total disability benefits if the permanent disability was caused by a

combination of the preexisting injuries and conditions and the employee's last injury of March 20, 2004. Under Section 287.220.1, the preexisting injuries must also have constituted a hindrance or obstacle to the employee's employment or re-employment.

Dr. Bernardi did not specifically address the issue of permanent total disability. He rated the employee for permanent partial disability and said there is no objective reason why the employee shouldn't be able to perform some type of work. Due to that rating, by implication he is indicating that the employee is not permanently and totally disabled.

Dr. Cohen provided details opinions regarding the employee's disabilities. He clearly indicated that the employee's preexisting conditions combine with the primary work related injury to create a greater overall disability than their simple sum and that due to this combination of disabilities the employee is permanently and totally disabled and not capable of gainful employment. More specifically he indicated that the employee's last injury alone would not preclude him from working altogether; total disability is caused by a combination of the problems with the right hand, neck and back. He also testified that the employee's preexisting conditions were a hindrance and obstacle to employment or reemployment.

Jim England testified that from a vocational standpoint the employee's lack of employability would be due to a combination of factors. The restrictions imposed by Dr. Cohen would limit the employee to sedentary work but would not knock him out of all work. There were also restrictions regarding his right hand and neck/head and this is another important factor as is the fact that employee can't read and write and handle math. He testified that something more than the last injury alone prevents the employee from working.

Based on a review of all of the evidence, the Court finds the opinions of Dr. Cohen and Jim England are credible-more credible than any evidence that suggests that the employee is not permanently and totally disabled due to a combination of injuries.

In addition to both the medical and vocational evidence, the Court further finds that the employee and Mr. Moss were credible witnesses on the issue of permanent total disability and whether the employee could work again. Both the employee and Mr. Moss offered detailed information concerning the impact the employee's condition has had on his daily ability to function at home, in a work place or in life in general. The testimony of the employee and Mr. Moss both strongly indicate that the employee is not able to work. This testimony is bolstered by history in that the employee has a strong work ethic, liked his job at Dumplins and even though unsuccessful, he tried to return to his job for a short time after his back injury.

Based on the credible testimony of the employee, Mr. Moss and the supporting medical and vocational rehabilitation evidence, the Court finds that no employer in the usual course of business would reasonably be expected to employ the employee in his present physical state and reasonably expect the employee to perform the work for which he is hired. The Court therefore finds that the employee is unable to compete in the open labor market and is permanently and totally disabled.

The Court rejects any evidence that the employee is not permanently and totally disabled as unreliable and totally lacking in credibility. The real issue in this case is not whether the employee is permanently and totally disabled, but whether such disability was caused by his accident alone or is due to a combination of her preexisting disabilities in combination with the disabilities from his accident.

Several professionals have provided opinions as to the permanent partial disability that was caused by the employee's accident. While Dr. Bernardi did not support the employee's position regarding accident and causation, he did rate the employee as having a fifteen percent permanent partial disability of the whole person. Dr. Cohen rated the employee as having a forty-five percent permanent partial disability, and indicated that forty percent was due to the employee's March 20, 2004 accident and five percent was due to his preexisting degenerative back condition.

Dr. Cohen also provided opinions about the employee's preexisting disabilities. He stated that the employee had a twenty percent permanent partial disability to his right hand due to his prior surgery. He also stated that the employee has a forty percent permanent partial disability to his body as a whole due to his two prior neck surgeries.

After a consideration of all of the evidence, the Court finds that the employee has the following permanent partial disabilities as a result of his accident/preexisting injuries:

- Right hand, fifteen percent.
- Neck and body as a whole. Twenty percent permanent partial disability due to each neck surgery for a total of forty percent permanent partial disability.
- Back and body as a whole due to the accident of March 20, 2004, Twenty-five percent permanent partial disability to the body as a whole.

The Court orders that Dumplins pay to the employee \$16,742.00 as compensation for the accident of March 20, 2004. ($25\% \times 400 = 100$ weeks. $100 \times \$167.42 = \$16,742.00$).

The next issue to be addressed is whether the employee's preexisting conditions were a hindrance or obstacle to his employment or re-employment. After a careful review of the evidence, the Court finds that the employee's preexisting conditions combine synergistically with the injuries from the March 20, 2004 accident to cause the employee's overall condition and symptoms to be greater. In addition, the Court finds that the employee is permanently and totally disabled as a result of the combination of his preexisting conditions and the March 20, 2004 accident and injury which resulted in pain and disability to his back and body as a whole. The Court finds that the employee's preexisting problems synergistically combines with the employee's disabilities from his March 20, 2004 accident that this make him more disabled than he might have been from the March 20, 2004 accident alone.

The Court has found that the employee is permanently and totally disabled as a result of the synergistic combination of the disabilities resulting from his preexisting disorders and his March 20, 2004 accident. The Court has assessed permanent partial disability as to Dumplins in the amount of \$16,742.00 for the March 20, 2004 accident. The Court finds that the employee reached maximum medical improvement on September 17, 2004.

The Second Injury Fund is therefore responsible for permanent total disability compensation beginning after Dumplins has met their obligation for the payment of permanent partial disability compensation (100 weeks). The employee’s rate for temporary total disability and permanent total disability is the same, \$167.42 per week. As of August 19, 2006 the Second Injury Fund has liability for permanent total disability and therefore should pay to the employee a one-time lump sum check for the period August 19, 2006 to the date of trial. As of August 4, 2010, the date of trial, the Second Injury Fund is ordered to pay to the employee \$167.42 per week as compensation for permanent total disability for the remainder of his lifetime or until suspended if the employee is restored to regular work or its equivalent as provided in Section 287.200 RSMo. It is the intent of the Court that the Second Injury Fund make a one-time lump settlement for any past amounts due and to then began weekly payments as outlined under Chapter 287.

Since the employee has been awarded permanent total disability benefits, Section 287.200.2 mandates the Division “shall keep the file open in the case during the lifetime of any injured employee who has received an award of permanent total disability”. Based on this section and the provisions of Section 287.140 RSMo., the Division and Commission should maintain an open file in the employee’s case for the purposes of resolving medical treatment issues and reviewing the status of the employee’s permanent disability pursuant to Sections 287.140 and 287.200 RSMo.

ATTORNEY’S FEE

Ronald L. Little, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney’s fee shall constitute a lien on the compensation awarded herein.

INTEREST

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

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation