

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

Injury No.: 02-035445

Employee: Vernon Jordon  
Employer: USF Holland Motor Freight, Inc.  
Insurer: Self-Insured c/o Gallagher Bassett

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence 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 section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated February 10, 2011. The award and decision of Administrative Law Judge Maureen Tilley, issued February 10, 2011, is attached and incorporated by this reference.

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

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

Given at Jefferson City, State of Missouri, this 13<sup>th</sup> day of December 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

CONCURRING OPINION FILED

William F. Ringer, Chairman

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Alice A. Bartlett, Member

DISSENTING OPINION FILED

Curtis E. Chick, Jr., Member

Attest:

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Secretary

Employee: Vernon Jordon

**CONCURRING OPINION**

I submit this concurring opinion to disclose the fact that I was previously employed as a partner in the law firm of Evans and Dixon. While I was a partner, the instant case was assigned to the law firm for defense purposes. I had no actual knowledge of this case as a partner with Evans and Dixon. However, recognizing that there may exist the appearance of impropriety because of my previous status with the law firm of Evans and Dixon, I had no involvement or participation in the decision in this case until a stalemate was reached between the other two members of the Commission. As a result, pursuant to the rule of necessity, I am compelled to participate in this case because there is no other mechanism in place to resolve the issues in the claim. *Barker v. Secretary of State's Office*, 752 S.W.2d 437 (Mo. App. 1988).

Having reviewed the evidence and considered the whole record, I join in and adopt the award and decision of the administrative law judge denying benefits.

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William F. Ringer, Chairman

Employee: Vernon Jordon

### **DISSENTING OPINION**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge (ALJ) should be modified and employee should be awarded past medical expenses and future medical care, additional temporary total disability benefits, and permanent total disability benefits.

The ALJ denied employee's claims for past medical expenses and future medical care, additional temporary total disability benefits, and permanent total disability benefits primarily because she found that employee failed to prove medical causation between his work accident of April 2, 2002, and his herniated disc at L4-5. I disagree with the ALJ and find that employee did prove medical causation.

Doctors Gardner, Vaught, Cohen, Coyle, and Bernardi all agree that in October 2004 employee had an L4-5 herniated disc with a large extruded fragment, a left foot-drop, and that surgery was necessary. The doctors do not agree, however, on what caused employee's October 2004 condition. In my opinion, the medical records make clear that employee's condition and need for surgery in October 2004 flowed directly from his April 2, 2002, work accident.

On April 2, 2002, employee fell from his truck, injuring his shoulder and low back. He was seen for this injury on April 4, 2002, and was diagnosed with a sprain/strain of the left shoulder and a contusion to the spine. Employee eventually had surgery on his left shoulder and was subsequently prescribed physical therapy.

On July 18, 2002, Dr. Ritter noted that employee had "low back pain at the lumbosacral junction" and that "[employee] ... had this since the time of his injury." Employee's physical therapy records show that he had immediate onset of low back pain after the April 2, 2002, accident and that the pain continued throughout these initial physical therapy sessions.

Employee was referred to Mid-America Rehab for a functional capacity evaluation (FCE). The August 29, 2002, FCE report indicated that employee complained of low back pain during the evaluation. Dr. Ritter then noted on August 22, 2002, that employee complained of "new worsening of his back and leg pain, right flank to right hip and now after the FCE, radiation to the left buttock and into the right calf with strain."

In light of employee's new complaints, Dr. Ritter ordered a lumbar spine MRI that was done on August 30, 2002. The radiologist reported a disc bulge at L4-5 and "evidence of disc intrusion into the inferior foramen and lateral recess on the right at L5-S1, which may be sufficient to provoke symptoms."

Dr. Gornet read employee's August 2002 MRI and diagnosed an L4-5 annular tear and some moderate foraminal lateral recess stenosis. At L5-S1, Dr. Gornet diagnosed a

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disc herniation on the right with a free fragment lining the lateral recess. Dr. Gornet stated that employee's symptoms are causally connected to his work injury.

Dr. Gornet ordered lumbar epidural steroid injections, which significantly helped employee's back pain. Dr. Gornet released him from his care on April 14, 2003.

Employee continued to treat for his left shoulder injury and on July 18, 2003, Dr. Ritter concurred in Dr. Hulse's recommendation for an arthroscopic evaluation and a probable repeat open rotator cuff repair. After the surgery Dr. Hulse ordered physical therapy. A physical therapy note of August 28, 2003, documented employee's continued back complaints by listing "back at 5/10 today."

The physical therapy notes from November 6, 2003, indicate that his therapy regimen included "simulated driving of semi-truck." The next day, November 7, 2003, Dr. Hulse's note indicates that employee was still having a great deal of difficulty in his back. Employee was scheduled to see Dr. Gornet again for his back.

Employee saw Dr. Gornet on November 24, 2003, and reported to Dr. Gornet that he was working in therapy after shoulder surgery and developed increasing left buttock and left leg pain. Dr. Gornet ordered additional lumbar epidural steroid injections, this time on the left at L4-5. Employee again reported positive results from the epidural steroid injections.

Employer sent employee to see Dr. Reinsel on January 8, 2004. Dr. Reinsel ordered lumbar spine x-rays and reported that the x-rays showed only minor degenerative changes. Dr. Reinsel's assessment was low back pain and left leg pain "with injury nearly two years old." Dr. Reinsel ordered physical therapy for employee's back.

On January 12, 2004, employee's physical therapist noted that employee's left lower extremity began to hurt when he was doing physical therapy for his shoulder. Employee stated that the pain is constant and runs from the hip down the side of his leg to the knee. The therapist stated that employee had signs and symptoms of lumbar pain and radiculopathy.

Employee continued to report to his physical therapist that he had low back pain and bilateral leg pain and numbness during his January 2004 sessions. Employee was seen by Dr. Reinsel on January 29, 2004. Dr. Reinsel diagnosed employee with low back pain and left lower extremity pain due to his two year old injury. Dr. Reinsel ordered an EMG and more physical therapy. On February 6, 2004, the EMG was reported as normal. On February 16, 2004, employee was seen by Dr. Reinsel again. Employee's left side pain had improved, but he was still having significant pain on the right side. Dr. Reinsel released employee from his treatment.

From March 23, 2004, through October 5, 2004, employee received lumbar epidural steroid injections and pain medication for his low back and lower extremity pain. On September 21, 2004, an MRI of employee's lumbar spine was ordered. The MRI was completed on September 27, 2004. The radiologist read the films and noted a central

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protrusion at L5 and an asymmetric protrusion of the L4 disc into the left lateral recess and origin of the left neural foramen.

Dr. Gardner examined employee and noted that employee had foot drop on the left. Dr. Gardner also noticed that the September 27, 2004, MRI films showed a large disc herniation on the left at L4-5, which was impinging on the nerve root on the left side, totally occluding the neural foramen on the left. A CT myelogram was completed and emergency L4-5 surgery was performed on October 14, 2004.

Employee testified that his low back and lower extremity pain abated after the March or April 2003 lumbar epidural steroid injection, but returned after turning a steering wheel during physical therapy for his shoulder in November 2003. Following this re-injury, employee began experiencing radiating pain into the left lower extremity. I find employee's testimony credible with regard to this re-injury.

In my opinion, the medical records clearly document employee's original work injury to his low back and how the L4-5 disc injury progressed over time to the point of requiring emergency surgery. Dr. Cohen evaluated employee and concluded that the work injury of April 2002 and employee's re-injury in physical therapy in 2003 were both substantial factors causing employee's disability and need for treatment and subsequent surgeries. In addition, although Dr. Coyle ultimately concluded that neither employee's April 2002 work injury nor his subsequent physical therapy caused his disability, he did testify as to how an initial subtle disc injury can progress to a herniation. I find that Dr. Coyle's description of how a subtle disc injury can progress to a herniation is exactly what happened with employee and is consistent with Dr. Cohen's causation opinion.

I also find that the medical records show that employee's April 2002 work injury caused his right L5-S1 disc protrusion that impinged the right L5-S1 nerve root and caused back pain and radicular pain in his right leg. Employee's right-sided back pain temporarily subsided following the March or April 2003 epidural steroid injection, but eventually returned.

The evidence as a whole establishes a medical causal relationship between the work accident of April 2, 2002, and employee's injuries to his low back, which resulted in left foot drop and ultimately required surgical intervention in October 2004. Employee's low back pain complaints were nearly constant from the time of the injury until the surgical intervention and the only intervening event that was reported occurred while employee was treating for the April 2, 2002, injury.

With respect to the nature and extent of employee's permanent disability, I find the opinions of Dr. Cohen, Dr. Stillings, Mr. Eldred, and Mr. Magrowski are most credible and conclude that employee is permanently and totally disabled and unable to compete in the open labor market. Employee never returned to work following the April 2, 2002, injury. Employee testified that his low back pain is constant and severe and often requires him to lie down. His pain complaints are supported by the medical records of Dr. Newell. No employer would reasonably be expected to employ employee in his present condition, reasonably expecting him to perform the work for which he was hired.

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In light of the foregoing, I find that employee should be awarded past medical expenses and future medical care, additional temporary total disability benefits, and permanent total disability benefits. As such, I would modify the award of the administrative law judge and award employee the same.

Therefore, I respectfully dissent from the decision of the majority of the Commission.

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Curtis E. Chick, Jr., Member

ISSUED BY DIVISION OF WORKERS' COMPENSATION

**FINAL AWARD**

Employee: Vernon Jordon Injury No. 02-035445  
Dependents: N/A  
Employer: USF Holland Motor Freight, Inc.  
Additional Party: None  
Insurer: Self Insured; TPA - Gallagher Bassett  
Hearing Date: November 1, 2010 Checked by: MT/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? April 2, 2002.
5. State location where accident occurred or occupational disease contracted: Boonslick, Minnesota.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? See findings.
8. Did accident or occupational disease arise out of and in the course of the employment? See findings.
9. Was claim for compensation filed within time required by law? See findings.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident happened or occupational disease contracted: The employee fell.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Left shoulder and low back.
14. Nature and extent of any permanent disability: See findings.
15. Compensation paid to date for temporary total disability: \$47,203.51
16. Value necessary medical aid paid to date by employer-insurer: \$50,793.07
17. Value necessary medical aid not furnished by employer-insurer: None
18. Employee's average weekly wage: \$1,500.00
19. Weekly compensation rate:
  - Permanent partial disability: \$628.90
  - Temporary total disability: \$329.42
20. Method wages computation: By agreement.
21. Amount of compensation payable: See findings.
22. Second Injury Fund liability: None.
23. Future requirements awarded: None.

Said payments shall be payable as provided in the findings of fact and rulings of law, and shall be subject to modification and review as provided by law.

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

## FINDINGS OF FACT AND RULINGS OF LAW

On November 1, 2010, the employee, Vernon Jordon, appeared in person and with her attorney, Ronald Little , for a hearing for a final award. The employer was represented at the hearing by its attorney, Steve Mcmanus. 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 findings of fact and rulings of law, are set forth below as follows:

### UNDISPUTED FACTS

1. **Covered Employer:** Employer was operating under and subject to the provisions of the Missouri Workers Compensation Act, and liability was fully self-insured. Gallagher Bassett is the third party administrator.
2. **Covered Employee:** On or about April 2, 2002, Vernon Jordan was an employee of USF Holland Motor Freight, Inc. and was working under the Workers' Compensation Act.
3. **Accident:** On or about April 2, 2002, the employee sustained an accident out of and in the course of his employment.
4. **Notice:** Employer had notice of employee's accident.
5. **Average Weekly Wage and Rate:** Employee's average weekly wage was \$1,500.00 at the time of his injury on April 2, 2002 resulting in a compensation rate for TTD/PTD of \$628.90 and a compensation rate for PPD of \$329.42.
6. **Temporary Disability paid by Employer:** Employer paid approximately 75-1/7 weeks or \$47,203.51 for the period April 4, 2002 to September 23, 2002 and August 12, 2003 to February 16, 2004.

### ISSUES

1. **Statute of Limitations:** Employee's claim for injury to his left upper extremity and low back was filed within the time allowed by law. Employer disputes that Employee's claim for psychological/psychiatric injury and for Schoemehl benefits was timely filed.
2. **Medical Causation:** Employee's injury to his left upper extremity and the strain/contusion to his low back are medically causally related to the April 2, 2002 accident. Employer disputes that Employee's right upper extremity, surgical low back and psychological injuries/disabilities are medically causally related to the accident of April 2, 2002.
3. **Medical Aid furnished by Employer:** At the time of trial, the parties were unable to agree on the amount paid. On December 1, 2010, the parties filed a written stipulation regarding this issue. Amount paid by Employer, \$50,793.07.
4. **Claim for Previously Incurred Medical:** Is Employee entitled to an award of \$50,469.17 in previously incurred medical aid? Employer disputes Employee's claim as to authorization, reasonableness, necessity and causal relationship.
5. **Claim for Mileage Reimbursement under Section 287.140 RSMo.:** Is Employee entitled to an award of \$2,520.07 as and for medical mileage reimbursement?

6. **Additional Future Medical Aid:** Does Employee need additional future medical aid as a result of the April 2, 2002 work accident?
7. **Claim for Additional TTD:** Is Employee entitled to an award of TTD for the periods 9/24/02 through 4/20/03 and 2/17/04 through 1/6/05 in the amount of \$47,536.03?
8. **Permanent Total Disability:** Is Employee permanently and totally disabled?
9. **Permanent Partial Disability:** Has Employee suffered compensable permanent partial disability?
10. **Schoemehl:** Is Employee's spouse entitled to contingent benefits under *Schoemehl*.

**EXHIBITS:**

**Employee's Exhibits:** The following exhibits of Employee were admitted at trial without objection by Employer except for any objections which may be contained within the deposition transcripts, which objections are taken with the case.

- Exhibit A 4/17/06 Dr. Raymond Cohen Deposition and Exhibits
- Exhibit B 12/23/08 Dr. Raymond Cohen Deposition and Exhibits
- Exhibit C 1/11/10 Dr. Raymond Cohen Deposition and Exhibits
- Exhibit D 10/10/07 Dr. Wayne Stillings Deposition and Exhibits
- Exhibit E 4/8/08 Mr. Phillip Eldred Deposition and Exhibits
- Exhibit F Ferguson Medical Group - Records and Bills 3/20/89 to 3/20/04
- Exhibit G Orthopaedic Associates - Records and Bills 5/4/94 to 9/3/02
- Exhibit H Missouri Southern Healthcare - Records and Bills 4/1/02 to 2/28/05
- Exhibit I Work Injury Care Center - Records and Bills 4/4/02
- Exhibit J Cape Imaging - Records and Bills 4/30/02
- Exhibit K HealthSouth Surgery Center /HealthSouth Rehab - Records and Bills 5/21/02 to 12/26/03
- Exhibit L Mid America Rehab - Records and Bills 8/19/02 to 8/4/03
- Exhibit M Dr. Matthew Gornet - Records and Bills 10/25/02 to 11/4/03
- Exhibit N Barnes Jewish West County Hospital - Records and Bills 1/2/03 to 2/13/03
- Exhibit O Southeast Missouri Hospital - Records and Bills 3/12/05 to 12/17/03
- Exhibit P Orthopedic Associates - Records and Bills 4/23/03 to 2/16/04
- Exhibit Q Des Peres Square Surgery Center - Records and Bills 4/21/03 to 8/4/03
- Exhibit R Missouri Baptist Medical Center - Records and Bills 6/27/03
- Exhibit S Bloomfield Medical Clinic - Records and Bills 10/16/03 to 12/3/09
- Exhibit T NEI of St. Louis - Records and Bills 2/6/04
- Exhibit U Poplar Bluff Regional Medical Center - Records and Bills 9/27/04
- Exhibit V Dr. Robert Garner - Records and Bills 10/13/04
- Exhibit W St. Francis Medical Center - Records and Bills 10/13/04 to 10/23/04
- Exhibit X Brain and Neurospine Clinic - Records and Bills 10/26/04 to 1/26/05
- Exhibit Y Walgreens Pharmacy Bills
- Exhibit Z David's Pharmacy Bills
- Exhibit AA Marriage License for Vernon Jordan and Emma Martin Jordan
- Exhibit AB Attorney Contracts for Vernon Jordan and Emma Jordan

Exhibit AC Ferguson Medical Group - Records 04/2002  
Exhibit AD Mr. Jeffrey Magrowski - Deposition and Exhibits  
Exhibit AE Kevin Vaught, M.D. - Bills 10/14/04

**Employer-Insurer Exhibits:** The following exhibits of Employer were admitted at trial without objection by Employee except for any objections which may be contained within the deposition transcripts, which objections are taken with the case.

Exhibit 1 1/7/08 Dr. Michael J. Milne Deposition and Exhibits  
Exhibit 2 4/22/08 Dr. James J. Coyle Deposition and Exhibits  
Exhibit 3 5/25/10 Dr. James J. Coyle Deposition and Exhibits  
Exhibit 4 10/9/09 Dr. Robert J. Bernardi Deposition and Exhibits  
Exhibit 5 12/12/07 Dr. Robert J. Bernardi Deposition and Exhibits  
Exhibit 6 8/3/09 Mr. Gary Weimholt Deposition and Exhibits  
Exhibit 7 L. J. Plunkett, M.D. - report

## **FINDINGS OF FACT**

### **Testimony of Emma Jean Jordan**

The first witness at the hearing was Employee's wife, Emma Jean Jordan. Ms. Jordan testified that she has lived her entire life in Dexter, Missouri where she now resides with her husband Vernon Gale Jordan. When they first married the employee's health was good. Ms. Jordan testified that on April 2, 2002, her husband had an accident at work and had a lot of treatment after that accident. He had two left shoulder surgeries. She stated that he also had surgery on his back by Dr. Vaught at St. Francis Medical Center.

She testified that her husband continues to treat with Dr. Newell at the Bloomfield Medical Clinic for his chronic pain, depression and anxiety. He sees Dr. Newell every month for his pain, depression and anxiety medications. Ms. Jordan stated that her husband has seen Dr. Newell for health concerns other than his left shoulder, back, depression and anxiety. She particularly recalled a problem with a broken rib, having a colonoscopy and subsequent removal of some polyps. She has observed changes in her husband since the April 2, 2002 work accident. She stated that before the work accident, the employee was energetic and happy. He could do anything he wanted to do including household chores. She stated that he didn't want her to have to do anything because she is disabled from arthritis. She said that after the accident, he always looks sad. She believes his sadness is because he is not able to take care of her. She stated that he tries to help her during the day. He may try to cook a meal, but he can't stand for long periods of time without a lot of pain. It was her impression that most of the employee's pain and problems are due to his low back. He alternates between the bed and the recliner during the day and the evening, due to the pain in his low back.

She and her husband have lived at their current address since their marriage in 1994. There was a period of time they were separated for a few months before the work accident in 2002. Ms. Jordan admitted she used to drink and drove him crazy with her drinking. She testified that her problems with alcohol ended in 1998 when she quit drinking.

### **Testimony of Vernon Jordan**

#### **JOBS**

The employee began doing farm work when he was growing up. At age 13 the employee went to work at a farm where he would chop and pick cotton. Throughout high school he continued to use a cotton gin. He began working at a shoe factory for approximately one and a half years.

The employee worked in the National Guard from the Armory and received an honorable discharge. This occurred in 1999. He did state that he had some computer program training but this was with a large machine that is no longer being utilized for training. However, he did admit to having a PC in his room at home. He states that he and his wife share the PC. He has been using it for approximately an hour a day since 1999. He knows how to get on the internet but does not know how to use it. Often he will play games on the computer as well.

#### **ACCIDENT**

The employee worked for USF Holland for approximately three years when the accident occurred. He was hired out of Sikeston, Missouri and worked at a Sikeston, Missouri terminal. He was in Boonslick, Minnesota when the accident occurred. He was cleaning off the back of his tractor trailer window when he stepped up on the cat walk and fell through a crack in the particle board. He fell onto the ground and ultimately on to the transmission. He states that when he fell he landed on his bottom side. However, other medical records say he does not know exactly what happened when he landed. Further, on cross-examination the employee admitted that he was not exactly sure what happened in his slip and fall incident. He stated that the drive train was underneath the particle board he was stepping on but he is not certain how he actually hit the ground or if he hit the ground. He is certain he does not know exactly how his left arm was injured. He does recall having pain in his low back, tailbone and in his lumbar spine. The employee immediately reported this at the terminal where he was located. He went on to Appleton, Wisconsin and saw a doctor or physician's assistant in Milwaukee (Claimant's Exhibit I). He was given a pain reliever and ultimately rode home with another driver. He states he could not move his left arm at this time.

Upon returning to Sikeston, the employee saw Dr. Bryant at Ferguson Medical Clinic. Dr. Bryant prescribed some pain medication and he followed up with Dr. Bryant for a few weeks until he was referred to Dr. Ritter in Cape. When he was treating with Dr. Bryant, the employee was having left shoulder and lower back pain.

Dr. Ritter did an MRI on the employee's left shoulder. Dr. Ritter then diagnosed the employee with a rotator cuff tear. Dr. Ritter performed the first surgery on the employee's left shoulder on May 13, 2002. After the shoulder surgery, Dr. Ritter ordered a course of physical therapy at HealthSouth in Dexter. The employee went three times per week for the duration. While the employee was having physical therapy for his shoulder they also did some physical therapy for his back towards the end of his treatment.

On August 8, 2002 he went through a functional capacity evaluation (FCE) in Cape Girardeau, Missouri. The employee was required to walk, lift, push a clutch and climb in and out of the simulated truck. The employee stated that at the start of the FCE he was already having back pain, but his back pain increased dramatically throughout and after the FCE. At that time his pain had moved into his right buttock and right leg. The employee testified that he reported his increase in pain to the people at the facility.

When he returned to Dr. Ritter after the FCE he reported his increased back pain and his leg pain. Dr. Ritter ordered the first lumbar MRI. It was done at St. Francis Medical Center in August of 2002. Dr. Ritter then released him from treatment.

The employee stated that he then requested more treatment from the nurse case manager. He asked her if she was going to help him get some more treatment on his back. She told him he needed to get a lawyer.

After that, the employee scheduled an appointment with Ron Little and hired Mr. Little to represent him. Shortly thereafter, Mr. Little arranged for Vernon to see Dr. Gornet in St. Louis around the first of the year in 2003. He stated that he took his MRI films from Dr. Ritter with him to his appointment with Dr. Gornet.

Dr. Gornet referred the employee to Dr. Moore for epidural steroid injections. Dr. Moore gave him several injections in January and February of 2003. The injections helped his back and leg pain dramatically.

Mr. Little also set the employee up to see Dr. Hulsey in St. Louis for his continuing left shoulder pain and symptoms. Dr. Hulsey recommended more treatment for his left shoulder. The insurance company sent the employee back to Dr. Ritter for one more visit. The employee preferred to treat with Dr. Hulsey and the insurance company agreed to authorize treatment with Dr. Hulsey. Dr. Hulsey performed another surgery on the employee's left shoulder. The employee stated that before the second surgery, he had immense pain and with no ability to use his left arm. The second surgery improved his left shoulder pain and symptoms dramatically. The employee testified that he was unable to work during the time following his release by Dr. Ritter up until he saw Dr. Hulsey. During that entire time he was having left shoulder pain and back pain. The employee stated that the restrictions imposed by Dr. Ritter when he released him were such that the Employer would not let him return to work.

After Dr. Hulsey did the second shoulder surgery he ordered physical therapy. The physical therapy was at HealthSouth in Dexter, the same place his physical therapy was before.

On January 6, 2003 the employee was in physical therapy at HealthSouth, ordered by Dr. Hulsey. During that session he was simulating driving with an extra large steering wheel. He was supposed to turn it from one side to the other all the way. The employee stated that his shoulder would not allow him to turn it all the way so he was using his whole body. He testified that he then felt a lot of pain in the left side of his back and in his left leg. He also stated that when he left physical therapy that day he was not able to drive home. He further stated that his wife came and picked him up because he was having too much back pain to drive.

The employee then made another appointment to see Dr. Gornet for his back. He saw Dr. Gornet again in November of 2003. He told Dr. Gornet about the physical therapy incident and that it changed the location of his pain. He told Dr. Gornet that his current pain was in his left buttock down his left leg. Dr. Gornet ordered more epidural steroid injections.

The employee again saw Dr. Moore for epidural steroid injections. Dr. Moore performed two of the injections. The injections helped ease the pain in his leg and in his low back. He was scheduled to have a third injection but the employee testified that the Workers' Compensation insurance would not pay for it.

Dr. Reinsel provided conservative treatment for his low back pain and symptoms, which included physical therapy. This treatment was authorized. Dr. Reinsel's note indicates the employee stated that he had pain in the left leg that went below the knee. This time his physical therapy was in Cape Girardeau at Mid-America Rehab. He went to several sessions during January and February 2004.

After the course of therapy, he was seen again by Dr. Reinsel. The employee had an EMG study ordered by Dr. Reinsel. The EMG came back normal. When he was released by Dr. Reinsel he sought treatment for his back pain and symptoms with his primary care physician, Dr. Newell at Bloomfield Medical Clinic. Dr. Newell prescribed medications and gave him trigger point injections for his back pain. Dr. Newell completed the pain drawings that appear in his medical records after the employee reported where he was hurting. Mr. Jordan was shown Dr. Newell's record of April 12, 2004 which included his pain drawing for that visit (see Exhibit S.) The employee said the trigger point injections were administered by Dr. Newell on both sides of his low back and that they helped with his back pain and symptoms. The employee stated that during the time he was treating with Dr. Newell between his release by Dr. Reinsel and his back surgery in October 2004, he continued to have pain into his right leg, all the way across his low back and also down into his left leg. This pain was further down on the left side than the right side. During this same time his left shoulder pain was minimal. He thought his medications seemed to change his pain level.

On September 21, 2004 Vernon complained of pain in his low back, buttocks and legs at his appointment with Dr. Newell. Dr. Newell ordered a lumbar MRI. That MRI was performed at the hospital in Poplar Bluff. After the MRI he returned to Dr. Newell who scheduled the employee to see Dr. Gardner in Cape Girardeau on October 13, 2004. Dr. Gardner immediately admitted the employee to St. Francis Medical Center and scheduled him for surgery the following

day with Dr. Kevin Vaught. At the time he went in to see Dr. Gardner, the employee said he was having a problem walking and seemed to be stumbling quite a bit. The doctors told him after the surgery he had a "foot drop."

After the surgery Dr. Vaught only followed up on the employee a couple of times and then released him from his care. After being released by Dr. Vaught, the employee continued to treat with his primary care doctor, Dr. Newell in Bloomfield. Since that time he has not treated with anyone other than Dr. Newell. Dr. Newell continued to give him trigger point injections and prescribe medications for his pain, anxiety and depression. The employee has been able to stop getting the trigger points injections.

The employee testified that his back and leg pain was better at the time he was released from Dr. Vaught than it is now. He stated that the pain seems to be getting worse as time goes by. He said the surgery by Dr. Vaught did help relieve some of his pain and symptoms and that he now takes Neurontin and Vicodin for pain control. He stated that when his pain is real bad he has to go to bed and that he is typically in bed the biggest part of the day although it does vary from day to day. Seldom is there a day that he won't have to lie down at some point. He continues to have pain in his low back and both legs. His left shoulder is tender and he has limited use of it. Mr. Jordan said if he does not use his left arm/shoulder, he does not have pain in it, unless he touches it in the tender spot. If he tries to use his left hand/arm/shoulder, he gets a dull aching pain within about five minutes.

Currently he takes Vicodin and Neurontin for pain control. He also takes Zoloft and Klonopin for depression and anxiety. All of his medications seem to help.

Before the April 2, 2002 work accident, he worked every day. He rarely missed work. He could only recall a couple of times in 27 years when he was unable to work. He noted one time that he "called in drunk" and another time in 1978 when a snow storm prevented everyone from going into work. The employee also stated that he injured his tailbone back in the 1980's and was off work as a result of that injury for a number of weeks. He stated that he fully recovered from that tailbone injury and that in the ten years before the April 2002 accident, he had not had any problems or pain in his tailbone.

### **Physical Activities**

The employee testified that he used to love to fish, play golf and hunt. Since the accident he can't play golf at all and his attempts at fishing or hunting are very limited. He stated that he had gone fishing twice this year and fished from the bank for 1 to 1-1/2 hours alternating between standing and sitting. He hunted for approximately 1 to 1-1/2 hours on three different days using a cross bow. He is unable to cock the bow himself. He has to have a buddy do it for him so that if he sees a deer all he has to do is pull the trigger. When he shoots the cross bow his right arm is out front and his left arm is back toward his shoulder. It has a stock like a gun. It is supposed to go back against his shoulder, but he holds it out in front because he can't put anything against his left shoulder.

The employee stated that he drove to where they hunted. He stated that he sat the whole time in his chair on the ground. He did not get a deer but he had made sure ahead of time that his friends would help him retrieve the deer if he had.

In 2002, after work accident and after being released by Dr. Ritter following the first left shoulder surgery, he opened a restaurant/café with his family. That venture did not work out - all he did was loose money. The restaurant was open about 7 or 8 months beginning in December of 2002. Although he did not do much "work" at the restaurant, he did spend a lot of time there. His mother did not want him working and thought he needed to relax so she brought the recliner to the restaurant and put it in the storage room. The employee said he spent most of his time at the restaurant in the recliner. His wife, mother, a cousin, and some friends worked the restaurant. If they were there four hours he probably spent 2 ½ to 3 of those hours in the recliner. Some days when they were at the restaurant he would slip out and go down to his parents' house to go to bed, because his back and legs would be hurting so bad.

Since the April 2002 work accident, the employee has not attempted work anywhere other than the café. He testified that if someone offered him an easy job that didn't require any lifting he thought he could do it if he was able to lay down when he needed to.

He was unable to say for certain which trips to the doctors he received mileage reimbursement for and which trips he was not reimbursed for. The only thing he was able to say for certain is that he didn't get reimbursed for all his trips.

When he first went to HealthSouth for physical therapy, that treatment was for his left shoulder only.

After his physical therapy he had the FCE. The employee stated that during the FCE his pain increased dramatically in his low back and left side. Although the employee said he told the therapist at Mid-America Rehab that his back and leg pain had increased, he acknowledged that the pain diagram in the FCE report did not show any left-sided back or leg pain.

The employee stated that he is currently on Medicare and does not know whether Medicare has paid for any of the bills for treatment of his left shoulder or low back. He does not recall the insurance company ever paying for his prescription medications. To his memory, he has always had to pay paid for his medication. He stated that he did receive a prescription card in the mail but the card never worked.

The employee is a smoker. He currently smokes about a pack a day although he used to smoke 1 to 2 packs day. He has smoked since he was 18 and he is now 58.

The evidence shows the employee was seen by Dr. Plunkett at the employee attorney's request (Exhibit 7). The employee acknowledged that Dr. Plunkett did not recommend any treatment for his low back but the employee did not believe he saw Dr. Plunkett for his back, just his left shoulder.

### **Pre-existing Medical History**

The employee has no history of substantial medical issues prior to the April 2, 2002 work accident and resulting injury.

### **Medical Treatment following April 2, 2002 Work Accident**

#### Work Injury Care Center (Exhibit I)

The employee was diagnosed with a sprain/strain of the left shoulder and a contusion to his spine. The employee's work restrictions were written for no lifting, pushing, pulling greater than 30 pounds with no work above the shoulders. He was referred to physical therapy a physician.

#### Ferguson Medical Group (Exhibit AC and Exhibit F)

The employee was next seen went to Ferguson Medical Group on April 5, 2002. He had x-rays taken of his lumbar spine. He was seen a few days later where his primary complaint was continuing coccyx pain. After another week his coccyx pain and his left shoulder pain started to get worse. The employee was then referred to Dr. Ritter from Cape

#### Girardeau Orthopaedic Associates (Exhibit G)

Dr. Ritter ordered an MRI of the left shoulder. Left shoulder surgery was performed May 13, 2002. After the surgery, the employee went through a course of physical therapy. In July 2002, Dr. Ritter diagnosed a sprain/strain to the lumbar spine. Dr. Ritter also ordered physical therapy for his back and continued his left shoulder therapy.

#### Cape Imaging (Exhibit J)

Dr. Ritter ordered the first MRI of Employee's left shoulder. It was performed by Cape Imaging on April 30, 2002. The radiologist read the MRI to reveal a "full-thickness tear of the supraspinatus tendon at its insertion . . ."

#### HealthSouth Surgery Center & Healthsouth Rehab (Exhibit K)

The employee had extensive physical therapy for his left shoulder at this physical therapy facility in Dexter, Missouri. The first course of left shoulder therapy was in 2002 following the surgery by Dr. Ritter. His next course of left shoulder therapy was in 2003 after the shoulder surgery by Dr. Hulsey.

#### Mid-America Rehab (Exhibit L)

This exhibit includes the FCE report of the August 19, 2002 evaluation ordered by Dr. Ritter following the employee's first left shoulder surgery. This exhibit also includes the lumbar

physical therapy records of the conservative treatment ordered by Dr. Reinsel.

St. Francis Medical Center (Exhibit W)

Dr. Ritter ordered the first lumbar MRI which was performed at St. Francis Medical Center on August 30, 2002. The radiologist noted only “mild early degenerative changes . . . without significant loss of height of any of the discs . . .” (Exhibit W). The radiologist also noted “evidence of disc intrusion into the inferior foramen and lateral recess region on the right at L5-S1 which may be sufficient to provoke symptoms.”

Matthew Gornet, M.D. (Exhibit M)

The initial appointment with Dr. Gornet in January 2003 was established for the employee by his attorney for an evaluation of his low back injury of April 2, 2002. Dr. Gornet noted the employee’s chief complaint to be of “low back pain to his right buttock, down his right leg to his foot. He also has occasional onset of left buttock pain.” (Exhibit M). Dr. Gornet reviewed the MRI scan from August 2002 and noted “an annular tear at 4-5 and some moderate foraminal lateral recess stenosis . . . [and] . . . a disc herniation on the right with a free fragment lining the lateral recess at L5-S1.” (Exhibit M). Dr. Gornet ordered a new MRI and stated that the employee’s “current symptoms are causally connected to his work-related injury.” (Exhibit M). In February 2003, Dr. Gornet recommended lumbar epidural steroid injections (Exhibit M). The employee returned to Dr. Gornet in November of 2003 and reported that “he was working in therapy after shoulder surgery and developed increasing left buttock and left leg pain.” (Exhibit M). Dr. Gornet again recommended epidural steroid injections. These injections were on the left at L4-5.

Barnes-Jewish West County Hospital (Exhibit N)

The MRI recommended by Dr. Gornet was performed February 13, 2003 at Barnes-Jewish West County Hospital and revealed “moderate to severe canal stenosis at L4-5 due to combination of mild to moderate diffuse disk bulge, congenital short pedicle and moderate bilateral facet osteoarthropathy. Moderate canal stenosis at L5-S1 due to mild diffuse disk bulge and moderate bilateral facet osteoarthropathy. In addition, there is right neural foraminal stenosis with compression of the exiting right L5 nerve root. Mild diffuse disk bulge at L2-3 and L3-4 causing mild central canal stenosis.” (Exhibit N).

Southeast Missouri Hospital/Dr. Richard Moore (Exhibit O)

The lumbar epidural steroid injections recommended by Dr. Gornet in February 2003 were performed by Dr. Moore in Cape Girardeau. The employee had significant improvement of his back and right leg pain as a result of these steroid injections. The lumbar epidural steroid injection recommended by Dr. Gornet in November 2003 were also administered by Dr. Moore. This time employee only had two of the three injections because he was unable to afford the third injection.

Orthopedic Associates/Dr. Hulsey/Dr. Reinsel (Exhibit P)

The records of Dr. Hulsey reflecting authorized treatment of the employee's left shoulder injury and the records of Dr. Reinsel documenting authorized treatment of Vernon's low back injury are contained within this exhibit.

NEI of St. Louis (Exhibit T)

Dr. Reinsel ordered an EMG study which study was performed by Dr. Phillips at the Neurological and Electrodiagnostic Institute, Inc. in St. Louis. The report of the EMG study stated that "the values for the nerves and muscles studied within the lower extremities fall within range of normal and the study is not impressive for active lumbar radiculopathy, lumbosacral plexopathy or peripheral neuropathy."

Poplar Bluff Regional Medical Center (Exhibit U)

An MRI was performed at Poplar Bluff Regional Medical Center at the request of Dr. Newell on September 27, 2004 due to the employee's history of "low back pain with radiculopathy on the left". (Exhibit U). The results of that MRI were significant for ". . . bulging disc/osteophyte complex at L4-L5. There is also asymmetric protrusion of the L4 disc into the left lateral recess and origin of the left neural foramen. This effaces the thecal sac but does not significantly affect the origin of the left L5 dorsal nerve root. There is mild central protrusion of the L5 disc. However this does not efface the thecal sac." (Exhibit U). The radiology report of this MRI noted only "mild degenerative changes." (Exhibit U).

Robert Gardner, M.D. (Exhibit V)

The employee was referred to Dr. Gardner by Dr. Newell following the September 2004 lumbar MRI scan. The employee saw Dr. Gardner one time and was admitted to the hospital in Cape Girardeau for emergency lumbar surgery by Dr. Kevin Vaught (Exhibit V).

Brain & Neurospine Clinic/Dr. Kevin Vaught (Exhibit X)

The employee's back surgery was performed by Dr. Vaught at Saint Francis Medical Center in October of 2004. The limited treatment records of the employee's back surgeon, Dr. Vaught, are contained in this exhibit. After the lumbar spine surgery, Dr. Vaught followed up with the employee on two occasions. Dr. Vaught released the employee from his care on January 26, 2005. He noted that the employee was to return on an as needed basis.

Missouri Southern Healthcare (Exhibit H)

Records of the employee's physical therapy ordered by Dr. Vaught following the lumbar spine surgery of October 2004 are contained in this exhibit.

Pharmacy Records (Exhibit Y & Z)

The employee's prescriptions for pain medications and his antidepressant and anti-anxiety medications have been filled at David's Pharmacy.

**Evaluations**Dr. Michael Milne

Dr. Michael Milne, an orthopedic surgeon evaluated the employee on March, 20, 2007. Dr. Milne stated that the employee had normal range of motion testing with internal rotation and external rotation (Dr. Milne's Deposition 1/7/2008 P. 11). In addition, the employee had normal strength in his left shoulder. Dr. Milne opined that, as a result of the April 2002 work injury and the employee had a 9% permanent partial disability to the left shoulder. Id. at 19. Further, Dr. Milne testified that the employee did not require any work restrictions for his left shoulder as a result of the April 2002 work injury

Dr. Robert Bernardi

On May 23, 2007, the employee saw Dr. Robert Bernardi for an independent medical evaluation. Dr. Bernardi testified that, based on Dr. Vaught's October 14, 2004 surgical findings, the employee's allegations that he injured his L4-5 disk in November 2003, simply defy logic. (Dr. Bernardi 10/9/09 Deposition P. 23). Dr. Bernardi testified that:

If [employee] ruptured in late 2003 or early 2004, he should have had the same kind of symptoms that he had in September of 2004, but he didn't have the same kind of symptoms. If he ruptured it in late 2003 or 2004, his body should have reabsorbed it. But instead, it didn't reabsorb it. Instead, he had this huge disc fragment in September. I mean, the nature of his symptoms and the findings on his studies suggests that what he had when he was admitted to the hospital in October 2004 was an acute disc herniation, and not one that had been sitting there for a year. Id.

Dr. Bernardi testified that he did not believe there were any "medical records that suggested that Mr. Jordan had lumbar radiculopathy at all until at least September of 2004 when he had the MRI scan of his low back which showed the large disc herniation for which he subsequently had the surgery performed by Dr. Vaught." (Dr. Bernardi 10/9/09 Deposition P. 8). Dr. Bernardi noted that the Nerve Conduction Study and EMG performed by Dr. Phillips on February 6, 2004 did not show any evidence of lumbar radiculopathy (Dr. Bernardi 10/9/09 Deposition P. 13). Further, Dr. Bernardi did not see any evidence in the medical records from late 2003 or early 2004 that employee needed low back surgery nor that any treatment provider had recommended surgery in that time period. Id. at 14. Dr. Bernardi testified that he did not feel employee needed low back surgery in that time period because:

He did not have symptoms that suggested nerve root compression, he did not have physical findings that suggested nerve root compression, and he did not have

electro-physiological studies, an EMG test, that suggested he any type of symptomatic nerve root compression. Id. at 14-15.

Dr. Bernardi testified that “People will have a week or two [of being symptom free] they can put together, but they don’t have ten months they can put together. If they go ten months and they don’t have symptom, and then they develop symptoms again, that’s kind of what’s called a recurrence. That’s not a manifestation of the same disc herniation. That’s a new problem. (Dr. Bernardi 10/9/09 Deposition P. 63).

#### Dr. James Coyle

On May 4, 2005, Dr. James Coyle saw the employee for an independent medical evaluation. Dr. Coyle testified that an individual with findings similar to the employee’s October 2004 myelogram would “barely be able to walk around” (Dr. Coyle Deposition 5/25/10 P. 62). Dr. Coyle testified that the L4-5 disc herniation as seen on the October 2004 myelogram “is really a massive disc herniation. This is not something that somebody could walk around with from September ’03- or January of ’04 until October of ’04. It’s really a very impressive disc herniation” Id. at 64.

When the employee originally saw Dr. Coyle in May 2005, the employee described two different incident’s in physical therapy that resulted in re-injuries to his low back (Dr. Coyle Deposition 5/25/10 P. 20.) The employee told Dr. Coyle that he initially re-injured his low back while riding a stationary bike and turning the steering wheel. He told Dr Coyle that he reinjured his lower back a second time in late January or early February 2004 while lifting weights and carrying them. Id.

Further, Dr. Coyle testified that:

There is no way that you can attribute the incapacitated state he was in at the time he had this [October 2004] myelogram and had this surgery to physical therapy either in the previous January or the previous fall. He got this way somehow in the fall of 2004. He did not get this way in January of 2004. And no matter what the MRI of September shows, it’s not indicative of where he was in January of 2004 or the fall of 2003. It’s a data point that clearly shows there’s a significant difference between the MRI and the myelogram. Something was happening in September 2004 that culminated in that massive extrusion seen October 13<sup>th</sup>, 2004, but it’s not in any way related to lifting in January of 2004 or bicycling and turning the steering wheel in the fall of 2003 (Dr. Coyle Deposition 5/25/10 P. 69-70).

Dr. Coyle testified that the September 27, 2004 lumbar MRI revealed a disc/osteophyte complex with associated protrusion at L4-5 (Dr. Coyle Deposition 5/25/10 P. 14). Further, Dr. Coyle testified that the myelogram taken just two and half weeks later, on October 13, 2004, revealed a much different disc at L4-5. The myelogram revealed that in the two and a half weeks since the MRI, the disc was “extruded up, it was extruded down the canal. It was compressing both the L4 and L5 nerve roots.” Id. Dr. Coyle testified that, based on his review of employee’s

September 27, 2004 MRI and October 13, 2004 myelogram, that “something dramatic changed” between those two diagnostic studies. Id. 26-28. Moreover, Dr. Coyle testified the employee “blew the disc out between September 27<sup>th</sup>, 2004, and October 13<sup>th</sup>, 2004. No doubt about it.” Id. at 29-30.

Dr. Coyle noted that the employee’s epidural injections would not cover up the symptoms as employee presented in October 2004. He testified that an epidural steroid injection will not mask foot drop as it is a motor deficit (Dr. Coyle Deposition 5/25/10 P. 16).

#### Gary Weimholt

On June 19, 2008, Gary Weimholt performed a vocational assessment on the employee. Mr. Weimholt opined that there was not “anything that would be significant enough barriers to take him out of the labor market.” (Deposition of Gary Weimholt 8/3/3009 P. 16). Having reviewed all of the medical reports and meeting with the employee, Mr. Weimholt testified that the majority of “reports from different doctors would not indicate restrictions that would take him out of the labor market.” Id. at 17. Mr. Weimholt testified that the employee was capable of competing for work and employable in his current condition. Further, he testified that the employee could compete in the open labor market if one only considered the two shoulder surgeries and he remained employable if employee’s back condition was considered in combination with the shoulder surgeries. Id. at 18.

#### Dr. Wayne Stillings

Dr. Wayne Stillings evaluated the employee on January 16, 2007. Dr. Stillings opined that the employee sustained a 25% permanent partial psychiatric disability as a result of the April 2002 injury and resulting mood disorder. He also found that Claimant sustained an additional 15% permanent partial disability as a result the April 2002 accident (employee’s Ex. D). However, Dr. Stillings admitted that he did not separate employee’s shoulder condition from his low back condition when proving his opinions regarding permanent partial disability (Dr. Stillings Dep. P. 33). Further, Dr. Stillings admitted that he does not differentiate the effect of the bilateral shoulders versus the low back versus the legs in terms of their impact on his diagnosis. Id. at 23.

#### Dr. Raymond Cohen

The employee saw Dr. Raymond Cohen for an independent medical evaluation on September 30, 2004 and September 6, 2005. Dr. Cohen initially opined that Claimant’s disc herniation and surgery were a direct result of the April 2002 work accident (employee’s exhibit C). Dr. Cohen eventually opined that the employee actually sustained the herniation while in physical therapy from two incidents; one involving turning the wheel of a stationary bike and the second involving lifting weights. Ultimately, Dr. Cohen opined that the herniated disc and surgery were caused by an incident when the employee turned the steering wheel during a

simulated driving activity. However, Dr. Cohen admitted that Claimant never told him anything about an injury involving simulated driving. Id. at 17.

Dr. Cohen's opined that "within a reasonable degree of medical certainty, he is permanently and totally disabled and not capable of gainful employment. The patient has no significant pre-existing conditions or disabilities."

Dr. Cohen opined that the employee sustained 50% permanent partial disability of the left shoulder, 15% permanent partial disability of the right shoulder, and 15% permanent partial disability of the body as a whole due to depression.

Dr. Cohen initially opined that the employee had 25% permanent partial disability of the body as a whole referable to the lumbar spine. However, after the employee's back surgery, Dr. Cohen opined that the employee has 40% permanent partial disability referable to the lumbar spine.

Dr. Cohen testified that he did not see any medical records referencing the employee's right shoulder before he saw him. He also stated that on his examination of the employee's right shoulder, he had mildly positive impingement signs. He stated that the employee's shoulder bothered him but not as much as with a more significant impingement situation or other problem in the shoulder. He also stated that he did not find any rotator cuff problems on the right shoulder. He also stated that the employee's work was a substantial factor in his disability.

#### Phillip Eldred

Phillip Eldred, a vocational expert evaluated the employee on January 8, 2005. Mr. Eldred stated "Mr. Vernon Jordan is unemployable in the open labor market. It is highly unlikely that any reasonable employer in the normal course of business would hire Mr. Jordan for suitable, gainful employment. Mr. Jordan has no transferable work skills for the sedentary work level even if he could perform work at the sedentary work level. Mr. Jordan has no transferable work skills for the light work level even if he could perform work at the light work level. Mr. Jordan would have problems being retrained in a formal training program due to his constant pain, and use of narcotic pain medication . . . Mr. Vernon Jordan is permanently and totally disabled as a result of his injuries on April 2, 2002. Mr. Vernon Jordan is permanently and totally disabled as a result of his injuries on April 2, 2002 in isolation without any pre-existing limitations. Mr. Vernon Jordan is permanently and totally disabled as a result of his injuries on April 2, 2002 disregarding his back injury. Mr. Vernon Jordan is permanently and totally disabled as a result of his injuries on April 2, 2002 disregarding his back injury without any pre-existing limitations." (Exhibit E, Report page 27-28).

#### Jeffrey Magrowski

Jeffrey Magrowski performed a vocational assessment on the employee. Mr. Magrowski opined that:

“Dr. Cohen's reported work restrictions of 9/30/04 would prevent Mr. Jordan from competing in the local labor market for a job. The results from this assessment, as a Vocational Expert, also lead me to conclude Mr. Jordan to be unemployable.”

## **RULINGS OF LAW:**

### ***Issue 2. Medical causation and Issue 4. Claim For previously incurred medical expenses.***

The employee's expert, Dr. Cohen, provided several different opinions regarding causation of the herniated disc. Dr. Cohen initially opined that the employee's disc herniation and surgery were a direct result of the April 2002 work accident. Dr. Cohen then changed his opinion and opined that the employee actually sustained the herniation while in physical therapy from two incidents; one involving turning the wheel of a stationary bike and the second involving lifting weights. Ultimately, Dr. Cohen changed his opinion yet again and in his January 11, 2010 deposition testified the herniated disc and surgery were caused by an incident when the employee turned the steering wheel during a simulated driving activity. However, Dr. Cohen admitted that the employee never told him anything about an injury involving simulated driving.

Further, the medical records do not substantiate Dr. Cohen's theory of causation. The employee underwent physical therapy at HealthSouth Rehabilitation Center on November 6, 2003 (Claimant's Exhibit K). The therapy note from that date indicates that the employee performed simulated driving of a semi-truck for five to ten minutes. However, there is no indication of any “additional injury” to his back and legs. Rather, the therapist's assessment in the November 6, 2003 record states, “The client tolerated today's treatment/therapeutic activity with minimal complaints of pain and difficulty.” *Id.* Further, when the employee next returned to physical therapy on November 12, 2003, the therapy note states that the employee was doing well that day. It also stated that the employee's pain had decreased with cortisone injections. The November 13, 2003 physical therapy notes state that the employee did not have any new complaints. The November 19, 2003 HealthSouth Physical Therapy record specifically notes that the location of the employee's pain was at his shoulder. There is no indication of any back or leg complaints. There is no mention of any back complaints in the HealthSouth Physical Therapy records until November 21, 2003, over two weeks after the alleged “additional injury”. At that time, the employee stated, “My shoulder feels pretty good, but now my back is hurting again.” There is no indication in that record that the employee reported that it was due to his physical therapy or specifically, as he alleges, the simulated driving that he performed on November 6, 2003. The HealthSouth Physical Therapy records do include several references to turning the steering wheel during simulated driving. However, the statements are all similar to the statement made by the employee to the therapist on December 5, 2003 that, “It is still difficult to turn the steering wheel with my left arm to the right.” There is no indication that the simulated driving was causing any injury to his back or legs. The employee participated in fourteen physical therapy sessions in the approximately two months between the date of the alleged “additional injury”, November 6, 2003, and when he was discharged from physical therapy on December 26, 2003. During those fourteen sessions, there is only one mention of back pain, which is referenced fifteen days after the alleged “additional injury”. There is no mention of any

increase in leg pain. Further, there is no indication in the records that the simulated driving that the employee was completing as part of his physical therapy caused any “additional injury” to his back or legs (employee’s Exhibit K).

The employee returned to Dr. Gornet on November 24, 2003. He reported that he was working in therapy after shoulder surgery and developed “increasing left buttock and left leg pain.” There is no indication that this was due to any specific incident in therapy when performing simulated driving. Dr. Gornet noted that these symptoms were new compared to his previous symptoms, which had only been in the right leg (employee’s Exhibit M). On November 7, 2003, the day after the alleged “additional injury,” the employee was evaluated by Dr. Hulsey for a follow-up evaluation for his left shoulder (employee’s Exhibit P). Although Dr. Hulsey indicated that the employee was still having difficulty with his back, there is no indication of any new injury that the employee sustained to his back or legs in physical therapy the day before Dr. Hulsey’s examination. Dr. Hulsey’s November 7, 2003 record does not include any indication that the employee made any complaints of his physical therapy aggravating his back or legs in any way, let alone any specific incident while performing simulated truck driving. Id.

Dr. Bernardi testified that, based on Dr. Vaught’s October 14, 2004 surgical findings, the employee’s allegations that he injured his L4-5 disk in November 2003, simply defy logic (Dr. Bernardi 10/9/09 Deposition P. 23). Dr. Bernardi testified that:

If [employee] ruptured in late 2003 or early 2004, he should have had the same kind of symptoms that he had in September of 2004, but he didn’t have the same kind of symptoms. If he ruptured it in late 2003 or 2004, his body should have reabsorbed it. But instead, it didn’t reabsorb it. Instead, he had this huge disc fragment in September. I mean, the nature of his symptoms and the findings on his studies suggests that what he had when he was admitted to the hospital in October 2004 was an acute disc herniation, and not one that had been sitting there for a year. Id.

Dr. Coyle testified that an individual with findings similar to Claimant’s October 2004 myelogram would “barely be able to walk around”. (Dr. Coyle Deposition 5/25/10 P. 62). Dr. Coyle testified that the L4-5 disc herniation as seen on the October 2004 myelogram “is really a massive disc herniation. This is not something that somebody could walk around with from September ’03- or January of ’04 until October of ’04. It’s really a very impressive disc herniation” Id. at 64. Further, Dr. Coyle testified that:

There is no way that you can attribute the incapacitated state he was in at the time he had this [October 2004] myelogram and had this surgery to physical therapy either in the previous January or the previous fall. He got this way somehow in the fall of 2004. He did not get this way in January of 2004. And no matter what the MRI of September shows, it’s not indicative of where he was in January of 2004 or the fall of 2003. It’s a data point that clearly shows there’s a significant difference between the MRI and the myelogram. Something was happening in September 2004 that culminated in that massive extrusion seen October 13<sup>th</sup>, 2004, but it’s not in any way related to lifting in January of 2004 or bicycling and

turning the steering wheel in the fall of 2003 (Dr. Coyle Deposition 5/25/10 P. 69-70).

Moreover, Dr. Bernardi testified that he did not believe there were any “medical records that suggested that Mr. Jordan had lumbar radiculopathy at all until at least September of 2004 when he had the MRI scan of his low back which showed the large disc herniation for which he subsequently had the surgery performed by Dr. Vaught.” (Dr. Bernardi 10/9/09 Deposition P. 8). Dr. Bernardi noted that the Nerve Conduction Study and EMG performed by Dr. Phillips on February 6, 2004 did not show any evidence of lumbar radiculopathy (Dr. Bernardi 10/9/09 Deposition P. 13). Further, Dr. Bernardi did not see any evidence in the medical records from late 2003 or early 2004 that the employee needed low back surgery nor that any treatment provider had recommended surgery in that time period. *Id.* at 14. Dr. Bernardi testified that he did not feel the employee needed low back surgery in that time period because:

He did not have symptoms that suggested nerve root compression, he did not have physical findings that suggested nerve root compression, and he did not have electro-physiological studies, an EMG test, that suggested he any type of symptomatic nerve root compression. *Id.* at 14-15.

Dr. Coyle’s testimony is extremely compelling regarding the findings of the employee’s diagnostic studies in September and October 2004. Dr. Coyle testified that the September 27, 2004 lumbar MRI revealed a disc/osteophyte complex with associated protrusion at L4-5 (Dr. Coyle Deposition 5/25/10 P. 14). Further, Dr. Coyle testified that the myelogram taken just two and half weeks later, on October 13, 2004, revealed a much different disc at L4-5. The myelogram revealed that in the two and a half weeks since the MRI, the disc was “extruded up, it was extruded down the canal. It was compressing both the L4 and L5 nerve roots.” *Id.* Dr. Coyle testified that, based on his review of employee’s September 27, 2004 MRI and October 13, 2004 myelogram, that “something dramatic changed” between those two diagnostic studies. *Id.* 26-28. Moreover, Dr. Coyle testified the employee “blew the disc out between September 27<sup>th</sup>, 2004, and October 13<sup>th</sup>, 2004. No doubt about it.” *Id.* at 29-30. Moreover, Dr. Bernardi testified that “People will have a week or two [of being symptom free] they can put together, but they don’t have ten months they can put together. If they go ten months and they don’t have symptom, and then they develop symptoms again, that’s kind of what’s called a recurrence. That’s not a manifestation of the same disc herniation. That’s a new problem (Dr. Bernardi 10/9/09 Deposition P. 63). Dr. Coyle noted that the employee’s epidural injections would not cover up the symptoms as employee presented in October 2004. He testified that an epidural steroid injection will not mask foot drop as it is a motor deficit (Dr. Coyle Deposition 5/25/10 P. 16).

Based on all of the evidence presented, including the physical therapy records, I find that the employee’s testimony regarding his “additional injury” at physical therapy is not credible.

I find the opinions of Dr. Bernardi and Dr. Coyle, are more credible than Dr. Cohen. Dr. Cohen’s lack of credibility is further documented by the multiple different opinions he provided regarding causation. I find that employee did not sustain “an additional injury” to his back and legs while treating for his left shoulder. The employee had a herniated disk at L4-5 in October

2004 that required surgery. However, I find that this was not medically causally related to the April 2002 accident. Furthermore, I find that the employee's accident was not a substantial factor in causing the employee's additional injury to his back and legs.

Accordingly, the employee is not entitled to any benefits that resulted from the herniated disc or subsequent surgery. Therefore the employee's claim for previously incurred medical expenses is denied.

Dr Cohen testified that the employee's work injury was a substantial factor in causing an injury to the employee's right shoulder. However, Dr. Cohen stated that he did not see any medical records referencing the employee's right shoulder before he saw him.

Based on the lack of medical documentation regarding an injury to the employee's right shoulder, I find that Dr. Cohen's opinion regarding medical causation of the employee's right shoulder is not credible. Furthermore, I find that the employee did not meet his burden of proof in proving that his work accident was a substantial factor in causing the employee's injury to his right shoulder. Therefore, based on all of the evidence presented, I find that the employee's right shoulder injury was not medically causally related to the employee's work accident in April of 2002.

Dr. Stillings did opine that the employee sustained a 25% permanent partial psychiatric disability as a result of the April 2002 injury and resulting mood disorder. He also found that employee sustained an additional 15% permanent partial disability as a result the April 2002 accident and resulting pain disorder (Claimant's Ex. D). However, Dr. Stillings admitted that he did not separate employee's shoulder condition from his low back condition when proving his opinions regarding permanent partial disability (Dr. Stillings Dep. P. 33). Further, Dr. Stillings admitted that he does not differentiate the effect of the bilateral shoulders versus the low back versus the legs in terms of their impact on his diagnosis. *Id.* at 23.

The employee has failed to offer any evidence as to what, if any, psychiatric permanent partial disability he sustained due to the compensable injuries. Based on the evidence presented, I find that the employee has failed to meet his burden of proof regarding any psychiatric injury or disability. Therefore, I find that the employee's work accident in April of 2002 was not a substantial factor in causing the employee's psychiatric injury. Furthermore, I find that the employee's psychiatric injury was not medically causally related to the employee's work accident in April of 2002.

#### ***Issue 5. Claim for mileage reimbursement***

Employee's allegation of mileage benefits is for treatment related to the subsequent herniated disc. As I found that the herniated disc is not medically causally related to the April 2, 2002 accident, Employee is not entitled to any mileage benefits for treatment for the herniated disc. Therefore the employee's request for mileage is denied.

***Issue 6. Claim for future medical aid.***

It is well established under Missouri case law that the standard of proof for future medical treatment cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Dean v. St. Luke’s Hospital*, 936 S.W.2d 601, 602 (Mo. App. W.D. 1997). The employee must meet his burden by showing that there is a reasonable probability that future medical treatment is necessary. *Id.* To recover future medical benefits under § 287.140.1, a claimant must show “by ‘reasonably probability’ that he is in need of additional medical treatment by reason of his work-related accident.” *Cochran v. Industrial Fuels & Resources, Inc.*, 995 S.W.2d 489, 498 (Mo.App.SD 1999). Employee has failed to meet his burden to establish that he is in need of additional medical treatment relating to the April 2, 2002 injury. He has not offered any credible evidence that he requires any further medical treatment for the compensable left shoulder injury and low back strain. “Where future medical benefits are awarded, the medical care must flow from the accident before the employer is to be held responsible.” *Cochran v. Industrial Fuels & Resources, Inc.*, 995 S.W.2d at 498. Employee has not proven that his need for medical treatment flows from the April 2002 work accident. Therefore, the employee’s claim for benefits for future medical treatment is denied.

***Issue 7. Claim for additional temporary total disability***

Employee alleges entitlement to additional temporary total disability (TTD) benefits of \$47,536.03. This represents benefits incurred in relation to his low back surgery and subsequent treatment. The dates the employee alleged entitlement to TTD are from September 24, 2002 through April 20, 2003 and February 17, 2004 through January 16, 2005. As previously discussed, the low back herniations and subsequent surgery are not medically causally related to the April 2, 2002 accident. As such, Employer is not responsible for any TTD benefits for any time Employee could not work due to the low back treatment. Therefore, Employee’s claim for additional TTD benefits is denied.

***Issue 8. Permanent total disability***

Employee has failed to meet his burden of proof that he is permanently and totally disabled as a result of his April 2, 2002 accident. The legislature has determined that the term “total disability” shall mean the “inability to return to any employment and not merely mean inability to return to the employment in which the employee was engaged at the time of the accident.” RSMo. Sec.287.020.7. Permanent total disability means that no employer in the usual course of business would reasonably be expected to employ the claimant in his or her present physical condition. *Clark v. Harts Auto Repair*, 274 S.W.3d. 612, 616 (Mo. App. W.D. 2009).

Vocational expert Gary Weimholt credibly testified that there was not “anything that would be significant enough barriers to take him out of the labor market.” (Deposition of Gary Weimholt 8/3/3009 P. 16). Having reviewed all of the medical reports and meeting with Claimant, Mr. Weimholt testified that the majority of “reports from different doctors would not indicate restrictions that would take him out of the labor market.” *Id.* at 17. Mr. Weimholt testified that the employee was capable of competing for work and employable in his current

condition. Further, he testified that Employee could compete in the open labor market if one only considered the two shoulder surgeries and he remained employable if employee's back condition was considered in combination with the shoulder surgeries. *Id.* at 18.

Phillip Eldred, a vocational expert evaluated the employee on January 8, 2005. Mr. Eldred stated "Mr. Vernon Jordan is unemployable in the open labor market. It is highly unlikely that any reasonable employer in the normal course of business would hire Mr. Jordan for suitable, gainful employment.

Jeffrey Magrowski also performed a vocational assessment on the employee. Mr. Magrowski opined that: "Dr. Cohen's reported work restrictions of 9/30/04 would prevent Mr. Jordan from competing in the local labor market for a job. The results from this assessment, as a Vocational Expert, also lead me to conclude Mr. Jordan to be unemployable."

Dr. Cohen opined that the employee was permanently and totally disabled from the April 2002 work injury. However, Dr. Cohen's opinion regarding permanent and total disability is not credible because he also found that the employee's right shoulder and additional back injuries were medically causally related to the employee's work injuries.

Based on the evidence presented, I find that Mr. Weimholt's opinion regarding employability in the open labor market is more credible than Mr. Eldred and Mr. Magrowski's opinion on this issue.

Based on all of the evidence presented, I find that the employee did not meet his burden of proof on the issue of permanent total disability. I find that the employee is not permanently and totally disabled from the April 2, 2002 work injury.

***Issue 9. Permanent partial disability***

I find that the employee sustained thirty-five percent (35%) permanent partial disability of the left shoulder at the 232 week level (81.2 weeks). Furthermore, I find that the employee sustained ten percent (10%) permanent partial disability of the low back at the 400 week level (40 weeks). Accordingly, the employer and the insurer are therefore directed to pay the employee the sum of \$329.42 per week for 121.2 weeks for a total of \$ 39,925.70.

***Issue 1. Statute of limitation regarding the alleged psychological injury and Schoemehl issue.***  
***Issue 10. Schoemehl/dependency***

The ruling on medical causation and permanent total disability make these issues moot. Therefore these issues will not be ruled upon.

**ATTORNEY'S FEE**

Ronald 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.

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

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Maureen Tilley  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest:

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Naomi Pearson  
*Division of Workers' Compensation*