

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

Injury No.: 05-067976

Employee: Timothy W. Laster
Employer: Timothy W. Laster
 d/b/a All Star Floors
Insurer: Auto Owners 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 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 April 26, 2013. The award and decision of Administrative Law Judge Edwin J. Kohner, issued April 26, 2013, 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 5th day of December 2013.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

V A C A N T

Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee:	Timothy W. Laster	Injury No.:	05-067976
Dependents:	N/A		Before the
Employer:	Timothy W. Laster d/b/a All Star Floors		Division of Workers'
Additional Party:	Second Injury Fund		Compensation
Insurer:	Auto Owners Insurance Company		Department of Labor and Industrial
Hearing Date:	March 12, 2013		Relations of Missouri
			Jefferson City, Missouri
		Checked by:	EJK/kr

FINDINGS OF FACT AND RULINGS OF LAW

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: June 7, 2005
5. State location where accident occurred or occupational disease was contracted: St. Charles County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
The employee suffered a herniated disc in his low back while lifting a vacuum cleaner out of his truck.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to-date for temporary disability: \$116,884.57
16. Value necessary medical aid paid to date by employer/insurer: \$251,911.96

- 17. Value necessary medical aid not furnished by employer/insurer? None to date
- 18. Employee's average weekly wages: \$1,000.00
- 19. Weekly compensation rate: \$666.67/\$354.05
- 19. Method wages computation: The self-employed claimant testified that he received \$1,000.00 per week

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

Permanent total disability benefits from Employer at the rate of \$666.67 per week beginning October 1, 2008, for Claimant's lifetime Indeterminate

- 22. Second Injury Fund liability: No

None

TOTAL: Indeterminate

- 23. Future requirements awarded: See Additional Findings of Fact and Rulings of Law

Said payments to begin as of October 1, 2008, and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Amanda N. Pietoso, Attorney at Law

FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Timothy W. Laster	Injury No.: 05-067976
Dependents:	N/A	Before the
Employer:	Timothy W. Laster d/b/a All Star Floors	Division of Workers'
Additional Party:	Second Injury Fund	Compensation
Insurer:	Auto Owners Insurance Company	Department of Labor and Industrial
		Relations of Missouri
		Jefferson City, Missouri
		Checked by: EJK/kr

This workers' compensation case raises several issues arising out of a work related injury in which the claimant, the owner of a floor installation business, suffered a herniated disc to his low back. The issues for determination are: (1) Average weekly wage; (2) Future medical care (3) Permanent disability; and (4) Second Injury Fund liability. The evidence compels an award for the claimant for future medical care and permanent total disability against the employer.

At the hearing, the claimant testified in person and offered depositions and reports of Robert Poetz, D.O., and Timothy G. Lalk. The claimant also submitted two depositions of the claimant. The defense offered the reports and depositions of David Robson, M.D., and June M. Blaine. The Second Injury Fund offered the report of Bob Hammond. Voluminous medical records were offered by the parties jointly, with additional medical records being submitted by the claimant and the defense.

All objections not previously sustained are overruled as waived. Jurisdiction in the forum is authorized under Sections 287.110, 287.450, and 287.460, RSMo 2000, because the accident occurred in Missouri. Any markings on the exhibits were present when offered into evidence.

SUMMARY OF FACTS

On June 7, 2005, this 43 year old claimant injured his right shoulder while lifting a shop-vac out of a van. After lifting the shop-vac, the claimant felt a sharp pain in his back and pain down his left leg. The claimant went home and rested. The claimant tried to utilize treatment modalities, such as ice and heat that he had learned due to previous back injuries. The pain did not improve, however, and the claimant ultimately sought treatment.

On July 13, 2005, the claimant went to the St. Joseph's Hospital emergency room with mild to moderate back pain that he described as burning, sharp, and radiating. The claimant was diagnosed with a lumbar sprain and prescribed medication. See Exhibit 1.

On August 2, 2005, Dr. Kennedy, who performed the claimant's previous back surgeries examined the claimant, who reported pain from the base of the lumbar spine with radiating pain from the right posterior lateral thigh to the foot. Dr. Kennedy diagnosed sciatica. A CT

myelogram performed on August 9, 2005, showed a disc herniation at L3-L4 lateralizing to the right and extruding into the foramen proximally on the right, effacement of the right L4 nerve root, and evidence of a fusion with posterior instrumentation at L4-S1. See Exhibit 2.

On August 23, 2005, the claimant began undergoing conservative care with Dr. Barry Feinberg and Dr. Rachael Feinberg. The claimant underwent treatment with medication, physical therapy, and a series of injections, which included epidural steroid and transforaminal epidural steroid injections, without relief. On October 12, 2005, Dr. Barry Feinberg noted there were two separate pains the claimant was experiencing. The claimant's right lateral pain was felt to be consistent with his previous surgery and, possibly, the new herniated disc. See Exhibit 4.

On October 18, 2005, Dr. Kennedy recommended surgery. On January 9, 2006, the claimant underwent: (1) The: removal of previous instrumentation from L4-S1; (2) A L3-L4 hemilaminectomy, discectomy with foraminotomy, and (3) A fusion at L3-L5 with bone morphogenetic protein (BMP). Post-surgery, Dr. Kennedy noted the claimant did not have much leg pain. When the claimant began aquatic therapy, the therapist, on April 15, 2006, noted the surgery had significantly improved the claimant's symptoms and he no longer had right lower extremity pain. However, the claimant complained that his legs became fatigued easily and he had a cold feeling in his low back, anterior thighs, and calves. See Exhibits 2, 5, and 7.

On May 9, 2006, the claimant reported limited range of motion, substantial pain in the lower lumbar area, a very tight sensation with a cold feeling at times, and that he had not had much improvement despite the therapy and his range of motion was very limited. Dr. Kennedy thought "a lot of the pain is due to the fact that this is a second time operation." He recommended that the claimant resume his treatment with Dr. Barry Feinberg and Dr. Rachael Feinberg. See Exhibit 2.

The claimant was making improvement with his lumbar pain by the time he saw Dr. Kennedy on August, 26, 2006. However, he still complained of a cold sensation in the lower legs in August and September of 2006. Dr. Kennedy was not sure why the claimant was having these symptoms, but thought there may be some degree of nerve root irritation left over from the original injury's involvement of tight stenosis. An MRI, obtained on October 6, 2006, did not show any evidence of further disc herniations. See Exhibit 2.

The claimant participated in physical therapy and received injections, but continued to be symptomatic. His main complaint was the cold sensation. On October 5, 2006, Dr. Rachel Feinberg was quite certain the sensation was "coming from the autonomic nervous system from the sacrum." On October 12, 2006, Dr. Rachel Feinberg further opined that the claimant was experiencing "high sympathetic outflow because he is fused to the sacrum." See Exhibit 4.

On February 1, 2007, Dr. Kennedy noted the claimant still had quite a bit of pain in the lower lumbar area and legs that had worsened somewhat since his last visit. A spinal cord stimulator was implanted for the claimant's postlaminectomy syndrome on February 12, 2007. The stimulator felt as if it was enhancing the claimant's symptoms and was removed four days later. The claimant then underwent dorsal median nerve root blocks, thoracic facet joint injections, and a lumbar facet injection. His diagnoses included postlaminectomy syndrome of the lumbar spine, thoracic radiculopathy, and pain in the thoracic spine. See Exhibits 2 and 4.

On May 23, 2007, the claimant bent over to look at a pot and felt pain in his left lower back. He presented to Barnes-Jewish St. Peters Hospital and given Dilaudid and Diazepam. Dr. Kennedy, on May 24, 2007, ordered a CT scan that showed a solid posterolateral fusion from L4 to the sacrum bilaterally but no significant posterolateral bony fusion at L3-L4. See Exhibits 2 and 10.

On May 31, 2007, Dr. Rachel Feinberg documented the claimant "did get quite a bit better with physical therapy and injections but the highly sympathetic outflow sensation or buzzing sensation of the sacrum did not improve." See Exhibit 4.

The claimant saw Dr. Barnardi and Dr. Coyle for second opinions. On July 18, 2007, Dr. Barnardi noted the claimant had an "extraordinarily complicated history of back pain." The claimant advised, after surgery in 2006, the pain he experienced "preop was pretty much gone," but he developed a cold feeling in his legs and his back and legs fatigued easily. Recently, he experienced severe low back pain that radiated into the anterior aspect of his left thigh. The claimant reported his left leg pain was different than his pre-operative leg pain, and it traveled directly from the anterior aspect of his thigh down and did not cross into the medial aspect of the thigh distally. Dr. Barnardi diagnosed a L3-L4 pseudoarthrosis and a possible new onset of left lumbar radiculopathy. The claimant was trying to heal his fusion without further surgery. See Exhibit 11.

Dr. Kennedy diagnosed a non-union on August 2, 2007, and recommended a revision surgery. Dr. James Coyle, on October 24, 2007, diagnosed the claimant with post-laminectomy syndrome, failed back syndrome, and pseudoarthrosis at L3-L4. Dr. Coyle recommended a revision decompression and fusion at L3-L4, but felt the "prognosis is guarded due to the patient's multiple prior surgeries and history of a failed fusion." See Exhibits 2 and 12.

On February 6, 2008, the claimant saw Dr. David Robson, who had participated in the 2006 surgical procedure, for his low back and bilateral leg complaints. Dr. Robson noted the claimant had undergone a "revision fusion with instrumentation at the L3-L4 level" and developed a symptomatic pseudoarthrosis. A CT myelogram, taken on February 12, 2008, that indicated a complete posterior bony fusion was not demonstrated at L3-L4. On February 18, 2008, the claimant underwent a hardware removal, a laminectomy at L3-L4, revision of spinal fusion at L3-L4, and spinal instrumentation from L3-L5. A complete discectomy and an anterior interbody fusion at L3-L4 with BMP was performed on February 25, 2008. See Exhibit 6.

On March 27, 2008, Dr. Robson noted the claimant's leg pain had "significantly improved." He did have a backache at the site of the surgery. Dr. Robson again noted "no significant leg pain," but a backache with increased activity on April 24, 2008. Aquatic therapy was ordered. The claimant reported low back pain and some diffuse leg pain on June 19, 2008. The claimant was off all medication, participating in therapy, and complaining of low back pain on July 22, 2008. The claimant had a solid fusion on August 19, 2008, but reported bilateral leg pain with increased activities. See Exhibit 6.

The claimant participated in a Functional Capacity Evaluation (FCE) on August 29, 2008. The FCE showed the claimant could function at a light duty level. Recognizing the claimant's core weakness and poor stooping ability, the therapist concluded work hardening

would be beneficial. Three weeks of work hardening was ordered and, by September 29, 2008, was performing at a medium duty level. See Exhibit 13.

Dr. Robson found the claimant to be at maximum medical improvement (MMI) and released him from treatment on October 1, 2008. See Exhibit 6. On this date, Dr. Robson noted the claimant had some achiness, but was taking no pain medication. See Exhibit 6. The claimant voiced no complaints related to his legs. See Robson deposition, page 19. He had no pain on internal or external hip rotation, a negative straight leg raise bilaterally at ninety degrees, and was neurologically intact. See Exhibit 6. After reviewing the work hardening results, Dr. Robson found the demonstrated medium duty level to be reasonable for a two level spinal fusion. See Exhibit 6. Accordingly, he assigned permanent restrictions of no repetitive lifting over fifty pounds occasionally and thirty pounds frequently. See Robson deposition, page 19. He assessed a 15% permanent partial disability from the injury to L3-L4 on June 7, 2005. See Robson deposition page 21. Dr. Robson did not include ratings for the claimant's prior back injuries, his left shoulder, or his right hand. See Robson deposition page 21.

The claimant presented to Mercy Clinic on August 12, 2011, for a physical. The claimant complained of chest discomfort he attributed to stress and his chronic back pain. Dr. Matthew Meyer's review of symptoms was negative for back pain, joint swelling, neck pain, or joint pain. Neurologically, the review of symptoms was negative for numbness, tingling, or weakness. No abnormal objective findings related to the back or lower extremities were noted. The claimant was diagnosed with chest pain and, after a normal EKG study, Claritin was the only medication prescribed. See Exhibit 15.

On March 19, 2012, Dr. Meyer examined the claimant for aching back pain that had worsened over the past few days. There was no numbness or paresthesias. On exam, the claimant appeared to be in mild to moderate pain and had paraspinal tenderness over the left, lower lumbar region. Dr. Meyer diagnosed the claimant with back pain and prescribed Flexeril, Mobic, and Lortab. See Exhibit 15.

The only medication the claimant takes for his back is Aleve. Although it has resulted in experiencing more pain, the claimant chose to forego pain medication to enable him to better interact with his three children.

Pre-existing Conditions

Pre-existing Left Shoulder Condition

The claimant suffered a birth defect affecting his left shoulder. After multiple dislocations, the claimant underwent a posterior bone block reconstruction of the left shoulder in 1985. He then developed arthritis in his shoulder. The claimant testified he has weakness in that arm, cannot use it for anything with strength, and his shoulder condition prevents him from lifting his arm overhead. See Exhibits 16 and J, page 22.

Pre-existing Right Hand Condition

In 1996, the claimant was involved in an altercation that resulted in the fracture of the base of his right fourth metacarpal at the CMC joint with a significant dorsal displacement of the

shaft of the fourth metacarpal. He further suffered a dorsal displacement of the proximal aspect of his fifth right metatarsal at the CMC joint. The claimant underwent a closed reduction percutaneous pin fixation. Afterward, the claimant developed arthritis in his right hand. He had difficulty gripping with strength with that hand. See Exhibits 17 and Lalk deposition, pages 12, 56.

Pre-existing Low Back Condition

On June 16, 1994, the claimant suffered a low back injury at work, was diagnosed with a back strain, and underwent conservative treatment. He was unable to work for a couple of weeks. See Exhibit H. On June 1, 1997, the claimant suffered a second work related low back injury. The claimant settled his workers' compensation case on the basis of a 2% permanent partial disability to the body as a whole. See Exhibit H.

On April 1, 1998, the claimant sustained a back injury while lifting a sander off the back of a truck at work. The claimant had right lower extremity pain, was diagnosed with a herniated disc at L5-S1, and underwent a discectomy and hemilaminotomy at that level in 1999. The claimant's leg pain resolved, but his back pain persisted, he had back soreness more frequently, and he had decreased strength in his back. He returned to work in January 2000. The claimant settled his related workers' compensation claim on the basis of a 25% permanent partial disability to the body as a whole. See Exhibits 20, 26, H, and E, page 7.

On September 1, 2000, the claimant injured his low back while unloading a buffer from a van. While lifting the buffer, the claimant suffered low back pain that progressively worsened. An MRI revealed a herniated disc at L4-L5 and scarring around his L5-S1 nerve root. On November 7, 2000, the claimant went to DePaul Pain Management for severe, low back pain that radiated into his anterior thighs to the top of his feet. The claimant was diagnosed with discogenic pain and post-laminectomy syndrome, a discogram ordered, and L4 nerve root block recommended. See Exhibits 26 and 27.

In early 2001, Dr. Kennedy began treating the claimant, and on February 12, 2001, a CT myelogram revealed an L4-L5 disc herniation and impingement of the left L5 nerve root sheath. Segmental instability was noted at L5-S1. On May 10, 2001, Dr. Kennedy and Dr. Robson performed a L4-L5 hemilaminectomy, L4-L5 discectomy, a left iliac crest bone graft, and a fusion from L4-S1. The claimant participated in aquatic therapy and continued to have low back pain, leg numbness and pain, and decreased range of motion. On November 15, 2001, Dr. Kennedy noted a cool sensation in the claimant's lower extremities. See Exhibit 20.

On November 19, 2001, an FCE demonstrated that the claimant could function at a medium duty work level with occasional material handling tolerances of thirty pounds. This did not meet the essential job demand of a floor layer. The claimant was also limited in frequent forward bending and squatting. Dr. Kennedy released the claimant from treatment on November 27, 2001, with permanent restrictions of no lifting over thirty pounds and no repetitive bending, twisting, or stooping. See Exhibits 18 and 20.

On May 6, 2002, Dr. Poetz examined the claimant for pain in his upper and low back, radiating pain down both legs, and a cool sensation running down his legs when he got into bed at night. See Poetz deposition, pages 10-11, 49. The claimant had increased pain with sitting,

driving, lifting, bending, and stooping. See Poetz deposition, pages 10-11, 49. Dr. Poetz documented the claimant was currently unemployed due to his lifting restrictions. See Poetz deposition, page 68. On exam, the claimant could flex to thirty degrees, complained of low back pain, and had pain upon rising. See Poetz deposition, page 11.

Dr. Poetz diagnosed the claimant with a herniated disc at L4-L5. See Poetz deposition, page 11. Dr. Poetz also recognized the pre-existing surgically repaired disc herniation at L5-S1. See Poetz deposition, page 16. He opined the claimant's "prognosis is guarded due to the length of time elapsed since the injuries and the continuance of pain in all areas of symptomology." See Employee's Ex. 2 to Exhibit D, page 4. Dr. Poetz concluded the claimant had a 25% permanent partial disability of the body as a whole from the accident on September 1, 2000, and an additional pre-existing 20% permanent partial disability to the body as a whole. See Poetz deposition, page 19.

With regard to future medical care, Dr. Poetz recommended the claimant quit smoking for pain management purposes, use Cox-2 non-steroidal anti-inflammatory medication, perform range of motion exercises, engage in a lumbar exercise program, and utilize warm, moist packs. See Poetz deposition, page 14. He testified the claimant's fusion warranted being followed by a physician to ensure the hardware stayed in place and no problems were occurring. See Poetz deposition, pages 89-90.

Dr. Poetz also provided permanent work restrictions. He advised the claimant should: (1) Avoid prolonged sitting, standing, walking, bending, and stooping; and (2) Find employment where he can move about as needed. See Poetz deposition, page 14. Dr. Poetz did not provide a lifting restriction, but testified the claimant was to "[a]void any activity that causes exacerbations of the symptoms or is known to cause progression of the disease process." See Poetz deposition, page 68. He explained this restriction tells the patient to avoid anything that would either hurt or cause undue stress to the levels of pathology, for example, standing, walking, and stooping. See Poetz deposition, pages 68-69, 73. Dr. Poetz testified that he would have been more restrictive than Dr. Kennedy concerning the amount the claimant could safely lift. See Poetz deposition, page 70. Dr. Poetz opined that the claimant should attend "[v]ocational rehabilitation for training for a sedentary occupation." See Employee's Ex. 2 to Exhibit D, page 4 and Poetz deposition, page 69.

On January 10, 2003, the claimant settled his September 1, 2000, workers' compensation claim against the employer on the basis of a 22.5% permanent partial disability of the body as a whole. On December 5, 2006, the claimant settled his claim against the Second Injury Fund on the basis of a "10% load, 15% of the right hand, plus a 10% load." See Exhibit H.

Subsequent Motor Vehicle Accident.

In 2009, the claimant suffered injuries to his neck and left hip in a motor vehicle accident. At the hearing, the claimant denied hurting his left hip, insisting any documentation of such an injury is incorrect. See Exhibits E, page 8 and Lalk deposition, pages 13-14.

Back Condition from 2001 to June 7, 2005

At the hearing, the claimant testified that he continued to have upper and low back pain, radiating pain down both legs, and a cool sensation running down his left leg getting into bed at night. The claimant also experienced a burning sensation at the graft site on his left hip and flare-ups of pain that caused burning into his left leg. When experiencing a flare-up of symptoms, the claimant had difficulty performing activities and utilized treatment modalities he had previously learned.

The claimant testified that he stopped playing sports after 2000 due to low back pain and did not work between 2000 and 2004. The claimant testified that he was unable to find a job during this period due to an inability to handle the work and workload expected of flooring installers. The claimant could no longer bend over to install floors or perform edging work. The amount he could lift was limited, preventing him from handling some of the equipment. The claimant had limitations in sitting, kneeling, twisting, and driving hurt his low back. He did not look for a job outside of the floor installation industry and did not seek vocational retraining.

Due to his inability to find a job within his restrictions and abilities, the claimant started this firm, the employer in this case, in late 2004. The claimant estimated he started the company six months to a year before the accident on June 7, 2005. Starting his own company permitted the claimant to engage in activities such as sales, organizing jobs, ordering materials, and light duty tasks. As the owner, he was able to control the activities he was responsible for performing, dictate what tasks would be completed by others, and, thereby, accommodate the work to his abilities. The claimant avoided activities that caused him pain and problems and, in doing so, reportedly got along alright. He did experience pain when engaging in activities that he could not avoid.

The claimant testified that this employer and Mid-Rivers Hardwoods had an arrangement in which the claimant entered contracts with customers for flooring projects and Mid-Rivers Hardwoods performed the installation of flooring. The claimant received 50% of the profit from the jobs. All Star Flooring and Mid-Rivers Hardwoods charged \$2.50 a square foot for the installation of flooring or the sanding/refinishing of flooring. If the job involved the installation and finishing of flooring, the companies charged \$5.00 a square foot. The claimant testified he sold one job, or approximately 800 square feet, a week and estimated he took home \$4,000.00-\$5,000.00. All of the accounting books for the employer have been destroyed and the claimant did not file taxes in 2004 or 2005, so no documentation of the claimant's income was submitted at the hearing.

The claimant testified that leading up to 2005, he had some back problems, but mainly experienced occasional flare-ups of symptoms. However, the claimant continued to accommodate his work pursuant to his limitations.

Back Condition June 7, 2005, to Date

The claimant testified that he did not improve after the second surgery. Instead, his condition remained the same or worsened. On the other hand, in his deposition, the claimant testified that the second surgery helped and "a lot of the symptoms that were constantly there all the time, kind of subsided ..." See Exhibit J, pages 18 and 48.

The claimant continues to have ongoing back pain that begins at his left hip and wraps around to his left thigh. He has a cold sensation in his legs, tightness in his low back, and his legs are weak and easily fatigued. Since his release from Dr. Robson's care, the claimant's tightness in his low back, burning from his left hip to his left thigh, and his bilateral leg fatigue have gradually worsened. He could not state when the worsening of his symptoms started. The claimant's limitations in bending, twisting, kneeling, driving, and sitting have increased since June 7, 2005. Although the claimant had bending limitations before June 7, 2005, afterwards he could no longer touch his toes or tie his shoes. He can bend to reach his knees, but it is painful. His sitting is limited to twenty minutes and his driving to ten minutes. The claimant believed his inability to lift weight had increased, preventing him from now lifting over a gallon of milk. Since June 7, 2005, the claimant has been limited in standing, climbing stairs, and sleeping. He can squat, walk one mile, and sleep four to six hours per night. Cold weather aggravates his symptoms, but hot showers and lying down decreases them.

In 2005, the claimant married and fathered his youngest child. The claimant and his family moved in with his mother in 2006. His marriage ended in divorce in 2011, and he now has custody of all three of his children. The claimant's children are twelve, eight, and four years old. He relies on his mother for assistance in the care of his children. On an average day, the claimant gets up, fixes breakfast, and gets his children ready for school. The claimant watches two hours of television a day and reads the news for an hour a day. He talks on the phone, takes walks, and interacts with his four year old child. He prepares sixteen meals a week. At the hearing, the claimant testified that he lies down three to five times a day for a fifteen to twenty minute period. The claimant testified that this had increased from one time a day in mid-2011, because of the gradual worsening of his condition. See Exhibit K, page 18.

After June 7, 2005, the claimant went to work for a friend selling decks and held the job for less than one month. The claimant missed an appointment due to pain and was let go. In 2011, the claimant was hired as a cook at Game Day Grill. His job duties included cooking, sweeping, mopping, and taking care of the kitchen area. The claimant worked three eight-hour shifts a week and held the job for one month. He testified that he did not complete all of his job tasks and missed three of his shifts. See claimant deposition, page 7. The claimant did not pay enough in to qualify for Social Security Disability. See claimant deposition, pages 18-19.

David Robson, M.D.

Dr. Robson, a board certified orthopedic surgeon, examined the claimant on September 23, 2010, for an updated evaluation. The claimant complained of low back pain that occasionally radiated down the posterior aspect of his left leg. See Dr. Robson deposition, pages 22. Dr. Robson testified that the claimant's condition had changed since 2008, because the pain on the left side of the leg had worsened a little bit. See Dr. Robson deposition, page 23. On examination, the claimant's straight leg raise was positive at eighty degrees on the left, and consistent to his past findings. See Dr. Robson deposition, page 24. His Hoffman's test, which indicates spinal cord findings, was normal and the claimant had no atrophy. See Dr. Robson deposition, page 24. The claimant's lumbar flexion was decreased by 20° and his extension was normal. See Robson deposition, pages 23-24. X-rays revealed worsening of some scoliosis and degenerative changes above the fusion, most notably at L1-L2. See Dr. Robson deposition, pages 24-25.

On October 12, 2010, Dr. Robson reviewed a CT scan and concluded that the claimant had a solid fusion from L3 to the sacrum and degenerative changes at L1-L2. See Dr. Robson deposition, pages 25-26. On that date, the claimant reported low back and left hip pain, but the pain level had slightly improved. See Dr. Robson deposition, pages 26-27. On exam, the claimant had pain over the left sacroiliac area and, for the first time, a decrease in his left hip's range of motion. See Dr. Robson deposition, page 27. His straight leg raising was positive on the left at seventy-five degrees bilaterally. See Dr. Robson deposition, page 27. His lumbar range of motion in flexion lacked 10° and his extension was normal. See Dr. Robson deposition, pages 27-28. Dr. Robson opined that the claimant would not benefit from any further treatment to his lumbar spine that patients with multi-level fusions did not need to have the hardware monitored by a physician, that there was a 10% chance of a problem at an adjacent level, and the claimant need only required medical attention if he started having difficulties. See Dr. Robson deposition, pages 28-29, 37, 38.

Dr. Robson could not relate the claimant's scoliosis and degenerative changes above his fusion. Robson deposition, pages 24-26, 28, 40. If the scoliosis were related, Dr. Robson testified that it would be at a level adjacent to the fusion, such as L2-L3, and the fact it was two levels higher makes a stronger point that it was just an "unfortunate occurrence in regards to his spine." See Dr. Robson deposition, page 40. The claimant's scoliosis worsened between 2005 and 2010. See Dr. Robson deposition, page 28. Dr. Robson testified that the degenerative changes and scoliosis were conditions that could be painful and symptomatic. See Dr. Robson deposition, pages 25-26. He concluded some of the claimant's pain complaints may be attributed to the scoliosis and left hip condition. See Dr. Robson deposition, page 40.

Dr. Robson also opined that the claimant's left hip complaints were unrelated to the work accident. See Dr. Robson deposition, page 28. Dr. Robson discussed, with the claimant, the possibility the left hip was causing some of the symptoms he was experiencing. See Dr. Robson deposition, page 28.

Dr. Robson provided medium permanent restrictions when he released the claimant from treatment on October 1, 2008. He opined that no changes to these restrictions were warranted in 2010. See Dr. Robson deposition, page 29. He testified that, in assigning the claimant's restrictions, consideration was given to the data from the FCE and work hardening, which was accumulated over a series of visits, and the typical limitations that, in his experience, someone with this type of fusion. See Dr. Robson deposition, page 20. Dr. Robson opined that the claimant's recovery was slightly better than typical. See Dr. Robson deposition, page 20. Dr. Robson credited the claimant with being motivated and working "very hard," in light of his multi-level fusion, to get back to a medium duty level. See Dr. Robson deposition, pages 20, 31, 37.

Concerning the claimant's pre-existing fusion, Dr. Robson advised someone fused from L4 to S1 should be restricted to the moderate to moderately heavy work range and, as such, the condition would affect the person's ability to perform work. See Dr. Robson deposition, page 29. He opined that the restrictions provided by Dr. Kennedy in 2001 and Dr. Poetz in 2002 were reasonable and would limit the type of work that could be performed. See Dr. Robson deposition, pages 30-31. If an additional level were added, such as in this case, Dr. Robson opined the ability to work may not change a whole lot. See Robson deposition, page 29. Dr. Robson testified, in this case, the claimant "worked very hard and regained to [sic] that medium

work range, so I would say that adding one additional level in this case really did not change his restrictions a significant step." See Dr. Robson deposition, page 31.

Dr. Robson testified that the claimant's prior fusion would have added extra stress to the L3-L4 level. See Dr. Robson deposition, page 30. The previous fusion would also make the L3-L4 level harder to fix. *Id.*

Robert Poetz, M.D.

Dr. Poetz, an osteopathic physician, examined the claimant on February 5, 2007. See Dr. Poetz deposition, page 6. The claimant reported that his condition improved after surgery, but complained of tightness in his back when he gets up and a cold sensation in his back and legs. See Dr. Poetz deposition, pages 20-21. His legs ached, were weak, no longer hold him up, and his knees bothered him. See Dr. Poetz deposition, pages 20-21. The claimant had difficulty performing any activity for any length of time and could not sleep due to pain. See Dr. Poetz deposition, pages 20-21. Prior to the latest injury, the claimant reported that he had occasional pain, but his nerve symptoms resolved. See Exhibit A, page 4. He was able to work before June 7, 2005, despite the pain from the 2000 injury. See Exhibit A, page 4.

Dr. Poetz diagnosed the claimant with an operated herniated disc at L3-L4, on the right resulting from the June 7, 2005 accident, with exacerbation of discogenic disease. See Dr. Poetz deposition, pages 25-26. He found the claimant had an operated herniated disc from 1999 and a herniated disc at L4-L5 that resulted in the need for a fusion from L4 to S1 in 2000. See Exhibit A, page 5. Dr. Poetz opined that the claimant had a 35% permanent partial disability to the body as a whole as a result of the accident of June 7, 2005. See Dr. Poetz deposition, page 74. Dr. Poetz also opined that the claimant had a pre-existing 20% permanent partial disability to the body as a whole as a result of the 1999 injury and a 25% permanent partial disability to the body as a whole as a result of the 2000 injury. See Dr. Poetz deposition, page 19. Finally, Dr. Poetz found "the combination of the present and prior disabilities result in a total which exceeds the simple sum by 15%." See Exhibit A, page 7. Dr. Poetz opined that the claimant was "**Permanently and Totally** disabled as a direct result of his June 7, 2005 [sic] and in addition to his prior injuries." (Emphasis original.) See Exhibit A, page 7.

Dr. Poetz examined the claimant on September 20, 2011, for a reevaluation of the back injury. See Poetz deposition, page 30. The claimant reported that he continued to have low back pain, weakness in his legs, and was now starting to experience pain in both hips. See Exhibit B, page 1. He complained of pain traveling down from the left hip, to the side of his left side, and wrapping around to the front of his leg to the knee. See Exhibit B, page 1. The claimant experienced increased pain with more activity, weather changes, and prolonged sitting and standing. See Exhibit B, page 1. He reported difficulty sleeping, but felt his constant, hip pain was the biggest problem. See Exhibit B, page 1. The claimant estimated he went to Med-First for flare-ups of pain three to five times a year. See Exhibit B, page 1.

On exam, the claimant lacked 45° of flexion, 15° of extension, and 20° of right and left lateral flexion. See Poetz deposition, page 31. His straight leg raise was positive on the left. See Dr. Poetz deposition, page 32. Dr. Poetz's previous diagnoses were unchanged. See Exhibit B, page 4. Dr. Poetz's permanency ratings also remained unchanged, except to increase the total by which the combination of the present and prior disabilities exceed the simple sum to 15-20%.

See Exhibit B, pages 5-6. Dr. Poetz again opined the claimant was "**Permanently and Totally Disabled** as a result of his June 7, 2005 injury and in addition to his prior lumbar spine injuries." (Emphasis original). See Exhibit B, page 6 and Dr. Poetz deposition, page 38.

In addition to the restrictions he provided in 2007, Dr. Poetz testified that effusion changes the mechanics of the spine and can cause additional stress to other levels, creating a greater risk for further disc pathology. See Dr. Poetz deposition, page 42. Dr. Poetz recommended that the claimant follow up with an orthopedic surgeon to monitor the status of the hardware or if symptoms out of the ordinary develop. See Dr. Poetz deposition, page 42. It was noted the claimant might have to undergo repeat MRIs and surgery if indicated. See Dr. Poetz deposition, page 42. He opined that the claimant may benefit from warm, moist packs, topical anti-inflammatory medication, or Cox-2 anti-inflammatory medication. See Exhibit B, page 4.

In an addendum report dated February 20, 2012, Dr. Poetz reviewed the treatment the claimant has received since February 2007 and diagnosed psuedoarthrosis. See Exhibit C, page 5. Dr. Poetz increased the claimant's permanent partial disability to 45% of the body as a whole from the injury on July 7, 2005. See Dr. Poetz deposition, page 91. He opined that the claimant was "**Permanently and Totally Disabled** as a result of his June 7, 2005 injury and in addition to his prior lumbar spine injuries." (Emphasis original). See Exhibit C, page 5 and Dr. Poetz deposition, page 38. When questioned about how lifting a Shop Vac could cause a disc herniation, Dr. Poetz testified:

A: Well, any mechanism that puts undue stress on that part of the body, the disc in especially a situation where the levels of pathology that developed at that time were levels above prior pathology, putting that level at a higher risk for injury, so that putting undue risk -- undue stress through that level can cause the disc to rupture.

Q: All right. And what's actually going on in terms of the disk rupturing within the body?

A: Well, if you picture the disc as a jelly donut, with a center, and if you press down on the jelly donut hard enough it's going to squirt jelly out the side. In the case of a disc, if that disc is under too much pressure, from levels above or below or both, and that pressure puts undue stress on the cartilaginous disk itself, then the center, the nucleus of that cartilaginous disc, will squirt out. See Dr. Poetz deposition, pages 26-27.

Dr. Poetz opined that a fusion limits movement, weakens the levels above and below it, and could make it more likely a problem or herniation will occur at an adjacent level. See Dr. Poetz deposition, pages 31, 60. Thus, the previous fusion placed the claimant at a higher risk for a herniation at L3-L4. See Dr. Poetz deposition, pages 60, 91.

Dr. Poetz also testified "[i]t's my opinion that he is permanently and totally disabled as a result of the June 7th, '05 injury, in addition to his prior lumbar spine injuries." See Dr. Poetz deposition, page 38. He also testified that the injury on June 7, 2005, alone caused the permanent total disability. He qualified his earlier testimony by opining

I think the sentence says he's permanently and totally disabled as a result of his June 7th, 2005, injury, period, if you want to put a period there, and, in addition, he has additional lumbar spine injuries. But my opinion is he would be permanently disabled as a result of that injury alone if he did not have other injuries as well. See Dr. Poetz deposition, page 40.

Dr. Poetz testified that 90% of patients who only had a herniated disc can be treated conservatively and recover to a symptom free, or almost symptom free, state. See Dr. Poetz deposition, page 60. He testified that individuals with one level, surgically corrected disc herniations return to the work force quite often. See Dr. Poetz deposition, page 63. Dr. Poetz testified:

Q: If the employee had only had a herniated disk at L3-L4, is that the type of condition that would normally just be treated with a discectomy?

A: Well, I don't know. Depends on the patient. Some patients that have ruptured disks at L3-4 don't have any surgery. 90 percent of patients who have ruptured disks can be treated conservatively without surgery and they get symptom free or relatively symptom free. So you're talking about a hypothetical patient. I don't know that I can give you any better answer than that.

Q: So could you say if Mr. Laster suffered only the L3-L4 disk herniation that he wouldn't need surgery or he would have just needed a discectomy?

A: Of course I can and did.

Q: Just L3-L4 alone?

A: I told you if he only had that injury he would be totally and permanently disabled as a result of that injury and resulting necessary treatment as well.

Q: I'm confused at -- you can't tell me what type of surgery he would have needed or what kind of procedure he would have needed for that injury, but yet you can tell me what the resulting permanent partial disability or permanent total disability for that's going to be?

A: Because we're talking about a patient named Timothy Laster, not a hypothetical patient.

Q: I'm saying if Mr. Laster had suffered only L3-L4 and he never had the pathology below, could you tell me what kind of treatment he would have needed?

A: I could, but I won't because you're talking about a hypothetical patient. I would have to examine the hypothetical patient in order to give you a correct answer.

Q: So, Doctor, is it not hypothetical for you to tell me that he would have been permanently and totally disabled if he only suffered the herniated disk at L3-L4 alone?

A: That is not hypothetical. That is a patient that I have examined and I have the imaging and everything else that goes along with it. That's everything but hypothetical.

Q: Doctor, when you examined the patient that had this -- Mr. Laster, as he had this disk herniation at L3-L4, does not his previous disk pathology, surgery, treatments, symptoms that were residual, and limitations affect how -- and interact with L3-L4?

A: Of course they do. And I clearly stated that and clearly gave him disability ratings for those other levels as well, which we've talked about several times. See Dr. Poetz deposition, pages 60-63.

Dr. Poetz testified that the claimant was permanently and totally disabled from herniation at L3-L4 because of "the risk of additional pathology and crippling." See Dr. Poetz deposition, page 64. Dr. Poetz acknowledged the claimant had low back pain between 2002 and 2005, and could not state how the pain differed after June 7, 2005. See Dr. Poetz deposition, pages 76-77. Dr. Poetz testified that he had never seen the claimant without the prior fusion and associated limitations. See Dr. Poetz deposition, page 113.

Although he believed there was a synergistic effect from all of the injuries combined, Dr. Poetz could not state whether the symptoms from the prior injuries combined with the symptoms from the primary injury to create a greater level of discomfort. See Dr. Poetz deposition, pages 93-94. Dr. Poetz testified it was not within his expertise to state how the pre-existing symptoms might affect the symptoms after June 7, 2005. See Dr. Poetz deposition, page 95.

Timothy G. Lalk

Mr. Lalk, a vocational rehabilitation counselor, interviewed the claimant on November 9, 2009. See Lalk deposition, page 7. Looking at the claimant's vocational background, the claimant's educational background includes the completion of the 11th grade. See Lalk deposition, page 15. The claimant attended West County Tech for one year of industrial machine repair training and completed four years of an apprenticeship with the Floor Layers Union. See Lalk deposition, pages 15-16. The claimant's last employment was with this employer, selling the floor remodeling projects to customers, estimating the cost, and subcontracting the project to a flooring installer. See Lalk deposition, page 27. The claimant performed some finish work, sanding, and picked up materials for the jobs but did not lift the materials. See Lalk deposition, page 27. The claimant avoided bending at the waist and would either kneel or squat to pick something up off of the floor. See Exhibit E, page 12.

Vocational testing revealed a high school level in reading and a seventh grade level in math. The reading comprehension portion of the adult basic learning examination, the claimant scored at a post-high school level. See Lalk deposition, page 18. Mr. Lalk opined that the claimant should be able to take classes or do independent preparation to obtain a GED. See Lalk

deposition, page 18. Mr. Lalk opined that the claimant should be intellectually able to consider retraining at a post-secondary level. See Lalk deposition, page 47.

Mr. Lalk concluded that, based on the restrictions set by Dr. Robson, the claimant should be able to return to his former employment activities of running a company involved in installing and finishing hardwood floors. See Lalk deposition, page 19. Alternatively, Mr. Lalk felt he could use his experience performing similar sales as an employee of another company and use his skills to do estimation of work and supervise work crews. See Lalk deposition, pages 37-38. The claimant's work background would also allow him to secure employment as a customer service rep in a retail store selling materials or products related to floors. See Lalk deposition, pages 37-38. Mr. Lalk felt that, under Dr. Robson's restrictions, the claimant was capable of any type of unskilled entry level position in the light, sedentary, and medium level of physical exertion. See Lalk deposition, page 38. Mr. Lalk noted, under Dr. Poetz's restrictions, the claimant could not perform most jobs that require even at the lightest level of physical exertion. See Lalk deposition, pages 19-20. Mr. Lalk opined that the claimant's report of symptoms and limitations were consistent with Dr. Poetz' findings. See Lalk deposition, pages 19-20. He testified that the claimant's need to lie down during the day was a self-imposed restriction. See Lalk deposition, page 42. Mr. Lalk concluded that the claimant was unable to secure employment in the open labor market. See Lalk deposition, page 20.

In an addendum report, dated August 18, 2010, Mr. Lalk addressed the cause of the claimant's permanent and total disability. See Exhibit F. He opined that the claimant's inability to gain employment in the open labor market was due to his low back symptoms and limitations. See Exhibit F, page 1 and Lalk deposition, pages 21-22. Mr. Lalk opined that there needed to be a medical determination on whether the prior low back condition combined with the primary injury to render him unable to secure and maintain employment. See Exhibit F, page 2. Mr. Lalk deferred to a doctor on the issue, but pointed out "Dr. Poetz stated in his report of 02/05/07 that the combination of his present and prior disabilities caused Mr. Laster to be permanently and totally disabled." See Exhibit F, page 2 and Lalk deposition, pages 21-24, 47. He further noted Dr. Coyle had found, on October 24, 2007, the claimant's prognosis was guarded "due to his multiple prior surgeries and history of a failed fusion." See Exhibit F, page 2. Mr. Lalk opined that this suggested the doctors believed the symptoms and limitations resulting from the injury of June 7, 2005, would not be as severe as they are now but for the prior injuries and subsequent significant treatment for his low back prior to June of 2005. See Exhibit F, page 2.

Mr. Lalk opined that the claimant's right hand and left shoulder conditions would have been a hindrance and obstacle to his employment or reemployment. See Lalk deposition, page 56. Mr. Lalk opined the limitations the claimant experienced before June of 2005, due to his low back condition were a hindrance and obstacle to his employment or reemployment due to his low back. See Exhibit F, page 2 and Lalk deposition, pages 24-26. The pre-existing restrictions would have limited the claimant to some light duty positions. See Exhibit F, page 2 and Lalk deposition, pages 26-27. The claimant's subsequent history, per his report and the medical records, is similar to the situations of Mr. Lalk's other clients wherein the individual has a series of back injuries, treatment, and the ultimate inability to function at even a sedentary level. See Exhibit F, page 2. Mr. Lalk opined that this appeared to be the case with the claimant, and observed the claimant "had a series of low back problems and injuries which have culminated in his inability to engage in employment in a competitive manner." See Exhibit F, page 2. Thus, while deferring to a medical opinion concerning the relationship of the prior injuries, the primary

injury, and the symptoms/limitations, Mr. Lalk concluded that, based on the medical records and the claimant's interview, "it appears that his inability to secure and maintain employment is due to a combination of his prior injuries and the injury of June 6, 2005 [sic]." See Exhibit F, page 2.

June M. Blaine

Ms. Blaine, a vocational rehabilitation counselor, interviewed the claimant on November 9, 2010, and recorded an educational and work history similar to that recorded by Mr. Lalk. See Blaine deposition, page 7. After the 2000 injury, the claimant, due to his limitations, was unable to perform the work of a floor installer. See Blaine deposition, pages 10, 22. The claimant was out of the industry until starting his own company in late 2004. See Exhibit 23 (1/31/11), page 5. The claimant sold flooring and completed sanding. See Blaine deposition, page 22. The claimant was partnered with a floor installer who would help with the tasks he could not complete. See Blaine deposition, pages 22-23. At the time of the evaluation, the claimant described a constant pain and cold sensation in the low back and down the left leg. The claimant described weakness, tiredness, and aching. He reported a burning sensation in the left hip, which he related to the 2000 bone graft, and indicated it would flare up occasionally and cause burning into the left leg. See Exhibit 23 (1/31/11), page 5 and Blaine deposition, page 13. The claimant described the low back pain as unpredictable. See Blaine deposition, page 14. Changing positions allowed him to change the pain sensations. See Blaine deposition, pages 13-14. Lying down would take the pressure off of his back. See Blaine deposition, pages 13-14.

On the Wide Range Achievement Test the claimant scored at a 10.2 grade level in sentence comprehension, an 11.9 grade level in word reading, and a 12.9 grade level in math. See Blaine deposition, page 15. Ms. Blaine opined that the claimant would be a candidate for a GED and could be retrained. See Blaine deposition, pages 16, 53.

Under Dr. Robson's restrictions, Ms. Blaine concluded that the claimant could work at a medium demand level. See Blaine deposition, page 27. Based on Dr. Poetz's restrictions, Ms. Blaine did not feel the claimant was employable in the open labor market. See Blaine deposition, page 28. Based upon his report, Ms. Blaine understood Dr. Poetz believed the claimant's inability to work was due to a combination of his pre-existing disabilities and the injury on June 7, 2005. *Id.* Ms. Blaine also testified, in her opinion, the claimant was permanently and totally disabled due to a combination of his pre-existing disabilities and the injury on June 7, 2005. See Blaine deposition, pages 32, 41. A review of Dr. Poetz's deposition testimony did not change her opinions. See Exhibit 23 (9/28/12). Explaining the basis of her opinion, Ms. Blaine testified:

...I think it has to do with the restrictions that are provided by the doctor, but also in talking with the individual, from a vocational standpoint, what they've been doing, what kind of work they've been doing, you know, how they perform their job tasks, you know, do they have to accommodate.

So I think I probably spoke too quickly saying it's just the medical. I think that's part of it, but I think as a vocational person, I'm asking the individual questions about limitations, problems, issues. I'm also asking them about what kind of work they've done, have they been able to perform their job tasks, do they need accommodations, could they not go back to their job. So I think maybe I

misspoke, but for me it's a number of factors that I'm looking at including the functional restrictions. See Blaine deposition, pages 33-34.

Ms. Blaine testified the claimant's pre-existing symptoms, limitations, and restrictions were a hindrance and obstacle to his employment or reemployment. See Blaine deposition, pages 18-22.

Bob Hammond

Bob Hammond, another vocational rehabilitation counselor, performed a record review only. See Hammond deposition, page 11. Mr. Hammond opined that the claimant had skills in customer service, measuring, estimating, evaluating, researching, supervising, ordering, material control, record keeping, performing math, and networking with others in the field. See Exhibit I, page 9, and Hammond deposition, pages 15-16. These skills, according to Mr. Hammond, would transfer to a lower level position at the light or sedentary levels and significantly enhance the claimant's employment potential. See Exhibit I, page 9 and Hammond deposition, page 16. Mr. Hammond opined that the claimant's experience and transferrable skills would supersede any lack of high school education for the types of jobs that would be transferrable to him. See Hammond deposition, pages 17-18.

Mr. Hammond opined that the claimant was able to perform work, prior to the 2005 injury, at the level he needed to as the owner of his business. See Hammond deposition, page 54. Mr. Hammond concluded that the claimant was able to return to work up to the reported 2005 injury and had the residual functional ability, based on objective matters, to work after the 2005 injury. See Exhibit I, page 10.

Under Dr. Robson's restrictions, Mr. Hammond opined that the claimant had transferable skills to a light to sedentary level and has the ability to supervise, perform cost analysis, material control, and estimates. See Exhibit I, page 10 and Hammond deposition, pages 19-20. Mr. Hammond opined the claimant could perform light to sedentary jobs as a floor estimator, a material manager, and salesman of flooring. Exhibit I, page 10. He opined that the claimant could work in a sedentary job allowing for entry level work. *Id.* Mr. Hammond noted, as examples, work as an assembler for electrical accessories, ampoule sealer, polish/assembler for glasses, info/telephone clerk (or combo), an assembler for small products/bench, a circuit board screener, a semi-conductor bonder, and a cutter/document preparer combination. See Exhibit I, page 10 and Hammond deposition, pages 49-52. Mr. Hammond noted Dr. Poetz felt the employee was totally disabled from the injury on June 7, 2005. See Hammond deposition, pages 20, 22.

Mr. Hammond opined that nothing prevents the claimant from creating a company wherein he could earn money and accommodate his restrictions and testified that no medical records show the need to lie down during the day. See Hammond deposition, page 22, 70, 71. He concluded the claimant's pre-existing restrictions would have been a hindrance to employment or reemployment. See Hammond deposition, pages 64, 67.

WAGE RATE

The method of calculating an employee's average weekly wage is set forth in Section 287.250. The section, in part, provides:

1. Except as otherwise provided for in this chapter, the method of computing an injured employee's average weekly earnings which will serve as the basis for compensation provided for in this chapter shall be as follows:

- (1) If the wages are fixed by the week, the amount so fixed shall be the average weekly wage;
- (2) If the wages are fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve and divided by fifty-two;
- (3) If the wages are fixed by the year, the average weekly wage shall be the yearly wage fixed divided by fifty-two; ... § 3287.250.1 RSMo Supp. 2005.

In this case the claimant is also the owner of the company who testified that the books for his company had been destroyed and he did not file taxes for the two years he owned the company. He testified that he made \$4,000.00-\$5,000.00 a month by selling 800 square feet worth of jobs a week at \$2.50-\$5.00 a foot. He split the profit for the jobs with Mid-Rivers Hardwoods. Depending on the amount of expenses, this would result in a weekly wage of \$1,000.00. This would give the claimant a temporary total disability and permanent total disability rate of \$666.67 and the maximum permanent partial disability rate. Based on the evidence in the record, the claimant's average weekly wage was \$1,000.00 per week.

The employer/insurer is entitled to a credit of \$6,091.94 for an overpayment of temporary total disability. This credit is in addition to the stipulated credit the employer/insurer is entitled to for the six days of temporary total disability accidentally paid, at a rate of \$696.97, after the claimant was placed at MMI.

FUTURE MEDICAL CARE

The Workers' Compensation Act requires employers "to furnish compensation under the provisions of this chapter for personal injury or death of the employee by accident arising out of and in the course of the employee's employment[.]" § 287.120.1. This compensation often includes an allowance for future medical expenses, which is governed by Section 287.140.1. Rana v. Landstar TLC, 46 S.W.3d 614, 622 (Mo.App.2001). Section 287.140.1 states:

In addition to all other compensation paid to the employee under this section, 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.

Section 287.140.1 places on the claimant the burden of proving entitlement to benefits for future medical expenses. Rana, 46 S.W.3d at 622. The claimant satisfies this burden, however, merely by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo.App.2002). Nonetheless, to be awarded future medical benefits, the claimant must show that the medical care "flow [s] from the

accident.” Crowell v. Hawkins, 68 S.W.3d 432, 437 (Mo.App.2001) (quoting Landers v. Chrysler Corp. 963 S.W.2d 275, 283 (Mo.App.1997)).

While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Stevens v. Citizens Mem'l Healthcare Found., 244 S.W.3d 234, 238 (Mo.App.2008); *see also* Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App.2004) (claimant must present “evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible” for future medical treatment). Conrad v. Jack Cooper Transport Co., 273 S.W.3d 49, 52 (Mo.App. W.D. 2008).

For an employer to be responsible for future medical benefits, such care "must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury[.]” Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 270 (Mo.App. S.D. 2004). While an employer may not be ordered to provide future medical treatment for non-work related injuries, an employer may be ordered to provide for future medical care that will provide treatment for non-work related injuries if evidence establishes to a reasonable degree of medical certainty that the need for treatment is caused by the work injury. Id.

In determining whether medical treatment is “reasonably required” to cure or relieve a compensable injury, it is immaterial that the treatment may have been required because of the complication of pre-existing conditions, or that the treatment will benefit both the compensable injury and a pre-existing condition. Tillotson v. St. Joseph Med. Ctr., 347 S.W.3d 511, 519 (Mo.App. W.D 2011). Rather, once it is determined that there has been a compensable accident, a claimant need only prove that the need for treatment and medication flow from the work injury. Id. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id. Application of the prevailing factor test to determine whether medical treatment is required to treat a compensable injury is reversible error. Id. at 521.

“It is not necessary that the claimant seeking future medical benefits produce conclusive evidence to support that claim.” Williams v. City of Ava, 982 S.W.2d 307, 311 (Mo.App. 1998). “The fact that a claimant may have a ‘possible’ need for future medical care does not constitute substantial evidence to support such an award.” Id., at 312. “Testimony that can be construed as based on reasonable probability, however, will support an award for future medical care.” Id., at 312. “Probability means founded on reason and experience which inclines the mind to believe but leaves room for doubt.” Cook v. Sunnen Products Corp., 937 S.W.2d 221, 223 (Mo.App.1996).

"The worker's compensation act permits the allowance for the cost of future medical treatment in a permanent partial disability award." Sharp v. New Mac Electric Cooperative, 92 S.W.3d 351, 354 (Mo. App. S.D. 2003). There is no requirement for a claimant to prove specific medical treatment will be required in order for payment of future medical expenses to be

made available. Id. What is required is proof there is a "reasonable probability" that additional medical care will be needed to treat the work-related injury. Id. "This includes treatment which gives comfort [relieves] even though restoration to soundness [cure] is beyond avail." Ford v. Wal-Mart Associates, Inc., 155 S.W.3d 824, 828 (Mo. App 2005). "A finding of MMI is not inconsistent with the need for future medical treatment," and "the Commission may not deny future medical treatment to relieve a claimant's pain because a claimant may have achieved MMI." Id. at 828-829.

The claimant satisfies his burden of proving entitlement to future medical expenses by establishing a reasonable probability that he will need future medical treatment. Smith v. Tiger Coaches, Inc., 73 S.W.3d 756, 764 (Mo. App. 2002). Once it is determined that there is a compensable accident, a claimant need only prove that the need for treatment and medication flow from the accident. Tillotson v. St. Joseph Medical Center at 519. The fact that the medication or treatment may also benefit a non-compensable or earlier injury or condition is irrelevant. Id.

Dr. Poetz testified that the claimant needs Cox-2 non-steroidal and anti-inflammatory medication or the newer topical anti-inflammatory medication such as Voltaren gel or Fletcher patch, should follow up with an orthopedic surgeon to monitor the status of the hardware because a fusion changes the mechanics of the spine and causes additional stress on other levels, and follow up with an orthopedic surgeon if symptoms out of the ordinary develop, and opined that it may be necessary for claimant to undergo a repeat MRI followed by surgery if indicated. See Dr. Poetz deposition, pages 88, 89. He also opined that the June 7, 2005 injury is the prevailing factor for the need for this future medical treatment. See Dr. Poetz deposition, pages 42-43.

Dr. Robson did not specifically provide an opinion about claimant's need for future medical treatment. He opined that when he last saw the claimant on October 12, 2010, that he believed the claimant was at maximum medical improvement. See Dr. Robson deposition, pages 28-29. "In summary, I think he has reached the point of maximum medical improvement. I have nothing else to offer him as far as his lumbar spine is concerned, but he does remain symptomatic." See Exhibit 4 in Dr. Robson deposition. Dr. Robson opined that the claimant would not benefit from any further treatment to his lumbar spine that patients with multi-level fusions did not need to have the hardware monitored by a physician, that there was a 10% chance of a problem at an adjacent level, and the claimant need only required medical attention if he started having difficulties. See Dr. Robson deposition, pages 28-29, 37, 38.

Based on the evidence, the claimant is awarded 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.

PERMANENT DISABILITY

Missouri courts have routinely required that the permanent nature of an injury be shown to a reasonable certainty, and that such proof may not rest on surmise and speculation. Sanders v. St. Clair Corp., 943 S.W.2d 12, 16 (Mo.App. S.D. 1997). A disability is "permanent" if "shown to be of indefinite duration in recovery or substantial improvement is not expected." Tiller v. 166 Auto Auction, 941 S.W.2d 863, 865 (Mo.App. S.D. 1997).

"Total disability" is defined as the inability to return to any employment and not merely the inability to return to the employment in which the employee was engaged at the time of the accident. Section 287.020.7, RSMo 2000. The test for permanent total disability is whether, given the claimant's situation and condition, he or she is competent to compete in the open labor market. Sutton v. Masters Jackson Paving Co., 35 S.W.3d 879, 884 Mo.App. 2001). The question is whether an employer in the usual course of business would reasonably be expected to hire the claimant in the claimant's present physical condition, reasonably expecting the claimant to perform the work for which he or she is hired. Id.

In this case, there are two critical threshold questions that require attention. First, whether the claimant is now permanently and totally disabled as defined in the Workers' Compensation statute, and second, if so, whether the severity of the last injury alone was sufficient to compel a finding that the claimant is permanently and totally disabled solely as a result of the last injury. The record contains conflicting evidence on both questions.

This 43 year old claimant is a high school dropout without a GED that worked exclusively in the floor laying business prior to his 2005 injury and does not possess computer knowledge and similar transferable skills. He testified that since his 2005 back injury, he must alternate between a seated and standing position every 15 to 20 minutes and must lie down 3 to 5 times per day to alleviate his pain. After the 2005 accident, the claimant gained employment through friends on two occasions but was fired from each job within a month due to his inability and unreliability to complete necessary tasks, caused by his back pain. Based on the vocational testing and evaluations, the claimant would be a candidate to complete a GED but has not done so.

Assuming the restrictions recommended by Dr. Poetz or the self imposed limitations that the claimant has to lie down during periods of the day to relieve his pain, the claimant is unemployable in the open labor market. Assuming only the restrictions recommended by Dr. Robson, the claimant is employable in a variety of positions in the open labor market. Despite the claimant's relative youth and intelligence, the weight of the evidence is that the claimant would not be able to compete in the open labor market given his low back condition and his limitations resulting from his low back condition. His unsuccessful attempt to return to employment together with the limitations from his back condition suggest that another attempt to return to employment in the open labor market would have a similar result.

The second issue is whether the disability from the last injury alone was so severe that it resulted in the claimant's total disability. This is an important determination, because the result will compel liability for either this employer or for the Second Injury Fund. In order for the claimant to be entitled to recover permanent total disability benefits from the SIF, he must prove that the last injury, combined with his pre-existing permanent partial disabilities, resulted in permanent total disability. Pruett v. Federal Mogul Corp., 365 S.W.3d 296, 306 (Mo. App. S.D. 2012) (citation omitted). For this reason, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. Id. (citing Birdsong v. Waste Mgmt., 147 S.W.3d 132, 138 (Mo. App. S.D. 2004); see also ABB Power T& D Company v. Kempker, 263 S.W.3d 43, 50 (W.D. 2007). If the claimant's last injury in and of itself rendered him permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. Id.

Since the claimant's medical condition involves successive low back injuries, a close review of the forensic expert evidence is important. For this reason, the vocational experts generally deferred to the medical evaluations which contained conflicting evaluations. The first medical expert, Dr. Robson, the treating surgeon, opined that the claimant is permanently partially disabled. He did not render an opinion whether the disability from the last injury alone was so severe as to result in total disability without regard to the claimant's pre-existing permanent partial disabilities. On the other hand, Dr. Poetz opined within a reasonable degree of medical certainty that claimant is permanently and totally disabled as a result of the 2005 injury alone and also opined that the claimant is "permanently and totally disabled as a result of his June 7, 2005 injury and in addition to his prior lumbar spine injuries." No doubt this is confusing, because a casual reading of Dr. Poetz' conclusions suggests that he is presenting two different conclusions. However, a closer review suggests that the conclusions are consistent. Given the disability from all of the claimant's low back occurrences, the claimant is certainly totally disabled based on the weight of the evidence. However this does not address this issue which is whether the disability from the last injury alone was so severe that it resulted in the claimant's total disability without contribution from the pre-existing conditions.

The claimant's counsel asked that question in Dr. Poetz' deposition to clarify his forensic medical opinion, and Dr. Poetz testified:

I think the sentence says he's permanently and totally disabled as a result of his June 7th, 2005, injury, period, if you want to put a period there, and, in addition, he has additional lumbar spine injuries. But my opinion is he would be permanently disabled as a result of that injury alone if he did not have other injuries as well. See Dr. Poetz deposition, page 40.

While a lay evaluation may produce a different result, this appears to be the only clear forensic evaluation on the issue. Dr. Poetz appears to be qualified as a physician with a valid medical license from the Missouri Board of Healing Arts, and none of the parties offered any evidence challenging his credentials as presented in his curriculum vitae. Our Courts have opined:

“[T]he question of causation is one for medical testimony, without which a finding for claimant would be based upon mere conjecture and speculation and not on substantial evidence.” Elliot v. Kansas City, Mo., Sch. Dist., 71 S.W.3d 652, 658 (Mo.App. W.D. 2002). Accordingly, where expert medical testimony is presented, “logic and common sense,” or an ALJ's personal views of what is “unnatural,” cannot provide a sufficient basis to decide the causation question, at least where the ALJ fails to account for the relevant medical testimony. Cf. Wright v. Sports Associated, Inc., 887 S.W.2d 596, 600 (Mo. banc 1994) (“The commission may not substitute an administrative law judge's opinion on the question of medical causation of a herniated disc for the uncontradicted testimony of a qualified medical expert.”). Van Winkle v. Lewellens Professional Cleaning, Inc., 358 S.W.3d 889, 897, 898 (Mo.App. W.D. 2008).

Based on the credible evidence of record, the complicated question of liability in this case compels an award of permanent and total disability in favor of the claimant and against the employer and its insurer, because the disability from the last injury alone was so severe that it

resulted in the claimant's permanent and total disability. For this reason, the claim against the Second Injury Fund is denied. This is so, because our law is, "If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation." Landman v. Ice Cream Specialties, Inc., 107 S.W.3d 240, 248 (Mo. banc 2003). "For this reason, "pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." Id. If the employee's last injury in and of itself rendered the employee permanently and totally disabled, the Fund has no liability; the employer is responsible for the entire amount of compensation. Id. Birdsong v. Waste Mgmt., 147 S.W.3d 132, 138 (Mo. App. S.D. 2004)

Made by: /s/ EDWIN J. KOHNER
 EDWIN J. KOHNER
 Administrative Law Judge
 Division of Workers' Compensation