

CORRECTED
FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)
(Corrections in bold)

Injury No.: 08-122167

Employee: Ross E. Lawrence
Employer: New Bloomfield R-III School District
Insurer: Missouri United School Insurance
Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having read all briefs, reviewed the evidence, heard oral arguments, and considered the whole record, we find that the award and decision of the administrative law judge **denying** compensation is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, we affirm the award and decision of the administrative law judge, with this supplemental opinion.

Quashed subpoena for corporate designee

Employee's attorney had requested a subpoena duces tecum for the deposition of a corporate designee of employer to be taken in September 2011. Employer objected to this subpoena, which was sustained by the administrative law judge (ALJ) and the subpoena was quashed. Employee then filed a motion to reconsider quashing corporate deposition notice, which was subsequently denied by the ALJ. The ALJ reasoned that employee had already deposed seven current or former employees and had another deposition of another former employee scheduled, so employee did not need any further discovery. Employee contends that he still had a right to depose a corporate designee of employer pursuant to § 287.560 RSMo and Missouri Rule 57.03(b)(4), and that he was unduly prejudiced by this denial.

At the hearing, employer called Debbie Cuno as a witness. Employee objected because Ms. Cuno had not been disclosed by employer and employee had not had an opportunity to depose her or prepare for her testimony. However, the ALJ allowed her testimony, and in the final award found that "one of the most compelling of these witnesses was Ms. Cuno."

We do have concerns with regard to the ALJ's decision to quash employee's corporate designee subpoena. We recognize that the ALJ has, and should have, discretion to quash subpoenas to avoid abuse of the discovery process. However, we believe that at minimum, employee should have been given an opportunity prior to hearing to discover employer's intended witnesses, verify the general nature of their anticipated testimony, and/or obtain copies of recorded statements. By quashing this subpoena, employee was potentially denied the opportunity to produce evidence and testimony to rebut or impeach the testimony of employer's witnesses cited by the ALJ. We believe that although the ALJ certainly could have limited the scope of additional discovery, quashing employee's corporate designee subpoena could have prejudiced employee.

Employee: Ross E. Lawrence

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However, in this particular case we do not believe the resulting award would have been any different even if the subpoena had not been quashed. For the reasons set forth below, we find that this decision should not be reversed merely on this basis.

Employee's evidence

Under the Missouri Workers' Compensation Law, the employee bears the burden of proving all essential elements of his workers' compensation claim. *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002). Proof is made only by competent and substantial evidence. *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974). Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

In this case, employee relies solely on his own testimony and the medical opinion of Dr. Russell, who he only saw one time for purposes of this litigation in November 2010. In Dr. Russell's written report dated November 2, 2010, he opined that the August 21, 2008, injury was the prevailing factor in employee's ongoing condition and necessitated employee's subsequent surgeries. Dr. Russell opined that the April 2008 fence post injury resolved without significant treatment prior to the August 2008 work injury and was unrelated to employee's current condition. Dr. Russell also opined that the November 2008 vehicular incident only temporarily aggravated employee's condition and "did not appreciably affect the final outcome of his injury." Finally, Dr. Russell concluded with his opinion that employee is 100% totally disabled as a result of the August 2008 injury alone.

Dr. Russell formed his opinions based on the information given to him by employee and a review of medical records.¹ Specifically, Dr. Russell's opinions are based on the assumption that employee pulled a muscle in his back in April 2008, but the resulting symptoms from that resolved in a couple of weeks. This assumption is consistent with employee's testimony at trial that all symptoms associated with the April 2008 injury had been resolved by May 2008.

However, medical records from Dr. Bellamy and St. Mary's Hospital do not support employee's testimony. On April 29, 2008, Dr. Bellamy saw employee and diagnosed a lumbar strain with radiculopathy. On May 13, 2008, he noted modest if any improvement in symptoms and continued "clear" evidence of radiculopathy. Records from St. Mary's, where employee sought treatment on the date of the August 2008 accident, refer to a prior back injury from cutting down a tree in Spring 2008, which was not mentioned elsewhere. More importantly, these records also refer to another incident that happened on "the Monday before" (August 18, 2008) when a table gave way and employee twisted his back again.

¹ Dr. Russell's report lists the following as records which he reviewed for his report: (1) Advanced Radiology of Columbia, MO; (2) Columbia Orthopedic Group, Columbia, MO; (3) Boone Hospital Center, Columbia, MO; (4) St. John's Health System, Springfield, MO; (5) St. Luke's Medical Group, Clinton, MO; (6) Spine Midwest, Inc., Jefferson City, MO; (7) St. Mary's Health Center, Jefferson City, MO; (8) Columbia Regional Hospital, Columbia, MO; (9) University of Missouri Health Care, Columbia, MO; (10) St. Mary's Health Center, Jefferson City, MO; and (11) Report Gallagher-Bassett Services, Kansas City, MO. It is not clear whether Dr. Russell reviewed the records of Dr. Bellamy.

Employee: Ross E. Lawrence

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Dr. Russell also was under the assumption, based on employee's representation to him, that employee's symptoms following the motor vehicle accident in November 2008 were basically unchanged. Again, this is consistent with what employee testified to at the trial in this case. However, this is vastly different from the testimony that employee gave in a deposition on June 27, 2011, for his litigation involving that motor vehicle accident (unrelated to this workers' compensation case). In his 2011 deposition, employee testified that the November 2008 vehicular accident resulted in the onset of new, continuing symptoms including moderate to extreme burning in his left leg and foot, and severe pains and muscle spasms in his lower back.

We do not necessarily expect testimony and medical records to meld with mathematical precision, but glaring omissions and contradictions must be addressed by expert testimony in order for such testimony to be persuasive.

Employee has had a very complicated medical history of trauma to his spine, both prior to and subsequent to his August 21, 2008, work injury. His burden of proof would be difficult to sustain even if he was entirely credible, if he had no evidence of serious prior injury, and if the expert testimony upon which his claim rests was fully informed. We agree with the ALJ's finding that employee was not a credible witness. We find that employee suffered a serious injury prior to his August 2008 work injury, and we are not persuaded that employee had recovered from that injury prior to the August 2008 work injury. We also find that Dr. Russell's testimony is not credible because it was not fully or accurately informed. For these reasons, employee has failed its burden of proving a compensable work injury, and this claim for compensation must be denied.

We affirm and adopt the award and decision of the administrative law judge, as supplemented herein.

The award and decision of Administrative Law Judge Vicky Ruth, issued February 25, 2013, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 11th day of March 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Ross E. Lawrence

Injury No. 08-122167

Dependents: N/A

Employer: New Bloomfield R-III School District

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance,
c/o Gallagher Bassett Services

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: November 19, 2012

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No.
2. Was the injury or occupational disease compensable under Chapter 287? No.
3. Was there an accident or incident of occupational disease under the Law? No.
4. Date of alleged accident or onset of occupational disease: August 21, 2008.
5. State location where alleged accident occurred or occupational disease was contracted: New Bloomfield, Missouri.
6. Was above employee in employ of above employer at time of the alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? N/A.
8. Did accident or occupational disease arise out of and in the course of the employment? No.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Claimant twisted and turned while walking down a hallway.
12. Did accident or occupational disease cause death? No. Date of death? N/A.
13. Part(s) of body allegedly injured by accident or occupational disease: body as a whole referable to the back.
14. Nature and extent of any permanent disability: none.
15. Compensation paid to-date for temporary disability: None.
16. Value necessary medical aid paid to date by employer/insurer? N/A.
17. Value necessary medical aid not furnished by employer/insurer? None.

18. Employee's average weekly wages: \$1,250.00.
19. Weekly compensation rate: \$772.53/\$404.66.
20. Method of wages computation: by agreement.

COMPENSATION PAYABLE

21. Amount of compensation payable from employer: none.
22. Second Injury Fund liability: none.
23. Future medical awarded: no.

Employee: Ross Lawrence

Injury No. 08-122167

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Ross E. Lawrence

Injury No. 08-122167

Dependents: N/A

Employer: New Bloomfield R-III School District

Additional Party: Second Injury Fund

Insurer: Missouri United School Insurance,
c/o Gallagher Bassett Services

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Hearing Date: November 19, 2012

On November 19, 2012, Ross Lawrence (the claimant), New Bloomfield R-III School District/Missouri United School Insurance (the employer/insurer), and the Second Injury Fund appeared in Jefferson City, Missouri, for a final award hearing. The claimant was represented by attorney Jeffrey Adams. The employer/insurer was represented by attorney Brian Fowler. The Second Injury Fund was represented by attorney Adam Sandberg. Claimant, Debbie Lawrence, Dr. Garth Russell, Tim Gilmore, Dr. Susan Wilderman, and Debbie Cuno testified in person at the hearing. In addition to their live testimony, claimant and Dr. Wilderman also testified by deposition. Wilber T. Swearingin, Josh Devlin, Mike Parnell, Angela Jordan, Teresa Rotter, Brenda Doty, Grover Morrow, and Dr. Steven Hendler testified by deposition. Nancy Moore observed the hearing on behalf of the employer. The parties submitted briefs on or about December 13, 2012, and the record closed at that time.

STIPULATIONS

The parties stipulated to the following:

1. On or about August 21, 2008, Ross Lawrence (the claimant) was an employee of New Bloomfield R-III School District (the employer).
2. The employer was operating subject to the provisions of Missouri Workers' Compensation Law.
3. The employer's liability for workers' compensation was self-insured by Missouri United School Insurance Company, in care of Gallagher Bassett Services.
4. The Missouri Division of Workers' Compensation has jurisdiction and venue in Callaway County, Missouri, is proper.
5. Claimant filed a Claim for Compensation within the time prescribed by law.
6. Claimant's average weekly wage was \$1,250.00, yielding a compensation rate of \$404.66 for permanent partial disability benefits and \$772.53 for temporary total disability benefits.

ISSUES

The parties agreed that the following issues were to be resolved in this proceeding:

1. Accident or occupational disease arising out of and in the course of employment.
2. Medical causation.
3. Nature and extent of permanent partial disability or permanent total disability.
4. Notice.
5. Unpaid medical bills.
6. Future medical care.
7. Second Injury Fund liability.

EXHIBITS

On behalf of the claimant, the following exhibits were entered into evidence:

- | | |
|------------|---|
| Exhibit 1 | Contract between claimant and employer. |
| Exhibit 2 | Medical Expense Summary. |
| Exhibit 3 | Medical records from St. Mary's Health Center. |
| Exhibit 4 | Itemized statements from St. Mary's Health Center. |
| Exhibit 5 | Medical records from Advance Radiology Columbia. |
| Exhibit 6 | Itemized statements from Advance Radiology Columbia. |
| Exhibit 7 | Medical records from Boone Hospital Center. |
| Exhibit 8 | Itemized statements from Boone Hospital Center. |
| Exhibit 9 | Medical records from Columbia Regional Hospital |
| Exhibit 10 | Itemized statements from Columbia Regional Hospital. |
| Exhibit 11 | Medical records from Columbia Orthopaedic Group. |
| Exhibit 12 | Itemized statements from Columbia Orthopaedic Group. |
| Exhibit 13 | Medical records from Spine Midwest, Inc. |
| Exhibit 14 | Itemized statements from Spine Midwest, Inc. |
| Exhibit 15 | Medical records from St. Luke's Medical Group - Clinton. |
| Exhibit 16 | Medical records from St. John's Hospital. |
| Exhibit 17 | Itemized statements from St. John's Hospital. |
| Exhibit 18 | Medical records from Select Physical Therapy. |
| Exhibit 19 | Itemized statements from Select Physical Therapy. |
| Exhibit 20 | Medical records from Golden Valley Memorial Hospital. |
| Exhibit 21 | Itemized statements from Golden Valley Memorial Hospital. |
| Exhibit 22 | Medical records from The Kansas City Neurosurgery Group, LLC. |
| Exhibit 23 | Itemized statements from The Kansas City Neurosurgery Group, LLC. |
| Exhibit 24 | Itemized statements from Mid-Mo Anesthesia Consultants. |
| Exhibit 25 | Itemized statements from Jefferson City Medical Group. |
| Exhibit 26 | Itemized statements from Broadway Internal Medicine Associates. |
| Exhibit 27 | Medical records from Dr. W. Mike See. |

Employee: Ross Lawrence

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- Exhibit 28 Itemized statements from Dr. W. Mike See.
- Exhibit 29 Report of Injury from employer.
- Exhibit 30 *Curriculum Vitae* of Wilbur T. Swearingin.
- Exhibit 31 Vocational Rehabilitation Evaluation Report from Wilbur T. Swearingin (8/09/11).
- Exhibit 32 Deposition of Wilbur T. Swearingin (5/14/12).
- Exhibit 34 *Curriculum Vitae* of Dr. Garth Russell.
- Exhibit 35 Medical report from Dr. Russell (10/13/10).
- Exhibit 36 Medical report from Dr. Russell (11/02/10).
- Exhibit 37 Amended Stipulation between parties.
- Exhibit 38 Deposition of Josh Devlin.
- Exhibit 39 Deposition of Mike Parnell (also admitted as Exh. T).
- Exhibit 40 Deposition of Angela Jordan (also admitted as Exh. U).
- Exhibit 41 Itemized statements from Mid-America Anesthesia Consultants.
- Exhibit 42 Photographs, late-filed on 11/29/12.

On behalf of the employer/insurer, the following exhibits were admitted into the record:

- Exhibit B Deposition of Teresa Rotter.
- Exhibit C Deposition of Brenda Doty.
- Exhibit D Deposition of Grover Morrow.
- Exhibit E Deposition of Susan Wilderman.
- Exhibit F Medical records from Dr. Bellamy.
- Exhibit G Medical records from Dr. Musick.
- Exhibit H Medical records from Dr. Rodgers.
- Exhibit I Medical records from Dr. Rodgers/E.R. (8/21/08).
- Exhibit J Memo from Ms. Jordan (objections overruled after hearing).
- Exhibit K Petition from civil suit.
- Exhibit L Portions of deposition in civil suit.
- Exhibit M Medical records from St. John's (8/11/10).
- Exhibit N Medical records from Dr. Abernathie (9/23/08).
- Exhibit O Medical records from Dr. Abernathie (10/07/08).
- Exhibit P Medical records from Columbia Orthopaedic Group.
- Exhibit Q Medical records from Dr. Abernathie (3/10/09).
- Exhibit R Deposition of Nancy Moore.
- Exhibit S Affidavit from Kurt Cuntz.
- Exhibit T Deposition of Mike Parnell (also admitted as Exh. 39).
- Exhibit U Deposition of Angela Jordan (also admitted as Exh. 40).

The employer/insurer offered the deposition of Dr. Hendler, Exhibit A. The Second Injury Fund objected to the admission of the deposition as the Fund was not notified of the deposition and was not present when it was taken. Claimant joined in the objection, arguing that it should not be used against any party. Claimant's objection as to the admissibility of Exhibit A is overruled as to claimant's claim against the employer/insurer. The objection of the Second Injury Fund is sustained as to claimant's claim against the Fund. Thus, the status of Exhibit A is as follows:

Employee: Ross Lawrence

Injury No. 08-122167

Exhibit A Deposition of Dr. Hendler – objection overruled and **exhibit is received into evidence in the claim against the employer/insurer**, but objection sustained and exhibit is not received into evidence as to the claim against the Second Injury Fund.

On behalf of the Second Injury Fund, the following exhibits were admitted into the record:

Exhibit I Deposition of Ross Lawrence (10/11/11).
Exhibit II Deposition of Ross Lawrence (2/10/10).

It was requested that the court take judicial notice of the *Motion to Quash* and employer/insurer's response, both filed on October 26, 2012, and of the *Order Denying Motion to Quash*, issued on or about November 2, 2012.

Note: All marks, handwritten notations, highlighting, or tabs on the exhibits were present at the time the documents were admitted into evidence. Some depositions were admitted with objections contained in the record. Unless otherwise specifically noted below, the objections are overruled.

FINDINGS OF FACT

Based on the above exhibits and the testimony presented at the hearing, I make the following findings:

1. Claimant was born on September 30, 1957; on the date of the hearing, he was 55 years old. He was 50 years old on the date of the alleged accident. He currently lives in Chilhowee, Missouri.
2. Claimant holds two bachelor's degrees, a master's degree, and an Educational Specialist degree. He has worked in the education field as a teacher and as an administrator/principal. In 2004, he worked for the Missouri Department of Elementary and Secondary Education as a MAP Instructor; this position involved working on testing and instruction for teachers.
3. Claimant was hired to be the secondary school principal at New Bloomfield R-III School District beginning July 1, 2008 and ending June 30, 2009. He testified that he executed this contract in May 2008. At that time, he and his wife were living in Chilhowee, Missouri. Claimant chose to move into an apartment in the school district area before the school year began in August 2008. His wife stayed in Chilhowee.
4. Shortly prior to accepting his position with employer, claimant injured his back. On April 27, 2008, claimant was at home and attempted to lift and position a 125-pound fence post that was about 14 inches in diameter. As he tried to position the fence post, he

slipped in the mud and twisted his back. He felt back pain and numbness down his legs to his feet.

5. On April 29, 2008, claimant treated with Dr. Bellamy.¹ The record indicates that claimant had low back pain, along with numbness radiating down towards his feet. Claimant reported that he “hurt his back on the 27th while working a fence. He had a very heavy post on his shoulders, slipped and twisted.”² The diagnosis was lumbar strain with radiculopathy. The doctor prescribed a Medrol Dosepak, Flexeril, and Vicodin. Claimant stayed in bed for at least four or five days.
6. On May 13, 2008, claimant returned to Dr. Bellamy and indicated that he had experienced modest improvement, if any.³ Claimant still had significant pain that was radiating down his leg below the level of the knee. The diagnosis was again lumbar strain with radiculopathy. The doctor continued claimant’s medications and recommended an MRI. Claimant indicated that he wanted to hold off on the MRI.
7. On August 21, 2008, claimant was walking down the school hallway. He heard a commotion and turned as he was looking over his shoulder. He testified that as he did so, it felt as if his legs gave out. He did not fall to the floor. Claimant admitted there was no water or debris on the floor, and there was nothing on the floor that caused him to slip or trip.
8. Claimant drove himself to a clinic in Jefferson City, Missouri, and was referred to St. Mary’s Health Center. Prior to obtaining medical treatment, claimant did not report a workers’ compensation claim and did not request that the employer refer him for treatment. The initial admission records from St. Mary’s Health Center are handwritten and nearly impossible to read.⁴ Dr. William Musick’s August 21, 2008 records (St. Mary’s Health Center), however, indicate claimant came in with back pain, difficulty urinating, and leg weakness. The doctor recorded the following:

He hurt his back back in the spring while cutting down a tree. A couple of weeks later he slipped in the mud while working outside and once again had pain in his back. It was at that time that he noticed a little bit of numbness and radiation of the pain to his leg. He also sensed a little bit of left leg weakness. Symptoms went away and got back essentially to normal.... Monday a table gave way and he twisted his back once again. That seemed to be better by yesterday but today he just turned in the hallway to look behind himself and had worsening pain. He also stumbled and felt like his legs were weak.... He also feels some degree of numbness in his legs and feet bilaterally. He has not been able to urinate since 9 a.m.⁵

9. Dr. Musick’s impression was a T11-T12 herniation with cord compression presenting as

¹ Exh. F.

² *Id.*

³ *Id.*

⁴ Exh. 3.

⁵ Exh. G.

acute spinal cord compression syndrome. He noted that claimant would be taken to the operating room by Dr. Blake Rodgers.

First Surgery and Continuing Medical Treatment

10. Dr. Rodgers' August 21, 2008 Operative/Procedure Report records the following history: Patient evidentially injured his back some months ago. He began having some numbness in his legs back in May with some intermittent bladder symptoms. On the morning of August 21, 2008, he basically became paraparetic with very great difficulty in moving his left leg and significant difficulty moving his right. His left leg was nearly paralyzed. He was not hyperreflexic, and he was in urinary retention. An MRI showed severe stenosis at T11-12 from what appeared to be a disk-osteophyte complex . . . as well as gliosis within the cord. He was unable to walk.⁶
11. The surgery performed by Dr. Rodgers was a laminectomy and fusion,
12. Claimant conceded at trial that he did not file a workers' compensation claim during 2008. He first requested workers' compensation benefits in June 2009.
13. Claimant was disappointed in the results of the September 2008 surgery and later became concerned that Dr. Rodgers operated on the incorrect level of his back. Claimant switched his care to Dr. Abernathie of the Columbia Orthopaedic Group.
14. On September 23, 2008, claimant saw Dr. Abernathie. Claimant reported the following: . . . in May, 2008 he was fine. He went to put in a big hedge post and it started to fall on him. He grunted and pushed it back **when he felt something pop in his back**. With that, he couldn't walk for eight or ten days because of numbness and weakness in the leg.... By July, he was really pretty well, but in early August, he had giving way of his left leg. He was put on steroids but the pain came back. He was walking in the hallway at school. Some kids behind him made a noise. He turned rapidly and felt something give in his back. He almost collapsed to the ground with sudden loss of sensation and strength.⁷ [Emphasis added.]
15. Claimant also told Dr. Abernathie that on the day of the appointment, September 23, 2008, "he was at a meeting when his legs gave way again.... He doesn't want to admit to much pain. It sounds like as long as he's not moving, he's okay, but with minimal motion, the pain can become quite extreme."⁸
16. Dr. Abernathie's records reflect that he saw claimant on September 24, 2008.⁹ Claimant reported he was weaker on the left side than the right side and that the weakness was variable. Claimant described spells where the left leg gives way. The doctor discussed

⁶ Exh. H.

⁷ Exh. N (see also Exh. 11).

⁸ *Id.*

⁹ Exh. 11.

performing an anterior fusion.

17. Dr. Abernathie's October 7, 2008 records indicate claimant was doing pretty well.¹⁰ Claimant felt better and was gaining strength in his lower extremities: "He's able to walk a mile and says he doesn't notice any grabbing or catching in his toes, but he does have weakness of the anterior tibialis and extensor hallucis longus. I'm surprised that he doesn't have the grabbing or catching."¹¹ Claimant was still wearing his brace at the time of this visit.
18. An MRI of the lumbar spine, performed on October 27, 2008, indicates that the impression was a fairly stable MR of the lumbar spine.¹² Hardware at T11-12 was noted, with some posterior disc osteophyte, slightly asymmetric to the left, which was stable. There was some mild contour deformity near the cord from the hardware that was also unchanged. The lumbar spine demonstrated no gross compromise to the spinal canal or exiting nerve roots at the lower lumbar levels. The mild degenerative changes appeared less pronounced compared to the previous exam at the L5 transitional level than previously, and there was no interval worsening of symptoms. There was no gross compromise to the left exiting nerve roots through the mid-to-lower lumbar levels.

November 2008 Automobile Accident and Continuing Medical Treatment

19. On November 10, 2008, claimant was walking along a street when a car struck his leg, causing him to turn and twist. He put out his hand to keep from falling and immediately felt additional symptoms and new pain. Claimant filed a lawsuit against his uninsured motorist carrier. His petition in that case stated that as a direct result of the vehicular accident, he suffered injuries to his back, neck, and whole body.¹³
20. In his deposition in that civil case, claimant testified that when the car struck him it "spun me around very hard" and "made him turn around almost 180 degrees."¹⁴ He indicated that his legs quit functioning, and that "I couldn't use them."¹⁵ Claimant indicated that after that accident, he had to stand for 10 to 15 minutes before he could move again.¹⁶ The numbness in both his legs became more pronounced after the automobile accident. He indicated that prior to that accident he was not taking any pain medicine.¹⁷ He testified in that deposition that his symptoms became "very much worse than they were the day before when I was at school."¹⁸ Claimant indicated that the new symptoms from the auto accident included a burning sensation from the back of his left leg into his left foot that goes from moderate to extreme, and that he now has severe pains and muscle spasms in the lower part of his back.¹⁹

¹⁰ Exh. O.

¹¹ *Id.*

¹² Exh. 5.

¹³ Exh. K.

¹⁴ Exh. L, pp. 56-57.

¹⁵ Exh. K, p. 57.

¹⁶ Exh. K, p. 59.

¹⁷ Exh. K, p. 61.

¹⁸ Exh. K, p. 61. Prior to this auto accident, claimant had returned to work for the employer.

¹⁹ Exh. K, p. 65.

21. On November 11, 2008, claimant saw Dr. Abernathie. Claimant reported that the day before a car “almost hit him. He was able to move swiftly, but jarred his back and hit his left ankle and foot. He called this morning stating that he was having a lot more numbness into the right foot.... He was able to stand up straight when we saw him a week ago and his previous problems had been resolved.” Upon examination, however, the doctor noted that claimant “stood decompressed and shifted to the right side; his left hip was up in the air. Much of claimant’s pain was at the lumbosacral junction at L5.²⁰ The doctor was concerned about the decompression. As directed, claimant returned on November 14, 2008. Dr. Abernathie again recorded that an automobile struck claimant and spun him around and now he has increased pain. The doctor ordered diagnostic studies.
22. Dr. Abernathie’s December 8, 2008 notes indicate that the x-rays of claimant’s spine look pretty good. The doctor ordered more testing to determine whether the hardware was in the right place and to see if there was more nerve compression.²¹
23. On December 12, 2008, a thoracic and lumbar myelography was performed.²² The report recorded the radiologist’s impression as follows: (1) Uneventful thoracic and lumbar myelogram; (2) Posterior spinal fusion of T11-T12 with some mass effect upon the anterior thecal sac at T11-T12; (3) Grade 1 anterolisthesis of L5 on S1, probable disc bulges L2 through L5. On the same date, a CT thoracic spine with contrast and a CT lumbar spine were performed.
24. At the January 5, 2009 visit to Dr. Abernathie, claimant reported that he slipped on the ice. Claimant was not complaining about his back as much, but he did not have normal strength and sensation to his legs. Dr. Abernathie recorded that if claimant had another flare-up, he recommended a decompression and fusion of the lumbar spine.²³
25. In February 2009, claimant had an epidural steroid injection. On February 18, 2009, claimant reported that he was still having problems with his left leg and was not able to get out of a chair by himself.²⁴ On February 24, 2009, claimant reported more dysfunction in his lower extremities. Dr. Abernathie reviewed the results of a recent EMG, noting that “I’m amazed at the results. The study basically shows improvement of the nerves throughout. It is possible with those results and we’re expecting [sic] that the dysfunction is pain related. While he does have some numbness on the lateral shin in the left leg below the knee, he’s had some of that off and on since. I wonder if he has problems because the pain is so severe. If that’s the case, doing the fusion at 4-5 and 5-1 makes sense.”²⁵ Dr. Abernathie also noted, however, that he was “a little hesitant to do real major surgery on him and particularly violate the spinal cord any more with the

²⁰ Exh. 11.

²¹ *Id.*

²² Exh. 5.

²³ Exh. 11.

²⁴ *Id.*

²⁵ *Id.*

results he has had more proximally.”²⁶ The doctor discussed with claimant the option of proceeding with the ALIF at L4-5 and L5-S1 surgery.

Second Surgery and Continuing Medical Treatment

26. Claimant had a second surgery on or about February 24, 2009.²⁷ The procedure was an anterior lumbar fusion of L4-5 and L5-S1, as well as repair of incisional hernia with mesh placement on the left side as well as abdominal laparotomy.
27. Dr. Abernathie’s March 10, 2009 records indicate that claimant was apparently doing better, although he reported that he has trouble with his legs if he walks more than 500 or 600 feet.²⁸ Claimant, however, reported an incident where he “slipped and fell, hitting his head on a wall and coming down to the ground. He said he’s been having more difficulty getting around since then with a lot of pain in his back and legs. [Dr. Abernathie] was concerned about the fracture of S1 with the fall.”²⁹ The doctor offered to have claimant come into the office, but claimant indicated that he would instead visit the next day. On that day, March 11, 2009, claimant appeared and reported he was concerned about the fall because he could not walk at first.³⁰ Within a few hours of the fall, however, he did start feeling better. Dr. Abernathie observed that claimant was walking with a scissoring gait.
28. On March 18, 2008, claimant told Dr. Abernathie he was more uncomfortable with his back and left leg, and that this is how he felt before his original surgery.³¹ On March 25, 2009, claimant reported a lot more pain in the left leg. The doctor saw atrophy of the left leg below the knee. He recommended surgery.

Third Surgery and Continuing Medical Treatment

29. Claimant had a third surgery on March 27, 2009.³² That surgery consisted of a decompressive laminectomy L3-4, L4-5, and L5-S1, with posterior fusion of L4-5 and L5-S1. The diagnosis was spondylolisthesis with instability.
30. Dr. Abernathie’s May 6, 2009 record indicates claimant reported that he was doing pretty well on Monday, but that on Tuesday he was walking and felt a pop in his left hip; everything went bad after that. Claimant started having some pain down the left leg, and some numbness and weakness of his arms and legs. On May 8, 2009, the doctor recorded that claimant still had complaints but was walking better; claimant also saw Dr. Clark at Columbia Orthopaedic Group. She referred him for physical therapy. On May 19, 2009, claimant reported that he was about the same, but the doctor indicated that claimant was

²⁶ Exh. 11.

²⁷ *Id.*

²⁸ Exh. O.

²⁹ *Id.*

³⁰ Exh. 11.

³¹ *Id.*

³² *Id.*

actually “substantially better.”³³

31. Throughout claimant’s treatment, Dr. Abernathie signed medical notes indicating claimant’s treatment was for a non-work related condition.³⁴

Subsequent Employment

32. After his contract ended with the employer, claimant went to work for the Fair Play School District. He worked from August 1, 2009 to October 14, 2009. That job required claimant to drive 57 miles each way from his home. Claimant testified that the travel became too much for him and he quit work. He has not applied for work anywhere since that position.

August 2010 Automobile Accident and Continuing Medical Treatment

33. In August 2010, claimant was involved in another automobile accident; in this accident, his car hit a deer. Claimant reported a neck injury and was seen for treatment at St. John’s Hospital.³⁵ These medical bills were paid through his health insurance. The August 11, 2010 medical records reflect that a cervical MRI was taken; that report provides that the radiologist’s impression was “[m]ild to moderate cervical discogenic degeneration most pronounced distally. Mild central canal stenosis again identified at C5-6 and C6-7 with moderate-to-severe leftward asymmetric neural foraminal narrowing also present over these levels. Edema type discogenic marrow endplate changes at C6-7 are new from the prior study and may be pain-generating.”³⁶

Current Complaints

34. Claimant lives with his wife and they have custody of two grandchildren, ages 10 and 11 years. He is active with the children. They live on 20 acres and claimant moves three of the acres using a riding lawn mower and a push mower. He has a large, 10,000-square-foot vegetable garden. He cares for his two horses and has ridden his horse since the August 2008 incident. Claimant works out for about two hours per day.
35. Claimant is still able to hike and he goes deer hunting periodically. He has been able to complete home repair projects like removing a bathroom floor and painting bedrooms. Claimant testified that he can stand if he is on carpet, and that if a school were carpeted, he could probably work. He indicated that he could walk “for hours” on carpeted floor.
36. Claimant conceded that his back problems began at his home in April 2008, when he attempted to lift and move the heavy fence post. Although claimant testified that he recovered from that April 2008 incident and was having little difficulty in August 2008, his testimony is directly impeached by numerous witnesses as discussed below. Claimant

³³ *Id.*

³⁴ Exh. 11.

³⁵ Exh. M.

³⁶ *Id.*

was not a credible and convincing witness.

Debbie Lawrence

37. Claimant's wife, Debbie Lawrence, testified that she and her husband moved him into an apartment near his job with the employer in about June 2008. She testified that he did not have trouble lifting items during that move. During the period of July to August 2008, she went to visit claimant approximately one time and he came home approximately one time. She testified that she did not notice any problems with his back.

Susan Wilderman

38. On behalf of the employer/insurer, Dr. Susan Wilderman testified by deposition and at the hearing. She is an assistant principal at the high school, and thus she also works for the employer/insurer. She began employment with the employer in 2008. She met claimant during the interview process before he was hired, and she saw him during the student registration process before school started. She also noted that administrators begin working two weeks before school starts. During that period, she observed that claimant was having a hard time with his gait, particularly the right foot. Dr. Wilderman stated that claimant had a hard time walking and seemed to have to focus on it.³⁷
39. Claimant told Dr. Wilderman about injuring his back in the fence post issue. He never told her he had injured his back at work. Dr. Wilderman was a credible witness.

Debbie Cuno

40. Debbie Cuno testified at the hearing on behalf of the employer/insurer. In 2008, Ms. Cuno was employed by the employer as a Library Media Specialist; she has subsequently retired. She met claimant on or about June 1, 2008, when they both attended a work-related conference in Branson, Missouri. At that four day conference, Ms. Cuno could tell there was something seriously wrong with claimant as he was sweating profusely, was very restless, it was difficult for him to sit, and he stood against the back wall of the conference room. Claimant also had trouble walking and limped. During the second day of the conference, claimant told her he had severe back problems and had a history of back problems. In response, she shared information regarding her family history of back problems.
41. In August 2008, Ms. Cuno started working at the school two weeks before the new school year began. During this period in 2008, she saw claimant and noticed that he was in pain. She explained that he would hold onto himself as he maneuvered around objects. Ms. Cuno was a credible witness.

³⁷ Exh. E.

Mike Parnell

42. Mike Parnell testified on behalf of the employer/insurer.³⁸ He was the superintendent of the New Bloomfield R-III School District in 2008. He interviewed claimant for the position as the secondary school principal. He was aware claimant was having issues with back pain *before* he started working for the employer. Claimant told Mr. Parnell he injured his back while working on his farm.
43. In addition, Mr. Parnell was aware of the incident in August 2008 at the school. He testified that claimant related “he was walking down the hall and the legs just gave out.”³⁹ Claimant indicated that this had been bothering or hurting him all week, but that he “just wanted to make it through those in-service days and get through the start of school...”⁴⁰ During one of their conversations, claimant informed Mr. Parnell he was not totally surprised by the back issues because his dad had experienced the same kind of problem.⁴¹
44. Mr. Parnell testified that claimant never told him that he had a work injury, nor did claimant tell him he wanted to file a workers’ compensation claim.⁴² At some point, claimant did inform Mr. Parnell that he had been struck by a car in November 2008.⁴³ Mr. Parnell was a credible witness.

Teresa Rotter

45. Teresa Rotter testified by deposition.⁴⁴ She is employed by the employer in the Payroll and Benefits Department. Sometime before school started in August 2008, claimant came into the school and Ms. Rotter overheard him state he had hurt himself building a fence.⁴⁵ She was not aware of the August 21 incident, although she did know he was missing time from work because she would ask him for absence slips.⁴⁶
46. Ms. Rotter testified that prior to August 21, 2008 – the date of the alleged injury - she overheard claimant talk to Brenda [Doty] about needing medical treatment for his back.⁴⁷ Ms. Rotter, however, was not certain if the conversation took place in person or by phone.
47. As part of her job, Ms. Rotter posted workers’ compensation notices and unemployment notices as part of her job. The workers’ compensation information is posted on a bulletin

³⁸ Exh. 39/Exh. T; hereinafter referred to as Exh. T.

³⁹ Exh. T, p. 11.

⁴⁰ Exh. T, pp. 11-12.

⁴¹ Exh. T, p. 13.

⁴² Exh. T, p. 20.

⁴³ Exh. T, p. 21.

⁴⁴ Exh. B

⁴⁵ Exh. B, p. 7.

⁴⁶ Exh. B.

⁴⁷ Exh. B, p. 10.

board just outside her office and in the work rooms of the various buildings.⁴⁸
Brenda Doty

48. Brenda Doty testified by deposition.⁴⁹ She is employed by the employer in the Accounting/Bookkeeping Department. She first met claimant in July 2008, when he began employment with the employer. She noticed he was limping and he informed her that he had hurt his back.⁵⁰ At some point **before school started – and thus before the date of the alleged work injury** - claimant asked her who she would see for treatment as he was having trouble with his back and legs. Ms. Doty told him the name of her physician and noted that if she or her kids needed minor treatment on a weekend, she would go to JCMG Urgent Care; if the issue was something major, she would take her kids to Columbia.⁵¹ Ms. Doty was a credible witness.

Grover Morrow

49. Grover Morrow testified by deposition.⁵² During the 2008-2009 school year, he worked for the employer in the custodial/maintenance department. He is no longer employed by the employer. He met claimant during the summer of 2009. At that time, he noticed claimant was limping and asked him about it; claimant responded that he had hurt his back while working on a fence.⁵³ Prior to August 21, 2009, Mr. Morrow would see claimant limping and having difficulty getting around, and he would advise claimant to be careful.⁵⁴
50. Mr. Morrow vaguely remembers an incident at work where claimant seemed to be having back problems in the hallway between classes.⁵⁵ Mr. Morrow thinks he got claimant a chair to sit on, claimant did not tell him exactly what had happened.⁵⁶

Angela Jordan

51. Angela Jordan testified by deposition.⁵⁷ In 2008, she was the secretary to the superintendent of the Board of Education. She met claimant when he came to the office to get paperwork and when he came to sign his contract.⁵⁸ At the first meeting, Ms. Jordan noticed that claimant was having difficulty walking and seemed to be in pain.⁵⁹ In

⁴⁸ Exh. B, pp. 13, 18, 19.

⁴⁹ Exh. C.

⁵⁰ Exh. C, p. 4.

⁵¹ Exh. C, p. 8.

⁵² Exh. D.

⁵³ Exh. D, p. 5.

⁵⁴ Exh. D, pp. 15, 16.

⁵⁵ Exh. D, pp. 6-7.

⁵⁶ Exh. D, p. 12.

⁵⁷ Exh. U.

⁵⁸ Exh. U, p. 5. Claimant's Exh. 1 indicates the contract was signed by claimant on May 2, 2008. Ms. Jordan testified, on page 32 of her deposition, that claimant came into the office to pick up his contract in July 2008. Thus, the testimony regarding these dates is somewhat unclear.

⁵⁹ Exh. U, pp. 5-6.

addition, claimant touched her desk as if he needed the support when he walked.⁶⁰ Ms. Jordan briefly talked to claimant about his physical condition, and “[h]e made light of it and said he needed to act his age and stop trying to build fence.”⁶¹

52. Ms. Jordan first learned claimant was claiming workers’ compensation benefits when he turned in paperwork to file a claim in June 2009.⁶² Prior to that date, claimant never told Ms. Jordan he had been injured on the job. Ms. Jordan prepared a memorandum noting that the first notice of the claim was not received until June 2009.⁶³ Ms. Jordan used Dr. Abernathie’s notes that claimant’s condition was not work-related to process claimant’s sick leave benefit request.⁶⁴

Nancy Moore

53. Nancy Moore testified by deposition.⁶⁵ She is now the secretary to the superintendent of the school board; previously, she was secretary to the high school principal and would have worked for claimant.⁶⁶ Ms. Moore first met claimant in July 2008. Before school started or right after it started, they discussed the physical problems claimant was having.⁶⁷ He indicated that he injured himself when he was putting in a fence post.⁶⁸
54. Ms. Moore personally observed that claimant was having physical problems. She described it as follows: “One of his legs was kind of like drop foot, he would kind of drag it, it would drag a little bit along as he was walking. He also after sitting for any length of time would start sweating profusely and he would say, I have to get up and walk for a little bit and he would get up and walk around the building.”⁶⁹ Before claimant had surgery, Ms. Moore would notice the sweating “maybe once, twice, three times a day . . .” but after he had surgery, it was more frequent.⁷⁰
55. Ms. Moore was aware at some point that claimant was missing time from work. However, he never asked her about filing a workers’ compensation claim.⁷¹ She indicated that notices about workers’ compensation benefits are posted right outside claimant’s office.⁷² Claimant told Ms. Moore that when he was walking for therapy, he was struck by a car.⁷³

Tim Gilmore

⁶⁰ Exh. U, p. 5.

⁶¹ Exh. U, p. 6.

⁶² Exh. U, p. 19.

⁶³ Exh. J.

⁶⁴ Exh. U, p. 33.

⁶⁵ Exh. R.

⁶⁶ Exh. R, p. 4.

⁶⁷ Exh. R, p. 7.

⁶⁸ Exh. R, pp. 6-7.

⁶⁹ Exh. R, pp. 7-8.

⁷⁰ Exh. R, p. 8.

⁷¹ Exh. R, p. 14.

⁷² Exh. R, p. 15.

⁷³ Exh. R, p. 21.

56. Tim Gilmore testified at the hearing on behalf of claimant. In 2008, he was a math teacher and a coach at the high school. During the summer of 2008, Mr. Gilmore would sometimes see claimant at the “open gym” sessions held at school. He observed claimant going into the weight room a few times in June and July. He does not recall whether claimant limped. He does not remember whether claimant complained about his back. He does not specifically remember seeing claimant in August 2008.

Josh Devlin

57. Josh Devlin testified by deposition on behalf of claimant.⁷⁴ In 2008, claimant hired Mr. Devlin as the assistant principal at New Bloomfield R-III. Mr. Devlin now works elsewhere. In 2008, Mr. Devlin lifted weights with claimant a few times, but he is not sure whether this occurred before or after August 21, 2008. Mr. Devlin does not recall claimant telling him about any prior back problems, nor did he see claimant limping prior to August 21, 2008.⁷⁵

Independent Medical Examination - Dr. Garth Russell

58. Dr. Garth Russell testified live at the hearing. Dr. Russell examined claimant on one occasion, November 2, 2010. Dr. Russell opined that the act of waking and then turning may have caused a herniated disc. He opined that the August 21, 2008 injury was the prevailing factor that produced the pain in his lower back with damage to the conus of the spinal cord and his subsequent significant injuries.⁷⁶ Dr. Russell further opined that claimant is “permanently and totally disabled from pursuing any gainful employment. He will continue to have chronic pain and weakness in both lower extremities with frequent exacerbations depending on activity.... [I]t is my open that his injury of August 21, 2008, which was employment related was the prevailing factor.”⁷⁷

59. Dr. Russell and Dr. Abernathie are both associated with Columbia Orthopaedic Group. Dr. Russell acknowledged that Dr. Abernathie’s records indicate that claimant’s back treatment was for a non-work-related condition. In fact, the initial history provided by claimant to Dr. Abernathie was that claimant hurt his back in May 2008⁷⁸ when he was moving a big hedge post. At that time, the post started to fall and claimant grunted, pushed on the post, and felt something pop in his back. In the history claimant provided to Dr. Russell, however, claimant did not mention that he felt something pop in his back when he moved the hedge post. During cross examination, Dr. Russell conceded that the physical act of attempting to move a 125-pound fence post, 14 inches in diameter, and then twisting and turning in the mud was a far more physically demanding activity on claimant’s back than the act of walking and turning to look over his shoulder. He acknowledged that Dr. Abernathie’s records reflect that claimant felt something pop in

⁷⁴ Exh. 38.

⁷⁵ Exh.. 38, pp. 9, 11.

⁷⁶ Exh. 35 and testimony at trial.

⁷⁷ Exhs. 36, 35, and testimony at trial.

⁷⁸ I believe this should be April 2008.

his back during the hedge post incident, and Dr. Russell appeared to agree this could have been because of the herniation of a disc. On cross examination, Dr. Russell also acknowledged that the walking and turning event may have been only a triggering event.

60. Dr. Russell conceded that the medical records do not contain any reference to claimant needing low back surgery prior to the automobile accident. Dr. Russell was not aware that claimant testified to a great burning sensation and additional physical pain and problems after the motor vehicle accident. And on cross examination, Dr. Russell agreed that the motor vehicle accident (in November 2008) would have aggravated claimant's low back condition

61. On cross examination, Dr. Russell conceded he was not aware seven witnesses had testified claimant had significant pain and difficulty with his back before August 21, 2008.

Independent Medical Evaluation - Dr. Steven Hendler

62. Dr. Steven Hendler testified by deposition on behalf of the employer/insurer.⁷⁹ This deposition (and its attachments) was admitted into the record in the case against the employer/insurer only; it is not a part of the evidence in the case against the Second Injury Fund.

63. Dr. Hendler examined claimant on September 4, 2009. At that time, claimant was working and was not taking pain medication. Upon examination, Dr. Hendler found that claimant had no issues with his upper extremities or with the right lower extremity. He had no spasms or tenderness in his back. Claimant did have a gait issue consistent with foot weakness.⁸⁰

64. Dr. Hendler testified that the event of walking down the hallway and turning was not the prevailing factor for claimant's herniated disc. He opined that the prevailing factor was the April 2008 fence post accident. The doctor indicated that the need for claimant's initial treatment related to the April 2008 incident, and that the need for the subsequent low back surgeries were causally related to the November 2008 motor vehicle accident.⁸¹ According to Dr. Hendler, claimant did not sustain a separate injury on August 21, 2008.⁸²

65. Dr. Hendler confirmed that the MRI taken after August 21, 2008, showed changes in the spinal cord that were not new and were instead pre-existing changes.⁸³ This is "documented by the fact that there were osteophytes and the gliosis in the spinal cord that were "suggestive and - - and diagnostic of a longer standing problem in the region."⁸⁴ Dr. Hendler clarified that, as Dr. Rodgers discussed in his records, the August 2008 MRI showed "severe stenosis at T11-T12, disk osteophyte complex, as well as the gliosis

⁷⁹ Exh. A.

⁸⁰ Exh. A., pp. 13-17.

⁸¹ Exh. A, pp. 28-29.

⁸² Exh. A, p. 36.

⁸³ Exh. A, p 46.

⁸⁴ *Id.*

within the cord.”⁸⁵ Dr. Hendler indicated this is why claimant needed surgery on that date – “to remove the problem claimant was having with the cord and the resulting condition it was causing.”⁸⁶

Vocational Rehabilitation Examination - Wilbur Swearingin

66. Wilbur Swearingin saw claimant for a Vocational Rehabilitation Evaluation on June 6, 2011, and he issued a report on August 9, 2011. Mr. Swearingin is a Certified Rehabilitation Counselor. Mr. Swearingin opined that “[c]onsidering the extent of Mr. Lawrence’s disability, the findings of Dr. Garth Russell, as to his medical inability to function in the labor market, it is my opinion Ross Lawrence is vocationally disabled and is neither employable nor placeable in the open labor market. It is further my opinion that Mr. Lawrence’ [sic] permanent and total disability arises from the occupational injury of August 21, 2008 in isolation.”⁸⁷ Mr. Swearingin also noted that given “the degree of Mr. Lawrence’ [sic] symptomology, his chronic pain and considering his need to lie down through the day, it is unlikely an employer would consider hiring and employing Mr. Lawrence in the normal course of business.”⁸⁸

CONCLUSIONS OF LAW

Based upon the findings of fact and the applicable law, I find the following:

This is a 2008 case; therefore, the 2005 Amendments to the Missouri Workers’ Compensation Law apply to the substantive law controlling the legal issues in this case.

Issue 1: Accident or occupational disease arising out of and in the course of employment

Issue 2: Medical causation

Under Missouri Workers’ Compensation law, the claimant bears the burden of proving all essential elements of his or her workers’ compensation claim.⁸⁹ Proof is made only by competent and substantial evidence, and may not rest on speculation.⁹⁰ Medical causation not within lay understanding or experience requires expert medical evidence.⁹¹ When medical theories conflict, deciding which to accept is an issue reserved for the determination of the fact finder.⁹²

⁸⁵ Exh. A, p. 47.

⁸⁶ *Id.*

⁸⁷ Exh. 32.

⁸⁸ *Id.*

⁸⁹ *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 198 (Mo. App. W.D. 1990); *Grime v. Altec Indus.*, 83 S.W.3d 581, 583 (Mo. App. 2002).

⁹⁰ *Griggs v. A.B. Chance Company*, 503 S.W.2d 697, 703 (Mo. App. W.D. 1974).

⁹¹ *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596, 600 (Mo. banc 1994).

⁹² *Hawkins v. Emerson Elec. Co.*, 676 S.W.2d 872, 977 (Mo. App. 1984).

In addition, the fact finder may accept only part of the testimony of a medical expert and reject the remainder of it.⁹³ Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony that it does not consider credible and accept as true the contrary testimony given by the other litigant's expert.⁹⁴

The fact finder is encumbered with determining the credibility of witnesses.⁹⁵ It is free to disregard that testimony which it does not hold credible.⁹⁶

The word "accident" as used by the Missouri workers' compensation law means "an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor."⁹⁷

An "injury" is defined to be "an injury which has arisen out of an in the course of employment. An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. The 'prevailing factor' is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability."⁹⁸ An injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-employment life.⁹⁹

The determination of the specific amount or percentage of disability to be awarded to an injured employee is a finding of fact within the unique province of the ALJ.¹⁰⁰ The ALJ has discretion as to the amount of the permanent partial disability to be awarded and how it is to be calculated.¹⁰¹ A determination of the percentage of disability arising from a work-related injury is to be made from the evidence as a whole.¹⁰² It is the duty of the ALJ to weigh the medical evidence, as well as all other testimony and evidence, in reaching his or her own conclusion as to the percentage of disability sustained.¹⁰³

Section 287.020.7, RSMo, provides that "total disability" is the inability to return to any employment and not merely the inability to return to the employment in which the employee was

⁹³ *Cole v. Best Motor Lines*, 303 S.W.2d 170, 174 (Mo. App. 1957).

⁹⁴ *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo. App. 1992); *Hutchinson v. Tri State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo. App. 1986).

⁹⁵ *Cardwell v. Treasurer of the State of Missouri*, 249 S.W.3d 902 (Mo.App. E.D. 2008).

⁹⁶ *Id.* at 908.

⁹⁷ Section 287.020.3(1), RSMo. All statutory references are to the Revised Statutes of Missouri (RSMo), 2005, unless otherwise noted.

⁹⁸ Section 287.020.3(1).

⁹⁹ Section 287.020.3(c).

¹⁰⁰ *Hawthorne v. Lester E. Cox Medical Center*, 165 S.W.2d 587, 594-595 (Mo.App. S.D. 2005); *Sifferman v. Sears & Robuck*, 906 S.W.2d 823, 826 (Mo.App. S.D. 1999).

¹⁰¹ *Rana v. Land Star TLC*, 46 S.W.3d 614 626 (Mo.App. W.D. 2001).

¹⁰² *Landers v. Chrysler*, 963 S.W.2d 275, 284 (Mo.App. E.D. 1998).

¹⁰³ *Rana* at 626.

engaged at the time of the accident.¹⁰⁴ The main factor in this determination is whether, in the ordinary course of business, any employer would reasonably be expected to employ the employee in this present physical condition and reasonably expect him to perform the duties of the work for which he was hired.¹⁰⁵ The test for permanent and total disability is whether the claimant would be able to compete in the open labor market.¹⁰⁶ When the claimant is disabled by a combination of the work-related event and pre-existing disabilities, the responsibility for benefits lies with the Second Injury Fund.¹⁰⁷ If the last injury in and of itself renders a claimant permanently and totally disabled, the Second Injury Fund has no liability and the employer is responsible for the entire compensation.¹⁰⁸

In order to find permanent total disability against the Second Injury Fund, it is necessary that the employee suffer from a permanent partial disability as the result of the last compensable injury, and that the disability has combined with a prior permanent partial disability to result in total disability.¹⁰⁹

Where a pre-existing permanent partial disability combines with a work-related permanent partial disability to cause permanent total disability, the Second Injury Fund is liable for compensation due the employee for the permanent total disability after the employer has paid the compensation due the employee for the disability resulting from the work-related injury.¹¹⁰ In determining the extent of disability attributable to the employer and the Second Injury Fund, an administrative law judge must determine the extent of the compensable injury first.¹¹¹ If the compensable injury results in permanent total disability, no further inquiry into Second Injury Fund liability is made.¹¹² Therefore, it is necessary that the employee's last injury be closely evaluated and scrutinized to determine if it alone results in permanent total disability and not permanent partial disability.

Various factors have been considered by courts attempting to determine whether or not an employee is permanently totally disabled. It is not necessary that an injured employee be rendered, or remain, wholly or completely inactive, inert or helpless in order to be entitled to receive compensation for permanent total disability.¹¹³ An employee's ability or inability to perform simple physical tasks such as sitting,¹¹⁴ bending, twisting,¹¹⁵ and walking¹¹⁶ may prove that the employee is permanently totally disabled. An employee's age may also be taken into

¹⁰⁴ See also *Houston v. Roadway Express, Inc.*, 133 S.W.3d 173, 178 (Mo.App. S.D. 2004).

¹⁰⁵ *Reiner v. Treasurer of the State of Missouri*, 837 S.W.2d 363, 367 (Mo.App. 1992).

¹⁰⁶ *Id.*

¹⁰⁷ Section 287.200.1, RSMo.

¹⁰⁸ *Nance v. Treasurer of Missouri*, 85 S.W.3d 767 (Mo.App. W.D. 2003).

¹⁰⁹ Section 287.220.1, RSMo.; *Brown* at 482; *Anderson* at 576.

¹¹⁰ *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 366 (Mo.App. 1992).

¹¹¹ *Roller v. Treasurer of the State of Mo.*, 935 S.W.2d 739, 742-743 (Mo.App. 1996).

¹¹² *Id.*

¹¹³ *Maddux v. Kansas City Public Service Co.*, 100 S.W.2d 535 (Mo. 1936); *Grgic v. P & G. Const.*, 904 S.W.2d 464 (Mo.App. E.D. 1995); *Julian v. Consumers Markets, Inc.*, 882 S.W.2d 274 (Mo.App. S.D. 1994); *Groce v. Pyle*, 315 S.W.2d 482 (Mo.App. 1958).

¹¹⁴ *Brown v. Treasurer of Missouri*, 795 S.W.2d 479 (Mo.App. E.D. 1990).

¹¹⁵ *Sprung v. Interior Const. Service*, 752 S.W.2d 354 (Mo.App. E.D. 1988).

¹¹⁶ *Keener v. Wilcox Elec. Inc.*, 884 S.W.2d 744 (Mo.App. W.D. 1994).

consideration.¹¹⁷

A large number of witnesses testified, either in person or at the trial – or both. In addition, many documents were admitted into evidence. In order to assist in the analysis of the pending issues, the following is a brief outline of the relevant timeline based on my findings of fact:

Spring 2008, before 4/27/08

- Claimant injured his back while cutting down a tree at home.

4/27/08

- Claimant injured his back at home. As he attempted to lift and position a 125-pound fence post, he slipped and twisted his back. He felt a pop in his back and had pain and numbness.

4/29/08

- Claimant treated with Dr. Bellamy, reporting back pain and numbness radiating down towards his feet.

After 4/27/08 – early 5/08

- Claimant stayed in bed at least four or five days, and had difficulty walking for eight to ten days.

5/13/08

- Claimant reported to Dr. Bellamy that he had had minimal, if any, improvement. He still had significant pain and radiating pain.

6/01/08 – 6/04/08

- At a conference, Ms. Cuno observed that claimant was in physical distress, was sweating profusely, had to get up and down constantly, and even leaned against a wall. He told her he had a bad back.

July 2008

- Ms. Moore observed that claimant was having problems walking; his foot would drop or drag. Claimant told her about the fence incident. She observed him sweating profusely on numerous occasions, and he would have to get up and walk around.
- Ms. Doty noticed claimant limping and he informed her he had hurt his back. He asked her who she would see for treatment.

Summer 2008 before school started

- Dr. Wilderman observed claimant walking with a limp and having problems walking. He told her he injured his back working on a fence.
- Ms. Rotter observed claimant having trouble walking; he had to kind of pick up his leg and it would drop or drag. She overheard him state that he hurt himself building a

¹¹⁷ *Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. S.D. 1997); *Reves v. Kindell's Mercantile Co., Inc.* 793 S.W.2d 917 (Mo.App. S.D. 1990). See also *Kowalski v. M-G Metals and Sales, Inc.*, 631 S.W.2d 919 (Mo.App. S.D. 1982).

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fence.

- Claimant told Mr. Parnell he had been working on his farm and injured his back. As to the August 2008 incident, claimant told Mr. Parnell he was walking down the hallway when his legs gave out; claimant also stated that his back had been hurting all week.
- Mr. Morrow observed claimant limping. Claimant told Mr. Morrow he hurt his low back while working on a fence.
- Ms. Jordan noticed claimant was having difficulty walking and seemed to be in pain. He mentioned the fence incident.

August 2008 (a Monday shortly before 8/21/08)

- Claimant hurt his back when a table gave way and he twisted his back.

8/21/08

- Claimant was walking in the school hallway, heard a commotion, and turned. He alleges this maneuver injured his back. There was nothing on the floor that caused him to slip or trip, and there was no water or debris on the floor.
- Claimant drove himself to St. Mary's Health Center and was examined by Dr. William B. Rodgers. Dr. Rodgers promptly performed a laminectomy and fusion. Claimant did not request treatment from the employer and did not notify the employer that his injury was work-related.

9/23/08

- Claimant saw Dr. Abernathie. Claimant reported that fence post injury from April or May 2008,¹¹⁸ and he specifically stated that he **felt something pop in his back**. Claimant would not walk for eight or ten days because of numbness and weakness in the leg.

11/10/08

- Claimant was struck by a car as he was walking. The car spun him around hard, making him perform an almost 180 degree turn. His legs stopped functioning for a few minutes, and he had to stand for 10 or 15 minutes before he could move again. The numbness in both legs became more pronounced. He developed a new symptom – a burning sensation from the back of his left leg into his left foot; this sensation varies from moderate to extreme. He now experiences severe pains and muscles spasms in the lower portion of his back.

2/24/09

- Second back surgery.

3/27/09

- Third back surgery.

August 2010

¹¹⁸ I believe it was actually April 2008, but this record suggest it was May 2008.

Employee: Ross Lawrence

Injury No. 08-122167

- Claimant was involved in a second motor vehicle accident when his car hit a deer. He sustained a neck injury and was treated at St. John's Hospital.

It is quite clear claimant injured his back on or about April 27, 2008, when he was lifting and maneuvering a very heavy fence (or hedge) post at home. He felt a pop in his back during this event and had immediate pain and numbness. In fact, claimant continued to suffer from significant back pain and radiating numbness during the rest of the spring and during the summer of 2008, right up to the date of the alleged accident, August 21, 2008. During June, July, and August, many of claimant's co-workers observed him limping and noted that he appeared to have pain. He told many of his co-workers about hurting his back in the fence post incident and that he was in pain.

Claimant did not share an accurate version of this relevant medical history with Dr. Russell. Thus, Dr. Russell's opinion was based upon incorrect information – that claimant's issues from the fence post incident had resolved - and the doctor was unaware of the actual state of claimant's back and his ongoing symptoms. Though not the fault of Dr. Russell, this greatly diminishes the value of his opinion in this case.

Claimant now contends that by August 21, 2008, his back injury had fully healed from the April 2008 fence post incident. This is untrue, as is established by the medical records and by the credible and convincing testimony of many other witness, including Ms. Cuno, Ms. Moore, Dr. Wilderman, Ms. Rotter, Mr. Parnell, Mr. Morrow, and Ms. Jordan. One of the most compelling of these witnesses was Ms. Cuno. She testified live at the trial, and she was a believable and honest witness. She recalled exactly where and when she met claimant – at the conference in Branson, Missouri. She was struck by claimant's physical appearance. She recalled that over the four days of the conference, claimant would sit in a chair and sweat profusely, he was up and down in the chair, and he would stand or even lean against a wall. Claimant told her that he had a significant back injury, adding that his father had a similar condition. Ms. Cuno also testified that she would see claimant at work in July and August 2008, during which time it was clear he continued to have issues with back pain. She even observed him having difficulties simply trying to walk.

I find claimant was not a credible witness; as such, his testimony is afforded little weight. Nevertheless, there is an element of truth in part of claimant's testimony. I find that on August 27, 2008, he was walking in the school hallway, heard something, and turned to look. It is believable that the act of turning while walking did increase his pain. This, however, does not automatically mean that claimant suffered a compensable accident. As noted above, claimant bears the burden of proof for all essential elements of his claim.

Section 287.020.3(c), RSMo, provides that an injury shall be deemed to arise out of and in the course of employment only if it is readily apparent, upon consideration of all the circumstances, that the accident is the prevailing factor in causing the injury; **and it does not come from a hazard or risk unrelated to the employment to which workers would have been equally exposed outside of and unrelated to the employment in normal non-**

employment life.¹¹⁹ The statute also provides that “an injury is not compensable because work was a triggering or precipitating factor.”¹²⁰ In this case, claimant was walking in the school hallway, turned, and hurt his back. There was nothing on the floor that caused him to slip and hurt his back; and in fact, there was nothing about his job that caused him to hurt his back. His action, turning while walking, is something nearly everyone does in normal non-employment life. Walking and turning and any resulting back injury did not come from a hazard or risk of employment, even though it occurred while at work. This case is similar to the case of *Miller v. Missouri Highway and Transp. Com’n*, in which the employee, Mr. Miller injured his knee when he was walking briskly at his work site in order to return to his truck to obtain materials needed for his job. The court focused on whether the risk of Mr. Miller’s injury – walking – was a risk to which he was exposed equally in his “normal nonemployment life.”¹²¹ In that case, claimant “was walking on an even road surface when his knee happened to pop. Nothing about work caused it to do so. The injury arose during the course of employment, but did not arise out of employment. Under sections 287.020.2, .3 and .10 as currently in force, that is insufficient.”¹²² The court determined that Mr. Miller did not sustain a compensable injury. Mr. Miller was walking briskly while working; his knee popped; the injury was not compensable. Claimant was walking at work and turned, allegedly injuring his back. Like the Miller case, claimant’s injury is not compensable as claimant did not sustain an injury or accident arising out of and in the course of his employment.

Claimant’s claim fails, and all other issues are moot. Nevertheless, I will briefly discuss the issue of whether claimant’s work was the prevailing factor causing his injury. In analyzing this issue, I find the opinion of Dr. Hendler to be credible and convincing. Dr. Hendler opined that the event of claimant walking down the hallway and turning was not the prevailing factor for claimant’s herniated disc. In his opinion, the prevailing factor was the April 2008 fence post accident. According to Dr. Hendler, claimant did not sustain a separate injury on August 21, 2008.¹²³ The doctor noted that the MRI taken after August 21, 2008, showed changes in the spinal cord that were not new and were instead pre-existing changes.¹²⁴ He explained that this was documented by fact that there were osteophytes and the gliosis in the spinal cord was suggestive and diagnostic of a longer standing problem in the region.¹²⁵ Dr. Hendler clarified that, as Dr. Rodgers discussed in his records, the August 2008 MRI showed “severe stenosis at T11-T12, disk osteophyte complex, as well as the gliosis within the cord.”¹²⁶ Dr. Hendler indicated this is why claimant needed surgery on that date – “to remove the problem claimant was having with the cord and the resulting condition it was causing.”¹²⁷ And as previously noted, Dr. Hendler credibly testified that this stemmed from the April 2008 injury. I find claimant has failed to meet his burden of proof that the alleged August 21, 2008 incident was the prevailing factor in causing his back injury. As such, claimant’s claim also fails as to this issue.

¹¹⁹ Section 287.020.3(c).

¹²⁰ Section 287.020.2

¹²¹ *Miller v. Missouri Highway and Transp. Com’n*, 287 S.W.3d 672, 674 (Mo. 2009).

¹²² *Id.*

¹²³ Exh. A, p. 36.

¹²⁴ Exh. A, p. 46.

¹²⁵ *Id.*

¹²⁶ Exh. A, p. 47.

¹²⁷ *Id.*

Employee: Ross Lawrence

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Any pending objections not expressly ruled on in this award are overruled.

Made by: _____

Vicky Ruth
Administrative Law Judge
Division of Workers' Compensation

Employee: Ross Lawrence

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