

Issued by THE LABOR AND INDUSTRIAL RELATIONS
COMMISSION

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

Injury No.: 04-146261

Employee: Bryan R. Long
Employer: Herzog Contracting Corporation
Insurer: ACIG Insurance Company
Date of Accident: August 14, 2004
Place and County of Accident: Saline County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 29, 2008. The award and decision of Chief Administrative Law Judge Nelson G. Allen, issued January 29, 2008, 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 19th day of August 2008.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: **BRYAN R. LONG** Injury No.: **04-146261**

Employer: **HERZOG CONTRACTING CORPORATION**

Insurer: **ACIG INSURANCE COMPANY**

Hearing Date: **NOVEMBER 29, 2007** Checked by: **NGA**

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: **AUGUST 14, 2004**
5. State location where accident occurred or occupational disease was contracted: **SALINE 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: **EMPLOYEE WAS CARRYING A BATTERY WEIGHING 125 POUNDS WHEN HE SLIPPED AND FELL INJURING HIS BACK AND BODY AS A WHOLE.**
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: **BACK & BODY AS A WHOLE.**
14. Nature and extent of any permanent disability: **CLAIMANT IS PERMANENTLY TOTALLY DISABLED.**
15. Compensation paid to-date for temporary disability: **\$2,980.15**
16. Value necessary medical aid paid to date by employer/insurer? **\$129,367.41**
17. Value necessary medical aid not furnished by employer/insurer? **NONE**

18. Employee's average weekly wages: **\$875.52**
19. Weekly compensation rate: **\$583.68**
20. Method wages computation: **SECTION 287.250 R.S.MO.**

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: **NONE**
weeks of temporary total disability (or temporary partial disability)
weeks of permanent partial disability from Employer
weeks of disfigurement from Employer

Permanent total disability benefits from Employer of \$583.68 per week beginning July 11, 2006 for claimant's lifetime subject to a credit of \$2,980.15 for benefits paid by the employer from October 17, 2007 to November 29, 2007.

22. Second Injury Fund liability: **N/A**
weeks of permanent partial disability from Second Injury Fund
Uninsured medical/death benefits
Permanent total disability benefits from Second Injury Fund:

weekly differential payable by SIF for weeks
beginning and, thereafter, for claimant's lifetime.

TOTAL:

23. Future requirements awarded: The employer is directed to provide claimant with such medical aid in the future that may be reasonably required to cure and relieve the condition caused by his August 14, 2004 injury to his spine.

Said payments to begin **July 11, 2006** 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: **John E. McKay.**

FINDINGS OF FACT and RULINGS OF LAW:

Employee: **BRYAN R. LONG** Injury No.: **04-146261**

Employer: **HERZOG CONTRACTING CORPORATION**

Insurer: **ACIG INSURANCE COMPANY**

Hearing Date: **NOVEMBER 29, 2007** Checked by: **NGA**

Prior to presenting evidence, the parties stipulated the issues to be determined by this hearing are:

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1. What is the correct rate of compensation;
2. Whether there was an underpayment of compensation from October 17, 2007 through November 29, 2007;
3. What is the nature and extent of claimant's disability; and
4. The liability of Employer/Insurer for future medical treatment.

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The parties agreed that on August 14, 2004, Bryan Long was an employee of Herzog Contracting Corporation. The Employer was operating under the provisions of the Missouri Workers' Compensation Law and was fully insured by ACIG Insurance Company.

The parties also agreed that on August 14, 2004, the Claimant sustained an injury by accident arising out of and in the course of his employment with Herzog Contracting Corporation. The employer had proper notice of the injury and a timely Claim for Compensation had been filed.

The parties agreed that the correct rate of compensation for permanent partial disability is \$354.05 per week.

The claimant was paid full salary through July 10, 2006. The employer does not request any credit for payment of salary nor overpayment of compensation prior to July 11, 2006.

Compensation has been paid in the amount of \$2,980.15 from October 17, 2007 through November 29, 2007. The employer is asking for a credit against permanent partial disability for this payment. Medical aid has been provided in the amount of \$129,367.41.

The Claimant testified in person. He is 31 years old. He has a high school education, graduating with a 1.6 or a "D" average which placed him next-to-last in his class. He has limited typing skills and limited computer skills. All of his employment has required heavy physical labor. He has no special training or transferable job skills. I found him to be a believable witness.

He said on August 14, 2004, he was carrying a 125-pound battery over a railroad track for Herzog Contracting Corporation when he slipped and fell, wrenching his back. As a result of the injury, he said he had four surgical procedures to the low back in a ten month period. In addition, he had ice therapy, heat therapy, physical therapy, multiple epidural injections, and other forms of treatment. He testified that the third surgical procedure was a total artificial disc replacement in the low back which left a scar on his abdomen that is one foot long and one inch wide. He said the total disc replacement surgery caused pain, numbness and tingling all the way to his big toe in his left-lower extremity so that his back and both lower extremities are now symptomatic. His left leg had not been painful prior to his disc replacement surgery.

He testified that his low-back pain varies from a five-to-seven on a ten-point scale. Standing, walking, sitting, and stooping make his pain worse. His right leg pain begins in his lower back, goes through the right hip, over the top of the right thigh, and ends at the inside of his right knee. This pain he described as ranging between a 5-7/10. He has numbness and tingling in his right leg, which is made worse when he stands for more than ten minutes. The left leg has pain that starts in his low back, goes into his left thigh, down his shin, into his left foot and left big toe. The other toes are not painful. The left lower extremity pain ranges

from 5-8/10. Walking and standing make the left lower leg pain worse. He testified that he suffers some degree of pain in his back and both legs at all times.

He said that if he had an eight-hour job, he could sit for 30-to-45 minutes before having to change positions. However, during the next increment, the time before he would have to change positions again would be shorter. He said that he could stand for 10 or 15 minutes before his right thigh became numb, but he could force himself to stand longer. The second increment of time would be shorter and he would pay a price the next day for forcing himself to stand longer. He could walk up to three-quarters of a mile but the second increment of walking would be much shorter and the third increment of walking during an eight-hour period would be shorter still.

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He said it is difficult to lift his three-year-old daughter into her car seat or playground swing. He cannot sit on the floor and play games with her. Before his injury, he had been able to help with lawn mowing, perform lawn mower tune-ups, water heater repairs, hang new front doors, replace car batteries and install guttering. He said that he could not help his mother with those activities after the August 14, 2004 work injury. He testified that he could not help his wife rotate the mattress on their bed or do most of the housekeeping chores because it was difficult for him to stand, bend, or move his lower back. He said shopping in large stores required him to stop and rest. He would also take rest breaks while driving automobiles. Prior to his injury, he was a sportsman; however, after the August 14, 2004 work injury, he tried trap shooting but had to stop after 10 or 15 minutes. He sold his deer rifle because he could no longer climb into or sit in a deer stand to hunt. He said that he sold his fishing boat because he could not sit in the boat very long.

He testified that prior to his injury, he averaged eight or nine hours of sleep per night. He said after the work injury, he sleeps five or six hours per night, but not continuously. He said the loss of sleep and the fact that his sleep is interrupted due to pain has caused a loss of concentration when he is awake. He takes a nap between about one and two o'clock p.m. every day.

Claimant testified that his wife helps him bathe and cuts his toenails. He said she helps him put on his socks and shoes. He said that most of his time is spent sitting in a loveseat that has a recliner function. He said that he either lies down or reclines in this loveseat about eight or nine times between 8:00 a.m. and 5:00 p.m. each day.

Dr. Ernest Neighbor testified by deposition taken on February 2, 2007 and admitted into evidence as Claimant's Exhibit U. All objections thereto are hereby overruled.

Dr. Neighbor examined the Claimant on September 13, 2006. He said the Claimant was permanently totally disabled as a result of the August 14, 2004 work injury and the resulting surgeries for that work injury, Ex. U, p. 19. Permanent restrictions by Dr. Neighbor included lifting no more than five pounds, occasionally but not repetitively, Ex. U, p. 29. He said the claimant should not bend or stoop and should have the ability to change positions frequently and be able to lie down whenever his pain cannot be controlled by standing and moving about, Ex. U, pp. 18, 19.

Dr. Neighbor testified that the work injury of August 14, 2004 caused herniated discs at L3-4 and L5-S1, Ex. U, pp. 16, 44. He said there is spinal instability because the diskectomies and nucleoplasties caused further collapse of the disc spaces, Ex. U, pp. 17, 18. Dr. Neighbor testified that no employer in the ordinary course of business would reasonably be expected to employ Bryan Long in his present physical condition, Ex. U, p. 19. He said Bryan Long is not able to work eight hours a day, 40 hours a week, 52 weeks a year, Ex. U, p. 19. Dr. Neighbor testified that based on reasonable medical certainty, Bryan Long could not be rehabilitated to perform another job and, therefore, he is permanently totally disabled, Ex. U, p. 19. He said there will not

be any substantial improvement in Bryan Long's condition, Ex. U, p. 19. When Dr. Neighbor uses the word "permanent," he means indefinite duration for the rest of Bryan Long's life, Ex. U, p. 20. He testified that the employer had created a special accommodated job for claimant through July 9, 2006, but that claimant has been permanently totally disabled since July 10, 2006 when the employer terminated the special accommodated job it had previously created for claimant, Ex. U, p. 20.

William O. Reed, Jr., M.D., testified by depositions taken on April 30 and May 24, 2007 and admitted into evidence as Employer and Insurer's Exhibits Numbers 1 and 2. All objections thereto are hereby overruled.

Dr. Reed is a board certified orthopedic surgeon. He was the claimant's treating physician. He first saw the claimant on December 7, 2004. He saw the claimant 20 times in an 18-month period.

Dr. Reed said he performed four surgeries on the claimant for his back injuries. They were:

- (1) Charite total disk arthroplasty, L5-S1;
- (2) Open radial discectomy, L5-S1 with excision of herniated nucleus pulpous;
- (3) Intraoperative fluoroscopy and interpretation;
- (4) Anterior retroperitoneal approach with mobilization of the left and right iliac veins.

Dr. Reed last saw the claimant on June 12, 2006. He said patients with a total disc arthroplasty are expected to return to a normal life and have normal work activities. Dr. Reed said the claimant's work restrictions were unlimited.

Dr. Reed used the American Medical Association's Guide for the Evaluation of Permanent Impairment, 4th Edition. Dr. Reed rated Mr. Long as having a 10% permanent partial impairment of the body as a whole.

Dr. Reed did say that it was accurate to say that Mr. Long has a prosthetic device in his body; that is a polypropylene disk, which has the possibility of wearing out. The time that it will last is not predictable, but is expected to last an average of at least 20 years before it must be replaced.

Mike Dreiling testified by deposition on September 24, 2007 and admitted into evidence as Claimant's Exhibit V. All objections thereto are hereby overruled.

Mr. Dreiling testified as a vocational expert for Claimant. He testified that Claimant had no transferable job skills, Ex. V, pp. 13, 14. He said practically and realistically, based on reasonable vocational certainty, claimant will not reach a goal of further schooling and training to a degree that he could be employed at any job. He testified that multiple barriers to employment included the following restrictions: no lifting, no bending, no stooping, and being able to lie down at claimant's discretion to control pain, Ex. V, p. 4. He said claimant could not sit for the three-to-four hours necessary to take the SAT/ACT College Entrance Exam and that the lack of formal education, the 13-1/2 years since high school, as well as, the poor performance in high school, combined with the loss of concentration due to pain and loss of sleep, were vocational barriers, Ex. V, pp. 16, 17, 19, 20. He said the special job created by Herzog does not exist at Herzog or anywhere in the open labor market. Further, he said the vocational impact of claimant's home in Mound City is a barrier to reliable employment because of the driving distance to areas of major employment availability, Ex. V, pp. 20, 21.

Mr. Dreiling testified that if Dr. Reed's testimony is believed, then claimant has no medical restrictions and is able to carry a 120-pound battery one-quarter mile over railroad tracks multiple times per day every day of the week, 52 weeks per year, Ex. V, pp. 22, 23. However, Mr. Dreiling testified, based on reasonable vocational certainty, that Dr. Neighbor's restrictions were more consistent with the objective evidence of herniated discs at L3-4, L5-S1 and four surgical procedures in 10 months, Ex. V, pp. 23, 24. Mr. Dreiling

said that Claimant is not able to compete in the open labor market, Ex. Y, p. 24. He is not able to work eight hours a day, 40 hours a week, 52 weeks a year, Ex. V, p. 24. He said no employer in the ordinary course of business could reasonably be expected to employ Claimant in his present physical condition, Ex. V, p. 24. Mr. Dreiling testified Bryan Long is permanently totally disabled as a result of the August 14, 2004 work injuries and resulting restrictions, Ex. V, p. 24.

The test of permanent total disability is if the claimant is able to compete in the open labor market, Laturno v. Carnahan, 740 S.W.2d 470, 472 (Mo. App. 1982).

In Brown v. Treasurer of Missouri, 795 S.W.2d 479, 483 (Mo. App. 1990), the Court of Appeals held that:

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“Total disability means the inability to return to any reasonable or normal employment. It does not require that the employee be completely inactive or inert. The central question is whether in the ordinary course of business, an employer would reasonably be expected to employ the claimant in his present physical condition, reasonably expecting him to perform the work for which he is hired.”

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The following factors are considered by Missouri courts in determining permanent total disability:

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1. The Claimant's age;
 2. The Claimant's physical condition as it affects his ability to work;
 3. The Claimant's occupational history;
 4. The Claimant's job skills;
 5. The Claimant's pain in performing his basic life activities;
 6. The Claimant's own opinion regarding his ability to return to any type of employment;
 7. Expert medical opinions regarding Claimant's capacity to return to work;

 8. Expert vocational opinions regarding Claimant's ability to compete in the open labor market;
 9. Claimant's history of employment following the alleged, permanently and totally disabling accident;
 10. Whether employment following the allegedly, permanently and totally disabling accident results in primarily from the Claimant's own efforts and qualifications or from the influence or accommodation of others;
- Brown v. Treasurer of Missouri, 795 S.W.2d 479, 484 (Mo. App. 1990); Isacc v. Atlas Plastic Corp., 793 S.W.2d 165, 166 (Mo. App. 1990).

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Nine of the ten factors result in a finding of permanent total disability for Mr. Long. The remaining factor, age, does not disqualify claimant from total disability.

The claimant is 31 years old. An older age combined with lesser injuries may produce a permanent total disability. However, severe devastating injuries are not limited to older workers. In Pavia v. Smitty's Supermarket, 118 S.W.3d 228 (Mo. App. 2003), claimant was a minor on the date of accident. Nonetheless, he was found to be permanently totally disabled regardless of the fact that he had just entered the work

force. Bryan Long is more than a decade older than the permanently totally disabled claimant in Pavia.

Dr. Neighbor has placed significant restrictions on Mr. Long's activities. Claimant is not to lift, bend, stoop, and must have the ability to change positions frequently and to lie down whenever the pain cannot be controlled with standing and moving about, Ex. U, pp. 18, 19. Dr. Neighbor's restrictions are more consistent with Mr. Long's extensive surgical history than the opinion of Dr. Reed, Ex. V, pp. 23, 24. In Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (MO. 2003), the claimant's back injury was rated at 25% but he was found to be permanently totally disabled because claimant needed to lie down or recline several times each day to control pain.

Mr. Long's occupational history has been heavy manual labor which required the extensive use of his back and legs for lifting weights exceeding 100 pounds. Dr. Neighbor testified that Mr. Long should be restricted to no lifting, bending, or stooping, Ex. U, pp. 18, 19. Occasionally, he may lift up to five pounds, but not repetitively, Ex. U, p. 29. Lifting restrictions of 20 pounds have rendered other employees permanently totally disabled, Fischer v. Arch Diocese of St. Louis, 793 S.W.2d 195 (Mo. App. 1990). Mr. Long's restrictions on lifting are more severe than the claimant in Fischer.

The vocational expert, Mike Dreiling, testified that Mr. Long has no transferable job skills outside of heavy manual labor. He said that Mr. Long cannot be rehabilitated to perform other work. Mr. Long, on his own initiative, explored possible re-training through the Missouri Department of Vocational Rehabilitation. Mr. Dreiling testified that claimant liked the idea of getting a college degree to become a conservation officer, however, multiple vocational barriers prevented him from doing so, Ex. Z, pp. 16, 17, 19, 20, 21. Claimant could not sit for three-to-four hours to take the ACT/SAT College Entrance Exam. Both pain and lack of sleep are barriers to his concentration during college. The lack of formal education for the last 13-1/2 years and being at the bottom of his high school class with a "D" average are additional vocational barriers to re-training. Medically, Mr. Long has lost significant use of his back and legs and cannot work eight hours a day, 40 hours a week, 52 weeks a year.

Mr. Long has back pain, left-leg pain, and right-leg pain 24 hours a day. The back pain varies from a 5-7/10, depending on activity. The right leg pain stops at the knee and varies from 5-7/10, with numbness and tingling after standing for 10-to-15 minutes. The left leg has no numbness or tingling but extends to the left big toe and has a greater pain intensity of 5-8/10. Standing, walking, sitting and stooping all make the pain in these multiple body parts worse. Performing basic life activities require assistance with bathing, cutting toenails, dressing, housework, interacting with his three-year-old daughter, and driving. Mr. Long's hobbies of hunting, fishing and assisting his family with home repairs and auto maintenance have been severely diminished. From eight o'clock a.m. to five o'clock p.m. in an ordinary day, Mr. Long is required to lie down or recline eight or nine times per day, including a one-hour nap between one and two o'clock p.m.

Dr. Neighbor testified that Mr. Long is permanently totally disabled from all gainful employment, Ex. U, p. 19. Dr. Reed said if pain exists more than one year, statistically it makes it more difficult to get back to work, Ex. 2, p. 81; Ex. E, p. 7. Dr. Reed said Mr. Long may have nerve injury from the original problem that is causing persistent inflammation of nerve roots and pain, Ex. 2, p. 114. He said that patients can have symptoms and magnify them which allow the painful symptoms to consume them and disable them, Ex. 2, p. 115. Dr. Reed said symptom magnification does not mean that the patient does not actually have something wrong, Ex. 2, p. 116. Dr. Reed testified that Bryan Long does have a significant degree of symptom magnification but he also has clear and significant physical examination abnormalities, Ex. 2, p. 116. In Bloss v. Plastic Enterprises, 32 S.W.3d 666 (Mo. App. 2000), compensation was awarded where there was symptom magnification. However, it is not necessary to determine that Mr. Long has symptom magnification to find permanent total disability. In Martin v. Town and Country Supermarkets, 220 S.W.3d 836 (Mo. App. 2007), a

two-level disc injury resulting in three back surgeries resulted in permanent total disability. Mr. Long has a more severe history of major surgeries than the claimant in Martin.

Mr. Long's history of employment following the August 14, 2004 work injury and four separate surgical procedures consisted of 18 hours of work over 1-1/2 years as a bail bondsman and employment by Herzog in an accommodated, specially-created job. Mr. Long said that he tried working as a bail bondsman but had to stop because of difficulty sitting in courtrooms and completing paperwork. In Brown v. Treasurer of Missouri, 795 S.W.2s 479, 483 (Mo. App. 1990), the claimant who was only able to work very limited hours at rudimentary tasks was a totally disabled worker. In Grigic v. P and G Construction, 904 S.W.2d 464, 466 (Mo. App. 1955), the Court stated:

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“We do not consider working very limited hours at rudimentary tasks to be reasonable or normal employment. The Commission found it significant that he is sometimes able to work a few hours a day, although he quickly becomes tired. This limited activity does not mitigate against a finding of total disability. The fact that claimant sometimes can work a few hours a day serves only to highlight his inability to work a regular schedule, which is the hallmark of ‘odd lots’ total disability.”

For example, in Gordan v. Tri-State Motors, 908 S.W.2d 849 (Mo. App. 1995), the Claimant, who did household repair work, lawn mowing, and auto repair work, was totally disabled because he did those activities at his own pace and with the assistance of others but was unable to compete in the open labor market. In Mr. Long's case, he has great difficulty doing household repair work, lawn mowing and auto repair work. Mr. Long is more disabled than the claimant in Gordan.

Mr. Long's history of employment following the August 14, 2004 work injury, is that he returned to light duty in a specially-created job designed to enable Mr. Long to change positions multiple times throughout the day and to work at his own pace without regard to clocking in or completing a full eight-hour shift. Although he was paid as if employed eight hours a day, five days a week, Mr. Long rarely was present for more than four days per week. He said that he left early every day and told co-employee, Eddie Waller, he was leaving early. He used the bathroom more frequently than before his August 14, 2004 work injury in order to be able to move and change positions. He also would recline in his pickup. He said that he changed positions about every 15 minutes on the accommodated job provided by the employer. After leaving work early, he said that he went home to lie down due to the pain. When the special accommodated job was changed to unrestricted duty, Mr. Long was unable to perform unrestricted duty and was terminated by his employer July 10, 2006.

From August 14, 2004 until his termination on July 10, 2006, Mr. Long was paid full wages whether he was having surgery, recuperating from surgery, or working less than eight hours a day or less than five days a week. Numerous Missouri cases award permanent total disability where an employee had been paid by the employer for accommodated work. In Talley v. Runny Meade Estate, Ltd., 831 S.W.2d 692 (Mo. App. 1992), the Claimant returned to work for 15 months after his work injury but was found to be permanently totally disabled.

Nine of the ten disability factors used by Missouri courts substantiate Mr. Long's permanent total disability. The lone factor of age does not bar a finding of permanent total disability because Mr. Long's injuries were

multiple and severe, resulting in four surgeries in ten months, with an unsuccessful surgical outcome.

The parties agreed that the Claimant received wages of \$875.52 a week for the 13 weeks prior to his injury. The claimant argues that his rate of compensation should include as gross earnings, the value of a new Chevy flat bed pickup truck.

The employer furnished the claimant with this vehicle without any restrictions as to its use. The employee provided the fuel and paid the insurance and taxes. He was allowed to use the truck for his personal use.

The claimant said the value of the truck was at least \$50,000. He said the use of it had the value of \$900 to \$1,000 per month. However, there was no substantial evidence as to what the value to be assigned to the use of the pickup truck would be, other than the unsubstantiated opinion of Mr. Long.

The wage determination is found in Sec. 287.250 RSMo. Subsection (2) provides what may be included in the term "gross wages". There is no authority which would allow the use of a company pickup truck to be included in the claimant's gross wages. Therefore, the claimant's average weekly wage is \$875.52 per week, resulting in a compensation rate for permanent total disability of \$583.68 per week.

I find that the claimant's testimony as to what actions he is able to perform and not perform are believable. I also believe the testimony of Dr. Neighbors and Mr. Dreiling. I find the fact that claimant has had four spinal surgeries as a result of his injuries to be persuasive. I do not believe the claimant could perform gainful duties on a regular basis for the number of hours required on a regular schedule that would be required by a prospective employer.

Because of the injuries the claimant received arising out of and in the course of his employment on August 14, 2004, I find that the claimant is permanently totally disabled. He is not able to compete for gainful employment in the open labor market. No prospective employer in the ordinary course of business would be reasonably expected to employ the claimant.

I find and believe from the evidence that as a result of the claimant's injury by accident arising out of and in the course and scope of his employment at Herzog Contracting Corporation on August 14, 2004, the claimant is permanently totally disabled. I order and direct the employer to pay to Bryan R. Long the sum of \$583.68 per week commencing July 11, 2006 and continuing for the remainder of Mr. Long's life. The employer is entitled to a credit of \$2,980.15 for benefits paid to the claimant from October 17, 2007 through November 29, 2007.

Dr. Neighbor testified that claimant is in need of ongoing medical treatment as a direct result of his August 14, 2004 work injury, Ex. U, pp. 20, 21, 22. I believe Dr. Neighbor. In addition to the ongoing medical treatment recommended by Dr. Neighbor, Dr. Reed testified that the claimant's artificial disk was considered to be a prosthesis and will need to be replaced in the future. Therefore, I find that there is a probability that the claimant will require some medical treatment in the future.

I order and direct the employer to provide the claimant with such medical aid in the future that may be reasonably required to cure and relieve the condition caused by his August 14, 2004 injury to his spine.

Mr. John E. McKay is hereby assigned a lien in the amount of 25% of this award for necessary legal services provided Claimant.

Date: January 29, 2008

Made by: /s/ Nelson G. Allen
Nelson G. Allen,
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/S/ Jeffrey W. Buker
Jeffrey W. Buker, Director
Division of Workers' Compensation