

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

Injury No.: 08-007055

Employee: Douglas Miniex  
Employer: City of St. Louis  
Insurer: Self-Insured

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 6, 2010. The award and decision of Administrative Law Judge John A. Tackes, issued December 6, 2010, 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 10<sup>th</sup> day of August 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer, Chairman

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Alice A. Bartlett, Member

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**DISSENTING OPINION FILED**  
Curtis E. Chick, Jr., Member

Attest:

\_\_\_\_\_  
Secretary

Employee: Douglas Miniex

### **DISSENTING IN PART**

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be modified to reflect a more appropriate award to employee.

It is obvious employee's work injury is compensable, and I agree employee met his burden of proving he sustained permanent disability. I disagree, however, with the administrative law judge's decision to award benefits based on a finding of only 2% permanent partial disability of the body as a whole. I believe the administrative law judge's award is inadequate and ignores undisputed evidence of employee's limitations and doctor-imposed restrictions. I believe an award consistent with a finding of a 20% permanent partial disability of the body as a whole would be more appropriate.

Employee worked for employer in its water department. On January 27, 2008, employee was riding in a truck with another employee en route to deliver some pipe for a city project. The coworker driving the truck steered the truck into a section of street that collapsed suddenly underneath the truck. The driver continued on, attempting to pilot the truck through the collapsed section. As a result, the cab of the truck raised up into the air as the truck moved forward and the rear tires entered the collapsed section. As the truck exited the collapsed section, the cab slammed back down to the pavement with significant force. Employee felt immediate pain in his low back, neck, and shoulder as a result of this violent jerking motion.

Employer sent employee to Concentra, where treating doctors diagnosed a lumbar strain and put him on a course of conservative treatment including physical therapy and injections. The physical therapy did not help but rather exacerbated employee's symptoms, so the doctors ordered diagnostic studies. On March 7, 2008, an MRI of employee's lumbar spine revealed a large central disc protrusion at L3-4, a mild disc bulge at L4-5, and a central disc bulge at L5-S1. Dr. Breeden diagnosed lumbar strain with bilateral lower extremity radiculitis and prescribed injections. Employee experienced little relief from the injections. Eventually, because employee was not a surgical candidate, employer's doctors released employee to return to work with extensive restrictions including no pushing, pulling, squatting, or lifting over 20 pounds. Employer discharged employee on October 21, 2008, due to his permanent restrictions. Employee tried to go to work but employer turned him away and sent him home.

Prior to the January 27, 2008, injury, employee had no back problems apart from the occasional minor ache. Now, employee can't walk more than 20 minutes at a time or sit for more than 30 minutes at a time due to back pain. He takes 750 mg doses of Vicodin to control his pain. He sleeps less than 4 hours per night because his pain wakes him up. Employee has had to give up fishing and other activities he used to enjoy. Employee continues to experience lower back pain which he describes as a 9 out of possible 10 in terms of severity. Employee has looked for jobs but nobody has called him for an interview.

Employee: Douglas Miniex

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Dr. Thomas F. Musich evaluated employee and provided his expert medical opinions in this matter. Dr. Musich opined that the accident on January 27, 2008, was the prevailing factor causing the disc pathology revealed by the March 2008 MRI, and employee's resulting disability in the form of persistent low back pain and complaints. Dr. James T. Doll, on the other hand, examined employee and provided a medical evaluation for the employer. Dr. Doll believes the disc pathology was preexisting and that the accident on January 27, 2008, only caused a lumbar strain. But Dr. Doll admitted that his causation opinions were mere speculation, because there was no MRI predating the injury to compare with the March 2008 MRI, and he also admitted that employee did not appear to have any significant complaints of back pain prior to the work injury. Dr. Doll assigned significant restrictions to employee, including the prohibition against lifting over 20 pounds, and no repetitive bending, twisting, or squatting. Remarkably, despite these rather extreme restrictions—restrictions that cost employee his job with employer—Dr. Doll rated employee's overall low back disability at only 6% permanent partial disability of the body as a whole. It may be that Dr. Doll rendered these unusual and inconsistent findings because of his apparent suspicion that employee was exaggerating his pain complaints. In any case, these incongruous findings are troubling and raise, in my mind at least, serious problems with respect to Dr. Doll's credibility. Simply put, a 20 pound lifting restriction is seriously limiting, and suggests that employee suffers more disability than the mere 6% found by Dr. Doll. I find Dr. Doll lacking credibility. I find Dr. Musich more credible. I find that the work injury was the prevailing factor causing the disc pathology seen on the March 2008 MRI.

According to § 287.190.6 RSMo, “[p]ermanent partial disability’ means a disability that is permanent in nature and partial in degree ...” It is well established in Missouri that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission.

The Commission may consider all the evidence, including the testimony of the employee, and draw all reasonable inferences in arriving at the percentage of disability. This is a determination within the special province of the Commission. The Commission is also not bound by the percentage estimates of the medical experts and is free to find a disability rating higher or lower than that expressed in medical testimony. This is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.

*Elliott v. Kan. City School Dist.*, 71 S.W.3d 652, 657 (Mo. App. 2002) (citation and quotations omitted), overruled on other grounds by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. 2003).

The administrative law judge disregarded the MRI from March 7, 2008, which showed multiple disc bulges and a large central disc protrusion and stenosis at L3-4, and found that employee suffered a lumbar strain only. The administrative law judge credited Dr. Doll,

Employee: Douglas Miniex

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noted that employee is a smoker, found employee lacking credibility (although failing to explain why, other than to reproduce Dr. Doll's insinuations that employee is engaging in symptom magnification) and found employee sustained a mere 2% permanent partial disability as a result of the work injury.

I dissent because this award is plainly inadequate given the seriousness of employee's low back injury and his ongoing complaints. The award is so paltry as to seem punitive and I believe it reflects the administrative law judge's inordinate focus on unimportant evidence. Obviously, the administrative law judge was swayed by various suggestions from Dr. Doll that employee is exaggerating his symptoms, and failed to look at the undisputed evidence of disability, including employee's physical restrictions. I think it is more important, when determining the degree of permanent partial disability, to focus on the extent to which employee's permanent limitations will impact on his ability to work following his injury, not whether employee is a smoker or whether Dr. Doll thinks he might be exaggerating his pain levels. What of the evidence that employee was fired by employer due to his permanent restrictions following the work injury? The administrative law judge glosses over this undisputed fact in favor of his subjective ruminations on employee's credibility. I acknowledge that it was the prerogative of the administrative law judge to find employee lacking credibility with regard to his pain complaints, but I would like an explanation as to how an individual with permanent restrictions of no lifting more than 20 pounds is only 2% disabled. I find no such explanation in the award by the administrative law judge. This lifting restriction cannot be said to be a "subjective complaint" of employee, nor can it be written off as a mere "exaggeration," because it was assigned by employee's treating doctors and adopted by the doctor the administrative law judge found credible. I acknowledge that the extent of permanent partial disability is a finding within the special province of the fact-finder and that considerable discretion is warranted, but I am convinced this award approaches the outer limits of that discretion.

In sum, while I agree that employee's injuries are compensable, I am convinced that the administrative law judge (and the majority) improperly overlooked the uncontested evidence of employee's physical restrictions and their effect on his ability to work. Based upon the entire record, I find that the disc pathology seen in the March 2008 MRI resulted from the work injury, rather than any degenerative process. I find employee credible. I find that employee sustained 20% permanent partial disability of the body as a whole referable to the low back.

I would modify the award of the administrative law judge to award a more appropriate amount of benefits. Because the majority has determined otherwise, I respectfully dissent from the decision of the Commission.

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Curtis E. Chick, Jr., Member

## FINAL AWARD

Employee:	Douglas Miniex	Injury No.:	08-007055 <sup>1</sup>
Dependents:	N/A		Before the
Employer:	City of St. Louis		<b>Division of Workers'</b>
Additional Party:	n/a		<b>Compensation</b>
Insurer:	Self Insured		Department of Labor and Industrial
Hearing Date:	September 1, 2010	Checked by:	JAT

### 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: January 27, 2008
5. State location where accident occurred or occupational disease was contracted: St. Louis, 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:  
Claimant was riding in Employer's truck when it was involved in an accident.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Low back and right shoulder
14. Nature and extent of any permanent disability: 2% BAW (low back)
15. Compensation paid to-date for temporary disability: \$0.00
16. Value necessary medical aid paid to date by employer/insurer? \$17,357.81

Employee: Douglas Miniex

Injury No.: 08-007055

- 17. Value necessary medical aid not furnished by employer/insurer? n/a
- 18. Employee's average weekly wages: \$714.16
- 19. Weekly compensation rate: 476.11/389.04
- 20. Method wages computation: Stipulated

**COMPENSATION PAYABLE**

21. Amount of compensation payable:

Unpaid medical expenses:	
8 weeks of permanent partial disability from Employer	\$3,112.32

22. Second Injury Fund liability: n/a

TOTAL: \$3,112.32

23. Future requirements awarded: None

Said payments to begin immediately 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: James A. Guirl

## FINDINGS OF FACT and RULINGS OF LAW:

Employee:	Douglas Miniex	Injury No.:	08-007055
Dependents:	N/A	Before the	
Employer:	City of St. Louis	<b>Division of Workers'</b>	
Additional Party:	n/a	<b>Compensation</b>	
Insurer:	Self Insured	Department of Labor and Industrial	
Hearing Date:	September 1, 2010	Relations of Missouri	
		Jefferson City, Missouri	
		Checked by:	JAT

A hearing in this Matter was held in the City of Saint Louis at the Division of Workers' Compensation by Administrative Law Judge John A. Tackes. Claimant, Douglas Miniex, appeared in person and by his attorney, James Guirl, for a hearing requesting a final award on his claim against the employer, City of St. Louis, a self insured employer. The record was closed September 1, 2010.<sup>1</sup> Attorney James Guirl represented Claimant. The Employer was represented by attorney Tom Goeddel.

The parties stipulated to the following<sup>2</sup>:

1. On or about January 27, 2009, Claimant sustained an accidental injury arising out of and in the course of employment. The accident occurred in St. Louis, Missouri.
2. The average weekly wage at the date of injury was \$714.16 resulting in compensation rates of \$476.11 for temporary total disability (PTD/TTD), and \$ 389.04 for permanent partial disability (PPD).
3. Employer paid medical expenses totaling \$17,357.81.

The issues to be determined are:

1. Medical causation
2. Nature and extent of PPD/PTD
3. Penalty for safety violation (seat belt)

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<sup>1</sup> Prior to the hearing, Claimant voluntarily dismissed without prejudice his claim in injury number 08-066119.

<sup>2</sup> At the hearing, no stipulation was made nor issue raised regarding employment, venue, claim, or notice at the hearing.

## SUMMARY OF THE EVIDENCE

Only evidence necessary to support the award will be summarized. Any objections not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, those markings were made prior to being made part of this record, and were not placed thereon by the Administrative Law Judge.

### *Exhibits*

Claimant offered the following exhibits, which were received into evidence:

- A. Medical Records from Concentra Medical Center (1/27/08 to (7/21/08)
- B. MRI from St. Alexius Hospital (3/7/08)
- C. Medical Records from Pain Treatment Center (1/11/08 to 11/18/08)
- D. Medical Records from Concentra Medical Center (7/21/08 to 8/6/08)
- E. Physical Therapy Records from PRORehab (3/10/08)
- F. Medical Records of Andrew Youkilis, M.D. (4/10/08 to 10/20/08)
- G. Myelogram from St. Luke's Hospital (10/20/08)
- H. Medical Records of Gurprakash Grewal, M.D. (2/5/08 to 10/28/09)
- I. Deposition of Thomas F. Musich, M.D. (8/9/10)
- J. Deposition of James M. England (6/10/10)

Employer offered the following exhibits, which were received into evidence:

- 1. Deposition of James T. Doll, D.O.
- 2. Deposition of Karen Kane, M.S., E.D., CRC
- 3. Petition for Damages

All objections not expressly ruled upon in this award are overruled to the extent they conflict with this award.

## FINDINGS OF FACT

Based on the competent and substantial evidence presented at hearing, as well as my personal observations of Claimant at hearing, I find:

### *Claimant's Testimony*

- 1. Claimant is a former employee of the City of St. Louis (Employer) where he worked in the water department. He was 47 years old at the time of the hearing and a resident of St. Louis, Missouri where he lives with his wife. Claimant last worked for Employer on

September 26, 2008. He was educated through the 11<sup>th</sup> grade and obtained a GED in 1981. He did not attend college and has no advanced technical training or clerical skills. He went to work in the construction business for Construction Technologies doing painting when he was 16 years old. In 1991 he changed duties with the company and became a delivery driver before finally doing construction work as a laborer in 1996.

2. From 1996 to 1999 he worked road maintenance for the St. Louis County Highway Department. In 1999 he went to work for CRH Transportation as a delivery driver until 2004. This was not a physically demanding job and required little physical exertion with no supervisory duties. In 2004 Claimant began employment delivering and installing washers/dryers and vending machines. His duties were very physical and he had no supervisory duties. In 2006 Claimant worked for the St. Louis City Water Department as a water utility worker fixing water mains and hydrants. This work included working in trenches with pipes measuring 6-72" in width. The work was physically demanding.
3. On January 27, 2008, Claimant was riding as a passenger in a truck delivering pipe to a project in the city. The vehicle pulled off the road to unload the material when part of the street collapsed under the right front wheel of the truck. The hole was one to two feet deep. The driver attempted to get the truck out of the hole but the truck lifted about a foot off the ground before coming down again. Claimant, who was seat belted in at the time, complained of pain in his lower back and right shoulder area. He informed his foremen of his injury and was given light duty for the rest of the day.
4. Claimant received authorized treatment through Concentra for a lumbar strain including multiple physical therapy appointments. Concentra also sent him to the Pain Treatment Center in March 2008 where he received injections. Claimant complained that the physical therapy did not help but increased his pain. The steroid injections he received did cause a complication with his diabetes that had to be addressed through his PCP. The PCP had to get his blood sugar under control before being released to return to work by Concentra with restrictions including no pushing, pulling, squatting or lifting over 20 pounds. Claimant continues to complain that his pain is nine out of ten (9/10) in his low back.
5. Claimant continued to complain of numbness and tingling in his buttocks down his leg, ankle, and foot so an MRI was ordered. Following the MRI Claimant consulted with a neurosurgeon, Andrew Youkulis, M.D., who discussed the need for fusion surgery but recommended Claimant stop smoking in order to improve his chances for a successful outcome. Claimant refused the surgical intervention in part because he did not want to stop smoking and did not believe he should have to quit smoking to have the surgery. Dr. Youkulis released Claimant from care in October 2008 with permanent restrictions matching his earlier medical restrictions. Claimant's last day of work with Employer, restricted or otherwise, was October 21, 2008 when he was relieved of his duties because of permanent restrictions.
6. On October 21, 2008, Claimant attempted to return to work but was not allowed on an assignment because he had not been released to full duty by his doctor. Claimant has

sought other employment by application for work in landscaping and lawn care but he has not been hired. He believes this has to do with his age and the economy.

7. Currently, Claimant continues to complain of limitations with his back because of pain in calf, knees, and ankles. He walks for less than 20 minutes at a time because of pain and sits for 30 minutes at a time, often laying down or reclining to get comfortable. He takes 750 mg of Vicodin and sleeps less than 4 hours a night with naps during the day. His weight has decreased from 300 pounds to 212 pounds and describes his mood as depressed.
8. Prior to his injury, Claimant had no significant work related back complaints or problems other than minor aches. In 1994 he was involved in a motor vehicle accident. He received treatment for back, neck, and leg pain. Prior to his injury, Claimant enjoyed fishing and dancing. He gave up fishing in 2010 and only slow dances now. Claimant performs some household chores including sweeping, dusting and cutting the lawn. He does not vacuum and avoids mowing the backyard because of dog feces.

#### *Medical Evidence*

9. On January 29, 2008, Claimant was seen at Concentra Medical Center two days post accident for complaints of neck and back discomfort. X-rays of the cervical, thoracic, and lumbar area revealed no acute changes with chronic changes in the thoracic spine. He was diagnosed with cervical and thoracic strain and placed on restricted duty. Claimant was treated conservatively with spine manipulation, physical therapy, and medication. He was advised not to drive because of the medicine he was prescribed. Medical restrictions included lifting less than forty pounds, pushing, and pulling.
10. On January 31, 2008, Claimant was diagnosed by Dr. Breeden, Concentra, with lumbar, thoracic and cervical strains. Manipulation of the lumbar, cervical, and lumbosacral spine was performed with little relief reported. Claimant continued to report pain in the range of 9 to 10/10 in his mid back region. Claimant reported some incremental improvement in his back and was returned to regular duty on February 27, 2008. Claimant reported 40% improvement in his back and 70% improvement in his neck.
11. On March 3, 2008, Claimant complained of bilateral lumbar pain radiating in his legs down to his knees which he estimated in the range of 3/10. Dr. Breeden noted that Claimant's subjective symptoms did not match the clinical examination and had an MRI performed. On March 7, 2008 an MRI of the lumbar spine revealed a large central disc protrusion at L3-4, a mild disc bulge at L4-5 and a central disc bulge at L5-S1. The diagnosis was lumbar strain with bilateral lower extremity radiculitis for which injections were prescribed. John Graham, M.D., performed epidural steroid injections on March 11 and 18, 2008. Claimant initially reported that overall, he had improved and his leg symptoms had resolved. Following a second injection however, Claimant, who has diabetes, reported problems with the injections regarding his blood sugar and no more injections were performed. Claimant reported little improvement with the injections. Dr. Graham placed Claimant at maximum medical improvement March 25, 2008.

12. On April 10, 2008, Dr. Youkilis performed a neurosurgical consultation for complaints of neck and shoulder pain, and low back pain. He assessed lumbar strain with no lumbar radiculopathy. He recommended physical therapy with traction and facet injections. Claimant was encouraged to stop smoking. On June 5, 2008, Dr. Youkilis noted no improvement with physical therapy and that traction made his pain worse. Dr. Youkilis recommended a myelogram and post myelogram CT scan of the lumbar spine. Dr. Youkilis did not indicate that a microdiscectomy or a fusion would improve Claimant's symptoms. Dr. Youkilis ordered 20 pound lifting restriction, minimal bending, lifting, and twisting and released Claimant from care.
13. On July 23, 2008, Concentra ordered physical therapy for thoracic strain to treat the upper back area. Claimant was released from light duty restrictions and care by Concentra to regular activity on August 6, 2008.
14. On October 20, 2008, a lumbar myelogram/CT scan revealed a moderate sized L3-4 central disc protrusion causing moderate impression on the thecal sac with moderate central canal narrowing. A follow up with Dr. Youkilis revealed Claimant's pain at the lumbosacral junction radiating to the buttocks and calf worse on the right than the left. Dr. Youkilis indicates the axial back pain is related to a central disc bulge at L3-4. He noted Claimant, who smokes a pack of cigarettes a day, should stop smoking and be sent for pain management.
15. On November 4, 2008, Dr. Graham evaluated Claimant and noted continued complaints of back pain with anterior and lateral leg pain to the knee with numbness and tingling. At follow up visit on November 18, 2008, Dr. Graham noted Claimant was sleeping better with medication. He continued work restrictions. Claimant was not considered a surgical candidate because of his diabetes and heavy smoking.
16. Claimant attended multiple physical therapy visits at ProRehab. He was initially evaluated February 17, 2009 complaining of pain, aggravated by everything he does. The physical therapist indicated Claimant presented with many outward signs of magnified pain behavior. His Oswestry score was 52% indicating a severe perceived disability with pain rating at 8-9/10. The physical therapist indicated that the scores were inconsistent with his physical presentation noting that Claimant had driven himself to the clinic for his session.
17. In February 2009 Claimant was seen by James Doll, D.O. who diagnosed persistent low back pain and assigned work restrictions similar to those assigned by Dr. Youkilis. On March 9, 2009, Claimant was seen by Dr. Doll for evaluation post physical therapy. Claimant reported no change in his low back and leg symptoms, had difficulty sitting and using his legs for extended periods, but admitted he was not performing his home exercise therapy and continued to smoke. An FCE was recommended.
18. On March 10, 2009, an occupational therapist at ProRehab performed an FCE and noted that Claimant's performance was submaximal and exhibited the presence of symptom magnification behaviors. This made it difficult to determine Claimant's work capacity.

On March 16, 2009, Dr. Doll indicated that Claimant continued to exhibit inconsistencies between subjective complaints and objective findings. He stated that this was highly suggestive of a nonorganic basis for his ongoing symptoms such as possible symptom magnification. Dr. Doll considered Claimant at MMI.

*Expert Opinion*

Deposition of Thomas F. Musich, M.D. (8/9/10)

19. On April 23, 2009, Dr. Musich performed an IME at Claimant's request. Dr. Musich obtained a medical history from Claimant, performed a physical examination and reviewed medical records from SluCare, St. Alexius Hospital, St. Luke's, Concentra, the Brain and Spine Center, Orthopedic and Sports Medicine, The Pain Treatment Center (physical therapy records) as well as other medical records regarding the evaluation and treatment of Claimant. At the time of the IME, Claimant complained of low back pain radiating into both lower extremities (right greater than left), with pain at 5-8/ 10. Claimant complained of radicular symptoms of pain, numbness and tingling down to his posterior lateral aspect of both thighs. He complains of persistent problems with his back, problems with sitting for more than 30 minutes, squatting, and bending.
20. Dr. Musich opined that the injury of January 27, 2008 is the prevailing factor in Claimant's "acute spinal symptomatology" requiring the treatment provided. He further opined that the permanent restrictions by Drs. Doll and Youkilis are reasonable and necessary. He indicated Claimant would not be able to return to his job with Employer.
21. Dr. Musich indicates Claimant should refrain from any activities requiring squatting, climbing, kneeling, or operating commercial machinery or vehicles and that he will need pain management indefinitely because of the trauma of January 27, 2008. He opined Claimant is permanently and totally disabled based on the restrictions, ongoing symptoms, and limited education and work history.

Deposition of James M. England (6/10/10)

22. On September 8, 2009, James England, England Company Rehabilitation Services, Inc., performed a Vocational Rehabilitation Evaluation at Claimant's request, for which he issued a report dated September 11, 2009. Mr. England reviewed medical records, family, social, and educational background, and vocational history. He also performed vocational testing and reviewed functional restrictions and limitations recommended or corroborated by Drs. Doll and Musich. At the time of the evaluation, Claimant reported taking prescription medication: Vicodin for pain, Xanax for anxiety, and medication for diabetes and high cholesterol.

23. Mr. England notes that Claimant's vocational testing results were adequate for a variety of vocational alternatives. He concluded that Claimant is considered a younger worker based on USDOL guidelines and has a fairly well established work history following his high school equivalency degree. He indicates that the current physical restrictions "would appear to eliminate" a return to his prior work but would not eliminate returning to a sedentary to light activity work if Claimant could change his position frequently.
24. Prior to the VRE, Claimant was seeking landscaping work and local delivery company work suitable to his restrictions. Mr. England recommended Claimant seek alternative skill development and job placement assistance through the Missouri Division of Vocational Rehabilitation. Mr. England believes Claimant would have grave difficulty successfully competing for employment and trouble sustaining employment in the long run because of his sleep habits.

Deposition of James T. Doll, D.O. (8/31/10)

25. Claimant was seen by Dr. Doll for evaluation and treatment on February 16, 2009. Dr. Doll took a history of the January 27, 2008 injury from Claimant and reviewed medical records. Dr. Doll notes a medical history of hypercholesterolemia, diabetes, and anxiety but no heart disease, hypertension, thyroid disease, gout, or other medical illness. Dr. Doll performed a physical examination and gave an impression of persistent low back pain; lumbar disc protrusion at L3-4 and disc bulge at L4-5 and L5-S1; and neck pain, status post cervicothoracic strain. He recommended physical therapy for a home exercise program instruction and postural exercises and a muscle relaxant at bedtime. Claimant was to avoid lifting more than 20 pounds and avoid repetitive bending, twisting, and squatting.
26. At a follow up visit with Dr. Doll on March 2, 2009, Claimant reported no change in low back and leg symptoms, neck symptoms improved, and difficulty with prolonged sitting and use of legs. No significant improvement was noted with the muscle relaxant medication which was discontinued.
27. Dr. Doll notes that therapy progress notes dated February 25, 2009, identify persistent subjective complaints, persistent diffuse complaints of pain and outward signs of magnified pain behavior with scores that are inconsistent with his physical presentation. Claimant's movements were slow and guarded but he demonstrated no particular myotomal or sensory pattern of weakness or loss of sensation.
28. Dr. Doll's impression was persistent diffuse low back pain;<sup>3</sup> lumbar disc protrusion at L3-4 and disc bulge at L4-5 and L5-S1; and improving neck pain. Dr. Doll admitted that the postmyelogram CT contained some objective finding of possible neurological complications in Claimant's low back in that it describes moderate impression on the thecal sac and moderate central canal narrowing. Claimant admitted to not continuing his

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<sup>3</sup> This is described by Dr. Doll as an illustration of the "lack of focal localized area of discomfort."

home exercise program and continuing use of tobacco. Dr. Doll recommended a functional capacity evaluation (FCE). Current restrictions were continued

29. On March 16, 2009, Claimant followed up with Dr. Doll post FCE (3/10/09). Claimant's consistency and quality of effort analysis revealed submaximal effort and the presence of symptom magnification behaviors. An exam of Claimant revealed continued inconsistencies between subjective complaints and objective findings. Dr. Doll suggests that the inconsistencies indicate possible symptom magnification. He opines that Claimant is capable of performing physical activities at the level previously determined by other his other physicians.<sup>4</sup> Dr. Doll placed Claimant at MMI March 16, 2009 and did not identify any need for additional treatment.
30. Dr. Doll specifically notes that Claimant did not follow through with his home exercise program, was not willing to stop smoking in order to make surgical intervention a viable option, claimant terminated the evaluation of his material handling capabilities portion of the FCE, and did not give maximum effort at physical therapy.
31. On April 27, 2009, Dr. Doll opined that Claimant sustained permanent partial disability attributable to a combination of his preexisting and underlying degenerative condition of the lumbar spine taken together with the effects of his January 27, 2008 injury of 6% PPD BAW referable to the lumbar spine with 4% for preexisting and underlying degenerative condition.

Deposition of Karen Kane, M.S., E.D., CRC

32. On August 3, 2010, a vocational assessment of Claimant was performed by vocational consultant Karen Kane, S&H Medical Management Services, Inc., at the Employer's request. Ms. Kane interviewed Claimant and reviewed background medical information including findings by Drs. Doll, Musich, Graham, and Youkilis. She gathered information on his social background, financial status, military background, license (CDL), hobbies & interests, education, academic testing performed by a vocational counselor (Mr. England), current daily activities, and vocational background pertaining to his work with Employer.
33. Ms. Kane's assessed how Claimant spends his time, maintains a routine, and functions at what level. The vocational background assists Ms. Kane's assessment of previous jobs and duties performed by Claimant. An analysis of transferable skills helps assess Claimant's reasoning, math, and language development levels. Ms. Kane noted that when discussing a return to the work force, Claimant indicated that he "was of the opinion he would not be able to participate in training courses since he could not see taking a career change." In other words, his focus was on a change of careers or jobs rather than his ability to function or work.

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<sup>4</sup> Restrictions: 20 pounds maximum lifting, no repetitive bending, twisting and squatting.

34. Based on a transferable skills analysis, Ms Kane found that Claimant would have the ability to interact with co-workers, supervisor, and customers; problem solve; complete activities with minimal supervision; and maintain and compile records. Jobs within this category and based on his physical abilities include customer service, counter person, desk clerk, dispatcher, order checker and light delivery driver. Based on her review of the medical records and employment information, Ms Kane opined that Claimant could return to the workforce, be hired, and maintain full time employment in the St. Louis area open labor market

### **RULINGS OF LAW**

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

The claimant bears the burden of proving all essential elements of a Workers' Compensation Claim, including the causal connection between the accident and the injury. *Grime v. Altech Indus.*, 83 S.W.3d 581, 583 (Mo.App. W.D. 2002) (overruled in part by *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220, 226 (Mo. 2003); see also *Davies v. Carter Carburetor*, 429 S.W.2d 738, 749 (Mo. 1968). While the claimant is not required to prove the elements of the claim on the basis of "absolute certainty," he must at least establish the existence of those elements by "reasonable probability." See *Anderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App.E.D. 1999); see also *Shelton v. City of Springfield*, 130 S.W.3d 30, 38 (Mo.App. S.W. 2004).

For most of his employment history, Claimant has been involved in heavy labor. On January 27, 2008, Claimant was injured when the truck in which he was riding lifted up and dropped back on the ground. One issue to be addressed herein concerns the allegation that Claimant was not wearing a safety belt at the time of the accident and therefore should be penalized for this violation of a safety rule. There is insufficient evidence on which to base a conclusion that Claimant was not wearing a seatbelt at the time of the incident. No penalty is therefore assessed based on this alleged failure to utilize a reasonable safety device.

In cases involving medical causation, which is not within the common knowledge or experience, the claimant must present medical or scientific evidence showing the cause and effect relationship between the complained of condition and the asserted cause. See *McGrath v. Satellite Sprinkler Systems, Inc.*, 877 S.W.2d 704, 708 (Mo.App. E.D. 1994). Where the opinions of medical experts are in conflict, the fact finding body determines whose opinion is the most credible. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 877 (Mo.App. 1984). Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *George v. Shop-n-Save Warehouse Foods, Inc.*, 855 S.W.2d 460, 462 (Mo.App. E.D. 1993); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 163 (Mo.App. 1986).

Claimant was involved in an unexpected traumatic event on January 27, 2008, which arose out of and in the course of his employment with Employer. Prior to the date of injury Claimant was not complaining about any pain or discomfort in his back and was under no treatment or medical restrictions referable to his back, neck, or right shoulder. This injury was diagnosed as a strain of the cervical, thoracic, and lumbar area of Claimant's back. Upon examination there were findings indicating chronic degenerative changes with little objective evidence of acute injury. Claimant however continued to complain of low back pain which did not entirely resolve and ranged in pain from 3-9/10 during the course of his evaluations and treatment.

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. §287.020 RSMo.

Medical tests (x-rays) performed near the time of the accident revealed no acute change to the cervical, thoracic or lumbar areas but did show chronic changes to the thoracic spine. On February 27, 2008, Claimant reported significant improvement in his back pain and even more so referable to his neck. Claimant's complaints of pain referable to his neck and right shoulder are found to have ultimately resolved and no permanent disability is found. Again it was noted that Claimant's subjective symptoms did not match the clinical examination.

Claimant was treated conservatively for a diagnosed back strain but continued to complain of significant pain. Claimant's complaints of pain are not consistent with the medical findings or treatment records. Even though Claimant complained of pain in the range of 9 out of 10 referable to his back, he remained unwilling to consider taking steps which would allow him to receive surgical intervention. Claimant was unwilling to consider not smoking so that his chance of recovery would be improved if he underwent back surgery. Claimant continued to dance, fish, and cut his lawn following his accident. The only reason he does not cut his back yard is because of the dog feces. Claimant has looked for other work but believes he is not getting work because of his age and the economy.

When evaluated by Ms. Kane, Claimant indicated he did not want to change jobs or the type of work he had been performing rather than not being physically able to do other types of work. A claimant is considered totally disabled, for purposes of the [Workers' Compensation Law], if he is unable to return to any employment, not merely the employment in which he was engaged at the time of the accident. *Kerns v. Midwest Conveyor*, 126 S.W.3d 445, 451 (Mo.App. W.D.2004) (citing §287.020.7). The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. *McCormack v. Carmen Schell Const. Co.*, 97 S.W.3d 497, 512 (Mo.App. W.D. 2002)(quoting *Karoutzos v. Treasurer of the State of Missouri*, 55 S.W.3d 493, 499 (Mo.App. W.D.2001)(Both overruled on other grounds in *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo banc 2003)). It does not require that the claimant be completely inactive or inert. *Pavia v. Smitty's Supermarket*, 118 S.W.3d 228, 234-235 (Mo.App. S.D.2003)(citations omitted). The pivotal question is whether an employer can reasonably be expected to hire this employee, given

her present physical condition, and reasonably expect the employee to successfully perform the work. *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004).

While undergoing physical therapy in February 2009, Claimant's occupational therapist notes "many out signs of magnified pain behavior" and other scores inconsistent with his physical presentation including the fact that Claimant had driven himself to the session. Claimant continued to give submaximal performance at physical therapy and exhibited symptom magnification. Dr. Doll later noted that the inconsistencies were highly suggestive of symptom magnification. Claimant reached MMI on March 16, 2009. In the absence of objective medical findings corroborating Claimant's subjective complaints, these credibility findings weigh heavily against Claimant who has the burden of proof regarding his claim.

Claimant's medical expert, Dr. Musich, opines that the injury of January 27, 2008 is the prevailing factor in Claimant's acute spinal symptomology. Dr. Musich, an evaluating physician, opines Claimant is PTD as a result of the restrictions, ongoing symptoms, and limited educational and work history. The injury however must be the prevailing factor in causing both the resulting medical condition and the disability. Dr. Musich's conclusory opinion does not distinguish the disability resulting from the acute strain on January 27, 2008 from the chronic degenerative changes. Dr. Musich's opinion is credible to the extent it states what is clear from the record which is that Claimant did not begin to exhibit complaints of pain until after the back strain on January 27, 2008. It does not however answer the question of the prevailing factor in relation to any other factor causing both the resulting medical condition and the disability.

Even Claimant's vocational expert is not persuasive on the issue of PTD. According to Mr. England, Claimant scored well enough to have a variety of vocational alternatives and considered his work history to be fairly well established post high school when he obtained a GED. Mr. England did not opine the ability to return to his work with Employer but did not eliminate sedentary to light activity work. Regardless of Claimant's grave difficulty competing for or sustaining such employment is not conclusive or persuasive of PTD.

More persuasive and probative regarding the outcome in this award is the expert opinions of Dr. Doll and Ms. Kane. Dr. Doll takes into consideration the significantly problematic history of subjective complaints not matching objective findings, outward signs of magnified pain behavior and information inconsistent with physical presentation. Following a functional capacity evaluation (FCE), Dr. Doll again noted submaximal effort and symptom magnification behaviors in Claimant's consistency and quality of effort. Dr. Doll opines Claimant is capable of performing physical activities with some restrictions including no lifting greater than 20 pounds, no repetitive bending, twisting, and squatting.

Likewise, Ms. Kane opined that Claimant had sufficient transferable skills such as the ability to interact with others, problem solve, complete assigned duties and maintain and compile records. She identified jobs that Claimant could apply and compete for which took into consideration his physical restrictions.

Taking into consideration the mechanism of injury, diagnosis, conservative course of medical treatment including physical therapy, and the expert opinions of Dr. Doll, Ms. Kane, and Mr. England, Claimant has not met his burden of proof to show by competent and substantial

evidence that he is permanently and totally disabled as a result of the January 27, 2008 injury. Claimant's testimony regarding the severity of his pain and inability to function within his physical restrictions is not credible. I find Claimant did not make a good faith effort to comply with treatment recommendations concerning home exercises and not smoking. Nevertheless, Claimant did sustain a low back strain that did not completely resolve and other injuries to his right shoulder which did resolve following the accident on January 27, 2008. The Claimant had a chronic degenerative condition which accounts for some of the disability he continues to experience.

Claimant does have some permanency referable to his low back from the January 27, 2008 injury which is over and above the preexisting chronic degenerative condition. The only competent rating of the PPD comes from Dr. Doll. Having found the subjective nature of Claimant's complaints to be exaggerated and unreliable, I find no reason to differ from Dr. Doll's opinion. I therefore find that Claimant did sustain 2% PPD referable to body as a whole (low back) for the strain but is not PTD by reason of the accident.

**CONCLUSION**

Employer's petition for damages based on the safety violation is denied. Claimant is not permanently totally disabled as a result of the accident on January 27, 2008 but did sustain permanent partial disability and is awarded \$3,112.32.

Date: \_\_\_\_\_

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John A. Tackes  
*Administrative Law Judge*  
*Division of Workers' Compensation*

A true copy: Attest

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Naomi Pearson  
*Division of Workers' Compensation*

<sup>1</sup> Prior to the hearing, Claimant voluntarily dismissed his claim in injury number 08-066119 without prejudice.