

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

Injury No.: 98-047791

Employee: Melvin Mitchell
Employer: North American Van Lines
a/k/a Muscle North America
Insurer: Zurich North American Insurance Company
(Third Party Administrator – Broadspire)
Date of Accident: March 27, 1998

Place and County of Accident: South Carolina (contract of employment and principle place of employment occurred in Butler 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 March 14, 2006. The award and decision of Administrative Law Judge Jack H. Knowlan, Jr., issued March 14, 2006, 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 18th day of September 2006.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

NOT SITTING

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Melvin Mitchell

Injury No. 98-047791

Employer: North American Van Lines a/k/a Muscle North America

Additional Party: N/A

Insurer: Zurich North American Ins. Co. (Third Party Administrator – Broadspire)

Hearing Date: February 16, 2006

Checked by: JK/kh

SUMMARY OF FINDINGS

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease? March 27, 1998
5. State location where accident occurred or occupational disease contracted: South Carolina (contract of employment and principle place of employment occurred in Butler 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 happened or occupational disease contracted: Employee injured his low back while lifting a moving box.
12. Did accident or occupational disease cause death? No
13. Parts of body injured by accident or occupational disease: Low back
14. Nature and extent of any permanent disability: Permanent total disability
15. Compensation paid to date for temporary total disability: \$36,182.78
16. Value necessary medical aid paid to date by employer-insurer: \$61,137.17
17. Value necessary medical aid not furnished by employer-insurer: \$189,095.13
18. Employee's average weekly wage: \$604.00
19. Weekly compensation rate:
\$402.67 for temporary total disability and permanent total disability
\$278.42 for permanent partial disability
20. Method wages computation: By agreement.
21. Amount of compensation payable:
Previously incurred medical expenses: \$189,095.13

Permanent total disability: \$402.67 per week commencing on November 2, 2001, and continuing for the remainder of the employee's life or until suspended, if the employee is restored to his regular work or its equivalent as provided in Section 287.200 RSMo.

22. Second Injury Fund liability: N/A

22. Future requirements awarded: Future medical aid pursuant to Section 287.140 RSMo and permanent total disability benefits.

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

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

FINDINGS OF FACT AND RULINGS OF LAW

On February 16, 2006, the employee, Melvin Mitchell, appeared in person and by his attorney, Mr. Joseph P. Rice, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorneys, Mr. Robert Haeckel and Ms. Sabrina Merritt. At the time of the hearing, the parties agreed on certain undisputed facts and identified the issues that were in dispute. These undisputed facts and issues, together with the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS:

1. On or about March 27, 1998, North American Van Lines and Muscle North America were covered employers operating under and subject to the provisions of the Missouri Workers' Compensation Act, and their liability was fully insured by Zurich North American Insurance Company.
2. On or about March 27, 1998, Melvin Mitchell was an employee of North American Van Lines and Muscle North America, and was working under the provisions of the Missouri Workers' Compensation Act.
3. On or about March 27, 1998, the employee sustained an accident that arose out of and in the course of his employment.
4. The employer had notice of the employee's accident.
5. The employee's claim was filed within the time allowed by law.
6. The employee's average weekly wage was \$604.00 and his rate of compensation is \$402.67 for temporary total disability and permanent total disability and \$278.42 for permanent partial disability.
7. The employer-insurer paid medical expenses through November 1, 2001 totaling \$61,137.17.
8. The employer-insurer paid temporary total disability benefits for 89 6/7 weeks at the rate of \$402.67 per week for a total of \$36,182.78. These temporary total disability benefits covered the time periods from March 28, 1998 through April 23, 1998; July 12, 1999 through July 18, 1999; and March 7, 2000 through November 1, 2001.

ISSUES:

1. Medical causation
2. Additional medical aid – past and future
3. Nature and extent of disability

EXHIBITS:

The following exhibits were offered and admitted into evidence:

Employee's Exhibits

- A. Medical records of Dr. Larry Horvath
- B. Medical records of Dr. Donald S. Piland
- C. Medical records of Dr. Joseph Miller
- D. Not offered
- E. Medical records of Dr. Garcia J. DeSousa
- F. Letter from Dr. Joseph Miller dated August 18, 1999

- G. Medical records of Dr. Jeffrey S. Walker
- H. Medical records of Dr. Thomas Newman
- I. August 27, 2001 report of Dr. Jeffrey S. Walker
- J. Medical records of Dr. Maniscalco
- K. Records of Rehab Solutions
- L. August 30, 2001 report of Dr. Charles P. McGinty Sr.
- M. October 15, 2001 report of Dr. Arthur E. Smith
- N. December 6, 2001 letter from employee's attorney to employer-insurer's attorney
- O. December 11, 2001 letter from employer-insurer's attorney to employee's attorney
- P. January 16, 2002 report of Dr. Charles P. McGinty Sr.
- Q. February 15, 2002 report of Dr. Charles P. McGinty Sr.
- R. February 26, 2002 report of Dr. Charles P. McGinty Sr.
- S. Records of Dr. Robert C. Nucci
- T. Records of Dr. Stephen T. Hess
- U. Hess Spinal Center Records
- V. Not offered
- W. Additional records of Dr. Robert Nucci
- X. Records from Diagnostic Radiology Specialists
- Y. Records of Dr. Edward J. Hammond
- Z. Records of Northwood Anesthesia Records
- AA. Records of the University Community Hospital
- BB. Additional records of Dr. Robert Nucci
- CC. Records from Hopkins Clinic
- DD. Social Security decision – not admitted based on objection of employer-insurer
- EE. Additional records of Dr. Robert Nucci
- FF. Records from Dr. Robert Miles
- GG. Medical bills (employer-insurer's objection overruled)
- HH. Curriculum Vitae of Dr. Robert Nucci
- II. Not offered
- JJ. Report of Injury
- KK. Deposition of Dr. Charles P. McGinty Sr.
- LL. Deposition of Dr. Arthur Smith
- MM. Deposition of Dr. Robert Nucci
- NN. Deposition of Karen Sherrets
- OO. Not offered
- PP. Not offered
- QQ. Statement of employee to employer-insurer

Employer-Insurer's Exhibits

1. Withdrawn
2. Withdrawn (same as employee's exhibit B)
3. Medical records of Dr. Joseph H. Miller
4. Withdrawn (same as employee's exhibit J)
5. Deposition of Dr. Jeffrey Walker
6. Withdrawn (same as employee's exhibit NN)
7. Deposition of Melvin Mitchell
8. Deposition of Dr. Russell Cantrell

FINDINGS OF FACT:

Based on the testimony of Melvin Mitchell ("employee"), Kathy Mitchell, Rebecca Teten and the medical records and depositions admitted, I find as follows:

- At the time of the hearing, the employee was 41 years old. The employee is married with two children, and lives in St. Petersburg, Florida.
- The employee's education was limited to completing the 10th grade, but he later obtained a GED.
- The employee's work history prior to his accident included painting billboards, working as a land surveyor, and driving a moving van.
- At the time of his March 27, 1998 accident, the employee was working as a driver for North American Van Lines and Muscle North America ("Employer"). His job required him to be responsible for everything on the truck, and included inventorying, inspecting, packing and moving furniture.
- Prior to March 27, 1998, the employee had no significant back complaints or symptoms that affected his ability to work or his activities at home. On January 21, 1998, the employee saw Nurse Practitioner April Piland in Poplar Bluff with complaints of low back pain. The medical history indicates that a week earlier he had reached to catch a dresser that was falling and strained his back. Nurse Practitioner Piland diagnosed a low back strain, and prescribed Relafin. The employee had a follow up visit for his high cholesterol on March 2, 1998. That record gives no

indication the employee was still experiencing low back pain. The employee's recollection was that the January 21, 1998 visit involved pain between his shoulder blades, and the symptoms had completely resolved prior to his March 27, 1998 accident. There is no evidence that the employee had any pain radiating down his leg in January of 1998, and there is no evidence of any other prior episodes of low back pain. The employee had a complete physical on March 27, 1997, and had no complaints of back pain (Employee's exhibit B).

- On March 27, 1998, the employee was lifting a 1.5 cubic foot book box, when he felt a sharp pain in his low back. The pain caused the employee to fall to his knees. The employee's initial statement to an investigator on March 29, 2001, and his history to Dr. Joseph Miller indicates that the box weighed 50 – 60 pounds (Employee's exhibits QQ and C). At the time of the hearing, the employee could not recall how heavy the box was, but admitted that he had previously testified in his deposition that the box weighed approximately 10 pounds.
- The employee first sought treatment on March 30, 1998 from Nurse Practitioner Piland. The employee reported persistent, sharp pain with pressure with standing, sitting or lying down. Nurse Practitioner Piland found the employee had a positive bilateral leg raise test, and ordered an MRI.
- The MRI performed April 1, 1998 indicated the employee had a herniated disc at the L2-3 and L4-S1 levels. The employee was then referred to Dr. Joseph Miller, who was a neurosurgeon with Semms-Murphy Clinic in Memphis, Tennessee.
- Dr. Miller's letter of April 9, 1998 indicates the employee was complaining of low back pain, and had experienced six episodes of numbness in both legs. A myelogram and post myelogram CT confirmed a ruptured disc at L2-3 with moderate encroachment on the spinal canal, as well as an annular bulging or tear at the L5-S1. Dr. Miller's note of April 13, 1998 indicates the employee did not think his pain was severe enough to warrant surgical exploration, and Dr. Miller agreed.
- On April 23, 1998, Dr. Miller released the employee to light duty. On May 21, 1998, Dr. Miller noted the employee had not been lifting, but experienced burning and pain in his back after he tried to put a 50-pound box on a dolly. Dr. Miller stated that the employee had "clear pathology", and they would need to be "cautious". He concluded that the employee was "getting by without surgery", and discharged the employee on a PRN basis with a 50-pound weight limit (Employee's exhibit C).
- After a gap in treatment of slightly more than one year, the employee felt that the numbness in his left leg was getting worse to the point where it was no longer safe for him to drive his truck. During this gap, the employee continued to experience fairly constant low back pain that was aggravated by prolonged sitting or standing. The employee was able to do his job because he always had other "lumpers" or employees do the lifting. The employee did the inspections, the inventory, and the driving, but did not do any lifting. There is no evidence of a new accident or other intervening event during this gap in treatment.
- After the employee requested additional treatment, the employer-insurer authorized treatment with Dr. Garcia DeSousa who is a neurologist in St. Petersburg, Florida. The employee was still working for the employer, but had relocated to St. Petersburg. Dr. DeSousa first saw the employee on August 11, 1999. His initial impression was "history of back injury with herniated lumbar disc and symptoms of lumbar radiculopathy in left leg" (Employee's exhibit E). An MRI performed October 8, 1999 confirmed a herniated disc with effacement of the dural sac at both the L4-5 and the L2-3 levels. Despite this finding and his continuing symptoms, the employee advised Dr. DeSousa that he wanted to pursue conservative treatment and try to keep working (October 28, 1999 record in employee's exhibit E). When conservative treatment failed to improve the employee's symptoms, Dr. DeSousa decided on February 10, 2000 to refer the employee to Dr. Jeffrey Walker, who is a neurosurgeon in St. Petersburg, Florida.
- Dr. Walker first examined the employee on March 7, 2000. Dr. Walker felt the employee had "multi-level degenerative disc disease" with protrusions at L2-3 and L5-S1. Although Dr. Walker initially did not believe the employee would benefit from surgery, when epidural injections and physical therapy failed to work, Dr. Walker recommended a second opinion by Dr. Larry Horvath. After positive discograms for both levels, Dr. Walker performed a hemi laminectomy and microdiscectomy on July 20, 2000 at the L2-3 level (Employee's exhibit G).
- By January 23, 2001, Dr. Walker noted the employee had not improved, and stated "I have exhausted my ability to treat him", Dr. Walker recommended a second opinion (Employee's exhibit G). In his April 27, 2001 record, Dr. Walker wrote that the employee stated that his "pain was worse than ever", and was in both legs. Even though another neurologist did not feel surgical intervention was warranted, the employee told Dr. Walker that "he cannot live like this", and needed some type of operation. Dr. Walker again recommended a neurosurgical opinion, but added that if that opinion did not suggest a viable alternative, Dr. Walker could recommend a dorsal column stimulator (Employee's exhibit G).
- The second opinions suggested by Dr. Walker were offered though Dr. Thomas Newman, a neurologist, and Dr. Jack Maniscalco, a neurosurgeon. Both Dr. Newman and Dr. Maniscalco work at Neuro Specialities in Tampa, Florida. Dr. Newman noted the employee's EMG and nerve conduction study were normal, and concluded the employee was suffering from chronic radicular pain. Dr. Newman suggested a trial of Neurontin. Dr. Maniscalco examined the employee on August 22, 2001, and concluded there was no objective evidence of nerve root entrapment or neurological dysfunction. Dr. Maniscalco noted the employee "seemed sincere and appeared to have a bona fide history of pain; however, I cannot correlate this with any physical findings nor any finding on the MRI scan". Dr. Maniscalco felt the employee was at MMI.
- Prior to his release by Dr. Walker, the employee had a functional capacity evaluation on May 7, 2001 at Rehab Solutions. The functional capacity evaluation concluded the employee was able to work at the light physical demand level, but added the employee was unable to return to his usual and customary job as a truck driver. The evaluator noted that the employee did not exhibit any symptom magnification. She further noted that the employee passed 40 out of 43 validity criteria (93%), which suggested excellent effort and valid results (Employee's exhibit L).

- After the employee was released by Dr. Walker, the employee's attorney wrote a letter to the employer-insurer's attorney on December 6, 2001 demanding additional medical treatment (Employee's exhibit N). On December 11, 2001, the employer-insurer's attorney responded and stated "employer has provided extensive treatment and multiple opinion's for your client in the past three years and will not be sending your client to any further specialists based on the previous opinions from well qualified physicians".
- After the employer-insurer refused additional treatment, the employee sought treatment on his own from Dr. Robert C. Nucci in Palm Harbor, Florida. Dr. Nucci is a board certified orthopedic surgeon with a fellowship in spine surgery. Dr. Nucci initially performed a microdiscectomy at the L5-S1 level on October 17, 2002. Dr. Nucci cautioned, however, that if the employee's disc space continued to collapse, the employee might need a lumbar fusion (October 11, 2002 record in Employee's exhibit S).
- The initial records after Dr. Nucci's first surgery indicate the employee was doing better. The employee, however, developed sciatica pain, and Dr. Nucci recommended pain management and physical therapy. By June 18, 2003, the employee was complaining of "intractable pain" that was radiating into the front of both legs. Dr. Nucci noted the most recent MRI revealed a "dark disc" at the L2-3 and L4-5 levels, and recommended additional surgery.
- On July 8, 2003, Dr. Nucci performed a two level posterior fusion with cages, rods, and screws (Employee's exhibit S and W). Dr. Nucci's notes after the fusion indicate that the employee initially did well, and the fusion was solid. The employee's symptoms eventually worsened, however, and Dr. Nucci prescribed additional therapy, injections and pain medication (Employee's exhibits S, W, BB and EE). The employee testified that despite some temporary relief, none of his three surgeries had improved his low back and leg pain.
- The employer-insurer paid temporary total disability benefits for a total of 89 6/7 weeks through November 1, 2001. Since that date, the employee has never returned to work and is now receiving Social Security Disability benefits.
- The employer-insurer paid medical bills totaling \$61,137.17 through the date of the employee's release by Dr. Walker.
- After the employer-insured denied additional treatment, the employee incurred additional medical expenses totaling \$189,095.13. These bills were all related to the treatment and surgeries provided by Dr. Nucci, and have been admitted as employee's exhibit G.
- Both the testimony of the employee and the testimony of his wife and sister indicate the employee is still experiencing severe low back and leg pain. The pain in his low back runs down the side of his left leg to his foot. He also has numbness in his left leg. The employee's low back pain also radiates down the front of his right leg to his knee.
- As a result of his low back pain and leg pain, the employee is very limited in the amount of activities he can perform. The employee has difficulty sitting, standing or walking for any extended period of time. The employee cannot walk more than 100 yards and avoids bending or stooping. The employee can climb stairs, but that activity increases his low back pain. The employee does not cook or do any chores around the house. The employee does have his driver's license, and can drive for short distances. The employee noted that when he is required to travel longer distances, he is miserable and takes several days to recover. Although the employee admitted that he occasionally will try to shoot a basketball with his younger son, his typical day is limited to intermittent periods of sitting or lying down to relieve his back pain.
- Both the employee's wife and his sister testified that prior to his accident, the employee was a very active, happy person who led a productive life working and spending time with his family. Since the accident, they both provided tearful details of the impact his injury has had on his physical and emotional condition.
- The medical testimony included the depositions of Dr. Jeffrey Walker, Dr. Robert Nucci, Dr. C. P. McGinty Sr., and Dr. Russell Cantrell.
- After reviewing his treatment of the employee, Dr. Walker concluded that the employee would not be able to return to his previous occupation, but after pain management he thought the employee should be able to return to either a sedentary or light job (Employer-insurer's exhibit 5, page 11).
- Dr. Walker gave the employee a 9% impairment rating under the Florida guidelines (Employer-insurer's exhibit 5, page 13). Dr. Walker gave permanent restrictions of no heavy lifting over 20 or 25 pounds and no repetitive bending, stooping or digging (Employer-insurer's exhibit 5, page 13 and 14).
- At the time of his last visit on November 1, 2001, Dr. Walker concluded the employee was at MMI, and he did not believe the employee would benefit from further surgery (Employer-insurer's exhibit 5, page 14 and 16). Although Dr. Walker agreed that his rating did not include any impairment for psychiatric problems, he did believe there was an element of depression involved due to chronic pain, and that is why he prescribed Elavil (Employer-insurer's exhibit 5, page 16).
- Dr. Robert Nucci's deposition was taken on May 20, 2005. Dr. Nucci reviewed the employee's medical bills related to his surgical procedures and concluded that the charges related to those bills were reasonable (Employee's exhibit MM, page 6). After reviewing his first surgery of October 17, 2002, Dr. Nucci concluded that the employee's herniated disc at the L5-S1 level was an annular tear that was caused by the employee's accident in March of 1997 (Employee's exhibit MM, page 10).
- Dr. Nucci also noted that the "dark disc" found on the June 2, 2003 MRI meant that the employee's disc that were damaged in the original injury were beginning to collapse and degenerate (Employee's exhibit MM, page 13). Based on this MRI and the fact that the "small" procedures had not relieved the employee's severe back and leg pain, Dr. Nucci recommended the two level fusion that he performed on July 8, 2003 (Employee's exhibit MM, page 14).
- After providing a detailed description of the fusion (Employee's exhibit MM, page 16 and 17), Dr. Nucci noted that the disc between the two levels that were fused will wear out faster because of the other fusions, and may lead to further treatment, including fusions at those levels (Employee's exhibit MM, page 17).

- Dr. Nucci's last visit with the employee was on August 14, 2004. Although Dr. Nucci felt that the fusion was "taking" and was technically successful, he added that the employee was still having pain in his back. Dr. Nucci had suggested nerve blocks at the L3 and S1 levels, and recommended a doctor who could perform those blocks (Employee's exhibit MM, page 19).
- On the issue of future medical aid, Dr. Nucci stated that the employee would need x-rays of his back once a year for five years, and then every two years. Dr. Nucci also recommended the employee have at least one course of modalities and physical therapy each year to decrease his pain and increase his function. He also noted that it is likely that the employee will need medication (Employee's exhibit MM, page 20).
- Dr. Charles P. McGinty wrote several reports on behalf of the employee, and was deposed on September 18, 2002. Based on his examination of the employee on August 16, 2001, and his review of medical records, Dr. McGinty felt the employee was suffering from chronic pain syndrome and depression (Employee's exhibit KK, page 15 and 16). Although Dr. McGinty agreed the employee may have had some degenerative disc disease before the accident, he concluded that the March 27, 1998 accident caused the employee's disc herniations and acute pain (Employee's exhibit KK, page 16). Dr. McGinty also felt the employee's depression was related to his accident in that it was caused by his chronic pain and inability to return to work (Employee's exhibit KK, page 19 and 20).
- On the issue of permanent total disability, Dr. McGinty testified that he did not believe the employee was capable of employment (Employee's exhibit KK, page 20 and 21).
- Dr. Russell Cantrell examined the employee on July 25, 2005, and was deposed on September 22, 2005. Dr. Cantrell diagnosed the employee as having chronic lumbar back pain (Employer-insurer's exhibit 8, page 14). Dr. Cantrell felt it was possible, but not probable, that a disc herniation at L2-3 level had occurred as a result of the employee's March 27, 1998 accident (Employer-insurer's exhibit 8, page 16). Dr. Cantrell concluded that the second and third surgeries performed by Dr. Nucci were not causally related to the employee's 1998 accident (Employer-insurer's exhibit 8, page 17). Dr. Cantrell did not believe that the employee required any further treatment as a result of the 1998 work accident (Employer-insurer's exhibit 8, page 18). Dr. Cantrell testified that the employee was able to work without restrictions. Dr. Cantrell suggested a 25 pound lifting restriction, occasionally; a 10 pound lifting restriction frequently; and the avoidance of repetitive bending. Dr. Cantrell assigned a 10% permanent partial disability to the employee that he attributed to his March of 1998 injury at work (Employer-insurer's exhibit 8; page 19 and 20).
- The vocational evidence included a deposition of Dr. Arthur Smith and a deposition of Ms. Karen Sherrets.
- Dr. Smith's deposition was taken on behalf of the employee on May 16, 2002. Dr. Smith identified himself as an employability consultant (Employee's exhibit LL, page 4), and is a licensed psychologist (Employee's exhibit LL, page 11). Based on his examination and testing of the employee, Dr. Smith concluded that "it would be unreasonable to expect an employer to hire him, and that if he were hired, that he would be unable to sustain employment" (Employee exhibit LL, page 19). Although Dr. Smith was not willing to make a "DSM IV" diagnosis of depression, he felt the employee's test results were "highly indicative" of severe depression (Employee's exhibit LL, page 12).
- The employer-insured relied on a November 5, 2002 deposition of Karen Sherrets. Ms. Sherrets is a certified rehabilitation coordinator with RSKCo in Tampa, Florida (Employee's exhibit NN, page 3). Based on her interview and testing, Ms. Sherrets concluded the employee was capable of performing light duty work (Employee's exhibit NN, page 16). Ms. Sherrets' list of jobs she felt the employee could perform included land surveyor, display designer, hand painter, field map editor, field engineer specialist, civil drafter, tool programmer, marine drafter, assistant drafter, commercial drafter, floral designer and hostler (Employee's exhibit NN, page 17). Ms. Sherrets, therefore concluded that the employee was employable in a number of occupations in the labor market (Employee's exhibit NN, page 22). During cross-examination, Ms. Sherrets admitted that she was employed by RSKCo, and RSKCo is the cost management arm of CNA Insurance Company (Employee's exhibit NN, page 23).

APPLICABLE LAW:

- Although the workers' compensation law must be liberally construed, the burden is still on the claimant to prove all material elements of his claim (*Melvie v Morris*, 422 S.W. 2d 335 (Mo.App.1968). The employee has the burden of proving not only that he sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between his accident and the injuries and the medical treatment for which he is seeking compensation. *Griggs v A. B. Chance Company*, 503 S.W. 2d 697 (Mo.App.1973).
- Under Section 287.020.2 RSMo., the term accident is defined to only include injuries that are "clearly work related". Under this Section, an injury is "clearly work related if work was a substantial factor in the cause of the resulting medical condition or disability".
- A pre-existing but non-disabling condition does not bar recovery if a work related accident causes the pre-existing condition to escalate to a level where it becomes disabling. *Wynebauer v Gray Eagle Distributors*, 661 S.W. 2d 652 (Mo.App.1983); *Avery v City of Columbia*, 966 S.W. 2d 315 (Mo.App.1998); and *Indelicato v Missouri Baptist Hospital*, 960 S.W. 2d 183 (Mo.App.1985).
- Under Section 287.140 RSMo., the employer is given the right to select the authorized treating physician. Subsection 1 also provides that the employee has the right to select his own physician at his own expense. The employer, however, may waive its right to select the treating physician by failing or neglecting to provide necessary medical aid. *Emert v Ford Motor Company*, 863 S.W. 2d 629 (Mo.App. 1993); *Shores v General Motors Corporation*, 8442 S.W. 2d 929 (Mo.App.1992) and *Hendricks v Motor Freight*, 520 S.W. 2d 702, 710 (Mo.App.1978).
- Under Section 287.140.1 "the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance, and medicines, as may reasonably be

required after the injury or disability, to cure and relieve from the effects of the injury”.

- The standard of proof for entitlement to an allowance for future medical aid cannot be met simply by offering testimony that it is “possible” that the claimant will need future medical treatment. *Modlin v Sunmark, Inc.*, 699 S.W. 2d 5, 7 (Mo.App.1995). The cases establish, however, that it is not necessary for the claimant to present “conclusive evidence” of the need for future medical treatment. *Sifferman v Sears Roebuck and Company*, 906 S.W. 2d 823, 838 (Mo. App.1995). To the contrary, numerous cases have made it clear that in order to meet their burden, claimants are required to show by a “reasonable probability” that they will need future medical treatment. *Dean v St. Lukes Hospital*, 936 S.W. 2d 601 (Mo.App.1997). In addition, employees must establish through competent medical evidence that the medical care requested, “flows from the accident” before the employer is responsible. *Landers v Chrysler Corporation*, 963 S.W. 2d 275, (Mo.App.1997).
- Section 287.020.7 RSMo. provides as follows:

The term “total disability” as used in this chapter shall mean inability to return to any employment and not merely inability to return to the employment in which the employee was engaged at the time of the accident.

The phrase “inability to return to any employment” has been interpreted as the inability of the employee to perform the usual duties of the employment under consideration, in the manner that such duties are customarily performed by the average person engaged in such employment. *Kowalski v M-G Metals and Sales, Inc.*, 631 S.W. 2d 919, 922 (Mo.App.1992). The test for permanent total disability is whether, given the employee situation and condition, he or she is competent to compete in the open labor market. *Reiner v Treasure of the State of Missouri*, 837 S.W. 2d 363, 367 (Mo.App.1992). Total disability means the “inability to return to any reasonable or normal employment”. *Brown v Treasure of Missouri*, 795 S.W. 2d 479, 483 (Mo.App.1990). An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Id.* The key is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person’s physical condition reasonably expecting the employee to perform the work for which he or she is hired. *Reiner* at 365. See also *Thornton v Haas Bakery*, 858 S.W. 2d 831, 834 (MO.App.1993).

RULINGS OF LAW:

Issue 1. Medical Causation

Employer-insurer has admitted that the employee had a work related accident, but at the time of hearing, denied that the employee’s injuries and treatment were medically causally related to the accident.

It should first be noted that the employer-insurer did not deny the employee’s low back injury was caused by his accident until it had authorized and paid for over \$61,000.00 in medical expenses. It was only after it became apparent that the employee might be totally disabled and might require future medical treatment that the employer-insurer decided to retract and deny that the employee’s back problems were related to his accident.

The employer-insurer’s argument included the “pre-existing degenerative condition” defense and the “gap” defense. Neither of these arguments are persuasive.

The employer-insurer first points to the fact that the employee had some pre-existing degenerative conditions in his spine, and received treatment for low back pain by Nurse Practitioner Piland on January 21, 1998. A review of the medical records reveals that this visit also resulted from a work related injury. There was no reference to any leg pain or radiculopathy. Nurse Practitioner Piland felt the employee had a muscle sprain, and prescribed a muscle relaxor. The employee returned to Nurse Practitioner Piland for a cholesterol check three weeks before his March 27, 1998 accident, and there was no mention of any residuals from the January low back sprain. It is also significant that none of the employee’s other prior medical records reveal any complaints or problems with low back or leg pain.

There is no credible evidence to support a finding that the employee had any pre-existing degenerative conditions in his lumbar spine that were either symptomatic or disabling prior to his March 28, 1998 accident.

The employee’s gap defense focuses on the fact that Dr. Miller did not recommend surgery, and the employee had a gap in treatment of over one year. The employer-insurer hints that the employee did not have any leg pain until he moved to Florida, but Dr. Miller’s medical records refute this position. A careful reading of Dr. Miller’s records indicate it was the employee who did not want surgery, and this reluctance continued in the early stages of the treatment he received in Florida. It was only after the numbness and pain in his leg deteriorated to the point that he could not safely drive his truck that the employee finally gave in to his wife’s demands that he seek additional treatment.

It is also significant that the employer-insurer has no evidence of any intervening accident or injury that might have arguably relieved the employer-insurer from further liability. The employee’s claim had not been settled, the statute of limitations had not run, and nothing has occurred to “break the chain of causation”.

Although the employer-insurer's attorney has been very creative and thorough, both the employee's testimony and the medical records support a finding that the employee's February 27, 1998 accident caused both the herniated discs in the employee's lumbar spine. On the issue of medical causation, I find that the opinions of Dr. McGinty and Dr. Nucci were more credible than the opinions of Dr. Cantrell. Even if it is concluded that either of the disc herniations were pre-existing conditions, the evidence unequivocally supports a finding that the employee's accident caused an aggravation of the employee's pre-existing condition and raised it to the level of disability.

Based on this evidence, I find that the employee's accident on March 27, 1998 was a substantial factor in causing the employee's low back injuries and the resulting medical treatment. This causal connection extends to all of the treatment provided under the direction of Dr. Robert Nucci for the employee's second and third surgeries.

Issue 2. Additional Medical Aid

The employee has requested an award of both previously incurred medical expenses and future medical aid.

The previously incurred medical expenses include \$189,095.13 in medical expenses as reflected in employee's GG. All of these bills were related to the treatment ordered by Dr. Nucci after the employee was released by Dr. Walker. The employer-insurer has denied these bills on the grounds that they were not authorized, the charges were not reasonable, the treatment provided by Dr. Nucci was not medically necessary and the treatment was not causally related to the employee's accident.

On the issue of authorization, the letter from the employer-insurer's attorney dated December 11, 2001 establishes that the employer-insurer denied additional medical treatment after the employee was released by Dr. Walker. I therefore find that the employer-insurer waived its right to select the treating physician, and cannot now argue that Dr. Nucci and the other healthcare providers listed in employee's exhibit GG were not authorized.

On the issue of the reasonableness of the charges, Dr. Nucci testified that the charges were reasonable. The employer-insured has offered no evidence to refute this testimony. I therefore find that the charges reflected in the employee's exhibit GG were reasonable.

The employer-insurer's primary argument against paying the medical bills is that the second and third surgeries performed by Dr. Nucci were not medically necessary. The employer-insurer based its decision to deny further treatment on the opinion's of Dr. Walker and Dr. Maniscalco. Neither neurosurgeon recommended additional surgery, but it is interesting to note that Dr. Walker offered to surgically implant a spinal cord stimulator. The medical records of both neurosurgeons, however, make it clear that the employee was credible and was suffering "intractable" low back and leg pain. The employee simply did not think he could live with the pain.

Under these circumstances, the employee sought treatment on his own from Dr. Robert Nucci. Dr. Nucci is a board certified orthopedic surgeon with a fellowship in spine surgery. These bills have not been paid, and Dr. Nucci only agreed to proceed after receiving a letter of assurance from the employee's attorney.

Although the two surgeries were "technically successful", it was the employee's testimony that neither surgery provided significant long-term relief. The decision as to whether a surgical procedure is "medically necessary", however, should not be made solely with the benefit of hindsight. No surgeon guarantees results, and frequently well-qualified surgeons disagree as to whether the potential advantages of surgery outweigh the inherent risk. In this case the employee was miserable, and an extremely well qualified surgeon felt he had a reasonable chance of curing or relieving the employee from the debilitating symptoms that he was experiencing.

After reviewing all of the medical evidence, I find that the two surgeries performed by Dr. Nucci and the resulting medical expenses set forth in employee's exhibit GG were medically necessary to cure and relieve the employee from the effects of this March 27, 1998 accident.

The employer-insurer's final defense to the payment of the medical bills is that they were not medically causally related to the employee's accident. Given the finding on issue 1, this defense is also rejected. I therefore find that all of the bills submitted in employee's exhibit GG were medically causally related to the employee's accident.

Based on these findings, the employer-insurer is directed to pay to the employee the sum of \$189,095.13 for previously incurred medical expenses.

The employee has also requested an award of future medical aid. The deposition of Dr. Nucci makes it clear that the employee will continue to require additional medical treatment to relieve him from the effects of his March 27, 1998 injury. Based on this evidence, I find that there is a reasonable probability that the employee will require additional medical treatment. The employer-insurer is therefore directed to provide all additional medical treatment reasonable and necessary to cure and relieve the employee from the effects of his March 27, 1998 injury to his lumbar spine in accordance with the provisions of Section 287.140 RSMo. This request shall include any treatments that is causally related to the employee's March 27, 1998 accident and the resulting surgeries by Dr. Walker and Dr. Nucci, and shall include, but not be limited to,

medication, x-rays, therapy, injections, and additional surgeries or other procedures that may be required to relieve the employee from the effects of his work injury.

Issue 3. Nature and Extent of Disability

After observing the employee's behavior for several hours during the hearing, and reviewing all of the medical and vocational evidence, it is clear that the employee is not employable in the open labor market. I specifically find that the opinions of Dr. Arthur Smith and Dr. C.P. McGinty are more credible than the contrary opinions offered by the employer-insurer.

The key factor in making this determination is pain. The employee's medical records establish that his high level of pain was the driving force behind all of the doctors and other healthcare professionals efforts to help the employee. Unfortunately, none of these efforts provided any significant, lasting relief. Unlike many cases, the physicians and therapist all found the employee to be sincere and credible. The functional capacity evaluation confirmed the employee was not malingering or exaggerating his symptoms, and he was putting forth excellent effort. After watching the employee during the hearing, the same conclusion was reached by the administrative law judge. The employee is experiencing a significant level of pain that would preclude him from functioning in the open labor market.

Based on this evidence, I find that given the employee's situation and condition, he is not competent to compete in the open labor market. I further find that no employer in the usual course of business would reasonably be expected to hire the employee in his present physical condition. I therefore find that the employee is permanently and totally disabled as a result of his March 27, 1998 low back injury and resulting surgeries.

The parties agreed that the employee's temporary total disability benefits were paid through November 1, 2001. Based on the medical evidence, I find that the employee had reached his maximum level of medical improvement on November 1, 2001, and that the employee has remained permanently and totally disabled since that date. The employer-insurer is therefore directed to pay to the employee the sum of \$402.67 per week for permanent total disability commencing on November 2, 2001, and continuing for the remainder of the employee's life, or until suspended if the employee is restored to his regular work or its equivalent as provided under Section 287.200 RSMo.

ATTORNEY'S FEE:

Joseph Rice, attorney at law, is allowed a fee of 25% of all sums awarded under the provisions of this award for necessary legal services rendered to the employee. The amount of this attorney's fee shall constitute a lien on the compensation awarded herein.

Employee: Melvin Mitchell

Injury No.: 98-047794

INTEREST:

Interest on all sums awarded hereunder shall be paid as provided by law.

Date: _____

Made by:

Jack H. Knowlan, Jr.
Chief Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Ms. Patricia "Pat" Secrest
Director
Division of Workers' Compensation