

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

Injury No.: 06-057515

Employee: Lindell L. Moll
Employer: Martin Marietta Materials Incorporated
Insurer: Ace American Insurance Company
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo.¹ We have heard the oral arguments of the parties, reviewed the evidence, and considered the whole record. We find 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, except as modified herein.

Pursuant to § 286.090 RSMo, we issue this final award and decision modifying the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Discussion

The administrative law judge found that employee sustained an injury to his low back as a result of the April 13, 2006, accident but he denied employee's claim for permanent partial disability referable to his lumbar condition. The administrative law judge reasoned:

The Court had previously ruled in favor of the employee on the issue of medical causation regarding his back. Dr. Chabot's opinion was that any problems with the employee's back were pre-existing and, therefore, were not medically causally related to his accident. He provided a 0% rating. Dr. Volarich's opinion was that the employee's injury to his back was medically causally related to the accident of April 13, 2006. He rated the employee's permanent partial disability to his back as 22 ½% of the body as a whole. However, he testified that he could not say what portion of his 22 ½% rating was due to the pre-existing condition. Dr. Volarich gave a rating of 45% permanent disability to the employee's neck.

...

The Court believes that the employee injured his back in the April 13, 2006 accident and believes that he incurred some permanent disability to his back as a result of that accident. However, the Court is unable to order that the employer-insurer pay any permanent disability compensation for the employee's back as the employee was not able to provide any expert

¹ Statutory references are to the Revised Statutes of Missouri 2005, unless otherwise indicated.

Employee: Lindell L. Moll

- 2 -

evidence separating the disability from the employee's preexisting back conditions from the disability that resulted from the April 13, 2006 accident.

...

The employee has the burden to prove the nature and extent of disability attributable to each injury. The Court finds that the medical opinion of Dr. Volarich is not sufficient for the employee to meet his burden of proof on his claim for permanent partial disability for the low back. Based on a review of the evidence and case law, the Court finds that the employee has failed to meet his burden of proof as to what percentage of permanent partial disability he sustained for the injury to his low back as a result of the compensable work related accident of April 13, 2006. The employee is not awarded any permanent partial disability benefits for any disability sustained to his back.

We disagree with the administrative law judge's analysis and conclusions regarding employee's lumbar conditions.

Dr. Volarich testified that employee's April 13, 2006, accident was the prevailing factor in causing employee's disc bulges at L4-5 and L5-S1 and employee's resulting lumbar syndrome. Dr. Volarich considered the following factors when reaching this conclusion: employee had no low back symptoms before the April 2006 work accident; the October 2, 2006, MRI of employee's lumbar spine revealed well-maintained disc spaces and minimal degenerative disc disease; the healthy presentation of the discs suggested no degenerative indication for lumbar disc bulging.

Contrary to the administrative law judge's finding, Dr. Volarich apportioned permanent partial disability between employee's preexisting lumbar conditions and his work-related lumbar condition. Dr. Volarich testified that he would assign no permanent disability to employee's preexisting lumbar conditions because employee had no symptoms before the work injury. In other words, Dr. Volarich assigned 0% disability to employee's preexisting lumbar conditions and 22.5% permanent partial disability of the body as a whole to employee's work-related lumbar condition. We find credible Dr. Volarich's opinions regarding employee's lumbar conditions. We find employee sustained a 22.5% permanent partial disability of the body as a whole referable to his lumbar spine as a result of the April 13, 2006, work accident.

We also disagree with the administrative law judge's conclusion that employee is not entitled to an award of future medical care. In order to prove he is entitled to an award of future medical care, employee had the burden of proving there exists a reasonable probability future medical treatment is needed.² Dr. Volarich testified that there was a reasonable probability that employee will need future medical treatment, particularly as relates to his cervical fusion. We find credible this opinion of Dr. Volarich. Employee is entitled to an award of such future medical care as is reasonably necessary to cure and relieve employee of the effects of his injury.

² *Concepcion v. Lear Corp.*, 173 S.W.3d 368, 372 (Mo. App. 2005).

Employee: Lindell L. Moll

- 3 -

Award

We modify the award of the administrative law judge. In addition to the amounts awarded by the administrative law judge, we award additional compensation as follows:

We direct employer/insurer to pay to employee \$32,857.20 for permanent partial disability benefits ($\$365.08 \times 90 = \$32,857.20$) on account of employee's compensable lumbar condition.

We direct employer/insurer to provide to employee such future medical care as may be reasonably required to cure and relieve employee of the effects of his injuries or disabilities.

In all other respects, we affirm the award of the administrative law judge.

We further approve and affirm 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.

The award and decision of Administrative Law Judge Gary L. Robbins, issued April 20, 2010, is attached and incorporated by this reference except to the extent modified herein.

Given at Jefferson City, State of Missouri, this 17th day of March 2011.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

ISSUED BY DIVISION OF WORKERS' COMPENSATION

FINAL AWARD

Employee: Lindell L. Moll

Injury No. 06-057515

Dependents: N/A

Employer: Martin Marietta Materials Incorporated

Additional Party: Second Injury Fund

Insurer: Ace American Insurance Company

Hearing Date: February 8, 2010

Checked by: GLR/rf

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? April 13, 2006.
5. State location where accident occurred or occupational disease contracted: Perry 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: The employee was driving a truck when he hit a culvert/ditch and injured his neck and back.

12. Did accident or occupational disease cause death? No.
13. Parts of body injured by accident or occupational disease: Neck, back and body as a whole.
14. Nature and extent of any permanent disability: See Award.
15. Compensation paid to date for temporary total disability: \$6,939.89.
16. Value necessary medical aid paid to date by employer-insurer: \$56,138.99.
17. Value necessary medical aid not furnished by employer-insurer: \$0.
18. Employee's average weekly wage: \$783.53.
19. Weekly compensation rate: \$522.35 per week for temporary total disability and \$365.08 per week for permanent partial disability.
20. Method wages computation: By agreement.
21. Amount of compensation payable: See Award.
22. Second Injury Fund liability: See Award.
23. Future requirements awarded: None.

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 8, 2010, Lindell L. Moll, the employee, appeared in person and by his attorney, Joseph P. Rice, for a hearing for a final award. The employer-insurer was represented at the hearing by its attorney, John D. Dietrick. Assistant Attorney General Clifford Verhines represented the Second Injury Fund. The Court took judicial notice of all of the records contained within the files of the Division of Workers' Compensation. 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 statement of the findings of fact and rulings of law, are set forth below as follows:

UNDISPUTED FACTS

1. The employer was operating under and subject to the provisions of the Missouri Workers' Compensation Act, and liability was fully insured by Ace American Insurance Company.
2. On or about the date of the alleged accident or occupational disease the employee was an employee of Martin Marietta Materials Incorporated and was working under the Workers' Compensation Act.
3. On or about April 13, 2006 the employee sustained an accident or occupational disease arising 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 \$783.53. The parties stipulated that the employee's rate for temporary total disability is \$522.35 per week and his rate for permanent partial disability is \$365.08 per week.
7. The employer-insurer paid \$56,138.99 in medical aid.
8. The employer-insurer paid \$6,939.89 in temporary disability benefits.
9. The employee has no claim for any past medical bills.
10. The employee has no additional claim for temporary disability benefits.

ISSUES

1. Medical Causation.
2. Mileage.
3. Future Medical Care.
4. Permanent Partial Disability.
5. Liability of the Second Injury Fund for Permanent Partial Disability.

EXHIBITS

The following exhibits were offered and admitted into evidence without objection:

Employee's Exhibits

- A. Medical records from Heartland Plastics (David M. Deisher, M.D.).
- B. Medical records from Convenient Healthcare.

- C. Records from Mid America Rehab.
- D. Medical records from Brain & Neurospine Clinic (Scott R. Gibbs, M.D.).
- E. Medical records from Southeast Missouri Hospital.
- F. Medical records from Orthopedic Specialists (Michael C. Chabot, D.O.).
- G. No Exhibit.
- H. Deposition of David T. Volarich, D.O.
- H1. Report of David T. Volarich, D.O.
- H2. Letter of David T. Volarich, D.O.
- H3. Curriculum Vitae of David T. Volarich, D.O.
- I. No exhibit.
- J. Mileage expenses.
- K. No exhibit.
- L. Demand letter.

Employer-Insurer's Exhibits

- 1. Deposition of Michael C. Chabot, D.O.

Second Injury Fund Exhibits

None.

STATEMENT OF THE FINDINGS OF FACT AND RULINGS OF LAW:

STATEMENT OF THE FINDINGS OF FACT-

Mr. Moll, the employee was the only person to personally testify at trial. All other evidence was presented in the form of medical records, written reports, or by deposition testimony. The employer-insurer did not call any live witnesses and presented one exhibit which was the deposition testimony of Michael C. Chabot, M.D. The Second Injury Fund did not call any live witnesses and did not present any documentary evidence.

Testimony of Employee

Mr. Moll, the employee testified that he was born on February 25, 1957. He completed the 11th grade at Perryville High School but did not graduate. He later obtained a GED. He currently resides in Perryville, Missouri. He testified that he had no health problems when he left high school.

After he left high school, Mr. Moll began working for different individuals performing general labor. He had an accident while he was working for Dale Brown. He testified that as he was getting off a tractor, the strap in his boot got caught in the power take off and he was pulled off the tractor. When he was pulled off the tractor he fell injuring his jaw and breaking his left arm. In addition, he indicated that his left little finger and left thumb had to be reattached as they were hanging. He indicated that he fully recovered from the jaw injury and he has no problems from that. On the other hand he testified that his left arm and hand have given him problems ever since the accident. He indicated that his left thumb and little finger continued to give him

problems and his hand would cramp up at times. He stated that if he used his hand too much it draws up into a claw like position. However, he testified that the main injury he sustained at the time of that fall was an injury to his left upper bicep. He described his left bicep muscle as no longer being there. He noted pain and a lack of strength in his left arm especially in a curl position. He testified that he cannot lift very much in a curl position estimating that he could only lift 10 to 15 pounds. When his hand goes into a claw position, Mr. Moll indicated that he would have to rest it for some time to get it to straighten out. The Court examined the arm and noted substantial wasting below the normal bicep to the elbow and a scar about 10 inches long running downward on the inner side of the arm. Mr. Moll testified that due to this injury he has lost about one third of the strength in his left arm. After this accident, Mr. Moll returned to work driving a tractor and hay chopper and performing general labor. However, he testified that he had to adjust his work because of the left arm. He indicated that he uses his left arm mostly to stabilize loads and does not actually do the lifting with the left arm. He gave some examples of his problem indicating that when he was a laborer, he generally worked performing clean up duties as opposed to regular construction. When he worked at Gilster Mary Lee he stacked boxes, but indicated that the lifting was done with the right arm and the left hand was used to steady the load.

Mr. Moll went to work for Martin Marietta in 1993. While in their employ he developed bilateral carpal tunnel syndrome and had surgery. After surgery, he continued to work for Martin Marietta driving a haul truck, welding and also performing maintenance-type of work.

On April 13, 2006, the employee sustained an accident that is the subject of this case. Martin Marietta is a quarry operation producing "aggregate". At that time, Mr. Moll's main job was to drive a 50 ton haul truck which was used to transport the rock in the quarry.

He indicated that while he was driving an empty haul truck, he was coming up a hill and hit a ditch/trench. He testified that the impact caused his head to hit the ceiling of the truck and that when he came down the seat bottomed out jamming everything in his back. When this happened he testified that he felt pain in his lower back across the beltline and tingling into both legs to his toes. He reported the accident to his supervisor and reported how he was doing. Mr. Moll continued to work that day but woke up several days later with a stiff neck. From that point on he had trouble turning his head to the right and pain radiated into his right arm. He also testified that he had no accidents involving his back or neck prior to this event

The employee advised his employer of his problems and he was sent for medical treatment. In summary, medical care began with conservative treatment and eventually resulted in neck fusion surgery. After conservative care failed, Mr. Moll was eventually scheduled for an MRI of the neck and then saw Dr. Gibbs, a neurosurgeon in Cape Girardeau. He underwent an EMG and nerve conduction test for his neck and had an MRI done for the low back. Treatment was then transferred to Dr. Chabot who ultimately performed the employee's neck surgery. After the surgery, he noted that his pain level was a lot better but he still had some stiffness and soreness in his neck. He stated that if he turns his head to the right he gets pain into his right arm. He also noted that he has difficulty with looking overhead. Mr. Moll returned to work for Martin Marietta on April 11, 2007. He noted that he now runs a loader at work and runs the haul truck

on a much less frequent basis than he did prior to the injury. Mr. Moll described the loader as an easier piece of equipment to drive with less jarring and bumping.

As of the trial date, the employee testified that he takes Aleve to relieve his symptoms in his neck. At the hearing he stated that his back was not bothering him right then, but when he has problems he has pain across the belt line that radiates into his legs. He stated that he sits to relieve the pain and also lies down at times to relieve his pain.

The employee testified that prior to the injury he was an active hunter and fisherman. He went deer hunting in November of 2006 and that he also caught a 91 pound catfish shortly after his injury. In November of 2006, he did tag a deer but his son dragged the deer from the woods. He continues to hunt and fish now but takes a lawn chair with him to sit on when he fishes. He also uses the lawn chair while deer hunting. When he has taken a deer by gun in the last couple of years his son has hauled the deer out of the woods for him.

Mr. Moll testified that he is comfortable with lifting 50 pounds or so with no problems. He described his toes as going numb when he is standing or lying in bed but this does not happen every day.

Mr. Moll agreed that Dr. Chabot released him to return to his regular work duties in April of 2007 and that he released him from treatment on May 7, 2007. He has not seen any other doctors for treatment to his neck or low back since being released by Dr. Chabot in May of 2007. He does not take any prescription medications for his neck or back at this time. He has continued to work for Martin Marietta doing essentially the same job duties except that he now drives the loader as opposed to the haul truck more frequently than prior to the injury. He testified that the loader has an air cushioned seat that makes its operation much better. Even with this change he testified that his back is worse now than when he first returned to work, indicating that if he twists or bends he has problems and that pain runs into his legs more quickly. He also testified that he has numbness in both hands that was not there prior to the neck surgery. He estimated that he lost 10-15 % of the strength in his hands that he had prior to the carpal tunnel surgery. He indicated that he has numbness and tingling in his legs that comes and goes for no reason.

Mr. Moll testified that he still performs maintenance and welding as part of his job duties. He stated that he has worked continuously since he was released to return to work and has not missed any time from work because of his back or neck since the neck surgery. He indicated that he has not had any complaints about his work from his employer because of his back or neck and has not been disciplined by his employer for poor work performance since returning from the surgery.

At trial, Mr. Moll testified that his neck pain is overall a lot better. He indicated that if he turns his head to the right he has neck and right arm pain, however turning to the left causes no problems. He stated that looking up causes him problems. Due to these types of problems, Mr. Mott refused a crane operator position when he returned to work. He indicated he did not want to kill anyone. He indicated that his back was not hurting at the time of the trial. However, when it does hurt he stated that he had to sit down or lay down to get relief and sometimes that does

not help. Mr. Moll testified that he has not complained about his problems at work for fear of being fired. Overall, he indicated that there are a lot of differences in his life than there were before his accident.

Medical Records

The employee was first seen at Convenient Healthcare on May 24, 2006. He reported that he drove a truck into a trench and complained that he jarred his back and was presently experiencing pain in his neck, low back and right arm. The assessment at that time was traumatic injury cervical and an MRI of the cervical spine was recommended. The MRI was done on May 25, 2006 at Perry County Memorial Hospital. The MRI of the cervical spine revealed a small right-sided C5-6 herniated disc without foraminal encroachment. He returned to Convenient Healthcare after the MRI was performed and the assessment at that point was a herniated disc. He was given a Medrol Dose Pack as well as Flexeril and Ultram.

On June 22, 2006 the employee was seen at Convenient Healthcare and described pain down his legs, neck and arm pain, and feet tingling. It was noted that the pain in his legs comes and goes. It was noted that physical therapy that was given at Mid America Rehab helped until he got home. He was seen on a couple more occasions and then was sent to the Brain and NeuroSpine Clinic of Missouri, LLC, where he saw Scott R. Gibbs, M.D.

Scott R. Gibbs, M.D.

Dr. Gibbs first saw the employee on July 20, 2006. Dr. Gibbs indicated that the employee had undergone 3 weeks of physical therapy which was equivocal as far as any improvement. He reviewed the prior MRI of the cervical spine and diagnosed the employee with a neck strain with bilateral arm paresthesia in non-dermatomal patterns as well as lumbago with bilateral non-dermatomal patterns of pain and paresthesia in the lower extremities. He recommended an MRI of the lumbar spine as well as EMG studies of the upper and lower extremities. He returned Mr. Moll back to work with a 50 pound lifting restriction and no repetitive bending, stooping or twisting.

Mr. Moll returned to see Dr. Gibbs on August 22, 2006. The doctor's notes indicate that care for the employee's back had not been authorized. He noted that another MRI of the neck had been done and that there were no changes since the prior MRI on May 25, 2006. It was noted at that point that he continued to work and was successfully performing his duties, but that he had pain that fluctuated. Dr. Gibbs' impression at that point was cervical strain with bilateral arm paresthesia in a non-dermatomal pattern as well as lumbago with bilateral non-dermatomal patterns of paresthesia in the lower extremities. He recommended additional physical therapy as well as an EMG test.

Dr. Gibbs saw the employee again on October 5, 2006. Again, the doctor noted that an evaluation of the back or lower extremity had not been authorized. However, the employee had undergone an MRI of the lumbar spine on October 2, 2006. The MRI was noted to have revealed congenital spinal stenosis due to congenitally short pedicles. It also revealed facet arthropathy and mild narrowing of the central canal at L4-5 and a broad-based disc bulge and moderate

narrowing to the lateral recess and neural foramina. The doctor's diagnostic impression at that time was neck pain and bilateral upper extremity pain following a C6 dermatomal pattern. He noted no frank myelopathy or radiculopathy and he suspected that this was due to degenerative disc and foraminal stenosis at C5-6. With respect to the lumbar spine he noted that there was no indication for any neurosurgical intervention. He believed that Mr. Moll may have some disc bulges superimposed on his congenital stenosis with no frank radiculopathy. Dr. Gibbs recommended that the employee undergo cervical fusion surgery.

Michael C. Chabot, D.O.

The employee then came under the care of Dr. Chabot. He was initially evaluated by Dr. Chabot on November 13, 2006. At that time, Dr. Chabot noted that the employee presented with complaints across the back of his neck radiating into the bilateral shoulders with pain radiating into the right arm to the right elbow with paresthesia involving the right hand. He complained of symptoms radiating into the proximal arm only and that he experienced numbness and tingling involving both arms. With respect to his low back, he complained of low back pain worse on the left than the right with numbness and paresthesia involving the bilateral legs. Dr. Chabot diagnosed the employee with a cervical herniated nucleus pulposus, cervical spinal stenosis, cervical radiculopathy, back pain and lumbar spinal stenosis. He recommended additional medical treatment including steroid injections to the cervical spine and surgery if the conservative treatment failed.

By December 4, 2006, Dr. Chabot noted that the employee was much better with treatment that included epidural steroid injections, medications and physical therapy. It was noted that the wide majority of his neck and back symptoms had resolved. Dr. Chabot noted that Mr. Moll should continue current medications and home exercises and return to regular work duties.

The employee's condition worsened. As a result, Dr. Chabot performed surgery to the employee's neck on January 8, 2007. The procedure performed at that time included an anterior cervical discectomy with spondylectomies at C5-6 and C6-7 and anterior cervical fusion at C5-6 and C6-7 and insertion of interbody implants consisting of 11 millimeter allograft implant at C6-7 and 9 millimeter allograft implant at C5-6 with anterior cervical plating at C5 to C7. The post operative diagnosis included cervical herniated nucleus pulposus, cervical radiculopathy and cervical disc degeneration.

During several follow up visits, Dr. Chabot noted that Mr. Moll was doing well. As of April 4, 2007 Dr. Chabot recommended that he return to his regular work duties. Dr. Chabot last treated the employee on May 7, 2007. At that time he released him from treatment indicating he could work his regular duties and had reached maximum medical improvement. He noted that the range of motion of the cervical spine was normal and his upper extremity neurologic exam was grossly normal. The employee's only complaint was occasional stiffness in the back of the neck.

In response to a request made by the insurance company, Dr. Chabot produced a report dated May 24, 2007 indicating that the employee had a permanent partial disability of 8% of the person as a whole in relationship to his neck

David T. Volarich, D.O.

On July 28, 2008 the employee was seen by Dr. Volarich at the request of his attorney. Dr. Volarich performed an IME but did not provide any medical treatment to the employee. He took a history from the employee, reviewed medical records, performed a physical evaluation and reported his findings.

He opined that prior to April 13, 2006 the employee had three prior injuries:

1. Left arm twisting/crush injury including fracture of the humerus and constriction injury to the distal bicep and tricep resulting in severe atrophy, weakness and deformity. Dr. Volarich reported that the atrophy of the employee's right arm was severe.
2. Jaw fracture that was asymptomatic.
3. Bilateral CTS syndrome with surgery.

He testified that both the right arm disability and the disabilities from the carpal tunnel surgeries were a hindrance or obstacle to the employee's employment. Dr. Volarich gave a 40% permanent partial disability rating for the right arm, and a 20% permanent partial disability rating for both wrists.

Dr. Volarich also provided a diagnosis regarding the employee's April 13, 2006 injuries:

1. Herniated discs at C5-6 and C6-7 causing upper extremity radicular symptoms worse on the right, status post anterior cervical discectomy with fusion and instrumentation at both levels.
2. Lumbar syndrome secondary to disc bulging at L4-5 and L5-S1 without radiculopathy.

Dr. Volarich further testified that the accident of April 13, 2006 was the substantial contributing factor as well as the prevailing or primary factor causing the disc herniations at C5-6 and C6-7 that required anterior cervical discectomy with fusion and instrumentation as well as causing the disc bulging on the low back that required conservative care.

Dr. Volarich believed that the employee had reached maximum medical improvement and provided the employee with a permanent partial disability rating of 45% of the body as a whole at the cervical spine and 22.5% of the body as a whole at the lumbar spine. He noted that based on his examination, additional surgery was not indicated. He also indicated that the injuries synergistically combine to create a disability greater than their simple sum requiring a loading factor.

Dr. Volarich was questioned about the employee's back condition. He agreed that according to the lumbar MRI there were pre-existing degenerative changes in the low back mainly at L4-5 and L5-S1. He also testified that he thought these underlying back conditions were aggravated by the April 13, 2006 injury as the employee was asymptomatic before then. He testified that the bulges are a direct result of the injury and indicated that these discs can be a source of pain causing the need for care. He further testified that his opinion that the accident caused the bulges was based on the employee's statement that he had no prior problems along with the radiologists report. He agreed that there is no way to tell how long a disc bulge has been present.

Dr. Volarich was also questioned about the employee's need for future medical care. He indicated that the range of treatment that might be necessary to Mr. Moll in the future by virtue of having a fusion performed ranged from nothing to the other end of the spectrum where the hardware would fail or something would become infected and it would have to be removed and replaced. He noted however, what he most likely will see is flare ups of pain. He agreed that the employee was not taking any prescribed medications or over the counter medication regarding his back and neck problems. He also testified that it is more likely than not that there won't be any problems with the hardware and that if the employee's condition remains as when he saw him then he would not need any meds in the future.

Dr. Volarich also indicated that he could not indicate what portion of his ratings, with regard to the cervical and lumbar spine, were directly attributable to subjective complaints as opposed to objective findings but admitted that at least some portion of his ratings were attributable to his subjective complaints. Dr. Volarich testified that he could not say what portion of his 22 ½% rating was due to the preexisting condition

Michael C. Chabot, D.O.

Mr. Moll was re-evaluated by Dr. Chabot on November 10, 2008. At that time, Dr. Chabot noted that he had occasional aches and pains involving the cervical spine, but his major complaint involved the low back. Mr. Moll complained of aching pain aggravated with repetitive bending and lifting with occasional radiation into the lower extremities, right worse than the left extending into the right calf. It was noted that symptoms had been aggravated 2 to 3 weeks ago and he had to place himself on bed rest for a couple of days until the symptoms resolved. Dr. Chabot took x-rays and noted that they revealed mild lumbar spondylosis, facet sclerosis involving primarily L3-4, L4-5 and L5-S1. He performed a physical examination which revealed no tenderness to palpation and no muscle spasm. Straight leg raising test was noted to be negative. He diagnosed back pain and mild spinal stenosis. Dr. Chabot noted that in his opinion the employee may have sustained a contusion or strain to the low back at the time of his April 13, 2006 injury but his present complaints were associated with his chronic degenerative changes. He noted that the prevailing factor in his present complaints was degeneration through the lumbar spine and not related to the April 13, 2006 injury. He stated that he reached maximum medical improvement regarding his back complaints shortly after his initial treatment in 2006. He noted that there was no need for further medical treatment with respect to the employee's back complaints and he did not sustain any permanent partial disability associated with the low back injury secondary to the April 13, 2006 work injury. The doctor also indicated that Mr. Moll did not need any work restrictions because of his low back. He again restated his prior rating of 8% of the body as a whole in reference to his neck.

RULINGS OF LAW-

Medical Causation

The employer-insurer maintains that any injury to the employee's lower back is not medically causally related to the accident of April 13, 2006.

The burden is on the employee to prove all material elements of the employee's claim. **Melvies v Morris**, 422 S.W.2d, 335(Mo.App.1968). The employee has the burden of proving that not only the employee sustained an accident that arose out of and in the course of employment, but also that there is a medical causal relationship between the accident and the injuries and the medical treatment for which the employee is seeking compensation. **Griggs v A.B. Chance Company**, 503 S.W.2d 697(Mo.App.1973).

Under Section 287.140 RSMo., the employee is entitled to receive all medical treatment that is reasonably required to cure and relieve him from the effects of the April 13, 2006 accident. The employee bears the burden of proving that his injury was medically causally related to the accident. **Irving v. Missouri State Treasurer**, 35 S.W. 3d 441, 445 (Mo. App. W.D. 2000). The burden of proof is on the claimant to prove not only that an accident occurred and that it resulted in an injury, but also that there is a medical causal relationship between the accident, the injuries, and the medical treatment for which he is seeking compensation. **Dolan v. Bandera's Café and Bar**, 800 S.W. 2d 163 (Mo. App. 1990). The employee has the burden of proving that there is a medical causal relationship between the accident, the injuries and the medical treatment for which compensation is being sought. **Griggs v. A. B. Chance Company**, 503 S.W. 2d 697 (Mo. App. 1973). In order to prove a medical causation relationship between the alleged accident and medical condition, the employee in cases such as this involving any significant medical complexity must offer competent medical testimony to satisfy his burden of proof. **Brundige v. Boehringer Ingelheim**, 812 S.W. 2d 200 (Mo. App. 1991).

There was a certain degree of violence in the employee's accident. He was driving a significant piece of equipment when he hit a trench. The impact was so severe that his head struck the top of the cab and that when he came down and impacted the seat he jammed everything in his back. The employee's testimony was credible and there is nothing to dispute how the accident took place. When you review the medical records you find that the employee began to complain about lower extremity and back problems, as well as his other problems shortly after the accident. The records of Dr. Gibbs document that the employee was complaining of back problems and further document that the employer-insurer was not authorizing any care pertaining to the employee's back. Testing was done that did document some objective findings.

Dr. Chabot began seeing the employee on November 13, 2006. At that time the employee complained of back pain. Dr. Chabot diagnosed back pain and lumbar spinal stenosis. As of November 10, 2008, Dr. Chabot reported that the prevailing factor in the employee's present back complaints were degenerative in nature and are not related to the April 13, 2006 accident. However, Dr. Chabot also testified that the employee may have sustained a contusion or strain to his low back at the time of his April 13, 2006 injury.

Dr. Volarich evaluated the employee on July 2008. As is his custom, he performed a physical examination, took a history and reviewed medical records. He diagnosed a lumbar syndrome secondary to disc bulging at L4-5 and L5-S1. He indicated that the accident of April 13, 2006 was the substantial contributing factor to the employee's disc bulging that caused the need for conservative care. In support of his position, Dr. Volarich testified that the employee was asymptomatic for low back problems prior to the accident.

Based on a consideration of all of the evidence the Court believes that the employee sustained an accident to his lower back on April 13, 2006 that caused a need for conservative medical care. The Court specifically finds that on this issue, Dr. Volarich's opinions are supported by the medical records and the testimony of the employee and they are therefore more credible than the opinions of Dr. Chabot. The Court specifically finds that the employee's injury to his lower back was medically causally related to his accident of April 13, 2006.

Mileage and Costs

Section 287.140 RSMo. requires the employer-insurer to reimburse employees for mileage. The employee cites Section 287.560 RSMo., and demands that the employer-insurer be required to pay \$1,000.00 as costs in this case. The employee states that the basis for the payment of these costs is due to the employer-insurer's actions in not timely responding to the employee's requests for reimbursement of mileage expenses. The basis of the employee's argument under Section 287.560 has to be that the employer-insurer defended this cause without reasonable grounds.

The evidence presented at trial and agreed to by the parties was that the employer-insurer had reimbursed all mileage payments due prior to trial. The parties agreed that \$809.89 was paid to the employee as of February 6, 2010. The employee claims that he should be paid costs and interest since the mileage reimbursement was not done until shortly before the trial date.

This motion is denied. The Court finds that the conditions required to order payment of costs under Section 287.560 have not been met. The employee did not solely prosecute this claim to recover tardy mileage demands. Other issues such as medical causation, future medical care and permanent disability are before the Court. Under the facts of this case, the conduct of the employer-insurer is not so egregious as to warrant the penalty requested by the employee.

However, having ruled against the employee on this point, the Court is sympathetic with the plight of the employee and agrees that the employer-insurer should do a better job of making timely mileage reimbursement payments.

Future Medical Care

The employee is seeking additional medical care for his lower back. The employer-insurer has denied that the employee needs any additional care for his back and argues that if any such care is needed, it is not causally related to the employee's accident of April 13, 2006.

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 the 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).

The employee presented the testimony and opinions of Dr. Volarich in support of his position. When you read the entire rhetoric of what Dr. Volarich said, the bottom line is that it is still speculative as to whether the employee will need future medical care or not. As Dr. Volarich stated “No one has a crystal ball”. In his testimony, Dr. Volarich uses such terms as “could”, “highly unlikely”, “possibility is extremely small”, “if”, “it just depends on what happens”, “can develop a problem in the future”, “we cannot predict”, and others in answering questions about whether or not the employee would need additional medical care.

On the other hand, Dr. Chabot testified that the employee does not need any additional medical care for his neck or back. Given the speculative nature of Dr. Volarich’s testimony, the Court does not find his opinion on the subject of future medical care to be credible. In this instance, Dr. Chabot’s testimony and opinions are found to be more credible than the opinions and testimony of Dr. Volarich.

The Court finds that the employee has not presented sufficient evidence to meet his burden of proof showing that he is in need of future medical care as a result of his April 13, 2006 accident. The employee has not shown by “reasonable probability” that he will need future medical care due to his accident of April 13, 2006. The employee’s claim for future medical care is denied.

Permanent Partial Disability

The Court had previously ruled in favor of the employee on the issue of medical causation regarding his back. Dr. Chabot’s opinion was that any problems with the employee’s back were pre-existing and, therefore, were not medically causally related to his accident. He provided a 0% rating. Dr. Volarich’s opinion was that the employee’s injury to his back was medically causally related to the accident of April 13, 2006. He rated the employee’s permanent partial disability to his back as 22 ½% of the body as a whole. However, he testified that he could not say what portion of his 22 ½% rating was due to the pre-existing condition. Dr. Volarich gave a rating of 45% permanent disability to the employee’s neck.

Based on a consideration of all of the evidence in this case, the Court finds that the employee has a 27 ½% permanent partial disability of his neck as a result of his April 13, 2006 accident. The employer-insurer is ordered to pay the employee \$40,158.80 as permanent partial disability for his neck disability.

The Court believes that the employee injured his back in the April 13, 2006 accident and believes that he incurred some permanent disability to his back as a result of that accident. However, the Court is unable to order that the employer-insurer pay any permanent disability compensation for the employee’s back as the employee was not able to provide any expert evidence separating the disability from the employee’s preexisting back conditions from the disability that resulted from the April 13, 2006 accident.

A claimant must show that a disability resulted and the extent of such disability. Proof of permanent disability requires reasonable certainty. The claimant must produce evidence from which it reasonably may be found that such injury resulted from the causes for which the employer would be liable. See **Griggs v. A. B. Chance**, 503 S.W.2d 697 (Mo App. 1973).

In **Plaster v. Dayco**, 760 S.W.2d 911 (Mo. App. 1988), the employee had pre-existing disability to her back and reinjured her back at work. The employee had a rating of about 60% permanent partial disability for the overall back condition. There was no expert evidence as to what percentage of the 60% preceded the workers' compensation injury. The Court held that it was the employee's burden to offer sufficient expert testimony to prove the extent of the pre-existing disability in order to determine what percentage of permanent partial disability is attributable to the job related injury. Failure to do so bars the employee from recovering permanent partial disability benefits.

In **Bersett v. National Supermarkets, Inc.**, 808 S.W.2d 34 (Mo. App. 1991), the employee had two injuries to his ankle. The only claim filed was on the first injury. The Court held that when there are two events, one compensable and one not compensable, which contribute to the disability, it is the claimants burden to prove the nature and extent of disability attributed to the job related injury. The employee failed to present any evidence to exclude a finding that the non-compensable event did not cause some or all of the employee's disability. There was no evidence to support a finding of a separate percentage of disability.

In **Goleman v. MCI Transporters**, 844 S.W.2d 463 (Mo. App. 1992), the Court held that it was the employee's burden to prove the nature and extent of the disability attributed to the compensable injuries. The employee had two work related injuries to his low back. A doctor rated the employee's permanent partial disability at 50%, but did not differentiate between the two work injuries. The Court held that the employee was not entitled to recover for the second injury where part or all of the disability was the result of the first accident. The Court held that it was the employee's burden to prove the nature and extent of disability attributed to the compensable injury even though both injuries were work related and sustained while employed by the same company where separate claims were pending for each injury.

The employee has the burden to prove the nature and extent of disability attributable to each injury. The Court finds that the medical opinion of Dr. Volarich is not sufficient for the employee to meet his burden of proof on his claim for permanent partial disability for the low back. Based on a review of the evidence and case law, the Court finds that the employee has failed to meet his burden of proof as to what percentage of permanent partial disability he sustained for the injury to his low back as a result of the compensable work related accident of April 13, 2006. The employee is not awarded any permanent partial disability benefits for any disability sustained to his back.

Liability of the Second Injury Fund for Permanent Partial Disability

The evidence shows that the employee had two pre-existing accidents that warrant consideration or Second Injury Fund liability:

1. The accident to the employee’s left arm when he got caught on the power take off.
2. The employee’s pre-existing bilateral carpal tunnel surgery.

Based on a consideration of all of the evidence, the Court finds that the employee has a 20% permanent partial disability to his left arm at the 232 level as a result of the tractor accident. The Court further finds that the employee has a 15% permanent partial disability to his left wrist and a 15% permanent partial disability to his right wrist at the 175 level due to carpal tunnel syndrome. The Court believes that there is synergism between the disabilities. Therefore, the Court further applies a load of 15% as a result of these pre-existing disabilities.

The Court orders that the Second Injury Fund pay to the employee \$11,441.61 due to a combination of his disabilities that resulted from the April 13, 2006 accident in combination with the disabilities that resulted from the accidents prior to April 13, 2006.

ATTORNEY’S FEE

Joseph P. 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.

INTEREST

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

Made by:

Gary L. Robbins
Administrative Law Judge
Division of Workers' Compensation

Date: _____

A true copy: Attest:

Naomi Pearson
Division of Workers' Compensation