

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

Injury No.: 98-019746

Employee: Douglas E. Murray
Employer: Hampton's Trenching, LLC
Insurer: One Beacon Insurance Group
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated April 15, 2009. The award and decision of Administrative Law Judge Robert B. Miner, issued April 15, 2009, 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 17th day of November 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Douglas R. Murray

Injury No.: 98-019746

Employer: Hampton's Trenching, LLC

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: One Beacon Insurance Group

Hearing Date: January 26, 2009

Checked by: RBM

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes.
2. Was the injury or occupational disease compensable under Chapter 287? Yes.
3. Was there an accident or incident of occupational disease under the Law? Yes.
4. Date of accident or onset of occupational disease: February 4, 1998.
5. State location where accident occurred or occupational disease was contracted: Excelsior Springs, Clay County, Missouri.
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes.
7. Did employer receive proper notice? Yes.
8. Did accident or occupational disease arise out of and in the course of the employment? Yes.
9. Was claim for compensation filed within time required by Law? Yes.
10. Was employer insured by above insurer? Yes.
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Employee was pulling on a spade that was stuck in the ground when he injured his back.

12. Did accident or occupational disease cause death? No.
13. Part(s) of body injured by accident or occupational disease: Back and body as a whole.
14. Nature and extent of any permanent disability: 17.5% of the body as a whole.
15. Compensation paid to-date for temporary disability: \$8,536.98, representing 44.71 weeks at the rate of \$190.92 per week.
16. Value necessary medical aid paid to date by employer/insurer? \$15,413.53.
17. Value necessary medical aid not furnished by employer/insurer? None.
18. Employee's average weekly wages: \$465.34.
19. Weekly compensation rate: \$310.23 for temporary total disability and permanent total disability, and \$278.42 for permanent partial disability.
20. Method wages computation: Section 287.250, RSMo.

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses: None.

Temporary total disability: The underpayment of temporary total disability benefits for the period February 4, 1998 through December 10, 1998 in the amount of \$5,201.78.

70 weeks of permanent partial disability from Employer (70 x \$278.42):
\$19,489.40.

No weeks of disfigurement from Employer.

TOTAL FROM EMPLOYER: \$24,691.18.

22. Second Injury Fund liability:

19 weeks of permanent partial disability from Second Injury Fund:
\$5,289.98.

TOTAL FROM SECOND INJURY FUND: \$5,289.98.

23. Future requirements awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Frank D. Eppright.

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Douglas R. Murray

Injury No.: 98-019746

Employer: Hampton's Trenching, LLC

Additional Party: The Treasurer of the State of Missouri as Custodian of the Second Injury Fund

Insurer: One Beacon Insurance Group

Hearing Date: January 26, 2009

Checked by: RBM

PRELIMINARIES

A final hearing was held in this case on Employee's claim against Employer and The Treasurer of the State of Missouri as Custodian of the Second Injury Fund ("The Second Injury Fund") on January 26, 2009 in Gladstone, Missouri. Employee, Douglas R. Murray, ("Claimant") appeared in person and by his attorney, Frank D. Eppright. Employer, Hampton's Trenching, LLC, ("Employer") and Insurer, One Beacon Insurance Group, ("Insurer") appeared by their attorney, Kip A. Kubin. The Second Injury Fund appeared by its attorney, Kimberly R. Fournier. Frank D. Eppright requested an attorney's fee of 25% from all amounts awarded. It was agreed that proposed Findings of Fact and Conclusions of Law would be due on February 20, 2009.

STIPULATIONS

At the time of the hearing, the parties stipulated to the following issues:

1. On or about February 4, 1998, Douglas R. Murray ("Claimant") was an employee of Hampton's Trenching, LLC ("Employer") and was working under the provisions of the Missouri Workers' Compensation Law.
2. On or about February 4, 1998, Employer was an employer operating under the provisions of the Missouri Workers' Compensation Law and was insured by One Beacon Insurance Group ("Insurer").
3. On or about February 4, 1998, Claimant sustained an injury by accident or occupational disease in Excelsior Springs, Clay County, Missouri, arising out of and in the course of his employment.

4. Employer had notice of Claimant's alleged injury.
5. Claimant's Claim for Compensation was filed within the time allowed by law.
6. Employer/Insurer had paid \$8,536.98 in temporary total disability at the rate of \$190.92 per week for the period February 4, 1998 through December 13, 1998.
7. Employer/Insurer had paid \$15,413.53 in medical aid.

ISSUES

The parties agreed that there were disputes on the following issues:

1. Liability of Employer for permanent disability.
2. Liability of the Second Injury Fund for permanent disability.
3. Average weekly wage and compensation rates.
4. Liability of Employer for past temporary total disability benefits.
5. Liability of Employer for past medical aid.
6. Liability of Employer for future medical expenses?

Claimant testified in person. In addition, Claimant offered the following exhibits that were admitted in evidence without objection:

A—Deposition of Dr. P. Brent Koprivica taken January 15, 2008 with Deposition Exhibits 1-4 (#1-68).

B—Deposition of Allan D. Schmidt, PhD taken November 27, 2007 with Deposition Exhibits 1-6 (#1-790).

C—Deposition of Mary Titterington taken December 5, 2007 (#1-43).

D—Deposition of Mary Titterington taken January 22, 2009 (#1-25).

E—Report of Dr. John D. Pro dated December 12, 2001 (#1-4).

F—Addendum Report of Dr. John D. Pro dated January 10, 2002 (#1).

Employer/Insurer offered the following exhibits that were admitted in evidence without objection:

- 1—MRI Report dated February 28, 1998.
- 2—MRI Report dated July 23, 1998.
- 3—Curriculum Vitae of Dr. Roger Jackson.
- 4—Dr. Roger Jackson Medical Note dated October 9, 1998.
- 5—Curriculum Vitae of Dr. Ira Fischman.
- 6—Dr. Fischman's Medical Records—October 14, 1998-May 4, 1999.
- 7—Functional Capacity Evaluation dated December 9, 1998.
- 8—EMG Testing Report dated November 25, 1998.
- 9—Curriculum Vitae of Dr. David Ebelke.
- 10—Dr. Ebelke Medical Note dated August 17, 1999.
- 11—Excelsior Springs Hospital ER Record dated December 30, 2000.
- 12—MRI Report dated July 17, 2003.
- 13—Wage Records on Douglas Murray.

The Second Injury Fund offered SIF Exhibit 1, the deposition of Claimant taken on January 22, 2008 that was admitted in evidence without objection.

Court's Exhibit 1, Medicaid lien in the amount of \$5,028.50, was admitted in evidence without objection.

Findings of Fact.

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the expert medical opinions and depositions, the medical records, the vocational evidence, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I find:

Claimant was born on May 22, 1961 and was 47 years old at the time of the hearing. He is divorced. He lives with a minor daughter and an adult daughter.

Claimant did not finish high school. He dropped out in the 11th grade. He took special education classes. He got mostly F's in school. He said he cannot read or write and his math skills are poor. He has been diagnosed as mentally retarded.

Claimant was working for Employer on April 4, 1998. He had worked for Employer off and on for twenty years. He worked on equipment and put cables and pipes underground. On April 4, 1998 he was putting in a 500 pound telephone cable with a spade. He pulled hard on the spade and felt his back snap. He told his supervisor about the injury and was sent to the company doctor in Liberty.

Claimant saw a doctor at Seaport on February 5, 1998 and was given medication. He went back to Seaport on February 10, 1998 because of pain in his low back, thigh and left knee. He was referred to physical therapy at Liberty Hospital. He had physical therapy six to seven times. It did not help. He returned to Seaport on February 24, 1998 and an MRI was recommended. An MRI was done on February 20, 1998. He had three steroid injections in his back.

Claimant saw Dr. Gall on April 16, 1998 because he was still having pain. He saw Dr. Gall again on July 15, 1998 because of back and left leg pain. He had another MRI in Liberty on July 23, 1998.

Claimant testified he had pain every day in October 1998, but it was not constant. It was extremely severe and disabling. Claimant was sent to Dr. Roger Jackson by Employer/Insurer on October 9, 1998. Dr. Jackson recommended he see a physiatrist. He was seen by Dr. Ira Fishman on October 14, 1998 for persistent aching low back pain and was prescribed Ultram and Naprosyn.

Claimant had an EMG on November 25, 1998. He saw Dr. Fishman on December 10, 1998 and was released by Dr. Fishman at that time. He did not have radiation or paresthesia when he saw Dr. Fishman.

Claimant began to see Dr. Manoch Kuangparichat on his own. He went back to Dr. Fishman on May 4, 1999 and had occasional radiation down both legs.

Claimant testified the insurance company sent him to Dr. David Ebelke on August 17, 1999 for back pain. Dr. Ebelke felt that he would not be a good candidate for surgery. Claimant had unauthorized medical treatment at Truman. Claimant testified that he went to Truman Medical Center on his own.

The insurance company sent Claimant to Dr. Edward Wilson on November 6, 2002. Dr. Wilson recommended the spinal fusion, but Claimant never had that surgery or any surgery. Claimant did not want surgery. He said it was scary.

Claimant stated his current problems are dull achy low back pain that becomes a sharp pain two to three times per week. It lasts a couple of minutes to hours when it is sharp. When the pain is sharp, Claimant tries to relax and rearrange himself. When he has sharp pain it goes down his left leg.

Claimant said he has problems sleeping, and sleeps two hours before waking up. He sleeps seven to eight hours each day. He said he has left leg numbness 50-75% of the time. He said he cannot lift, bend, push or pull without hurting.

Claimant testified that most of his jobs have been physical. He said he could not use a computer. Claimant worked for a time as a supervisor at a ready mix employment, but he did no paperwork. He said he could not do that job now because his back hurts. He also loaded trucks in the past, but said he could not do that now because of his back. He had worked driving a truck, but he was not able to read signs and was taken off the truck and made a yard man. He did not believe he could do that job because of his back. He said he could not do a job if he were required to read and write.

Claimant's daily routine begins when he gets the kids up and off to school. He does laundry. He drives two to three times a week. The farthest he drives is forty-five minutes each way to see his girlfriend in Cameron.

Claimant helped a friend put on a flat roof after the accident. He helped for a couple of days and recalled that he was paid probably \$30.00 to \$40.00. Claimant later testified if he had stated in his deposition that he had earned \$300.00 working on the roof, that was probably correct. He worked on the roof three hours each day. He had problems before and after he worked on the roof.

Claimant also worked for a time when he lived in rent control housing. The \$25.00 to \$40.00 per month rent that he was to pay was waived for his work. He worked at the federally subsidized apartment between two and five years. He changed light bulbs in the complex, painted, did a little maintenance, and watched the property. He has changed the oil in his car and has helped others change oil.

Claimant testified he never returned to work after the accident. He never applied for a job after the accident. Claimant testified he was receiving Social Security Disability.

Claimant acknowledged that Dr. Ebelke did not recommend surgery and released him to work with a restriction of lifting no more than 25 pounds repetitively. He acknowledged that Dr. Ebelke had recommended home exercises. Claimant said he had not continued to do the home exercises.

Claimant testified he went to the emergency room in December 2000 after changing a tire and reported pain down his left leg to his foot. He said he still has a driver's license and it has no restrictions. He takes care of his minor daughter. He does laundry, does dishes, fishes, and deer hunts. He went deer hunting in February 2007 with a friend. They got one deer and both grabbed the deer and dragged it out with ropes. He can drive about one hour without stopping. He can walk between one and one-half miles. He can lift a gallon of milk. He still has pain in his back and down his legs, but not all the time.

Claimant attempted to get a GED, but was not successful in obtaining it.

Claimant said he has had his daughter Rae Ann with him all nine and one-half years she has been alive. He could lift her as an infant until she was about 20 pounds. He could feed her and change her diapers. Claimant smokes a pack of cigarettes a day and has smoked for a long time. He had worked as a supervisor for about a year telling employees what machines they were to work on, and checking their work.

Claimant said that before his 1998 accident, he had no physical problems performing his job. He could hunt, fish, play baseball, play football and help around the house. Before his accident he went fishing two to three times per week. Before the 1998 accident, he worked full time and overtime when work was available. He worked for Employer without assistance with physical aspects of the work. He testified that before the incident, he had no physical problems. Before the incident he was able to bend, lift and stoop. He had no limitations with walking, lifting, bending, stooping or stairs before the 1998 accident. He had no problems sleeping before the accident. Claimant said that before the accident, he had occasional back pain one or two times per year or less. The pain was less than the pain from the accident. It did not limit his job in the past. He did not have similar leg pains in the past.

Claimant said he has had problems with his back and left leg since 1998. He said his pain has caused his leg to go out between twenty and thirty times. One time when that happened, he fell and was hospitalized for six and one-half weeks from a staph infection. He said he had fallen ten to twenty times in the last year because his left leg gave out on him. He testified he has pain on a daily basis. He stated two days a week his pain is so bad he can barely get out of bed. He testified he has to sit down, stand up, and lie down to relieve the pain. He now naps two to three times per week. He said he had chosen not to have surgery because he was frightened and was unsure of what the outcome would be.

Claimant went deer hunting on November 18, 1998. Claimant fishes about once a week during the summer for two hours at a time. He sits in a chair. He goes less now because of back pain.

Claimant testified he would have surgery if it would help his back, but he acknowledged he had declined surgery when it was offered to him.

Claimant's deposition taken on January 22, 2008 was admitted as Second Injury Fund Exhibit 1. Claimant testified in his deposition that he normally takes medications on a daily basis. He takes an anti-inflammatory, a muscle relaxer, and a prescription pain pill. He does not know the name of the pain pill. He has been a smoker all of his life.

He smokes a pack a day. He had been receiving social security disability benefits for about five years.

Claimant testified in his deposition that he had done roofing and rough-in work for four to five years in the past. He had been a machine operator and a concrete truck driver. He had also been a lead man at a plastics company. His duties as lead man were to make sure everybody was working and keeping the machines running and keeping plastic in them. He watched over between four and ten people. He had been a laborer loading trucks. He had operated a forklift. He had worked for Employer off and on for approximately twenty years as a general laborer. His job duties were to lay pipe, cable, and line underground, shovel and assemble pipe, and operate ditch witches, bobcats, back hoes and track hoes.

Claimant testified he did not have any physical restrictions or limitations that kept him from doing his work before February 4, 1998. He was not under any kind of doctor's care at that point. He did not have any help or accommodation from his employer to do his job. He had never had surgery on his back. He sees a family doctor every two or three months for medications mostly. He said he had never seen a psychiatrist or psychologist for depression. He fell about five years ago and injured his right leg. He got a staph infection and was hospitalized. The upper part of his right leg is numb. That does not cause him to fall more often. He does not have any problems walking on that leg at all.

Claimant testified in his deposition that he has a real sharp, deep pain in his back on a daily basis. He said pain medications ease the pain a lot. He stated he also lies down and rests, and walks around to help the pain in his back. He testified he lies down on a daily basis because of back pain. When asked how many times a day he has to lie down, he answered, "A lot."

Claimant testified in his deposition that he can drive about an hour without needing to stop and get out of the car. He can walk about a mile to a mile and a half without needing to stop due to pain. He said he goes fishing every day if the weather lets him. He went hunting a few times in the fall of 2007. He went deer hunting a couple of times and rabbit hunting three or four times. He said he is not able to read at all. He said he worked an hour a week keeping an eye on an apartment complex for two or three years since the 1998 injury. He also spent about half a day working on a roof and earned two or three hundred dollars for that. He could not recall any other jobs he had since 1998. He has not applied for any jobs since 2003. He could not think of any jobs that he can do. In the past when he would have job applications, he would have somebody else help him fill those out.

The Court notes that Claimant did not stand up or appear to the Court to be in pain during the hearing. He did not grimace or request a recess to stretch, stand, or lie down.

Exhibit B includes records of Claimant's treatment with Seaport Family Practice from February 5, 1998 through April 2, 1998. Claimant saw Dr. Suzanne Browning on February 5, 1998 for follow-up of a back injury two days before at work. Left lumbar strain was diagnosed and medications were prescribed.

Claimant was under the care of Dr. Thomas Vinton from February 5, 1998 to March 16, 1998 for left lumbar strain. Dr. Vinton's March 20, 1998 letter noted Claimant had physical therapy and epidural steroid injections. His pain was noted to be persistent and he was off work.

The Liberty Hospital MRI of Claimant's lumbar spine taken February 28, 1998 (Exhibit 1) notes very mild degenerative disc as seen at L4-5. A small bulge was identified at L4-5. Claimant was treated at the clinic for low back pain again on April 10, 1998, February 24, 1998, March 16, 1998, and April 2, 1998. Dr. Vinton noted on April 2, 1998 that he recommended Claimant see a neurosurgeon.

Claimant saw Dr. Clifford Gall on April 16, 1998. Dr. Gall's letterhead states "Neurological Surgery." Dr. Gall noted on April 16, 1998 that on physical examination, Claimant had no mechanical findings and no neurologic findings whatsoever. He noted Claimant's MRI showed a very small disc bulge at L4-5 slightly asymmetric to the left. He noted Claimant's leg pain was not a major or significant complaint. He noted Claimant was doing very well without any physical findings to suggest a lumbar disc herniation or lumbar radiculopathy and did not feel he would be a very good candidate for surgery at that time.

An MRI from Liberty Hospital pertained to Claimant's lumbar spine dated July 23, 1998 noted central and left-sided bulging of the disk at L4-5 with some minimal protrusion into the left neural foramen. No growth spinal stenosis was present.

Dr. Gall noted on September 10, 1998 that Claimant's MRI showed a disc bulge at L4-5. He found no abnormalities on physical examination to further correlate with that. He was suspicious that the disc was causing Claimant's symptoms, but wanted an EMG. He stated, "I suppose that Mr. Murray's left leg pain may well be the result of the back injury he incurred on February 3, 1998."

Dr. Roger Jackson examined Claimant on October 9, 1998. Dr. Jackson's Curriculum Vitae (Exhibit 3) is thirty-one pages long. He is a Diplomate of National Board of Medical Examiners and is certified by the American Board of Orthopedic Surgery. He is licensed to practice medicine in Kansas and Missouri. He is an active

staff surgeon at North Kansas City Hospital. His CV notes numerous awards and honors, U.S. Patents, national and international presentations, publications and peer review journals, chapters in published text books, periodicals and manuals, and abstracts in published transactions and proceedings. Dr. Jackson is very highly qualified.

Dr. Jackson's report pertaining to Claimant dated October 9, 1998 (Exhibit 4) notes Claimant was referred for a second opinion. The history of accident is noted. History of treatment is noted. Dr. Jackson performed an examination of Claimant. He noted Claimant's gait was normal, heel/toe walking was normal, balance was normal, and kyphosis and lordosis was normal. No tenderness was found at palpation in lower back. No muscle spasm was noted. Range of motion low back standing forward flexion was slow and guarded with finger tips. He noted he could detect no focal muscle weakness about the hips, knees, ankles or toes. He noted the July 23, 1998 MRI showed degenerative disc disease at the L4-5 level with associated lateral disc bulge at that level, and that it did not appear that he had a complete disc herniation.

Dr. Jackson's Opinion set forth in his October 9, 1998 report is:

Chronic low back pain, most likely discogenic in nature at the L4-5 level. I **recommend** nonoperative care. I felt that the best approach at this time would be referral to a physiatrist. The patient was given samples of Ultram. No further suggestions or recommendations since there are no surgical indications in my opinion. The patient is being released from my care.

Dr. Ira Fishman's medical report dated October 14, 1998 was admitted as Exhibit 6. Dr. Fishman's Curriculum Vitae, Exhibit 5, notes that he is certified by the American Board of Physical Medicine and Rehabilitation. He is a graduate of the Chicago College of Osteopathic Medicine. His CV notes that from September 1996 to the present he has been in private inpatient and outpatient physiatry practice.

Dr. Fishman saw Claimant on October 14, 1998 for evaluation and treatment of chronic lower back pain. Claimant indicated he had persistent aching lower back pain that was still problematic for him, but had not experienced as frequent or severe radiation down the left leg. Dr. Fishman performed an examination which indicated evidence of a chronic lumbosacral strain. His report stated that his examination did not indicate a full-blown lumbar radiculopathy. He suggested Claimant be enrolled initially in a two week preconditioning program that will emphasize stretching of his lower back and leg muscles and progression to a definitive abdominal strengthening and back strengthening exercise program. He prescribed Ultram and stated Claimant will remain off work while he is receiving those physical therapy treatments.

Dr. Fishman saw Claimant on November 2, 1998. He noted Claimant had made considerable improvement in trunk mobility and motor strength and had an overall reduction in lower back discomfort. It was felt he was functioning in the medium/heavy physical demand category, but not yet in his regular job requirements which required him to function in the heavy physical demand category. He stated Claimant was ready to progress to a work conditioning program and work hardening and work conditioning.

Dr. Fishman saw Claimant on November 19, 1998. He felt Claimant had reached a plateau in his physical therapy progress and was still functioning in the medium/heavy physical demand category. Claimant had stated he was experiencing increased left lower lumbar pain with occasional radiation down the left leg. Dr. Fishman performed an examination that still indicated evidence of a residual lumbosacral strain. He noted Claimant's symptoms were suggestive of a lumbar radiculitis. He recommended that Claimant be discharged from his work hardening and work conditioning program. He recommended an EMG and pending the results, a one day functional capacity evaluation.

Claimant returned to Dr. Fishman on December 10, 1998. The EMG did not reveal evidence of a lumbar radiculopathy. Claimant completed a functional capacity evaluation on December 7, 1998. It was felt that Claimant's current functional capabilities allowed him to return to his regular job duties as a laborer without restrictions. Claimant indicated he still was experiencing lower back pain, more of an aching quality, but did not experience any pain radiation down either lower extremity nor any numbness or paresthesia. Dr. Fishman performed a physical examination that indicated evidence of a residual chronic lumbosacral strain. His examination did not indicate evidence of a lumbar radiculitis or lumbar radiculopathy.

It was Dr. Fishman's opinion on December 10, 1998 that based within all reasonable degree of medical certainty, Claimant had reached maximum medical improvement and was not in need of further physical therapy treatments or epidural steroid injections. He noted Claimant had been determined not to require surgery for his lower back. He discharged Claimant from his care at that time. He indicated that Claimant needed to continue with his home exercises and stretching at work. He felt Claimant had incurred a permanent partial impairment that was related to his unresolved lumbar sacral strain. He assigned Claimant a 5% whole person impairment rating. His report stated that the functional capacity evaluation revealed Claimant to have a capacity return to his regular job duties without restrictions. Dr. Fishman released Claimant to his regular job duties.

Exhibit 7 is the functional capacity evaluation (FCE) pertaining to Claimant dated December 9, 1998. The FCE notes that Claimant's current capabilities match job requirements of the laborer job at the heavy level. The primary recommendation was that Claimant return to work as a laborer without restriction.

Claimant saw Dr. Fishman again on May 4, 1999. Claimant stated that his lower back pain had never resolved and he now experienced a hard aching pain that was more constant with occasional radiation down both legs. Dr. Fishman performed an examination which he said was essentially unchanged from his prior examination on December 10, 1998 other than for the fact that Claimant has lower back pain upon testing flexion versus extension. Dr. Fishman noted there were inconsistencies in his examination on May 4, 1999 including pain produced with straight leg raising on the left in the seated position but not in the supine position that are not characteristic of a lumbar radiculopathy. He stated Claimant's physical examination on May 4, 1999 still revealed evidence of his unresolved lumbosacral strain without evidence of a lumbar radiculitis or lumbar radiculopathy. He had nothing further to offer Claimant in terms of treatment for his lower back. He suggested that arrangements be made for Claimant to be evaluated by a spine surgeon.

Dr. David Ebelke performed an independent medical examination of Claimant. His August 17, 1999 report was admitted as Exhibit 10. Dr. Ebelke's CV (Exhibit 9) notes that he is a Diplomate of the American Board of Orthopedic Surgery. His practice is limited to disorders of the spine. His CV notes numerous professional education courses, scientific papers/presentations, and other professional meetings attended.

Dr. Ebelke noted Claimant's complaints, history of accident and treatment. He reviewed medical records of Dr. Jackson, Dr. Gall, and the physical therapy (Rehability) note dated October 30, 1998. Dr. Ebelke performed a physical examination of Claimant. He reviewed x-rays and noted results of MRIs.

Dr. Ebelke stated that he believed Claimant sustained a lumbar strain in his work injury, and that may have been an annular strain, superimposed on a degenerative disk at L4-5. He stated that Claimant had not yet herniated. He did not believe Claimant would benefit from any type of decompressive procedures such as discectomy. He noted that Claimant was "not a particularly good candidate for a fusion operation, due to his smoking history, lung problems, and some possible symptom magnification signs perceived on exam, however if he felt the pain were severe enough to warrant the substantial risks of a possible 1 level fusion, then I would recommend further work-up with bone scan/SPECT images of the lumbar spine." Dr. Ebelke's report noted the chances of helping Claimant were probably in the range of 50% to perhaps 60% at best, the amount of pain improvement is unpredictable, there is a risk that the operation could make him worse than he is presently, and the complication of such an operation is from 10-20%.

Dr. Ebelke doubted a fusion would get Claimant back to his old occupation. He further stated, "Presently, I think he's capable of working in a medium work category,

which allows maximum occasional lifting of 50 lbs. and repetitive lifting of 25 lbs.” Dr. Ebelke had not reviewed the December 9, 1998 FCE. His letter stated a physical therapy note dated October 10, 1998 indicated Claimant was capable of performing at the medium/heavy physical demand category. The report stated that if a more recent functional capacity evaluation had been done, that might also be a valid indicator of what Claimant is actually physically capable of presently.

Dr. Ebelke put Claimant’s impairment rating at 5%. He stated that Claimant is at maximum medical improvement for what non-operative management has to offer and has been for some time.

Exhibit B also included records of Truman Medical Center that document Claimant’s treatment in 1999 and 2000 for chronic back pain. A note dated November 11, 1999 indicated that back pain and left leg pain had increased since painting.

Records of Excelsior Springs Medical Center include a letter dated February 11, 2000 from Misty Jones, LPTA, which notes Claimant had been seen in physical therapy for a total of fourteen visits. Claimant rated his pain eight over ten at the last treatment session, but at a previous treatment session, he rated pain at two over ten. A TENS device had been ordered and given to Claimant, but he returned it, advising that it made his pain increase.

Exhibit 11 is an Emergency Department Physician’s Record of Excelsior Springs Medical Center dated December 30, 2000. It notes Claimant complained of back pain for past two weeks in low back and worsened that day helping change a tire. Pain was noted to radiate down left leg into the ankle where it was noted it usually hurts. Diagnosis was low back/acute on chronic.

Exhibit B also includes records of North Kansas City Hospital pertaining to Claimant’s admission on May 13, 2001 and discharge on May 22, 2001. An Emergency Room Note dated May 13, 2001 stated that Claimant fell three days before and suffered contusion and abrasion to the area of the right knee. He was admitted for cellulitis of the right leg. The History and Physical noted that Claimant had a spasm and fell on May 10 causing him to fall onto concrete, landing on his right knee. The assessment was cellulitis of the right knee. The Discharge Summary dated May 22, 2001 noted discharge diagnoses of severe cellulitis left leg, necrotizing fasciitis, history of chronic back pain, mild renal insufficiency noted during the hospital course. He was discharged in stable condition to Liberty Hospital to follow up with Dr. Craig Newland.

The records note that Claimant had fasciectomy right thigh on May 18, 2001 and May 20, 2001, and debridements of the right thigh, on May 20, 2001, May 23, 2001, May 25, 2001, May 27, 2001, June 1, 2001 and June 5, 2001.

The Liberty Hospital History and Physical Examination dated May 22, 2001 noted Admitting Diagnosis of extensive cellulitis and fasciitis involving the right leg, status post-fasciotomy, chronic lumbar pain, and allergic rhinitis. The Liberty Hospital Discharge Summary dated June 7, 2001 documents Claimant's hospitalization there from May 22, 2001 through June 7, 2001 for multiple surgeries on the right leg for fasciotomy done on May 18, 2001.

Claimant saw Dr. Craig Newland on July 12, 2001. Claimant was status post-multiple serial debridements and serial delay primary closure. Claimant saw Dr. Newland on August 30, 2001. Dr. Newland noted Claimant had narcotizing fasciitis. He noted the wounds had progressive healed and looked good. Range of motion was full. Claimant had gained strength and confidence. He noted a few little patchy areas of diminished sensation were certainly fully expected. Claimant was doing well. He was to follow up on an as needed basis.

Claimant saw Dr. Craig Newland on August 30, 2001. Dr. Newland noted narcotizing fasciitis. He noted the wounds had progressive healed and looked good. Range of motion was full. Claimant had gained strength and confidence. He noted a few little patchy areas of diminished sensation were certainly fully expected. Claimant was doing well. He was to follow up on an as needed basis. Dr. Newland saw Claimant on July 12, 2001. Claimant was status post-multiple serial debridements.

Exhibit B includes Dr. Chris Wilson's November 6, 2002 report. The report describes Claimant's medical treatment, the physical examination he performed, and his review of diagnostic studies. His report states that Claimant was unlikely to benefit from additional non-surgical modalities of care. He states that Claimant will require lumbar decompression and posterior spinal fusion at L4-5 with transpedicular instrumentation. Dr. Wilson notes Claimant is a smoker and iliac crest grafting should accompany the procedure. He notes that if Claimant desired to proceed with surgical intervention, he would require approximately six months of recumbency and then would be at maximum medical improvement and would receive, based on the American Medical Association's Guidelines, 4th Edition, a 21% permanent partial impairment rating with appropriate physical limitations then given. He stated that Claimant's MRI study dated July 23, 1998 revealed no obvious pathology which would contribute to weakness about the lower extremities and produce any pattern of falls. Dr. Wilson stated that he would not relate Claimant's knee abrasion, cellulitis, or the recurrence of necrotizing fasciitis and his subsequent treatment to his work injury occurring three years prior to that condition.

An Addendum report of Dr. Wilson date February 24, 2003 stated in part, "I would relate the onset of lower extremity pain and nerve root irritation to Mr. Murray's injury described as occurring in 1998."

An MRI report dated July 17, 2003 pertaining to Claimant's lumbar spine (Exhibit 12) contains the Impression: 1. Left paracentral herniated disk L5-S1 with thecal sac compression; 2. Diffused bulging annulus L4-5 with left lateral neural foraminal encroachment.

Exhibit B includes a report from Dr. Chris E. Wilson dated July 21, 2003 (page 600). Claimant complained of an increase in left lower extremity pain. Dr. Wilson performed a physical examination and noted that straight leg raise produced no severe pain. Gait was nonantalgic. There was no sciatic list or evidence of lumbar spasm. An updated lumbar MRI scan dated June 17, 2003 was reviewed. Dr. Wilson noted that the previously noted disk bulge at L4-5 had recessed, and there was facet hypertrophy with minimal lateral recess changes. A new onset left eccentric disk bulge was noted at L5-S1. Dr. Wilson stated that he would not relate the disk bulge at L5-S1 to Claimant's described work injury occurring on February 4, 1998. He stated that the changes at L5-S1 following the MRI scan of July 23, 1998 represented pathology not attributable to any specific work activities. Dr. Wilson's report further stated:

With regards to his changes at L4-5, he has reached maximum medical improvement. He desires no surgical intervention and I would concur. He may require intermittent use of muscle relaxants such as Flexeril and intermittent use of anti-inflammatory such as Celebrex. The duration of use should be expected to include a six month span.

The patient's revised permanent partial impairment would be 7% based on AMA Guidelines, 4th Edition. Permanent limitations should include the avoidance of repetitive loads of greater than 25 pounds and repetitive bending or twisting activities. He is to be seen back on a p.r.n. basis.

Dr. P. Brent Koprivica performed an independent medical evaluation of Claimant on February 13, 2001 at the request of Claimant's attorney's office. Dr. Koprivica's deposition taken on January 15, 2008 was admitted as Exhibit A. The objections contained in the deposition are overruled. Dr. Koprivica identified Deposition Exhibit 1, his CV, and Deposition Exhibit 2, his February 13, 2001 medical report. He also identified Exhibit 3, his one page addendum report dated February 20, 2002, and Deposition Exhibit 4, his three page addendum report dated March 31, 2007. Koprivica deposition exhibits 1, 2, 3 and 4 are admitted into evidence. Koprivica Deposition Exhibit 1 notes that Dr. Koprivica is board certified by the American Board of Emergency Medicine and American Board of Preventive Medicine and Occupational Medicine. He is a licensed medical doctor. He is not an orthopedic surgeon or neurosurgeon. He did not treat Claimant.

Koprivica Deposition Exhibit 2, his February 13, 2001 report, identified the treatment records he had reviewed. His report noted the educational and vocational history, and history of present injury/illness. Claimant's subjective complaints were noted. Claimant indicated he had aching in his low back on a daily basis. The severity varied. It averaged a three on a scale of one to ten. Claimant complained of left leg numbness intermittently. He was noted to be on an unknown pain medication, muscle relaxer and non-steroidal anti-inflammatory drug. The results of his physical examination were noted. His opinions and conclusions were noted and were consistent with his deposition testimony.

Dr. Koprivica's report dated February 13, 2001 noted that Claimant is functionally illiterate and reports a history of dyslexia and cannot read or write. He stated it would be mandatory that Claimant discontinue smoking before any fusion procedure is pursued. He stated that in the event surgery was not pursued, he would consider Claimant to have been maximum medical improvement from a non-operative management standpoint as of the release of Dr. Fishman on December 10, 1998.

Dr. Koprivica testified that the cause of Claimant's back injury was the result of the incident with the shovel that had occurred on February 3, 1998. He felt Claimant had symptomatic discogenic disease at L4-L5. He testified that if it were determined that Claimant was totally disabled, he was totally disabled based on the February 1998 injury in isolation, but that if he was not totally disabled, that it would be appropriate to apportion a 50% permanent partial disability to the body as a whole for the primary injury. He had not reached a conclusion regarding whether or not Claimant was permanently and totally disabled when he authored his February 13, 2001 report.

On February 13, 2001, Dr. Koprivica thought Claimant should limit lifting or carrying to 50 pounds on an occasional basis. He felt Claimant should not do frequent or constant lifting, but on an occasional basis he could lift up to 50 pounds. He felt Claimant should avoid frequent or constant bending at the waist, pushing, pulling or twisting, that he should avoid sustained or awkward postures of his low back, and that he should also have some postural analysis so he can change from sitting to standing or walking based on back pain.

Dr. Koprivica concluded in his February 20, 2002 report, after receiving the vocational assessment by Mary Titterington and a report by Dr. Pro, that Claimant was totally disabled based on the primary injury in isolation.

Dr. Koprivica's March 31, 2007 report noted his opinion had changed. His opinion changed because Dr. Schmidt felt that there was substantial disability psychologically that predated the work injury, and the work injury itself contributed

minimally to the overall behavioral disability with which Claimant presented, and those psychological findings were really going to preclude Claimant from being a candidate surgically for the physical injury he sustained in 1998. Dr. Koprivica testified that Claimant would be a poor candidate for a discectomy and fusion. Dr. Koprivica testified that after receiving Dr. Schmidt's report, it was his opinion that Claimant's total disability resulted from the impact of combining the permanent partial disability on a psychological basis with the additional psychological and physical disability attributable to the February 4, 1998 work injury. He testified those were his current opinions regarding Claimant's condition. He removed Dr. Pro's opinions and did not rely on the opinions of Dr. Pro in reaching the conclusions set forth in his March 31, 2007 report. His statements were made to a reasonable degree of medical certainty.

Dr. Koprivica acknowledged in his deposition that the MRI done after the February 4, 1998 injury, but before his February 2001 evaluation, did not show any frank herniations. He testified that the exertional restrictions that he had placed on Claimant would not typically totally disable someone, and they should be able to access the open labor market. He found no sensory dermatomal loss when he examined Claimant. If a person has a sensory loss and a dermatomal pattern, that would indicate some sort of a nerve root injury or nerve root impingement. Dermatomal loss would not necessarily always be present for someone that has a disk injury like Claimant's. Claimant's reflexes were found to be equal. That did not indicate that Claimant had any nerve root injury or nerve root impairment. Claimant was not limping when he saw him. He was not using any type of assisted device. Dr. Koprivica observed that Claimant had muscle spasms. He testified that normally you expect muscle spasms to be the result of an acute injury.

Dr. Koprivica had not been provided with any medical records of any treatment after the date his first report was authored in February 2001. He agreed that when he authored his second report dated February 2002, he found Claimant to be permanently and totally disabled based on the 1998 injury in isolation. He agreed he had noted that Claimant had incredible pain issues. The restrictions he placed on Claimant would put him in a light work category. Those restrictions coupled with Claimant's pain complaints would not take Claimant out of the workplace. In 2002, he thought Claimant was potentially employable if you exclude consideration of illiteracy and the cognitive issues. He acknowledged that Claimant was pretty active physically before his 1998 injury. He said that he believed it was probable that Claimant was at maximum medical improvement on February 20, 2002.

Dr. Koprivica testified he knew that illiteracy was an issue with Claimant but the first time he received any information to support whether it was something that was a diagnosable industrial disability for which he would apportion was Dr. Schmidt's report. He relied on that when he changed his opinion as to what comprised Claimant's permanent and total disability. He testified that if someone cannot read, but has the

ability to be taught, he was not sure that is a permanent disability. He was not provided any information before his last report to suggest that there was a documented learning disability that would preclude Claimant from being able to retrain in that fashion. With Dr. Schmidt's report, he understood there was a learning disability that precluded it.

Dr. John Pro's December 12, 2001 report was admitted as Exhibit E. He saw Claimant, reviewed records, and prepared his report. His report recites the history of Claimant's treatment. Claimant described pain as a four out of ten at his lowest level. Claimant said he often had pain radiating from his low back and the lateral side of his calf and lateral foot and had several episodes of falling and his legs would go numb. Claimant described a lot of stress with his second ex-wife whom he was constantly fighting over custody and other issues. He had also had problems with his sixteen year old daughter recently which had been stressful. He was noted to have been illiterate and alexic throughout his life. It was noted he can make change and can handle his own finances.

Dr. Pro's impression was Axis I: "Chronic pain syndrome with medical and psychological factors, adjustment disorder with mild depression, and possible mild mental deficiency. Axis II was noted to be "learning disability with severe dyslexia." His report stated he agreed that Claimant had reached maximum medical improvement regarding his back pain. He stated Claimant would benefit from stronger medication to help with his sleep. He believed Claimant was suffering from chronic pain syndrome. He believed Claimant's adjustment disorder was mild and that his depression was not severe. He believed Claimant suffered from a severe learning disability rendering him unable to read and write. He stated that Claimant sustained an injury on February 1998 resulting in a chronic pain syndrome and mild depression which had rendered him with a 30% whole person permanent rating.

The deposition of Allan D. Schmidt, Ph.D. taken on November 27, 2007 was admitted as Exhibit B. Exhibit B includes Dr. Schmidt's Curriculum Vitae, his medical report dated October 9, 2006, Deposition Exhibit 2, and voluminous additional records and reports. Dr. Schmidt's CV notes that he is a licensed psychologist in Kansas and Missouri. He obtained his PhD degree in 1982. He has practiced as a clinical psychologist.

Dr. Schmidt saw Claimant on September 29, 2006. He reviewed records described in his report. He took a medical history, family history and social history. He described Claimant's educational background in his report. He administered tests to Claimant. Claimant focused on his pain, his sleep disturbance, and feeling some numbness and weakness. He reported feeling low in energy or slowed down. Claimant had a full scale IQ of 74, verbal IQ of 65, and a performance IQ of 90. His verbal IQ of

65 is in the mild mental retardation range. His performance IQ is in the low limit of the average range. His reading score was in the 1.1 percentile.

Dr. Schmidt concluded that Claimant is functioning in the mild mental retardation range and has a learning disability in the reading area. Both are long standing problems. He cannot perform activities that require reading or comprehension. He also has an adjustment disorder in reaction to his injury and inability to return to work. He gave a current total psychological disability rating of 25% and a psychological disability rating of 20% prior to his injury within a reasonable degree of certainty in his field of expertise.

Dr. Schmidt's diagnostic impression is Axis I, which is current clinical disorders—an adjustment disorder; Axis II, longstanding kinds of problems—mild mental retardation and reading disorder; Axis III, which are physical problems—chronic pain; Axis IV, psychosocial stressors—inability to work, disruption of financial plans and some limitation to mobility and activities; and Axis V, which is a global assessment of psychological functioning—a GAF score of 55, on a scale from 0 to 100. He said 50 or lower tends to indicate very serious symptoms or serious impairments of psychological or social or occupational functioning.

Dr. Schmidt identified Deposition Exhibit 3, his report with an addendum date of December 30, 2006, which states that the accurate ratings should have been stated at 35% total, 30% prior to the injury, and 5% due to the injury. That report stated, "It is my opinion that his work injury resulted in a 5% psychological disability. It is also my opinion that his work injury was a substantial factor in causing his psychological disability." He noted his opinion was given within a reasonable degree of psychological certainty.

Dr. Schmidt said that the 30% rating he gave Claimant for his preexistent psychological problems were based solely on Claimant's mild mental retardation and reading disability.

Mary Titterington's December 5, 2007 deposition was admitted as Exhibit C. Objections contained in her deposition are overruled. Deposition Exhibit 1, her Curriculum Vitae, was also admitted. Ms. Titterington has an M.S. degree in guidance and counseling. She has been a self-employed vocational rehabilitation consultant since 1987.

Ms. Titterington saw Claimant at his attorney's request on December 21, 2001 to determine Claimant's ability to work in the open labor market and/or to benefit from vocational retraining. She met with him for two hours ten minutes. Her January 9, 2002 report was identified as Exhibit 2. She reviewed medical records including the reports of Dr. Pro and Dr. Schmidt. She noted Claimant's education and work history. He had not

obtained a GED and had basically held laboring jobs. He had had trouble on some jobs in the past because he could not do written reports and could not read street signs and kept getting lost. She gave him an intelligence test. His verbal IQ was at 68, which is at the second percentile and is in the mentally deficient range. She said the old terminology was mental retardation. His general IQ was 74, which is borderline. His reading pronunciation was at the preschool level. His spelling was at the first grade level. He could do basic adding and subtracting and very limited multiplication. He was functionally illiterate. She stated that Claimant is functioning in borderline to below mental deficiency and is illiterate.

Ms. Titterington said that based on the restrictions established by Dr. Koprivica and Dr. Ebelke, Claimant cannot return to his former jobs. Those are jobs that physically require him to do activities that are above the physical restrictions. He does not have any transferable job skills and is an unskilled worker. She said there are no jobs that Claimant could do within the work base with Dr. Koprivica's restrictions. She stated there are some jobs that Claimant could do if Dr. Ebelke's restrictions are accepted alone, even with the illiteracy. She testified further that when you combine the psychological component of Dr. Pro and the pain disorder, as well as the adjustment disorder that Dr. Schmidt identified, and combine that with Claimant's literacy, his work base is totally eroded even with Dr. Ebelke's restrictions. She said Claimant is not a good candidate for vocational rehabilitation. He could not attend any formal education. He had attempted one-on-one literacy and did not progress.

Ms. Titterington testified that in her opinion, Claimant is not employable in the open labor market. She stated that any employer could not reasonably be expected to hire Claimant for work as it is customarily performed in the open labor market. Her opinions were stated within a reasonable degree of vocational certainty.

Ms. Titterington testified that Claimant's illiteracy is due to his inability to learn. She testified that Claimant's total disability could be just from his pain in and of itself, if you accept his assessments.

Ms. Titterington's January 9, 2002 report, Titterington Deposition Exhibit 2, identified the records she reviewed. They included treatment records and reports of Dr. Koprivica, Dr. Ebelke, and Dr. Pro. The report noted Claimant's medical history, medications, and current medical problems. The report stated that Claimant reported constant aching pain in the low back that became more severe with activity and intermittent pain in the right leg with associated numbness in the right thigh. The physical limitations expressed in Dr. Koprivica's February 13, 2001 report and Dr. Ebelke's August 17, 1999 report were noted. Claimant's assessment of his functional capacities was noted. Dr. Pro's psychological limitations were noted. Activities of daily living, pre- and post-injury activities, education, work history and testing were noted.

The vocational implications pertaining to Claimant identified in her report are consistent with her testimony. Ms. Titterington's report states in summary: "Mr. Murray is a 40-year-old man with less than a high school diploma, who is illiterate and has restrictions on his ability to lift, bend, twist, push, pull and carry. His pain is of a sufficient nature as he is incapacitated up to two days a week. His severe pain causes him to be unable to meet the basic work behaviors that an individual must be able to perform to be successfully employed."

Ms. Titterington wrote a supplemental report on May 29, 2007. It identified additional records she had reviewed including Dr. John Pro, 1-10-02; Dr. Allan Schmidt, 10-9-06 and 12-30-06; and Dr. P. Brent Koprivica, 2-02-02. Her May 29, 2007 report noted that Dr. Wilson's restrictions from his rating report of July 21, 2003 would allow Claimant to return to the labor force if they were taken in isolation of his emotional impairments as discussed by Drs. Pro and Schmidt. She again stated Claimant was unemployable when all of his impairments were considered in combination.

Ms. Titterington was deposed again on January 26, 2009 (Exhibit D). She testified that Claimant is not employable, and it is the combination of the physical, mental and emotional. She said that when you combine Claimant's low verbal IQ especially with his reading disorder, his learning disorder, his overall illiteracy, he is unable to work. Her opinions were stated within a reasonable degree of certainty in her field of expertise. She had reviewed Dr. Schmidt's report and deposition and Dr. Koprivica's deposition and report. She testified that if Claimant was falling to the ground on a regular basis and would be, such that he could hurt himself, an employer would be reticent to hire him. She said that if Claimant or anyone else is totally incapacitated two days a week, they are certainly unemployable. Claimant told her he had up to six hours sleep on a good night. She said that if Claimant had substantially disturbed sleep or he is not rested, it can disrupt work.

Ms. Titterington understood Claimant was on a mild pain medication. She has not seen people have had significant difficulties performing with the use of Ultram, one of the medications Claimant was taking. She testified that if a person has to lie down a number of times during the day, that person would be unemployable in the open labor market. She testified that if Claimant needs to lie down daily, and has at least two days a week where he is incapacitated and in pain, those things alone could keep him from being employable on the open labor market. She also stated that if Dr. Pro's evaluation was taken out of the entire mix, and she combined Dr. Koprivica and Dr. Schmidt's restrictions, reports and opinions, it takes Claimant out of the labor force. She also testified that if you put Dr. Pro back in, and assuming Claimant needs to lie down on a daily basis, take pain medication, and if he is incapacitated two days a week, he is unemployable in the open labor market.

Some of the medical records in evidence contain highlighting. The Administrative Law Judge did not place highlighting on any of the exhibits.

Exhibit 13 contains wage information pertaining to Claimant. Page one of Exhibit 13 is a copy of a February 9, 1999 letter from Employer to Claimant's attorney. It notes:

The following is the information you requested on the above-referenced employee.

DATE	HOURS	GROSS WAGE
1-26-98	38	488.30
1-19-98	38	488.30
1-12-98	32	411.20
1-5-98	17	218.45
12-29-97	13	167.05
12-22-97	4	51.40
12-15-97	19	244.15
12-8-97	0	-0-
12-1-97	11	141.35
11-24-97	21	269.85
11-17-97	29	372.65
11-10-97	24	308.40
11-3-97	21	269.85

This averages out to 20 ½ hours per week and \$263.92 gross wage. The hourly rate of pay was \$12.85 per hour. The employee was hired to work a 40 hour week, but this varies in the construction business.

Page one does not show the number of days worked in the week.

Page two of Exhibit 13 is a copy of a letter dated February 17, 1998 from Employer to Hawkeye Security Insurance that lists the following gross wages for Claimant from 11-4-97 to 2-4-98:

Date	Wages
2-4-98	488.30
1-27-98	488.30
1-20-98	411.20
1-13-98	218.45
1-6-98	167.50

12-30-97	51.40
12-22-97	244.15
12-12-97	150.00
12-9-97	141.35
11-25-97	372.65
11-18-97	308.40
11-11-97	269.85
11-4-97	411.20

Page two of Exhibit 13 does not note hours or days worked. The amount of weekly wages is the same as shown on page one of Exhibit 13, except that it includes the sum of \$150.00 for the week of 12-12-98 instead of \$0.00 for the week of 12-8-98, and except the sum of \$269.85 is shown for the week of 11-3-97 instead of the sum of \$411.00 the week of 11-3-97, and except the sum of \$167.05 is shown on page one for the week of 12-29-97 instead of the sum of \$167.50 shown on page two for the week of 1-6-98.

Exhibit 13 also includes a Payroll Detail Report of Employer pertaining to Claimant that notes wages paid to him for periods in 1997 and 1998. The Payroll Detail Report does not indicate hours or days worked. The wages it shows are the same as shown on page two of Exhibit 13.

Rulings of Law.

Based on a comprehensive review of the substantial and competent evidence, including the testimony of Claimant, the expert medical opinions and depositions, the medical records, the vocational evidence, the exhibits admitted in evidence, the stipulations of the parties, and my personal observations of Claimant at the hearing, I make the following Rulings of Law:

1. Liability of Employer for permanent disability.

Claimant asserts that he should be awarded permanent and total disability benefits either from Employer or the Second Injury Fund. For the reasons explained hereafter, I have found that Claimant is not permanently and totally disabled, and is not entitled to an award of permanent and total disability benefits from either Employer or the Second Injury Fund.

Prior to August 28, 2005, Section 287.800, RSMo¹ provided in part: “Law to be liberally construed.—All of the provisions of this chapter shall be liberally construed with a view to the public welfare. . . .” The fundamental purpose of the Workers' Compensation Law is to place upon industry the losses sustained by employees resulting from injuries arising out of and in the course of employment. The law is to be broadly and liberally interpreted with a view to the public interest, and is intended to extend its benefits to the largest possible class. Any doubt as to the right of an employee to compensation should be resolved in favor of the injured employee. *West v. Posten Const. Co.* 804 S.W.2d 743, 745-46 (Mo. 1991), *overruled in part on other grounds by Hampton*, 121 S.W.3d at 224.² Although all doubts should be resolved in favor of the employee and coverage in a workers' compensation proceeding, if an essential element of the claim is lacking, it must fail. *Thorsen*, 52 S.W.3d at 618; *White v. Henderson Implement Co.*, 879 S.W.2d 575, 579 (Mo.App. 1994).

The claimant in a workers' compensation proceeding has the burden of proving all elements of the claim to a reasonable probability. *Cardwell v. Treasurer of State of Missouri*, 249 S.W.3d 902, 912 (Mo.App. 2008); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). The quantum of proof is reasonable probability. *Thorsen*, 52 S.W.3d at 620; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Fischer v. Archdiocese of St. Louis*, 793 S.W.2d 195, 199 (Mo.App. 1990). “Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt.” *Thorsen*, 52 S.W.3d at 620; *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Fischer*, 793 S.W.2d at 198.

Such proof is made only by competent and substantial evidence. It may not rest on speculation. *Griggs v. A. B. Chance Company*, 503 S.W.2d 697, 703 (Mo.App. 1974). Expert testimony may be required where there are complicated medical issues. *Goleman v. MCI Transporters*, 844 S.W.2d 463, 466 (Mo.App. 1992). “Medical causation of injuries which are not within common knowledge or experience, must be

¹ All statutory references are to the Revised Statutes of Missouri 2000, unless otherwise noted. See *Lawson v. Ford Motor Co.*, 217 S.W.3d 345 (Mo.App. 2007) where the Eastern District Court of Appeals held that the 2005 amendments to Sections 287.020, RSMo and 287.067, RSMo do not apply retroactively. In a workers' compensation case, the statute in effect at the time of the injury is generally the applicable version. *Chouteau v. Netco Construction*, 132 S.W.3d 328, 336 (Mo.App. 2004); *Tillman v. Cam's Trucking Inc.*, 20 S.W.3d 579, 585-86 (Mo.App. 2000).

² Several cases are cited herein that were among many overruled by *Hampton* on an unrelated issue (*Id.* at 224-32). Such cases do not otherwise conflict with *Hampton* and are cited for legal principles unaffected thereby; thus *Hampton's* effect thereon will not be further noted.

established by scientific or medical evidence showing the cause and effect relationship between the complained of condition and the asserted cause.” *Thorsen*, 52 S.W.3d at 618; *Brundige v. Boehringer Ingelheim*, 812 S.W.2d 200, 202 (Mo.App. 1991). Compensation is appropriate as long the performance of usual and customary duties led to a breakdown or a change in pathology. *Bennett v. Columbia Health Care*, 134 S.W.3d 84, 87 (Mo.App. 2004).

Where there are conflicting medical opinions, the fact finder may reject all or part of one party's expert testimony which it does not consider credible and accept as true the contrary testimony given by the other litigant's expert. *Kelley v. Banta & Stude Constr. Co. Inc.*, 1 S.W.3d 43, 48 (Mo.App. 1999); *Webber v. Chrysler Corp.*, 826 S.W.2d 51, 54 (Mo.App. 1992); *Hutchinson v. Tri-State Motor Transit Co.*, 721 S.W.2d 158, 162 (Mo.App. 1986). Commission's decision will generally be upheld if it is consistent with either of two conflicting medical opinions. *Smith v. Donco Const.*, 182 S.W.3d 693, 701 (Mo.App. 2006). The acceptance or rejection of medical evidence is for the Commission. *Smith*, 182 S.W.3d at 701; *Bowers v. Hiland Dairy Co.*, 132 S.W.3d 260, 263 (Mo.App. 2004). The testimony of Claimant or other lay witnesses as to facts within the realm of lay understanding can constitute substantial evidence of the nature, cause, and extent of disability when taken in connection with or where supported by some medical evidence. *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo.App. 1993); *Reiner v. Treasurer of State of Mo.*, 837 S.W.2d 363, 367 (Mo.App. 1992); *Fischer*, 793 S.W.2d at 199. The trier of facts may also disbelieve the testimony of a witness even if no contradictory or impeaching testimony appears. *Hutchinson*, 721 S.W.2d at 161-2; *Barrett v. Bentzinger Brothers, Inc.*, 595 S.W.2d 441, 443 (Mo.App. 1980). The testimony of the employee may be believed or disbelieved even if uncontradicted. *Weeks v. Maple Lawn Nursing Home*, 848 S.W.2d 515, 516 (Mo.App. 1993). “While the determination of a witness's competency to testify is for the trial court, the credibility of a witness's testimony is for the fact finder to determine. *Clark v. Reeves*, 854 S.W.2d 28, 30 (Mo.App.1993). Credibility means the capacity for being believed or credited. *Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo.App.1993).” *Turnbo by Capra v. City of St. Charles*, 932 S.W.2d 851, 855 (Mo.App. 1996).

The determination of the degree of disability sustained by an injured employee is not strictly a medical question. *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 284 (Mo.App. 1997); *Cardwell*, 249 S.W.3d at 908; *Sellers v. Trans World Airlines, Inc.*, 776 S.W.2d 502, 505 (Mo.App. 1989). While the nature of the injury and its severity and permanence are medical questions, the impact that the injury has upon the employee's ability to work involves factors, which are both medical and nonmedical. Accordingly, the Courts have repeatedly held that the extent and percentage of disability sustained by an injured employee is a finding of fact within the special province of the Commission. *Sharp v. New Mac Elec. Co-op*, 92 S.W.3d 351, 354 (Mo.App. 2003); *Elliott v. Kansas*

City, Mo., School District, 71 S.W.3d 652, 656 (Mo.App. 2002); *Sellers*, 776 S.W.2d at 505; *Quinlan v. Incarnate Word Hospital*, 714 S.W.2d 237, 238 (Mo.App. 1986); *Banner Iron Works v. Mordis*, 663 S.W.2d 770, 773 (Mo.App. 1983); *Barrett v. Bentzinger Bros.*, 595 S.W.2d 441, 443 (Mo.App. 1980); *McAdams v. Seven-Up Bottling Works*, 429 S.W.2d 284, 289 (Mo.App. 1968). The fact-finding body is not bound by or restricted to the specific percentages of disability suggested or stated by the medical experts. *Cardwell*, 249 S.W.3d at 908; *Lane v. G & M Statuary, Inc.*, 156 S.W.3d 498, 505 (Mo.App. 2005); *Sharp*, 92 S.W.3d at 354; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 885 (Mo.App. 2001); *Landers*, 963 S.W.2d at 284; *Sellers*, 776 S.W.2d at 505; *Quinlan*, 714 S.W.2d at 238; *Banner*, 663 S.W.2d at 773. It may also consider the testimony of the employee and other lay witnesses and draw reasonable inferences in arriving at the percentage of disability. *Cardwell*, 249 S.W.3d at 908; *Fogelsong v. Banquet Foods Corporation*, 526 S.W.2d 886, 892 (Mo.App. 1975).

The finding of disability may exceed the percentage testified to by the medical experts. *Quinlan*, 714 S.W.2d at 238; *McAdams*, 429 S.W.2d at 289. The Commission “is free to find a disability rating higher or lower than that expressed in medical testimony.” *Jones v. Jefferson City School Dist.*, 801 S.W.2d 486, 490 (Mo.App. 1990); *Sellers*, 776 S.W.2d at 505. The Court in *Sellers* noted that “[t]his is due to the fact that determination of the degree of disability is not solely a medical question. The nature and permanence of the injury is a medical question, however, ‘the impact of that injury upon the employee's ability to work involves considerations which are not exclusively medical in nature.’” *Sellers*, 776 S.W.2d at 505. The uncontradicted testimony of a medical expert concerning the extent of disability may even be disbelieved. *Gilley v. Raskas Dairy*, 903 S.W.2d 656, 658 (Mo.App. 1995); *Jones*, 801 S.W.2d at 490.

Section 287.020.7, RSMo provides: “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. 1982). The test for permanent total disability is whether, given the employee's situation and condition, he or she is competent to compete in the open labor market. *Knisley*, 211 S.W.3d at 635; *Sullivan v. Masters Jackson Paving Co.*, 35 S.W.3d 879, 884 (Mo.App. 2001); *Reiner v. Treasurer of the State of Mo.*, 837 S.W.2d 363, 367 (Mo.App.1992); *Lawrence v. Joplin R-VIII School Dist.*, 834 S.W.2d 789, 792 (Mo.App. 1992).

Total disability means the “inability to return to any reasonable or normal employment.” *Lawrence*, 834 S.W.2d at 792; *Brown v. Treasurer of Missouri*, 795

S.W.2d 479, 483 (Mo.App.1990); *Kowalski*, 631 S.W.2d at 992. An injured employee is not required, however, to be completely inactive or inert in order to be totally disabled. *Brown*, 795 S.W.2d at 483. The key question is whether any employer in the usual course of business would be reasonably expected to hire the employee in that person's present physical condition, reasonably expecting the employee to perform the work for which he or she is hired. *Knisley*, 211 S.W.3d at 635; *Brown*, 795 S.W.2d at 483; *Reiner*, 837 S.W.2d at 367; *Kowalski*, 631 S.W.2d at 922. See also *Thornton v. Hass Bakery*, 858 S.W. 2d 831, 834 (Mo.App. 1993).

In deciding whether the fund has any liability, the first determination is the degree of disability from the last injury considered alone. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003); *Hughey v. Chrysler Corp.*, 34 S.W.3d 845, 847 (Mo.App. 2000). Accordingly, pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined. If the last injury in and of itself renders the employee permanently and totally disabled, then the fund has no liability and the employer is responsible for the entire amount of compensation. *Landman*, 107 S.W.3d at 248; *Hughey*, 34 S.W.3d at 847.

Based on the competent and substantial evidence referenced above, including the medical treatment records, the expert opinions from the doctors and vocational expert, as well as based on my personal observations of Claimant at the hearing, and based on the application of the Workers' Compensation Law, I find that Claimant failed to prove that his injury of February 4, 1998 either in isolation or in combination with a preexisting disability caused him to be permanently and totally disabled. This finding is supported by the following.

Claimant has never had back surgery. Dr. Gall, a neurosurgeon, did not recommend surgery. Dr. Jackson, an orthopedic surgeon, did not recommend surgery. He noted on October 9, 1998 that the July 1998 MRI showed that it did not appear that Claimant had a complete herniation. Dr. Ebelke, an orthopedic surgeon, did not recommend surgery. Dr. Wilson, a neurosurgeon, did not recommend surgery in his last report. He noted in July 2003 that Claimant "desires no surgical intervention and I would concur."

Dr. Ebelke noted some possible symptom magnification signs perceived on exam on October 10, 1998. Dr. Fishman noted there were inconsistencies in his examination on May 4, 1999 including pain produced with straight leg raising on the left in the seated position but not in the supine position that are not characteristic of a lumbar radiculopathy. He said then there was not evidence of a lumbar radiculitis or lumbar radiculopathy.

Dr. Fishman rated Claimant 5% whole person impairment on December 10, 1998. Dr. Ebelke rated Claimant 5% on October 10, 1998. On February 13, 2001, Dr. Koprivica rated Claimant 50% permanent partial disability to the body as a whole for the primary injury if he was not totally disabled. Dr. Wilson noted on July 21, 2003 that Claimant's revised permanent partial impairment would be 7% based on AMA Guidelines, 4th Edition. Dr. Schmidt's December 30, 2006 report stated that Claimant's work injury resulted in a 5% psychological disability.

Dr. Koprivica concluded in his February 20, 2002 report, after receiving the vocational assessment by Mary Titterington and a report by Dr. Pro, that Claimant was totally disabled based on the primary injury in isolation. Dr. Koprivica testified that after receiving Dr. Schmidt's report, it was his opinion in March 2007 that Claimant's total disability resulted from the impact of combining the permanent partial disability on a psychological basis with the additional psychological and physical disability attributable to the February 4, 1998 work injury.

Dr. Pro stated in December 2001 that Claimant sustained an injury on February 1998 resulting in a chronic pain syndrome and mild depression which had rendered him with a 30% whole person permanent rating. But Claimant presented no evidence that he received any treatment for depression, or that he had depression at the time of the hearing in 2009. I find Dr. Pro's opinion is not credible.

Dr. Schmidt, a psychologist, examined Claimant in September 2006. He administered tests to Claimant. Claimant had a full scale IQ of 74, verbal IQ of 65, and a performance IQ of 90. His verbal IQ of 65 is in the mild mental retardation range. His performance IQ is in the low limit of the average range. His reading score was in the 1.1 percentile.

Dr. Schmidt concluded that Claimant is functioning in the mild mental retardation range and has a learning disability in the reading area. Both were noted to be long standing problems. He noted Claimant cannot perform activities that require reading or comprehension. Dr. Schmidt did not diagnose depression. He diagnosed an adjustment disorder. On December 30, 2006 he gave Claimant a 30% rating for his preexistent psychological problems that were based solely on Claimant's mild mental retardation and reading disability.

Mary Titterington testified by deposition in December 2007 that Claimant is not employable in the open labor market. She stated that any employer could not reasonably be expected to hire Claimant for work as it is customarily performed in the open labor market. However, she stated there are some jobs that Claimant could do if Dr. Ebelke's restrictions are accepted alone, even with the illiteracy. Ms. Titterington testified on January 26, 2009 that Claimant is not employable, and it is the combination of the

physical, mental and emotional. She said that when you combine Claimant's low verbal IQ especially with his reading disorder, his learning disorder, his overall illiteracy, he is unable to work. Ms. Titterington testified that Claimant's illiteracy is due to his inability to learn.

Ms. Titterington also stated that if Dr. Pro's evaluation was taken out of the entire mix, and she combined Dr. Koprivica and Dr. Schmidt's restrictions, reports and opinions, it takes Claimant out of the labor force. She also testified that if you put Dr. Pro back in, and assuming Claimant needs to lie down on a daily basis, take pain medication, and if he is incapacitated two days a week, he is unemployable in the open labor market.

I do not find Dr. Koprivica's opinion that Claimant is permanently and totally disabled and Ms. Titterington's opinion that Claimant is not employable in the open labor market to be credible.

Claimant never had back surgery. He was diagnosed with a lumbar strain. He did not present evidence that he has had treatment for his back injury since being released by Dr. Wilson in 2003. He did not offer medical records of treatment by a family doctor or other provider since then. He said he took pain medicines, but he could not recall the name of the pain pill. He offered no pharmacy records documenting the type of medications he took, the dates of purchase, or the dosages. He offered no records documenting he had any physical therapy since 2000. He offered no records of treatment for depression or other emotional or psychological conditions. He offered no other lay testimony to corroborate complaints of pain or limitations in activities.

Claimant did not attempt to work after 1998 other than doing the roof job and subsidized housing work. Claimant has not applied for any work since the injury. He has a valid Missouri driver's license and can drive for one hour without stopping. He also continues to hunt and fish, and has gone deer hunting since the injury and was able to help drag a downed deer from the woods. He can walk up to a mile and one half without stopping. He does not have trouble lifting anything as heavy as a gallon of milk. He draws Social Security benefits at this time. Claimant admits that he does not have pain all the time, and his activities after the accident are not indicative of someone who is not able to be employed based on any restrictions from this accident.

Claimant testified in his deposition that he has a real sharp, deep pain in his back on a daily basis and that pain medications ease up the pain a lot. He said he also lies down and rests, and walks around to help the pain in his back. He testified he lies down on a daily basis because of back pain. When asked how many times a day he has to lie down, he answered, "A lot."

The Court does not find credible Claimant's testimony that he lies down on a daily basis because of back pain. The Court finds that Claimant's pain does not prevent him from being able to work in the open labor market. Claimant complained at the hearing of dull back pain that becomes sharp enough at times that he needs to stand or lie down. Claimant did not appear to the Court to be in pain during the hearing. He did not grimace or request a recess to stretch, stand, or lie down.

Dr. Fishman, a treating doctor, did not find evidence of lumbar radiculopathy in December 1998. Dr. Fishman released Claimant to his regular job duties. The December 9, 1998 FCE notes that Claimant's current capabilities match job requirements of the laborer job at the heavy level. The primary recommendation was that Claimant return to work as a laborer without restriction.

Dr. Ebelke thought Claimant was capable of working in a medium work category, which allows maximum occasional lifting of 50 pounds and repetitive lifting of 25 pounds.

Dr. Wilson stated on July 21, 2003 that he had reviewed the June 17, 2003 MRI. He noted it showed the previously noted disk bulge at L4-5 had recessed, and a new left eccentric disc bulge at L5-S1 was noted. His report stated he would not relate the disk bulge at L5-S1 to Claimant's described work injury occurring on February 4, 1998. His July 21, 2003 report noted permanent limitations should include the avoidance of repetitive loads of greater than 25 pounds and repetitive bending or twisting activities.

On February 13, 2001, Dr. Koprivica thought Claimant should limit lifting or carrying to 50 pounds on an occasional basis. He felt Claimant should not do frequent or constant lifting, but on an occasional basis he could lift up to 50 pounds. He felt Claimant should avoid frequent or constant bending at the waist, pushing, pulling or twisting, that he should avoid sustained or awkward postures of his low back, and that he should also have some postural analysis so he can change from sitting to standing or walking based on back pain. But Dr. Koprivica's reports do not indicate that he reviewed the December 9, 1998 Functional Capacity Evaluation that notes Claimant's capabilities then matched job requirements of the laborer job at the heavy level, and that it was recommended Claimant return to work as a laborer without restriction.

Dr. Koprivica testified that the exertional restrictions that he had placed on Claimant would not typically totally disable someone, and they should be able to access the open labor market. He agreed he had noted that Claimant had incredible pain issues. The restrictions he placed on Claimant would put him in a light work category. He stated that those restrictions coupled with Claimant's pain complaints would not take Claimant out of the workplace.

The evidence demonstrates, and I find, that Claimant is capable of working within the doctors' restrictions of avoiding repetitive lifting of greater than 25 pounds and avoiding repetitive bending or twisting activities.

Dr. Fishman rated Claimant 5% whole person impairment on December 10, 1998. Dr. Ebelke rated Claimant 5% on October 10, 1998. On February 13, 2001, Dr. Koprivica rated Claimant 50% permanent partial disability to the body as a whole for the primary injury if he was not totally disabled. Dr. Wilson noted on July 21, 2003 that Claimant's revised permanent partial impairment would be 7% based on AMA Guidelines, 4th Edition. Dr. Schmidt's December 30, 2006 report stated that Claimant's work injury resulted in a 5% psychological disability.

I find, based on the substantial and competent evidence and the application of the Workers' Compensation Law, that as a result of the work injury that Claimant sustained on February 4, 1998, Claimant has sustained an additional 17.5% permanent partial disability to his body as a whole. I find later in this award that the permanent partial disability rate is \$278.42 per week. I therefore award to Claimant the sum of \$19,489.40 in permanent partial disability benefits from Employer/Insurer.

I further find that the work accident on February 4, 1998 did not result in Claimant's permanent and total disability.

2. Liability of the Second Injury Fund.

Section 287.220. 1, RSMo provides in part:

All cases of permanent disability where there has been previous disability shall be compensated as herein provided. Compensation shall be computed on the basis of the average earnings at the time of the last injury. If any employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed, and the preexisting permanent partial disability, if a body as a whole injury, equals a minimum of fifty weeks of compensation or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, according to the medical standards that are used in determining such compensation, receives a subsequent compensable injury resulting in additional permanent partial disability so that the degree or percentage of disability, in an amount equal to a minimum of fifty weeks

compensation, if a body as a whole injury or, if a major extremity injury only, equals a minimum of fifteen percent permanent partial disability, caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. After the compensation liability of the employer for the last injury, considered alone, has been determined by an administrative law judge or the commission, the degree or percentage of employee's disability that is attributable to all injuries or conditions existing at the time the last injury was sustained shall then be determined by that administrative law judge or by the commission and the degree or percentage of disability which existed prior to the last injury plus the disability resulting from the last injury, if any, considered alone, shall be deducted from the combined disability, and compensation for the balance, if any, shall be paid out of a special fund known as the second injury fund, hereinafter provided for. If the previous disability or disabilities, whether from compensable injury or otherwise, and the last injury together result in total and permanent disability, the minimum standards under this subsection for a body as a whole injury or a major extremity injury shall not apply and the employer at the time of the last injury shall be liable only for the disability resulting from the last injury considered alone and of itself; except that if the compensation for which the employer at the time of the last injury is liable is less than the compensation provided in this chapter for permanent total disability, then in addition to the compensation for which the employer is liable and after the completion of payment of the compensation by the employer, the employee shall be paid the remainder of the compensation that would be due for permanent total disability under section 287.200 out of a special fund known as the 'Second Injury Fund' hereby created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141.

The court in *Knisley v. Charleswood Corp.*, 211 S.W.3d 629 (Mo. App. 2007) states at 634-35:

To prevail against the SIF on a claim for permanent total disability, a claimant must establish that: (1) she had a permanent

partial disability at the time she sustained the work-related injury and (2) the pre-existing permanent partial disability was of such seriousness as to constitute a hindrance or obstacle to her employment. Section 287.220.1 RSMo 2000; *Motton v. Outsource Intern.*, 77 S.W.3d 669, 673 (Mo.App. E.D.2002). “The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment.” *Sutton v. Vee Jay Cement Contracting Co.*, 37 S.W.3d 803, 811 (Mo.App. E.D.2000) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)); *Garrone v. Treasurer of State of Missouri*, 157 S.W.3d 237, 244 (Mo.App. E.D.2004). The primary determination is whether an employer can reasonably be expected to hire the employee, given his or her present physical condition, and reasonably expect the employee to successfully perform the work. 157 S.W.3d at 244.

The court in *Knisely*, 211 S.W.3d also states at 635:

Section 287.200.1 does not require a claimant to distinguish each disability and assign a separate percentage for each of several pre-existing disabilities to prevail on a claim for permanent total disability. Section 287.200.1; *See Vaught v. Vaughts, Inc.*, 938 S.W.2d 931, 942 (Mo.App. S.D.1997) (overruled on other grounds, *Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003)). Rather, a claimant must establish the extent, or percentage, of the permanent partial disability resulting from the last injury only, and prove that the combination of the last injury and the pre-existing disabilities resulted in permanent total disability. *Id.*

In interpreting this statute, the Court has stated that “[t]o create Second Injury Fund liability, the pre-existing disability must combine with the disability from the subsequent injury in one of two ways: (1) the two disabilities combined result in a greater degree of disability than the sum of the degree of disability from the pre-existing condition and the degree of disability from the subsequent injury; or (2) the pre-existing disability combines with the disability from the second injury to create permanent total disability.” *Searcy v. McDonnell Douglas Aircraft Co.*, 894 S.W.2d 173, 178 (Mo.App. 1995). Claimant must show that: (1) he has preexisting disability that reaches second injury fund threshold, (2) he has additional disability from a compensable injury that qualifies for second injury fund threshold, and (3) that his preexisting disability combines with his present injury to result in a greater degree of disability than the sum of either disabilities alone, “...that is, a synergistic enhancement in which the combined totality is greater than the sum of the independent parts.” *Searcy*, 894 S.W.2d at 178.

“When a claim is made against the Fund for permanent disability compensation, statutory language and case law make it mandatory that the Claimant provide evidence to support a finding, among other elements, that he had a preexisting permanent “disability.” (omitting citations). The disability, whether known or unknown, must exist at the time the work-related injury was sustained, *and* be of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should the employee become unemployed.” *Messex v. Sachs Elec. Co.*, 989 S.W.2d 206, 214 (Mo.App. 1999); *Luetzinger v. Treasurer of Mo.*, 895 S.W.2d 591 (Mo.App. 1995) (emphasis added). “The nature and the extent of the permanent-partial preexisting condition must be proven by a reasonable degree of certainty. (omitting citation). Expert opinion evidence is necessary to prove the extent of the preexisting disability.” *Messex*, 989 S.W.2d at 215.

The Court in *Uhlir v. Farmer*, 94 S.W.3d 441 (Mo.App. 2003) stated at 444-45:

For Second Injury Fund liability, a preexisting disability must combine with a disability from a subsequent injury in one of two ways: (1) the two disabilities combined result in a greater overall disability than that which would have resulted from the new injury alone and of itself; or (2) the preexisting disability combined with the disability from the subsequent injury to create permanent total disability. *Reese v. Gary & Roger Link, Inc.*, 5 S.W.3d 522, 526 (Mo.App. E.D.1999), citing *Searcy*, 894 S.W.2d at 177-78.

The Court must determine the nature and extent of any preexisting disability and whether that disability meets the statutory threshold for Second Injury Fund liability required by Section 287.220. I find by a preponderance of the credible evidence that Claimant did have preexisting disability that does meet the statutory threshold for Second Injury Fund liability.

Dr. Schmidt tested Claimant and noted Claimant had a full scale IQ of 74, verbal IQ of 65, and a performance IQ of 90. His verbal IQ of 65 is in the mild mental retardation range. His performance IQ is in the low limit of the average range. His reading score was in the 1.1 percentile. Dr. Schmidt testified that Claimant had a 30% whole person rating for his preexistent psychological problems based solely on his mild mental retardation and reading disability.

Mary Titterington noted Claimant had not obtained a GED and had basically held laboring jobs. She noted Claimant had trouble on some jobs in the past because he could not do written reports and could not read street signs and kept getting lost. She gave him an intelligence test that revealed his verbal IQ was at 68, which is at the second percentile and is in the mentally deficient range. His general IQ was 74, which is borderline. His

reading pronunciation was at the preschool level. His spelling was at the first grade level. He was functionally illiterate. She stated that Claimant is functioning in borderline to below mental deficiency and is illiterate. Ms. Titterington testified that Claimant's illiteracy is due to his inability to learn.

Based on the substantial and competent evidence, I find that Claimant had preexisting permanent partial disability. I find that Claimant is not able to read and is not able to learn to read because he has a learning disability. I find that his learning disability preexisted his February 4, 1998 injury and that the condition is permanent. I find that Claimant's illiteracy and mild mental retardation constitute a preexisting permanent disability. *See Tiller v. 166 Auto Auction*, 941 S.W.2d 863 (Mo.App. 1997). I find that Claimant's preexisting disability was of such seriousness as to constitute a hindrance or obstacle to employment or re-employment should he become unemployed as required by Section 287.220, RSMo.

I find that Claimant is capable of employment in the open labor market even with his preexisting learning disability. He worked for many years before his February 4, 1998 injury with that condition. Further, the evidence did not demonstrate that Claimant had any other preexisting disability besides his mild retardation and learning disability before the February 4, 1998 injury.

I find that Claimant's preexisting permanent disability was 30% to the body as a whole prior to his last injury on February 4, 1998 because of his mild mental retardation and reading disability. This amounts to 120 weeks of compensation and is sufficient to meet the Second Injury Fund threshold of an amount equal to a minimum of fifty weeks compensation, if a body as a whole injury, as required by Section 287.220, RSMo. I further find, based on the substantial and competent evidence and the application of the Workers' Compensation Law, that Claimant's preexisting disability did not combine with the disability Claimant sustained from the February 4, 1998 injury to result in his permanent and total disability.

I have found that Claimant did sustain additional injury from a compensable accident that Claimant sustained on February 4, 1998, an additional 17.5% permanent partial disability to his body as a whole, which amounts to seventy weeks of disability. This meets the Second Injury Fund threshold requirement of fifty weeks of the body as a whole as required by Section 287.220, RSMo.

Based on the substantial and competent evidence, I find that Claimant's preexistent disability combines with the work injury of February 4, 1998 to produce a synergistic effect to result in a greater degree of overall disability than the simple sum of those disabilities. Further, I find that the work injury of February 4, 1998 does not merely supplement the preexisting condition. I find that the synergistic effect of

Claimant's disabilities is 10% above the simple sum of the disabilities, or 19 weeks of compensation. Accordingly, I find that The Second Injury Fund is liable for nineteen weeks of compensation at the weekly compensation rate of \$278.42, or \$5,289.98.

3. Average weekly wage and compensation rates.

Section 287.250, RSMo dealing with the average weekly wage provides in part:

1. (4) If the wages were fixed by the day, hour, or by the output of the employee, the average weekly wage shall be computed by dividing by 13 the wages earned while actually employed by the employer in each of the last 13 calendar weeks immediately preceding the week in which the employee was injured or if actually employed by the employer for less than 13 weeks, by the number of calendar weeks, or any portion of the week, during which the employee was actually employed by the employer. For purposes of computing the average weekly wage pursuant to this subdivision, absence of five regular or scheduled work days, even if not in the same calendar week, shall be considered an absence for a calendar week if the employee commenced employment on a day other than the beginning of a calendar week, such calendar week and the earnings earned during such week shall be excluded in computing the average weekly wage pursuant to this subdivision.

3. If an employee is hired by the employer for less than the number of hours per week needed to be classified as a full-time or regular employee, benefits computed for purposes of this chapter for permanent partial disability, permanent total disability and death benefits shall be based upon the average weekly wage of a full-time or regular employee engaged by the employer to perform work of the same or similar nature and at the number of hours per week required by the employer to classify the employee as a full-time or regular employee, but such computation shall not be based on less than thirty hours per week.

4. If pursuant to this section the average weekly wage cannot fairly and justly be determined by the formulas provided in subsections 1 to 3 of this section, the division or the commission may determine the average weekly wage in such manner and by such method as, in the opinion of the division or the commission, based upon the exceptional facts presented, fairly determine such employee's average weekly wage.

Page one of Exhibit 13 notes that Claimant was hired to work a 40 hour work week. I find that Claimant was not a part-time Employee. I find that the February 17, 1998 letter from Employer in Exhibit 13 most accurately sets forth Claimant's gross wages for the thirteen weeks immediately before his February 4, 1998 accident. Exhibit 13 indicates that Claimant did not work overtime during that period. Claimant earned \$12.85 per hour. Thus, for the week 12-8-97 that he earned \$150.00, he would have worked 11.67 hours. The week of 11-24-97 that he earned \$411.20, he would have worked 32 hours. Although Exhibit 13 does not specifically identify how many days Claimant worked each week during the thirteen weeks before his accident, the Court concludes that the most likely number of days worked each week is as follows. Because the dates are somewhat different in the two wage statements, the Court has combined information from both to arrive at the following:

DATE	HOURS	Days	GROSS WAGE
1-26-98	38	5	488.30
1-19-98	38	5	488.30
1-12-98	32	4	411.20
1-5-98	17	2	218.45
12-29-97	13	2	167.50
12-22-97	4	1	51.40
12-15-97	19	3	244.15
12-8-97	11.67	2	150.00
12-1-97	11	2	141.35
11-24-97	32	4	411.20
11-17-97	29	4	372.65
11-10-97	24	3	308.40
11-3-97	21	3	269.85

The total gross wages earned during this thirteen week period was \$3,722.75. The total days worked were forty, or eight weeks. The sum of \$3,722.75 divided by eight equals \$465.34. Two-thirds of that amount equals \$310.23. Pursuant to Section 287.250.1(4), RSMo, I find that Claimant's average weekly wage was \$465.34, and that his compensation rate for temporary total and permanent total disability benefits is \$310.23 per week, and his compensation rate for permanent partial disability benefits is \$278.42 per week. I find that these rates fairly determine Claimant's average weekly wage based on the evidence presented.

4. Liability of Employer for past temporary total disability benefits.

The burden of proving entitlement to temporary total disability benefits is on the Employee. *Boyles v. USA Rebar Placement, Inc.* 26 S.W.3d 418, 426 (Mo.App. 2000); *Cooper v. Medical Center of Independence*, 955 S.W.2d 570, 575 (Mo.App. 1997). Section 287.170.1, RSMo provides that an injured employee is entitled to be paid compensation during the continuance of temporary total disability up to a maximum of 400 weeks. Total disability is defined in Section 287.020.7, RSMo as the "inability to return to any employment and not merely . . . [the] inability to return to the employment in which the employee was engaged at the time of the accident." Compensation is payable until the employee is able to find any reasonable or normal employment or until his medical condition has reached the point where further improvement is not anticipated. *Cooper*, 955 S.W.2d at 575; *Vinson v. Curators of Un. of Missouri*, 822 S.W.2d 504, 508 (Mo.App. 1991); *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641, 645 (Mo.App. 1991); *Williams v. Pillsbury Co.*, 694 S.W.2d 488, 489 (Mo.App. 1985).

Temporary total disability benefits should be awarded only for the period before the employee can return to work. *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Phelps*, 803 S.W.2d at 645; *Williams*, 649 S.W.2d at 489. With respect to possible employment, the test is "whether any employer, in the usual course of business, would reasonably be expected to employ Claimant in his present physical condition." *Boyles*, 26 S.W.3d at 424; *Cooper*, 955 S.W.2d at 575; *Brookman v. Henry Transp.*, 924 S.W.2d 286, 290 (Mo.App. 1996). A nonexclusive list of other factors relevant to a claimant's employability on the open market includes the anticipated length of time until claimant's condition has reached the point of maximum medical progress, the nature of the continuing course of treatment, and whether there is a reasonable expectation that claimant will return to his or her former employment. *Cooper*, 955 S.W.2d at 576. A significant factor in judging the reasonableness of the inference that a claimant would not be hired is the anticipated length of time until claimant's condition has reached the point of maximum medical progress. If the period is very short, then it would always be reasonable to infer that a claimant could not compete on the open market. If the period is quite long, then it would never be reasonable to make such an inference. *Boyles*, 26 S.W.3d at 425; *Cooper*, 955 S.W.2d at 575-76.

It was Dr. Fishman's opinion on December 10, 1998 that, based within all reasonable degree of medical certainty, Claimant had reached maximum medical improvement. He released Claimant to his regular duties at that time. Dr. Ebelke's August 17, 1999 report stated Claimant was at maximum medical improvement for what non-operative management has to offer and has been for some time. Dr. Koprivica stated in his February 13, 2001 report that if Claimant did not pursue surgery, he was at maximum medical improvement as of the release of Dr. Fishman on December 10, 1998. Claimant chose not to pursue surgery, and the doctors have recommended against surgery.

I find that Claimant reached maximum medical improvement on December 10, 1998, the date that he was released by Dr. Fishman. The parties stipulated that Employer/Insurer paid Claimant temporary total disability benefits from February 4, 1998 through December 13, 1998 in the amount of \$8,536.98 at the rate of \$190.92 per week. I have found that the proper temporary total disability rate should be \$310.23 per week. Claimant should have been paid a total of \$13,738.76 in temporary total disability benefits based on 44 2/7 weeks from February 4, 1998 through December 10, 1998, the date he reached maximum medical improvement, at the rate of \$310.23 per week. There has been a temporary total disability underpayment of \$5,201.78. I award Claimant \$5,201.78 from Employer/Insurer for this temporary total disability underpayment.

5. Employer's liability for past medical aid.

The employee must prove that the medical care provided by the physician selected by the employee was reasonably necessary to cure and relieve the employee of the effects of the injury. *Chambliss v. Lutheran Medical Center*, 822 S.W.2d 926 (Mo.App. 1991); *Jones v. Jefferson City School District*, 801 S.W.2d 486, 490-91 (Mo.App. 1990); *Roberts v. Consumers Market*, 725 S.W.2d 652, 653 (Mo.App. 1987); *Brueggemann v. Permaneer Door Corporation*, 527 S.W.2d 718, 722 (Mo.App. 1975). The employee may establish the causal relationship through the testimony of a physician or through the medical records in evidence that relate to the services provided. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989); *Meyer v. Superior Insulating Tape*, 882 S.W.2d 735, 738 (Mo.App. 1994); *Lenzini v. Columbia Foods*, 829 S.W.2d 482, 484 (Mo.App. 1992); *Wood v. Dierbergs Market*, 843 S.W.2d 396, 399 (Mo.App. 1992). The medical bills in *Martin* were shown by the medical records in evidence to relate to the professional services rendered for treatment of the product of the employee's injury. *Martin*, 769 S.W.2d at 111.

Section 287.140.1, RSMo, provides in part: "If the employee desires, he shall have the right to select his own physician, surgeon, or other requirement at his own expense." The Court in *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81 (Mo.App. 1995) states at 85:

An employer is charged with the duty of providing the injured employee with medical care, but the employer is given control over the selection of a medical provider. It is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer. Therefore, the employer is held liable for medical treatment procured by the employee only when the employer has notice that the employee needs treatment, or a demand is made on the employer to furnish medical treatment, and the

employer refuses or fails to provide the needed treatment. *Hawkins v. Emerson Electric Co.*, 676 S.W.2d 872, 880 (Mo.App.1984).

The court in *Reeves v. Fraser-Brace Engineering Co.*, 237 Mo.App. 473, 172 S.W.2d 274 (Mo.App. 1943) states at 282:

Under the decisions construing Section 3701, we find several situations in which an employee will be denied recovery. Obviously, where an employee after receiving an injury which he knows is compensable refuses medical attention offered by an employer, and selects his own physician, he cannot recover under Section 3701 for those services. *Moorman v. Central Theatres Corp.*, Mo.App., 98 S.W. 2d 987. Also, where an employer has no notice of such an injury to the workman, nor opportunity to furnish medical aid for him, the employer is not liable for the medical aid furnished. *Schutz v. Great American Ins. Co.*, 231 Mo.App. 640, 103 S.W.2d 904; *Aldridge v. Reavis*, Mo.App., 88 S.W.2d 265.

I further find that Claimant did not make demand on Employer/Insurer for payment of any medical expenses not paid by Employer/Insurer before they were incurred, and that he did not give notice to Employer/Insurer of the medical treatment that he sought to obtain and give them an opportunity to furnish medical aid to him. Claimant could not recall ever asking Employer for follow-up treatment after she talked to the workers' compensation insurance adjuster in 2002. Claimant did not offer evidence that she had ever informed Employer/Insurer that she was requesting or demanding that they provide any of the treatment she obtained.

Court's Exhibit 1, Medicaid lien in the amount of \$5,028.50, was admitted without objection. I find that Claimant selected his own medical providers represented in Court's Exhibit 1, at his own expense. I further find that Employer did not have notice of Claimant's need for medical treatment and that Claimant did not make demand that Employer provide needed treatment which Employer neglected.

The Court finds that the medical bills represented in Court's Exhibit 1 were not authorized by Employer and Insurer, and that pursuant to Section 287.266.10 RSMo, the debt in the amount of \$5,028.50 represented by Court's Exhibit 1 should be apportioned to Claimant, and not to Employer or Insurer.

Claimant offered no past unpaid medical expenses in evidence other than the Medicaid expenses identified in Court's Exhibit 1. I find that Claimant failed to prove that he is entitled to any past medical benefits from Employer/Insurer. I find under the

reasoning of *Blackwell, Hawkins and Reeves*, Employer/Insurer are not liable for any past medical aid.

Claimant's claim for past medical benefits is denied.

6. Employer's liability for future medical aid?

Claimant is requesting an award of future medical aid. Section 287.140, RSMo requires that the employer/insurer provide "such medical, surgical, chiropractic, and hospital treatment ... as may reasonably be required ... to cure and relieve [the employee] from the effects of the injury." This has been held to mean that the worker is entitled to treatment that gives comfort or relieves even though restoration to soundness [a cure] is beyond avail. *Bowers*, 132 S.W.3d at 266. Medical aid is a component of the compensation due an injured worker under section 287.140.1, RSMo. *Bowers*, 132 S.W.3d at 266; *Mathia v. Contract Freighters, Inc.*, 929 S.W.2d 271, 277 (Mo.App. 1996). The employee must prove beyond speculation and by competent and substantial evidence that his or her work related injury is in need of treatment. *Williams v. A.B. Chance Co.*, 676 S.W.2d 1 (Mo.App. 1984). Conclusive evidence is not required. *Bowers*, 132 S.W.3d at 270; *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 283 (Mo.App. 1997).

It is sufficient if Claimant shows by reasonable probability that he or she is in need of additional medical treatment. *Bowers*, 132 S.W.3d at 270; *Mathia*, 929 S.W.2d at 277; *Downing v. Willamette Industries, Inc.*, 895 S.W.2d 650, 655 (Mo.App. 1995); *Sifferman v. Sears, Roebuck and Co.*, 906 S.W.2d 823, 828 (Mo.App. 1995). "Probable means founded on reason and experience which inclines the mind to believe but leaves room to doubt." *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 329 (Mo.App. 1986); *Sifferman* at 828. Section 287.140.1, RSMo does not require that the medical evidence identify particular procedures or treatments to be performed or administered. *Talley v. Runny Meade Estates, Ltd.*, 831 S.W.2d 692, 695 (Mo.App. 1992); *Bradshaw v. Brown Shoe Co.*, 660 S.W.2d 390, 394 (Mo.App. 1983).

The type of treatment authorized can be for relief from the effects of the injury even if the condition is not expected to improve. *Bowers*, 132 S.W.3d at 266; *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. banc 2003). Future medical care must flow from the accident, via evidence of a medical causal relationship between the condition and the compensable injury, if the employer is to be held responsible. *Bowers*, 132 S.W.3d at 270. Medical aid may be required even though it merely relieves the employee's suffering and does not cure it, or restore the employee to soundness after an injury or occupational disease. *Mathia*, 929 S.W.2d at 277; *Stephens v. Crane Trucking, Incorporated*, 446 S.W.2d 772, 782 (Mo. 1969); *Brollier v. Van Alstine*, 236 Mo.App. 1233, 163 S.W.2d 109, 115 (1942). To relieve a condition is to give ease,

comfort or consolation, to aid, help, alleviate, assuage, ease, mitigate, succor, assist, support, sustain, lighten or diminish. *Stephens*, 446 S.W.2d at 782; *Brolier*, 163 S.W. 2d at 115. The employer/insurer may be ordered to provide medical and hospital treatment to cure and relieve the employee from the effects of the injury even though some of such treatment may also give relief from pain caused by a preexisting condition. *Hall v. Spot Martin*, 304 S.W.2d 844, 854-55 (Mo. 1957).

It was Dr. Fishman's opinion on December 10, 1998 that based within all reasonable degree of medical certainty, Claimant had reached maximum medical improvement and was not in need of further physical therapy treatments or epidural steroid injections. He discharged Claimant from his care at that time.

Dr. Wilson wrote in July 2003, "With regards to his changes at L4-5, he has reached maximum medical improvement. He desires no surgical intervention and I would concur. He may require intermittent use of muscle relaxants such as Flexeril and intermittent use of anti-inflammatory such as Celebrex. The duration of use should be expected to include a six month span."

I find that Claimant failed to prove that he is entitled to an award for any future medical benefits, and his request for future medical aid is denied.

7. Attorneys Fees.

Claimant's attorney is entitled to a fair and reasonable fee in accordance with Section 287.260, RSMo. An attorney's fee may be based on all parts of an award, including the award of medical expenses. *Page v. Green*, 758 S.W.2d 173, 176 (Mo.App. 1988). Claimant's attorney did not offer a written fee agreement in evidence at the hearing. However, during the hearing, and in Claimant's presence, Claimant's attorney requested a fee of 25% of all benefits to be awarded. Claimant did not object to that request. I find Claimant's attorney is entitled to and is awarded an attorney's fee of 25% of all amounts awarded for necessary legal services rendered to Claimant. The compensation awarded to 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 Claimant: Frank D. Eppright.

Date: April 15, 2009

Made by: /s/ Robert B. Miner
Robert B. Miner
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

/s/ Naomi Pearson

Naomi Pearson
Division of Workers' Compensation