

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

Injury No.: 03-142058

Employee: Stephen Petelik
Employer: Motor Control Specialists
Insurer: Ohio Casualty Insurance Company
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 Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated December 23, 2008. The award and decision of Administrative Law Judge Linda Wenman, issued December 23, 2008, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 2nd day of June 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

John J. Hickey, Member

Attest:

Secretary

AWARD

Employee: Stephen Petelik Injury No.: 03-142058
Dependents: N/A Before the
Employer: Motor Control Specialists **Division of Workers'**
Additional Party: Second Injury Fund Department of Labor and Industrial **Compensation**
Relations of Missouri
Insurer: Ohio Casualty Insurance Company Jefferson City, Missouri
Hearing Date: September 24-25, 2008, continued to Checked by: LJW
September 30, 2008

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
 - 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
 - Date of accident or onset of occupational disease: August 19, 2003
 - State location where accident occurred or occupational disease was contracted: St. Louis County, MO

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

- 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: While lifting a control panel, Employee fell, landing on his back and side, and the control panel landed on his left arm.

12. Did accident or occupational disease cause death? No

13. Part(s) of body injured by accident or occupational disease: Left arm and low back.

- Nature and extent of any permanent disability: Permanent Total Disability from Employer

15. Compensation paid to-date for temporary disability: None

16. Value necessary medical aid paid to date by employer/insurer? \$588.70

Employee: Stephen Petelik Injury No.: 03-142058

17. Value necessary medical aid not furnished by employer/insurer? \$136,170.82

- Employee's average weekly wages: \$582.88

19. Weekly compensation rate: \$388.78 / \$347.05

20. Method wages computation: Stipulated

COMPENSATION PAYABLE

21. Amount of compensation payable:

Unpaid medical expenses:	\$272,341.64*
238 4/7th weeks of temporary total disability (or temporary partial disability)	\$185,503.60**
Permanent total disability benefits from Employer beginning April 16, 2008, for Claimant's lifetime	TO BE DETERMINED

22. Second Injury Fund liability: No

Total: \$457,845.24***

23. Future requirements awarded: Pursuant to award

*Amount doubled from \$136,170.82

**Amount doubled from \$92,751.80

*** Payable now, in addition to ongoing PTD benefits starting April 16, 2008

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 in favor of the following attorney for necessary legal services rendered to the claimant: Ellen Morgan

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stephen Petelik Injury No.: 03-142058

Dependents: N/A

Employer: Motor Control Specialists

Additional Party: Second Injury Fund

Insurer: Ohio Casualty Insurance Co.

Before the
**Division of Workers'
 Compensation**
 Department of Labor and Industrial
 Relations of Missouri
 Jefferson City, Missouri

Checked by: LJW

PROCEDURAL HISTORY

On May 18, 2005, a Temporary Award was issued by the Honorable Margaret D. Landolt, directing Motor Control Specialists (Employer) to provide the following: medical treatment referable to Stephen Petelik's (Claimant) low back; past and ongoing temporary total disability payments; and payment of past medical expenses incurred by Claimant related to treatment sought for his low back. Employer appealed Judge Landolt's ruling to the Labor & Industrial Relations Commission (LIRC). On July 26, 2005, the LIRC dismissed Employer's Application for Review finding no jurisdictional grounds for review. Employer next appealed the LIRC's dismissal to the Missouri Court of Appeals, Eastern District (Court of Appeals). On April 25, 2006, the Court of Appeals dismissed Employer's appeal finding no jurisdictional grounds for review. As of the date of final hearing, Employer has not complied with any order as set forth in Judge Landolt's Temporary Award.

The undersigned Judge has reviewed the Temporary Award of May 18, 2005, along with the transcript and evidence presented at the hardship hearing. Following this review and the testimony and evidence presented at the hearing for final award, the findings of fact and rulings of law found in Judge Landolt's award are adopted in this final award, attached to the final award, incorporated by this reference, and will not be repeated. Any additional findings of fact and conclusions of law found necessary to supplement or to comport to the new evidence presented at this trial will be included in this award.

PRELIMINARIES

A hearing for final award was held regarding the above referenced Workers' Compensation claim by the undersigned Administrative Law Judge on September 24-25, 2008, and continued to September 30, 2008. The parties were provided an opportunity to file a post-trial brief, and the briefs were due by October 21, 2008. Post-trial briefs were received on behalf of Claimant and the Second Injury Fund. No post-trial brief was submitted by Employer. Attorney Ellen Morgan represented Claimant. Employer is insured by Ohio Casualty Insurance Company, and represented by attorney Kevin Leahy. Assistant Attorney General Carol Barnard represented the Second Injury Fund (SIF).

Prior to the start of the hearing, the parties identified the following issues for disposition in this case: accident as relates to Claimant's alleged low back injury; medical causation as relates to Claimant's alleged low back injury; notice as relates to Claimant's low back injury; liability for past medical expenses; liability of Employer and SIF for permanent total disability (PTD) or permanent partial disability (PPD) benefits; future medical care; liability of Employer for past temporary total disability (TTD) benefits; attorney's fees and costs under §287.560 RSMo.; doubling of Temporary Award; timeliness of Employer's answer; and Employer's request for issuance of an additional Temporary Award if Claimant is not found to be at maximum medical improvement (MMI).

Claimant offered Exhibits A-S, U-VV, and WW-ZZ. Employer offered Exhibits 1-2, and 4-5. The exhibits were admitted into the record. Any markings contained within any exhibit were present when received, and the markings did not influence the evidentiary weight given the exhibit. Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

All evidence presented has been reviewed. Only testimony and evidence necessary to support this award will be reviewed and summarized.

1. Claimant is forty-one years old, a high school graduate, and attended a community college course to obtain a commercial driving license. Prior to his employment with Employer, Claimant worked in a furniture store, briefly as a truck driver, in construction, as a landscaper, in a pizza parlor, and as a maintenance man.
2. In 1996, Claimant was a passenger in a motor vehicle involved in a roll-over accident. As a result of the accident, Claimant had glass fragments in his scalp and left leg, but no other injuries. All occupants of the vehicle were treated and released from the hospital.
3. On August 19, 2003, Claimant sustained a work related injury as outlined in Judge Landolt's Temporary Award.
4. On September 24, 2003, Claimant's initial MRI of his lumbar spine demonstrated a large posterior central herniated disc with moderate diffuse annular bulge at L5-S1, with marked compression of the left anterior thecal sac and origin of the S1 nerve root along with encroachment of the inferior left and right L5-S1 foramen. The MRI also displayed a moderate diffuse bulge with flattening of the anterior thecal sac at L4-5 with the suggestion of a focal annular tear.
5. Following issuance of the Temporary Award and Employer's continued denial of medical care, Claimant maintained medical treatment with Drs. Livingstone, Graven, and Vellinga utilizing his own and then wife's medical insurance. On July 14, 2005, following a positive discogram, a repeat MRI of Claimant's lumbar spine was obtained. The MRI demonstrated mild posterior bulges and stenosis at L4-5, and a significant central disc protrusion at L5-S1 that significantly narrowed the L5-S1 foramen bilaterally. Surgery was recommended.
6. On October 3, 2005, Claimant underwent an L4-5 and L5-S1 decompression laminectomy, posterior fusion with hardware, cages and bone grafts performed by Dr. Graven. Claimant attended post-operative physical therapy, experienced less radicular pain, but continued to complain of low back pain. By February 21, 2006, post-operative x-rays were interpreted by Dr. Graven as demonstrating a significantly solid fusion and intact hardware.
7. On April 27, 2006, Dr. Graven noted Claimant continued to require four Percocet pills per day, and opined "I am doubtful that he will have real significant improvement after this." On August 17, 2006, Dr. Graven discussed additional treatment options with Claimant including insertion of a spinal cord stimulator, repeat discogram, and further surgery. Claimant remained on Percocet. On December 12, 2006, Dr. Graven noted Claimant still had low back and right leg pain, was considering the spinal cord stimulator, however, "light [life] changes prohibit him from having surgery at this time." Dr. Graven also opined Claimant was unable to work. On April 6, 2007, Dr. Graven referred Claimant to Dr. Vellinga for further pain management.
8. On April 25, 2007, Dr. Vellinga suggested a repeat MRI of Claimant's lumbar spine be obtained. The MRI was performed on July 17, 2007, and demonstrated anterior/posterior spinal fusions L4-S1, and edema of the L4, L5, and S1 vertebral bodies. Dr. Vellinga continued to provide pain management treatment utilizing a regimen of Percocet and Duragesic patches, and a muscle relaxant as needed.
9. On April 15, 2008, in response to a disability inquiry, Dr. Graven indicated Claimant had reached MMI, his level of activity was relatively sedentary, and Claimant was unable to do any repetitive bending, stooping, squatting, or any manual labor. Dr. Graven confirmed Claimant remained under the care of Dr. Vellinga and required daily narcotic analgesics. Dr. Graven opined "if he were able to return to work, it would be in the most sedentary occupation, desk work only with no repetitive bending, stooping, squatting, or lifting greater than five pounds." Dr. Graven indicated Claimant would also require frequent breaks and positional change, "if not recumbent rest."
10. As of trial, Claimant remains unemployed, and requires daily narcotics to control his back pain. Claimant rates his pain as "variable" depending on his degree of activity. He experiences difficulty sleeping, and is unable to sleep for extended periods of time due to his back discomfort. He finds it necessary to lie down several times during the day, and change positions frequently to relieve his back pain. Due to his pain medication, Claimant experiences memory and concentration problems. Throughout his life Claimant has been an avid fisherman, but must now limit the way he fishes, and the length of time he spends fishing. Claimant attempts to help with housework, but activity causes him back pain. Prior to his injury, Claimant confirmed he had not received any medical care related to his back.
11. Throughout the years, Claimant's medical bills have been paid by private insurers, and he is currently receiving Medicare benefits. He has received financial support through a long-term disability policy, and his ex-wife's 401K plan. The medical and financial suppliers are seeking reimbursement for monies expended on his care.
12. On October 19, 2004 (see J. Landolt's award), April 27, 2007, and July 1, 2008, Claimant was examined by Dr. Poetz, a board certified family practice physician, at his attorney's request. At the April 27, 2007 visit, Dr. Poetz noted Claimant had undergone spinal surgery, post-operative physical therapy, and was receiving post-operative pain management services. Upon examination, Dr. Poetz noted flattening of Claimant's lumbar lordosis, fifteen degrees of flexion, and positive right straight leg raising. Dr. Poetz opined the medical treatment received by Claimant prior to his April 27, 2007, visit had been reasonable and necessary to treat Claimant, and the charges associated with the care were usual and customary. Dr. Poetz opined Claimant was not at MMI, remained temporarily totally disabled and required additional medical treatment.
13. At the July 1, 2008 visit, Dr. Poetz noted Claimant's on-going treatment with pain management. Upon examination, Dr. Poetz once again noted flattening of Claimant's lumbar lordosis, fifteen degrees of flexion, and positive right straight leg raising. Dr. Poetz' diagnoses included: preexisting lumbar degenerative disc disease; L4-5 and L5-S1 herniated discs with radiculopathy and exacerbation of degenerative disc disease related to the August 19, 2003 work injury; status post lumbar fusion at L4-5 and L5-S1 with instrumentation related to the August 19, 2003 work injury; and a resolved left arm contusion related to the August 19, 2003 work injury. Dr. Poetz again opined the medical treatment received by Claimant prior to his July 1, 2008 visit had been reasonable and necessary to treat Claimant, and the charges associated with the care were usual and customary. Dr. Poetz rated Claimant's lumbar spine disability at 45% BAW PPD directly due to the August 9, 2003 work injury, and 5% BAW PPD referable to preexisting lumbar spine degenerative disease. Dr. Poetz opined Claimant was PTD as a "direct result of his August 9, 2003 work related injury," and was unemployable in the open labor market.
14. On July 14, 2008, Claimant was examined by Dr. Curylo, a board certified orthopedic surgeon, at Employer's request. Dr. Curylo noted Claimant had no history of back problems prior to August 2003. Upon examination of Claimant's lumbar spine, Dr. Curylo noted Claimant experienced pain with flexion and extension, and tenderness at L3-S1. Dr. Curylo also noted Claimant's neurological examination was normal, and Dr. Curylo observed no indication Claimant was malingering. On the date of examination Dr. Curylo obtained lumbar x-rays and reviewed Claimant's previous lumbar MRIs. The x-rays demonstrated a solid fusion at L5-S1, and possible pseudoarthrosis at L4-5. Dr. Curylo noted Claimant's September 2003 lumbar MRI demonstrated degenerative disc disease L4-S1, and a central/paracentral disc herniation with a large extruded fragment at L5-S1. Dr. Curylo interpreted the July 2007 MRI as demonstrating edema at L4-5, causing Dr. Curylo to question whether Claimant had a pseudoarthrosis at L4-5 or a low grade infection at that level. Dr. Curylo offered three potential diagnoses: pseudoarthrosis; low-grade infection; or failed back syndrome. Dr. Curylo opined before a definitive diagnosis could be made, Claimant would require further testing consisting of a lumbar CT scan and bone scan to rule out pseudoarthrosis, and

hematology studies to rule out infection. Dr. Curylo did not find Claimant to be at MMI. Dr. Curylo opined Claimant's back condition was a substantial factor in causing his current disability. However, Dr. Curylo opined Claimant's lumbar spine condition was not related to the work injury of August 19, 2003, as Claimant "did not complain of any back pain or any sciatica [in the emergency room], and his symptoms started several days later when he was on a vacation trip which involved significant physical activities."

15. Upon cross examination, Dr. Curylo acknowledged he did not know the distance Claimant fell; the weight involved in the fall; how long Claimant's vacation lasted; Claimant's level of activity during the vacation; or exactly when Claimant's low back pain started. Dr. Curylo conceded if Claimant's vacation activities were not physical, Claimant's low back complaints could be related to his August 19, 2003 work injury. Dr. Curylo further acknowledged it was possible Claimant's large disc fragment could have migrated over the course of several days and then produced pain. Dr. Curylo opined back symptoms following a herniated disc normally appear within three to four days. Dr. Curylo acknowledged the medical treatment provided to Claimant's lumbar spine to date had been appropriate for his condition, and if his lumbar spine is fused at L4-5 the permanent restrictions given to Claimant are appropriate, however, if the L4-5 level is not fused Claimant needs treatment.

16. Jeffrey Magrowski, PhD., a vocational rehabilitation specialist, testified at trial at Claimant's request. Prior to his testimony, Dr. Magrowski interviewed Claimant on September 19, 2008. After meeting with Claimant and reviewing his medical records and restrictions, Dr. Magrowski concluded Claimant was not employable and could not successfully compete in the open labor market. Looking at Claimant's restrictions, Dr. Magrowski concluded if he was employable, Claimant would require sedentary work. Dr. Magrowski noted Claimant's daily need for narcotics affects his memory and concentration and would impact his ability to find sedentary work, and most employers will not hire a worker if they take narcotics or opium based drugs. Additionally, Claimant would require special accommodations beyond normally scheduled breaks, further shrinking his employment base. Dr. Magrowski found Claimant to be unemployable due to his back disability alone, and noted prior to August 2003 Claimant worked without any restrictions.

RULINGS OF LAW WITH SUPPLEMENTAL FINDINGS

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

Issues relating to accident & medical causation

Section 287.020 RSMo (2000), defines accident as an unexpected or unforeseen event or series of events that occur suddenly, without fault, and produce objective symptoms of an injury. The injury must be "clearly work related", and that term is defined as work being a substantial factor in the resulting medical condition. Further, an injury is not compensable merely because work was a triggering or precipitating factor. To be medically causally related, the work must be a substantial factor in the cause of the resulting medical condition and disability. A causative factor may be substantial even if it is not the primary or most significant factor. *Cahall v. Cahall*, 963 S.W.2d 368, 372 (Mo.App. 1998) (overruled on other grounds). Further, there is no minimum percentage set out in the Workers' Compensation Law defining "substantial factor." *Id.* Whether employment is a substantial factor in causing the injury is a question of fact. *Sanderson v. Porta-Fab Corp.*, 989 S.W.2d 599, 603 (Mo.App. 1999) (overruled on other grounds). Determinations of this kind require the assistance of expert medical testimony. Medical causation not within lay understanding or experience requires expert medical evidence. *Wright v. Sports Associated, Inc.*, 887 S.W.2d 596 (Mo.banc 1994) (overruled on other grounds). The weight to be accorded an expert's testimony should be determined by the testimony as a whole and less than direct statements of reasonable medical certainty will be sufficient. *Choate v. Lily Tulip, Inc.*, 809 S.W.2d 102 (Mo.App. 1991) (overruled on other grounds).

Employer does not dispute Claimant suffered a compensable work related accident on August 19, 2003. Employer does dispute whether Claimant's low back was injured in that accident. Claimant's testimony regarding how the accident occurred, when his low back pain began, and the activities he performed on his vacation is consistent with the testimony given during the hardship hearing held by Judge Landolt. Like Judge Landolt, I find Claimant's testimony to be credible. The only medical evidence produced at the hardship hearing was from Dr. Poetz who testified it was not uncommon for a ruptured disc to initially be asymptomatic, and to take several days for the fragment to migrate and place pressure on a nerve root causing pain. Judge Landolt found Dr. Poetz's "explanation to be reasonable, and consistent with the evidence in this case that his [Claimant's] back and leg became symptomatic three to four days after his work accident." Dr. Poetz reaffirmed his opinion in subsequent reports and deposition.

Employer now relies on the opinion of Dr. Curylo, who concluded Claimant's disc herniation did not occur at the time of his fall because he did not report back symptoms while in the emergency room, and he engaged in "significant" physical activities while on vacation. However, Dr. Curylo also acknowledged he did not know the distance Claimant fell; the weight involved in the fall; how long Claimant's vacation lasted; Claimant's level of activity during the vacation; or exactly when Claimant's low back pain started. Dr. Curylo conceded if Claimant's vacation activities were not physical, Claimant's low back complaints could be related to his August 19, 2003 work injury. Dr. Curylo further acknowledged it was possible Claimant's large disc fragment could have migrated over the course of several days and then produced pain. Dr. Curylo opined back symptoms following a herniated disc normally appear within three to four days. During hardship hearing testimony, Claimant and his ex-wife placed the start of Claimant's low back symptoms at three to four days following his work related fall, which matches the time frame cited by Dr. Curylo.

Based on the evidence presented at the hardship hearing and hearing for final award, I find Claimant has met his burden to establish accident and medical causation, and find Claimant's work on August 19, 2003, was a substantial factor in causing his medical condition and need for medical care to his left arm and low back.

Issues related to notice

Employer raises a notice defense regarding Claimant's low back injury sustained in the August 19, 2003 accident. Section 287.420 RSMo. (2000), instructs an injured worker provide written notice of an injury to their employer within thirty days of an accident. Failure to provide the thirty days notice is waived if an employee can demonstrate good cause for failing to provide the written notice, or if the employer has not been prejudiced. As indicated by Judge Landolt in the hardship award, "sometime between November 3, 2003, and May 12, 2004, when his Claim for Compensation was filed, Claimant made the connection that his back and leg pain were related to his work accident." Thus, there was potentially a maximum six month window where Employer was unaware Claimant believed he may have suffered a back injury during his August 19, 2003 work injury. This window may have been less than six months. During this period of time, Claimant was undergoing medical care for his back that Dr. Poetz and Dr. Curylo have deemed to be appropriate, reasonable, and necessary. During this time frame Claimant's ex-wife kept Employer fully apprised of Claimant's treatment. I find Employer was not prejudiced by lack of written notice.

Issues related to past medical expenses

Section 287.140.1 RSMo. (2000), provides that an employer shall provide such medical, surgical, chiropractic, ambulance and hospital treatment as may be necessary to cure and relieve the effects of the work injury. Additionally, §287.140.3 RSMo., provides that all medical fees and charges under this section shall be fair and reasonable. A sufficient factual basis exists to award payment of medical expenses when medical bills and supporting medical records are introduced into evidence supported by testimony that the expenses were incurred in connection with treatment of a compensable injury. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo.banc 1989).

Employer paid for the medical treatment associated with Claimant's left arm injury. Claimant seeks reimbursement of medical expenses to treat his low back in the amount of \$136,170.82. An itemized listing of charges in the amount of \$136,170.82 was issued by the medical providers, supported by the appropriate medical records, and Claimant's testimony. Employer denied Claimant's low back injury was work related, and Claimant was forced to seek medical treatment on his own. Employer did not challenge the reasonableness or necessity of the treatment provided. Claimant's low back injury is compensable, and he has met his burden of evidence. Accordingly, I find Employer liable for \$136,170.82 in medical expenses accrued by Claimant in an attempt to cure and relieve the effects of his work related injury.

Issues related to future medical care

Claimant requests future medical care from Employer in regard to his low back injury. Dr. Curylo opined Claimant will require additional medical care to determine the status of his fusion. Dr. Poetz opined Claimant will require continued medical care for pain management. Claimant is not required to present evidence concerning the specific future medical treatment that will be necessary in order to receive an award of future medical care. *Landers v. Chrysler Corp.*, 963 S.W.2d 275 (Mo.App. 1997) (overruled on other grounds). Future medical benefits may be awarded if a claimant shows by reasonable probability that there will be a need for additional medical care due to the work-related injury. *Id.* When future medical benefits are awarded, the medical care must flow from the accident in order to hold an employer liable. *Id.* Reasonable probability is based on reason and experience that inclines the mind to believe, but leaves room for doubt. *Tate v. Southwestern Bell Telephone Co.*, 715 S.W.2d 326, 320 (Mo.App. 1986).

I find Claimant is entitled to receive future medical care from Employer. Employer is instructed to leave medical open regarding Claimant's low back injury, including, but not limited to, medical examinations and care by a board certified neurosurgeon or orthopedic surgeon specializing in spine disorders, pain management by a board certified pain management specialist, physical therapy, medications, medical equipment prescribed by the authorized physician, and surgical or diagnostic needs. Employer will retain the right to direct any future medical care if utilizing a physician who meets the qualifications as previously described.

Issues related to TTD benefits

TTD benefits are intended to cover a period of time from injury until such time as claimant can return to work. *Phelps v. Jeff Wolk Construction Co.*, 803 S.W.2d 641 (Mo.App. 1991) (overruled on other grounds). Employer has paid no TTD benefits to date. Claimant testified he has been unable to work since September 19, 2003. Claimant seeks 238 4/7th weeks of TTD benefits covering a period from September 19, 2003, until April 15, 2008, when Dr. Graven opined Claimant was at MMI. A review of the medical records demonstrates Dr. Graven provided an initial off-work slip beginning September 24, 2003, and thereafter kept Claimant off work. Prior to Dr. Graven's off-work slip, Dr. Livingstone had kept Claimant off-work until September 18, 2003, due to his lumbar spine complaints. I find it reasonable and consistent with the medical records that Claimant was unable to work between September 19, 2003 and September 24, 2003, and forward until he reached MMI on April 15, 2008. I find Employer liable for 238 4/7th weeks of TTD benefits, or \$92,751.80.

Issues related to MMI and additional Temporary Award

Employer requests issuance of a new temporary award if Claimant is not found to be at MMI. Once an injured worker has reached MMI, their case is ready for settlement or a final award. Determining if an injured worker has reached MMI requires the assistance of a medical expert. Deciding which medical expert's opinion to accept is for the court to determine.

Employer relies upon Dr. Curylo's opinion Claimant is not at MMI until further testing rules out the presence of a pseudoarthrosis or low grade infection. The treating physician, Dr. Graven, has indicated Claimant reached MMI on April 15, 2008. Both physicians provide sound medical reasoning for reaching their respective opinions. Dr. Curylo believes the presence of edema on Claimant's last MRI at Claimant's L4-5 vertebral bodies is suggestive of a pseudo-fusion, which could be medically/surgically treated and possibly improve Claimant's condition. Dr. Graven followed Claimant post-operatively, obtaining post-operative x-rays read as showing intact hardware placement and solidifying fusion. Dr. Graven opined Claimant experiences chronic pain. Taking into account the equally sound medical opinions of two competent physicians, I find the opinion of the treating physician, Dr. Graven, to be persuasive, and find Claimant to be at MMI. As Claimant is at MMI, a final award must issue.

While issuing a temporary award in line with Dr. Curylo's recommendation is a medical option, it is complicated by the actions taken by Employer in refusing to follow the lawful order issued by Judge Landolt in the initial Temporary Award. Employer has ignored one Temporary Award. This court does not have equitable powers. I can not place conditions on a Temporary Award to convert it into an automatic final award if Employer fails to comply with the conditions a second Temporary Award sets forth. I can issue a Temporary Award or issue a Final Award. I can not issue a hybrid somewhere in between.

Liability of the Employer or SIF for Permanent Total Disability

Claimant seeks permanent total disability benefits from Employer. Section 287.020.7 RSMo., defines "total disability" as the inability to return to any employment, and not merely the inability to return to employment in which the employee was engaged at the time of the last work related injury. *See Fletcher v. Second Injury Fund*, 922 S.W.2d 402 (Mo.App.1996)(overruled on other ground). The determinative test to apply when analyzing permanent total disability is whether a claimant is able to competently compete in the open labor market given claimant's condition and situation. *Messex v. Sachs Electric Co.*, 989 S.W.2d 206 (Mo.App. 1999)(overruled on other grounds). An employer must be reasonably expected to hire the claimant, given the claimant's current physical condition, and reasonably expect the claimant to successfully perform the work duties. *Shipp v. Treasurer of Mo.*, 99 S.W.3d 44 (Mo.App. 2003)(overruled on other grounds). Even though a claimant might be able to work for brief periods of time or on a part-time basis it does not establish that they are employable. *Grgic v. P&G Construction*, 904 S.W.2d 464, 466 (Mo.App.1995). As stated in *Hughey v. Chrysler Corp.*, 34 S.W.3d 845 (Mo. App. 2000), when determining whether an employer or SIF is responsible for PTD benefits, "the first determination is the degree of disability from the last injury," and "if a claimant's last injury in and of itself rendered the claimant permanently and totally disabled, then the Second Injury Fund has no liability and employer is responsible for the entire amount." *Id.* at 847.

Claimant alleges PTD due to the effects of his August 19, 2003 injury. Two physicians and a vocational expert provided testimony regarding Claimant's employability. Dr. Curylo opined in his initial report if Claimant has chronic pain due to a failed back syndrome, Claimant should be able to return to light duty work with a twenty pound lifting restriction, if he is also allowed to sit/stand every twenty to thirty minutes. When asked at trial to consider the opinion and restrictions placed by Dr. Graven on April 15, 2008, Dr. Curylo testified the treating physician would be in a better position to determine Claimant's limitations.

Dr. Poetz opined Claimant is PTD "as a direct result of his August [1]9, 2003 work related injury." Dr. Poetz did rate 5% preexisting disability to Claimant's lumbar spine, but acknowledged other than an occasional backache, Claimant never had a significant injury to his low back, never needed to seek medical treatment regarding his low back, and Claimant never missed time from work due to low back complaints. Section 287.220.1 RSMo. (2000), provides a preexisting disability must constitute a hindrance or obstacle to employment or obtaining reemployment for SIF liability to be considered. Prior to this injury, if Claimant had any preexisting low back disability it did not rise to a level to constitute a hindrance or obstacle to employment.

Dr. Magrowski opined vocationally Claimant was PTD and unemployable in the open labor market considering only his low back disability. Dr. Magrowski reached this conclusion due to the level of narcotic pain medications Claimant was taking, and his severe physical restrictions placed by Dr. Graven. Dr. Magrowski concluded Claimant could not compete or successfully maintain employment in the open labor market.

I find the opinions of Dr. Poetz and Dr. Magrowski to be persuasive. I find Claimant is PTD due to the low back injury he sustained in the August 19, 2003 work accident. Given Claimant's limitations, it would be unreasonable to expect any employer to hire Claimant, or to expect Claimant to successfully perform new work duties. Claimant is permanently and totally disabled due to his last work injury alone, and Employer shall pay PTD benefits as prescribed by law. As Employer is liable for PTD benefits, SIF has no liability regarding this injury.

Issues related to §287.510 penalty

Claimant seeks a doubling of the benefits awarded in the Temporary Award. Section 287.510 RSMo. (2000), authorizes an ALJ to issue a temporary or partial award, and states in part: "if the same be not complied with, the amount thereof may be doubled in the final award, if the final award shall be in accordance with the temporary or partial award." Further, the courts have instructed that an employer's reasons for nonpayment are irrelevant to apply the doubling penalty as there is no reason "to graft a requirement of ill-will or purposefulness onto the statute". *Shaw v. Scott*, 49 S.W.3d 720 (Mo.App. 2001).

In the instant case, Employer readily admits it did not comply with any aspect of the Temporary Award issued by Judge Landolt in 2005. Employer offers no plausible explanation for the failure to comply, short of its disagreement with the result. Employer did not believe Claimant injured his back as a result of the August 19, 2003 fall. At the hardship hearing, Employer offered no contrary medical evidence, despite being granted an opportunity to submit medical evidence after the close of testimony. After the Temporary Award issued, Employer did not seek or develop any contrary medical evidence until approximately two months before the trial for final hearing. The very first time Employer sought a medical examination of Claimant was on July 14, 2008, roughly four years after the claim was filed alleging a low back injury, and more than three years after the Temporary Award issued.

In this award, Claimant has prevailed on all issues that were placed in dispute and decided by Judge Landolt's Temporary Award. Accordingly, I find the benefits Claimant should have received as a result of the Temporary Award should be doubled. The benefits awarded in the Temporary Award included past and ongoing medical benefits, and past and ongoing TTD benefits. As outlined earlier in this award, Employer owes \$136,170.82 in medical benefits, and \$92,751.80 in TTD benefits. Applying the penalty authorized by §287.510, Employer owes an additional \$228,922.62 in penalty benefits.

Issues related to attorney fees & costs under §287.560

Claimant seeks \$2,546.00 in costs related to discovery conducted in preparation for the hardship and final hearings. Section 287.560 RSMo. (2000), provides in part: "if the division or commission determines that any proceedings have been brought, prosecuted or defended without reasonable ground, it may assess the whole cost of the proceedings upon the party who so brought, prosecuted or defended them." In the instant case, while the tactical decisions made by Employer are questionable, Employer had reasonable grounds to defend in both the hardship and final hearings. Claimant's request for costs and fees under §287.560 is denied.

Issues related to timeliness of Employer's answer

Claimant seeks a ruling on the timeliness of Employer's answer, and the effect of an untimely answer. Code of State Regulation 8 CSR 50-2.010(8) states in part:

- ... within thirty (30) days from the date of the division's acknowledgement of the claim, the employer or its insurer . . . shall file an Answer to Claim for Compensation . . .
- (A) Extensions of time to file an Answer to Claim for Compensation will be granted only upon a showing of good cause. Applications for an extension of time to answer the claim shall be made to the chief administrative law judge of the local office with venue of this case.
- (B) Unless the Answer to Claim for Compensation is filed within thirty (30) days from the date the division acknowledges receipt of the claim or any extension previously granted, the statements of fact shall be deemed admitted for any further proceedings.

In the instant case, Claimant's Claim for Compensation was acknowledged as received by the Division on May 18, 2004. Employer's answer was received by the Division on August 20, 2004. The Division file is silent regarding any request or grant made by the St. Louis Chief Administrative Law Judge to allow an extension of filing time. Employer offers no defense regarding the untimely filing. Based on the evidence available, I find Employer's answer to have been filed out of time. As such, any statement of facts contained in Claimant's Claim for Compensation are admitted, however, the statements apply only to questions of fact, and are not determinative of the legal questions presented. *Hendricks v. Motor Freight Corp.*, 570 S.W.2d 702 (Mo.App. 1978).

CONCLUSION

Claimant sustained a work related accident on August 19, 2003, that resulted in injury to his left arm and low back. Claimant is found to be permanently and totally disabled as a result of the August 19, 2003 injury. Employer will pay \$136,170.82 in past medical benefits, \$92,751.80 in past TTD benefits, \$228,922.62 in §287.510 penalty, weekly PTD benefits, and will provide future medical care as outlined in this award. SIF has no liability in this claim. Claimant's attorney is entitled to a 25% lien.

Date: _____

Made by: _____

LINDA J. WENMAN
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Jeffrey W. Buker
Director
Division of Workers' Compensation

TEMPORARY OR PARTIAL AWARD

Employee: Stephen Petelik Injury No.: 03-142058
Dependents: N/A Before the
Employer: Motor Control Specialists **Division of Workers' Compensation**
Additional Party: Second Injury Fund (Open) Department of Labor and Industrial Relations of Missouri
Insurer: Ohio Casualty Jefferson City, Missouri
Hearing Date: January 28 and February 21, 2005 Checked by: MDL:tr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: August 19, 2003
5. State location where accident occurred or occupational disease contracted: St. Louis County, Mo.
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
- Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident happened or occupational disease contracted:
Employee was lifting a control panel when he fell, landing on his back and side.
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Parts of body injured by accident or occupational disease: Low back
14. Compensation paid to-date for temporary disability: None
15. Value necessary medical aid paid to date by employer/insurer? \$588.70
16. Value necessary medical aid not furnished by employer/insurer? \$17,526.75

Employee: Stephen Petelik Injury No.: 03-142058

17. Employee's average weekly wages: \$582.88
18. Weekly compensation rate: \$388.78/\$347.05
19. Method wages computation: By agreement

COMPENSATION PAYABLE

20. Amount of compensation payable:

Unpaid medical expenses: \$17,526.75

Employee is entitled to temporary total disability benefits of \$388.78 from September 19, 2003 until such time as he is found to be at maximum medical improvement *

* an indeterminate amount

21. Second Injury Fund liability: Open

TOTAL: \$17,526.75 *

22. Future requirements awarded: Future medical benefits pursuant to award

Each of said payments to begin immediately and be subject to modification and review as provided by law. This award is only temporary or partial, is subject to further order, and the proceedings are hereby continued and the case kept open until a final award can be made.

IF THIS AWARD IS NOT COMPLIED WITH, THE AMOUNT AWARDED HEREIN MAY BE DOUBLED IN THE FINAL AWARD, IF SUCH FINAL AWARD IS IN ACCORDANCE WITH THIS TEMPORARY AWARD.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% which is awarded above as costs of recovery of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

Ms. Ellen Morgan

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Stephen Petelik Injury No.: 03-142058

Dependents: N/A Before the Division of Workers' Compensation

Employer: Motor Control Specialists Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri

Additional Party: Second Injury Fund (Open)

Insurer: Ohio Casualty Checked by: MDL:tr

PRELIMINARIES

A hearing was held on January 28 and February 21, 2005 at the Division of Workers' Compensation in the City of St. Louis. Stephen Petelik ("Claimant") was represented by Ms. Ellen Morgan. Motor Control Specialists ("Employer") and its Insurer, Ohio Casualty, were represented by Mr. Kevin Leahy. Although the Second Injury Fund is a party to this case, due to the fact that Claimant is seeking a temporary award, the Fund did not participate in the hearing.

The parties stipulated that on or about August 19, 2003, Claimant sustained an accidental injury arising out of and in the course of employment. The parties further stipulated that Claimant's average weekly wage was \$582.88 resulting in a rate of compensation of \$388.78 per week for total disability benefits and \$347.05 per week for permanent partial disability benefits. Venue, timeliness of the claim, and notice were not at issue. Employer has paid \$588.70 in medical expenses and no temporary total disability benefits.

The issues for resolution by hearing are: whether Claimant sustained any injury to his low back arising out of the accidental injury occurring on August 19, 2003; is Employer liable for medical expenses incurred by Claimant; is Claimant entitled to future medical treatment medically causally connected to the injury of August 19, 2003; and is Claimant entitled to compensation for temporary total disability benefits?

Any objections not expressly ruled on in this award are overruled.

FINDINGS OF FACT

Based upon the competent and substantial evidence, I find:

On August 19, 2003, Claimant was working as an electrical panel fabricator for Employer. His job duties consisted of wiring and assembling various electrical panels for motor controls. These motor controls varied in size from very small to as large as a room. On the date of injury, Claimant was lifting a panel approximately 2 feet by 3 feet, weighing from 75 to 100 pounds, when he lost his balance, and fell to the concrete floor on his left side and back, with the panel pinning his left arm to the floor. His co-workers had to lift the panel off of his arm so that he could get up. He suffered immediate pain in his left arm. His wife, Connie Petelik, was called and she took Claimant to the Emergency Room at DePaul Hospital. Claimant does not recall any immediate back pain from the injury, and did not tell the physicians at the Emergency Room that he suffered a back injury in the fall. Examination of Claimant's back at the Emergency Room was normal, with full range of motion and no back tenderness. He was released with a prescription for 800 mg of Ibuprofen, and told to follow up with his family physician. On August 20, 2003, he presented to Dr. Livingstone, his family doctor, for follow-up. Claimant did not mention a back injury, was released on anti-inflammatories, and told to stay home from work until August 25, 2003. Prior to August 19, 2003, Employee had lost no time from work at Employer for back problems, although he had lost time from work for a migraine condition.

Claimant continued to take painkillers the remainder of the week, and on Friday, August 22, 2003, he and his wife Connie left for a planned vacation at Table Rock Lake. Claimant and his wife drove to the Lake, and set up camp.

Claimant first remembered having significant back pain the first time he went fishing, although his wife remembers that he first started complaining about his back on the drive down to the lake. Claimant had a new bass boat with a padded pedestal seat. While Claimant was fishing he was unable able to sit on his boat and fish from morning to night the rest of the week, and could only fish for short periods of time. This had never happened to him before, and as the week of vacation went on, his back pain became more and more severe. Claimant began to experience pain in his lower back with shooting pain down his right leg to his knee.

Claimant returned home around September 1, 2003 and returned to work. He had difficulty working, and his low back pain, and pain radiating down his legs gradually became more and more severe.

On September 15, 2003, Claimant presented to Dr. Livingstone's office with a three- week history of low back pain. Dr. Livingstone diagnosed somatic dysfunction lumbosacral spine with some cervical thoracic involvement, and took Claimant off work until September 22, 2003. Dr. Livingstone ordered an MRI which was performed on September 24, 2003, and revealed at L5-S1 a "moderate diffuse annual bulge with a large focal posterior central, eccentric to the left disc herniation".

Eventually, by September 19, 2003, Claimant had trouble walking. Dr. Livingstone referred him to Dr. Timothy Graven, an orthopedic surgeon. Dr. Graven referred Claimant to physical therapy and to Dr. Vellinga, a pain management specialist, who administered three injections. When Dr. Graven last saw Claimant in May 2004, he appeared to be recommending surgery as a treatment option. Employer knew that Claimant was seeing Dr. Graven and Dr. Vellinga for treatment because his wife faxed that information to Employer. Claimant had missed substantial time from work for migraine headaches in the year before his injury and was already fearful of losing his job. Claimant never told his supervisors that his back injury was related to his injury at work.

Claimant's medical bills were paid for by his IBEW group health plan. Employee had prior back pain but nothing like the pain and problems he had after the August 19, 2003 accident. Claimant had a prior MRI for evaluation of his migraines, but never had an MRI or CT for low back pain or problems prior to August 19, 2003, nor had any physician ever recommended one. Claimant testified that he does not know what caused his back pain because he is not a doctor.

Claimant's left arm symptoms resolved, and Claimant is currently having no problems with regard to his left arm. Claimant has not worked since the week of September 24, 2003. Claimant currently has difficulty sitting because of his low back pain and the radiating pain into his leg. He is taking Vicodin which is prescribed by Dr. Graven.

Edward Jackson, the owner of the company, testified that he knows Claimant and is familiar with Claimant's accident. The last conversation he recalls having with Claimant was on September 15, 2003. Claimant informed him that he was suffering from substantial back pain, and when Mr. Jackson questioned him about whether his back pain was related to his fall of August 19, 2003 he denied it, stating that he had ongoing back pain for a good portion of his life.

The physical therapy records from Excel Sports reflect that on October 13, 2003 Claimant gave a history of low back pain that began insidiously one month before.

Dr. Graven's records contain a pain management questionnaire completed by Claimant on November 3, 2003. In that questionnaire, completed and signed by Claimant, he stated that his low back pain started on August 15, 2003 and that he had back pain somewhat for four or five years. He also answered that this was not a workers' compensation claim.

Dr. Robert Poetz is the only physician to testify in this matter. The initial treating physician, Dr. Livingstone, had no opinion regarding causation on the back injury. Employer presented no medical evidence.

Dr. Poetz testified that the injury of August 19, 2003 alone was responsible for Claimant's inability to work and need for treatment. Further, Dr. Poetz stated that it is not unusual for severe back problems such as a ruptured disc to be asymptomatic initially, and for it to take several days for the piece of disc to migrate out to where it starts to cause pressure on the epidural sacrum or nerve root and become symptomatic.

He further testified that the treatment rendered to date, and suggested for the future by Drs. Vellinga and Graven, were reasonable and necessary and directly medical causally connected to the injury of August 19, 2003.

There is no history in Dr. Livingstone's records of Claimant having any sort of back problem or treatment, before August 19, 2003 despite numerous office visits to Dr. Livingstone.

Claimant testified that Exhibit E are the certified records of Dr. Graven and contain Dr. Graven's bill (although Dr. Graven's bill is actually Exhibit G). Claimant testified that Dr. Graven's bill is accurate with regard to charges and payments made. Claimant also testified that Exhibit F is a bill from DePaul Hospital for treatment from March 12, 2003 through February 11, 2004, although treatment with Dr. Glogovac of March 12, 2003 for Claimant's hand was not related to his work accident. Any charges at DePaul which were incurred after August 19, 2003 represent treatment Claimant received for his back. Claimant also testified that Exhibit D is a bill for Excel Sports for physical therapy he received for his back. Although the medical bills were submitted and paid through Claimant's IBEW plan, it is Claimant's understanding that the union is seeking reimbursement for those bills.

Claimant testified that he never told Employer that he thought his back pain was a result of his August 19, 2003 accident.

RULINGS OF LAW

Based upon my comprehensive review of the evidence, including my observations of the witnesses at hearing, the review of the medical records, and deposition testimony of the medical expert, and the application of Missouri Workers' Compensation law, I find:

Medical Causation

Claimant injured his low back in his work related accident that occurred on August 19, 2003. There is no question that Claimant did not report a low back injury following his accident. Claimant did not report back pain to the Emergency Room immediately following the accident because at that time his back wasn't bothering him. I find Claimant testified credibly that his back first began to bother him when he went fishing. He began fishing four days after the work accident. Claimant's wife testified credibly that Claimant began to complain about his back on their drive to the lake, which was three days after the work accident.

When Claimant returned to work after Labor Day, he still didn't connect his back pain to his work accident. Mr. Jackson also testified credibly that on September 15 Claimant denied that his back pain was related to his work accident. This was twenty-seven days after the work accident. It is also clear that on November 3, 2003 (seventy-six days after the work accident) Claimant still did not correlate his back pain to his work accident because he answered on Dr. Vellinga's pain management questionnaire that his was not a workers' compensation injury or claim.

Sometime between November 3, 2003 and May 12, 2004, when his Claim for Compensation was filed, Claimant made the connection that his back and leg pain were related to his work accident.

Claimant is not a doctor. The law does not require Claimant to know what caused his back and leg pain. Claimant did not land directly on his back. Claimant's initial pain involved his arm, and not his back. Claimant testified credibly that he has had some degree of back pain for a long time before August 19, 2003, due to the fact that he has always done physical labor jobs. It is reasonable that Claimant did not make the connection between his work accident and his back symptoms, and does not in this case reflect negatively on his credibility. Claimant had no intervening injuries between the date of injury and the onset of symptoms. Claimant promptly sought medical treatment once his symptoms appeared.

The only medical expert in this case provided what I find to be a reasonable explanation for the absence of immediate back complaints. Dr. Poetz testified that it is not uncommon for a ruptured disc to be asymptomatic initially, and for it to take several days for the piece of disc to migrate out to where it starts to cause pressure on the nerve root and become symptomatic. I find his explanation to be reasonable, and consistent with the evidence in this case that his back and leg became symptomatic three to four days after his work accident.

Dr. Poetz's opinion is uncontroverted, and I find it to be reasonable and consistent with Claimant's testimony.

Past Medical Expenses

Claimant is entitled to reimbursement by Employer for medical and hospital bills incurred for treatment provided for his back condition.

Section 287.140.1 Mo.Rev.Stat. (2000) provides in part:

In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, chiropractic, and hospital treatment, including nursing, custodial, ambulance and medicines as may reasonably be required after the injury or disability to cure and relieve from the effects of the injury. If the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense.

While the employer has the right to select the provider of medical and other services, this right may be waived by the employer if the employer after notice of the injury, refuses or neglects to provide the necessary medical care. *Sheehan v. Springfield Seed & Floral*, 733 S.W.2d 795 (Mo.App. 1987). *Shores v. General Motors Corp.*, 842 S.W.2d 920 (Mo.App. 1992). After May 12, 2004 Employer had notice that Claimant was alleging a back injury, but failed to provide an evaluation or treatment.

The Court of Appeals in *Sheehan v. Springfield Seed & Floral*, *supra*, indicated that the foregoing rule assumes that the employee realizes that he or she has sustained a work related injury or disability. "Where an employee does not know at the time that he or she receives medical treatment that he or she has suffered a compensable injury, and the employee contracts for medical services without the employer's knowledge, the employer is not relieved from liability for necessary medical services." *Id.* at 798.

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. Employee must establish the causal relationship between the bills for medical services and the treatment provided. *Martin v. Mid-America Farm Lines, Inc.*, 769 S.W.2d 105 (Mo. 1989).

Claimant's testimony established the causal connection between the medical bills and the medical treatment rendered.

Because I find Claimant's work was a substantial factor in causing his back condition, I find Employer is responsible for reimbursing Claimant for past medical expenses to treat Claimant in the amount of \$17,526.75.

Temporary Total Disability

Claimant is entitled to temporary total disability benefits from September 19, 2003 until such time as he is found to be at maximum medical improvement. Dr. Livingstone and Dr. Graven took Claimant off work, and Dr. Poetz opined that Claimant was and is unable to work. Employer offered no evidence to refute these opinions.

Future Medical

Employer shall provide Claimant with such medical care as required to cure and relieve him from the effects of his work related accident.

This award is subject to a lien in the amount of 25% of Claimant's award.

-
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Date: _____

Made by: _____

Margaret D. Landolt
Administrative Law Judge
Division of Workers' Compensation

A true copy: Attest:

Patricia "Pat" Secest
Director
Division of Workers' Compensation

While Judge Landolt retained jurisdiction of the Temporary Award, Employer filed a collateral action in Cole County Circuit Court. On June 6, 2006, Employer filed a Petition for Declaratory Judgment in Cole County challenging the constitutionality of 8 CSR 20-3.040. Claimant filed a motion to dismiss the Cole County Circuit Court action, which was granted on February 6, 2007. Employer appealed this dismissal to the Missouri Court of Appeals Western District. On June 24, 2008, the Court of Appeals Western District reversed and remanded the action to the Cole County Circuit Court where the collateral action is currently pending.

During the pendency of his claim, Claimant has divorced and undergone a bankruptcy proceeding.

During deposition, Dr. Poetz acknowledged he had not reviewed any medical records of Claimant prior to the August 2003 injury that referenced low back pain, Claimant had reported no prior low back problems or injuries before August 2003, and Dr. Poetz had no knowledge of Claimant missing time from work due to low back pain before the August 2003 injury.

Claimant actually seeks \$136,070.82 in medical expenses. Reviewing the itemized bills presented, Claimant seeks \$11,255.00 in bills from care received from Dr. Vellinga. Dr. Vellinga's billing actually reflects \$11,355.00 in charges. The addition error is corrected in this award.

Claimant sought \$95,751.79 in total TTD benefits reflecting 238 4/7th weeks. When calculated using the stipulated weekly TTD rate of \$388.78, the correct total TTD benefit is \$92,751.80, and the amount is corrected in this award.

This does not mean further diagnostic studies and subsequent medical treatment can not be provided Claimant that may, or may not, alter his condition. Claimant has been awarded future medical benefits, and the treatment recommended by Dr. Curylo can be provided.

Prior to the start of the hardship hearing, Employer was granted 30 days to submit medical expert opinion via deposition after the close of testimony. The trial record closed without receipt of additional evidence.

Administrative Judicial Notice taken of Division's file.